STATE OF MICHIGAN

COURT OF APPEALS

JAMES B. ENGEL,

Plaintiff-Appellant,

V

BAY WINDS FEDERAL CREDIT UNION,

Defendant-Appellee.

UNPUBLISHED
May 22, 2007

No. 275443
Kent Circuit Court
LC No. 06-003804-NZ

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendant. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

This case involves plaintiff's complaint for conversion of a 1987 Lamborghini. The car was co-owned by plaintiff, his father, Larry Engel, and his sister, Lisa Engel. According to defendant, the car was offered as collateral for a loan. On June 27, 2003, the three signed a "LoanLiner" agreement with defendant. The agreement did not specify the collateral for the loan as including the Lamborghini. Larry Engel signed the document as a "borrower." Plaintiff and his sister also signed the document relative to a handwritten notation under their signatures that they were "owners of collateral other than borrower." In addition to this document, the three co-owners of the car also allegedly executed an "Application for Michigan Vehicle Title" at the same time. This form was handwritten, listed the Engels as co-owners, and listed defendant in the space for first secured party. The stated reason for the application was "lien placement." All three of the Engels' signatures are on the application. This application was allegedly submitted to the Secretary of State along with a typewritten, unsigned application, with "see att" in the signature line. This second form contains a "filing date" of July 18, 2003. According to an affidavit from an employee of defendant who was involved in the transaction, this application was executed on June 27, 2003.

Larry Engel had difficulty making payments on the loan. On August 13, 2003, he executed a modification agreement changing the repayment schedule, but subsequently defaulted on the loan. The modification agreement expressly indicated that the Lamborghini was collateral, but plaintiff did not sign this agreement. Defendant made a demand for possession of the automobile because of Larry Engel's default on the loan. Defendant maintains that Engel

refused; however, he sent defendant a letter on October 30, 2003, asking that defendant repossess the car because plaintiff had missed the last six payments on the car and had disappeared with it.

Defendant had the Lamborghini seized and prepared it for sale. However, before the sale could occur, the car was allegedly stolen. Defendant received insurance proceeds and apparently applied the proceeds to the loan. Defendant indicates that the car was eventually recovered.

Plaintiff filed a complaint for conversion and a motion for a restraining order. Defendant moved for summary disposition pursuant to MCL 2.116(C)(8) and (10), maintaining that plaintiff's claim was unfounded because it was entitled to possession of the car once plaintiff's father had defaulted on the loan. Plaintiff countered with a claim that his signature on the security agreement was insufficient to create a security interest in the Lamborghini. In response to defendant's argument that plaintiff's signature on the application for a certificate of title identifying the Lamborghini and defendant as a secured party was itself sufficient to create a security interest, plaintiff maintained that he had not signed such a document. He contended that he had signed a "blank" application for title that did not contain this security interest when he and his family were changing the title of the car from Florida to Michigan. He maintained that his father had taken this application and, with defendant's assistance, added the security interest information to it before submitting it to the Secretary of State. Plaintiff provided his own affidavit and that of his father in support of this claim. The trial court agreed with defendant, denied plaintiff's request for a restraining order, and granted defendant's motion for summary disposition. Plaintiff now appeals.

Issues of law, including whether a valid and enforceable security agreement exists under article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq*., are reviewed de novo. *Roan v Murray*, 219 Mich App 562, 565; 556 NW2d 893 (1996). Questions of statutory interpretation are also questions of law and are thus reviewed de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715-716; 698 NW2d 875 (2005). When considering a motion pursuant to MCR 2.116(C)(10), the trial court must "review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). However, the court may not make factual findings or weigh the credibility of witnesses. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, *supra* at 120.

MCL 440.9203 provides in pertinent part:

> (1) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(2) Except as otherwise provided in subsections (3) through (9), a security interest is enforceable against the debtor and third parties with respect to the collateral only if all of the following are met:

(a) Value has been given.

(b) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.

(c) One or more of the following conditions are met:

(i) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned.

Article 9 defines a "security agreement" as "an agreement that creates or provides for a security interest." MCL 440.9102(ttt). MCL 440.9102(bb) provides in pertinent part:

"Debtor" means 1 of the following:

(i) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor.

The requirements for a security interest to attach, therefore, are relatively straightforward. As this Court has previously stated, MCL 440.9203 is "essentially a statute of frauds [that] provides that a security interest is not enforceable against a debtor and does not attach unless . . . the agreement is in writing, signed by the debtor, and contains a description of the collateral." *Roan, supra* at 565-566.

In the instant case, the parties do not dispute that defendant gave value, or that plaintiff had ownership rights in the collateral. Plaintiff's argument that he is not bound by the security agreement because he did not have a credit union account and was not a "co-borrower" is without merit. The language of MCL 440.9102(bb) contemplates the attachment of a security interest to property even when the owner is not an obligor on the loan.

We agree with plaintiff's assertion that the security agreement is not, by itself, sufficient to meet the requirements of an "authenticated . . . security agreement that provides a description of the collateral" under MCL 440.9203. The agreement provides evidence that plaintiff intended to provide a security interest in some collateral, as evidenced by the fact that plaintiff signed the document as "owner[] of collateral other than borrower." But it does not specifically describe any collateral other than credit union accounts.

Defendant maintains that the title application signed by plaintiff was sufficient to create a security agreement in the Lamborghini. Such a holding is supported by this Court's decision in *Roan, supra* at 566-567, where this Court held that an application could be so used:

Under Michigan law,

> "[a]greement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (sections 1205 and 2208). [MCL 440.1201(3)].
>
> The Supreme Court has recognized that, although a signed writing describing the collateral is required, the other requirements of an "agreement" under the UCC may be established by parol evidence of course of dealings, usage of trade, or course of performance. See *NBD-Sandusky Bank v Ritter*, 437 Mich 354, 364-365; 471 NW2d 340 (1991). The application for a certificate of title showed unequivocally that plaintiff was to have a security interest in the Corvette. Thus, we conclude that the title application constituted a security agreement that gave plaintiff a security interest in the vehicle. [Alterations in original.]

On appeal, defendant essentially ignores plaintiff's claim that he did not, in fact, sign the disputed application for title presented by defendant in its appellate materials. We note, however, that affidavits from plaintiff and plaintiff's father, which we must credit when reviewing whether defendant was entitled to summary disposition, contend that this document is essentially a forgery.

Nevertheless, the title history presented by plaintiff below reveals another Application for Michigan Vehicle Title, identifying plaintiff as the applicant and signed by him, ostensibly to replace a lost title to the car. This application also identifies defendant as first secured party in the automobile. Plaintiff's assertions of fraud, which are specific to the other "jointly signed" application for title, do not pertain to this second application. We find that this second application also acts as an authentication of the security agreement and acknowledgement that plaintiff unequivocally knew about and intended defendant to have a security interest in the Lamborghini. See *Roan*, *supra* at 567.

Under the circumstances, we hold that plaintiff has failed to create a question of fact as to whether he, his father, and his sister intended the Lamborghini to serve as collateral for the loan. The evidence presented below unequivocally shows that they did. Because plaintiff does not dispute that Larry Engel failed to make payments on the loan, or that defendant could not claim possession of property legitimately given as collateral for the loan, we agree with the trial court's grant of summary disposition in defendant's favor.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff