STATE OF MICHIGAN

COURT OF APPEALS

KURT W. HEINTZ,

Plaintiff-Appellant,

v

THI, d/b/a TOLEDO BEACH MARINA, INC., a/k/a TBM LAUNCH & RACK CENTER,

Defendant-Appellee.

UNPUBLISHED
July 25, 2006

No. 267509
Monroe Circuit Court
LC No. 05-019533-CZ

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We affirm.

This case arises out of defendant's sale of plaintiff's boat to pay plaintiff's overdue storage and launch charges. On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because: (1) defendant failed to comply with statutory notice requirements, (2) defendant failed to enforce its lien within a reasonable time after plaintiff was in default for more than 180 days, and (3) defendant failed to show that the sale was commercially reasonable.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In this case, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not identify the subrule under which it granted the motion, but it is apparent that the motion was granted under subrule (C)(10), because the court looked beyond the pleadings to determine whether the submitted evidence demonstrated that defendant was entitled to judgment as a matter of law. When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must examine the documentary evidence presented by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

Until 1998, liens for unpaid boat storage facility charges were governed by the Garage Keeper's Lien Act, MCL 570.301 *et seq*. In 1998, the Legislature amended the Garage Keeper's

Lien Act to apply only to vehicles that travel on highways, and enacted the Michigan Marina and Boatyard Storage Lien Act (MBSLA), MCL 570.371 *et seq*.

The MBSLA provides that "[a] facility owner has a possessory lien on property stored at that facility for storage, rent, labor, materials, supplies, and other charges . . . ." MCL 570.373(1). It is undisputed that defendant is a "facility" as defined in the MBSLA because it provides boat storage and repair services. See MCL 570.372(c).

Concerning the enforcement of liens, § 5 of the MBSLA provides, in relevant part:

> (2) *If a property owner is in default for a period of more than 180 days, the facility owner may enforce the lien by selling the repaired or stored property at a commercially reasonable public sale*. As used in this section, "commercially reasonable" means that term as defined in the uniform commercial code, 1962 PA 174, MCL 440.1101 to 440.11102.
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> (5) Before conducting a sale under this section, and within a reasonable time after default has continued for more than 180 days, the facility owner shall do both of the following:
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> (a) Mail a notice of default to the property owner and the secretary of state. The secretary of state shall notify the facility owner and provide him or her with the name of the registered owner of the property and a list of all lienholders. The facility owner shall provide a copy of the notice of default to each lienholder of record listed on the title, registration, or other marine documentation. The notice of default shall include all of the following:
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> (iii) A demand for payment of the charges due within a specified time not less than 30 days after the date the notice is delivered to the property owner and all lienholders of record.
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> (b) After the expiration of the 30-day period set forth in subdivision (a)(iii), publish an advertisement of the sale once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the sale is to be held. The advertisement shall include a general description of the property, the name of the property owner, and the time and location of the sale. The date of the sale shall be not less than 15 days after the date the first advertisement of the sale is published.
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> (6) At any time prior to the sale of property under this act, any lienholder may cure the default by paying the amount of the lien to the facility owner, which amount shall be added to the lien of the lienholder.

(7) A sale under this act shall be held at the facility or at another reasonable location.

(8) A person who purchases property sold at a commercially reasonable sale pursuant to this act takes the property free and clear of the rights of the property owner and all lienholders of record.

* * *

(13) Except as otherwise provided in this act, all notices required by this act shall be mailed by registered or certified mail, return receipt requested. . . . *Notices to a property owner shall be mailed to the property owner at the property owner's last known address as listed on the title, registration, or other marine documentation or as provided in the most recent agreement concerning storage, labor, materials, or supplies entered into between the facility owner and the property owner*. . . . Notices are considered delivered on the date the recipient of the notice signs the return receipt or, if the notice is undeliverable, the date the post office last attempts to deliver the notice.

(14) The facility owner may bid all or a portion of his or her claim at the auction sale of the property. [MCL 570.375 (emphasis added).]

I.

Plaintiff first argues that because there was no address listed in the parties' last storage agreement, defendant was required to send the notice of default to the address listed on the certificate of title.[1] Plaintiff maintains that defendant violated the MBSLA by sending the notice of default to the address listed in an older storage agreement, and by sending a second notice of default to a nonexistent address, i.e., to a misspelled version of the street address listed on the certificate of title. We disagree.

Section 5(13) of the MBSLA provides that "[n]otices to a property owner shall be mailed to the property owner at the property owner's last known address as listed on the title, registration, or other marine documentation *or as provided in the most recent agreement concerning storage,* labor, materials, or supplies entered into between the facility owner and the property owner." (Emphasis added.)

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[1] On June 10, 2000, plaintiff and defendant entered into a one-year rack and launch storage contract. On May 31, 2001, plaintiff signed a new month-to-month contract. On October 12, 2001, plaintiff signed a third agreement. On October 15, 2001, plaintiff signed a fourth agreement, which states "good till April 02." On September 27, 2002, plaintiff signed a fifth agreement for June 2002 until June 2003; this agreement specifically indicated it was a "renewal," which the prior agreements had not done. The first three documents listed plaintiff's address as 5143 Territorial Road, Grand Blanc, Michigan; the final two documents did not list any address.

On March 16, 2004, a notice of default was sent to plaintiff at the Territorial Road address. It is undisputed that plaintiff continued to reside at the Territorial Road address until at least March 21, 2004.[2] Additionally, on March 29, 2004, plaintiff signed for a certified letter sent to the Territorial Road address by Lou Balogh, defendant's operations manager, regarding the past due balance of plaintiff's account.

We conclude that defendant complied with § 5(13) by mailing the first notice of default to the address listed in the last agreement that contained an address, particularly considering that the latter two agreements were identified as an "extension" and a "renewal." Moreover, all five agreements provided that plaintiff would promptly inform defendant of any change in his mailing address, and failure to do so meant defendant could rely upon the stated last address.

We note that even if defendant had obtained a copy of the certificate of title on or before March 16, 2004, there is no indication that it would have listed a different address. According to plaintiff's own affidavit, he did not move out of the Territorial Road address until sometime after March 21, 2004. There is no evidence to the contrary. Thus, obtaining a copy of the title sooner would not have resulted in mailing the notice of default to a different address.

For these reasons, we conclude that defendant complied with MCL 570.375(13) when it mailed a notice of default to plaintiff's Territorial Road address by certified mail on March 16, 2004. Because defendant's first notice of default complied with the act, defendant was not required to mail a second notice of default to plaintiff's new address. Defendant did, however, mail a notice to the address on the certificate of title provided by the Secretary of State in response to defendant's first statutorily required mailing. But defendant misspelled the street name, sending the letter to 8246 Pinehallow Court, Grand Blanc, Michigan 48439 rather than to 8246 Pinehollow Court, Grand Blanc, Michigan 48439. Plaintiff claims this misaddressed letter was not received. Because the first mailing complied with the requirements of the act, we need not consider whether the second notice of default sent to plaintiff's new address was deficient because of a spelling error in the street name of the address. We add that if we were to consider this question, the discrepancy of a single character in the street name would hardly serve as solid evidence that the letter was not delivered.

Plaintiff argues that the trial court improperly made a finding of fact or a credibility determination when the court commented that plaintiff's acceptance of Balogh's certified letter at the Territorial Road address on March 29, 2004, suggested that plaintiff must have been avoiding service of the March 16, 2004, letter because it was sent from an attorney. Plaintiff correctly argues that a trial court may not make a finding of fact on a disputed issue or decide issues of credibility when reviewing a motion for summary disposition. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). In this case, however, the trial court's statement was not essential to a determination of the issue. For purposes of MCL 570.375, "[n]otices are considered delivered on the date the recipient of the notice signs the return receipt or, *if the notice is undeliverable, the date the post office last attempts to deliver the*

[2] Plaintiff averred in his affidavit "[t]hat since March 21, 2004 he moved" from that address.

notice." As indicated previously, defendant's first notice of default was given in compliance with the statute. The reason why plaintiff did not accept that notice is immaterial.

II.

Plaintiff next argues that defendant violated MCL 570.375(5) by not sending a notice of default within a reasonable time after plaintiff was in default for more than 180 days. Plaintiff did not raise this issue below. On the contrary, he took the contradictory position that defendant sent the notice of default *before* he had been in default for 180 days. A party may not seek redress on appeal by taking a position contrary to that argued in the trial court. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Even if we reviewed this unpreserved issue for plain error, appellate relief would not be warranted because we find no basis in the record for concluding that § 5(5)(a) was violated.

III.

Lastly, plaintiff argues that his boat was not sold at a commercially reasonable sale because defendant failed to provide proper notice of default, and sold the boat to an employee for the amount of plaintiff's indebtedness. We disagree.

Section 5(2) of the MBSLA states that "[i]f a property owner is in default for a period of more than 180 days, the facility owner may enforce the lien by selling the repaired or stored property at a *commercially reasonable public sale*." As used § 5(2), "'commercially reasonable' means that term as defined in the uniform commercial code ["UCC"], . . . MCL 440.1101 to 440.11102." Section 9627 of the UCC, MCL 440.9627, provides:

> (1) *The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner*.
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> (2) A disposition of collateral is made in a commercially reasonable manner if the disposition is made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.
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> (3) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding, by a bona fide creditors' committee, by a representative of creditors, or by an assignee for the benefit of creditors.
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> (4) Approval under subsection (3) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. [Emphasis added.]

As previously discussed, defendant's first notice of default complied with the MBSLA. Thus, there is no merit to plaintiff's argument that the sale of his boat was commercially unreasonable because of improper notice.

This Court has not before addressed the commercial reasonableness of a sale of property seized under the MBSLA, so we begin by noting that per MCL 440.9627(2), a sale is commercially reasonable if made in the manner usual in a recognized market at the price current in that market. Here it is undisputed that defendant complied with § 5(b) of the MBSLA by advertising twice in a newspaper of general circulation in the area of the sale. Although plaintiff argues that defendant should have advertised more, we cannot say that sale after advertising in the local paper is not the usual manner. We add that according to plaintiff's own affidavit, plaintiff had been attempting to sell the boat for four to six months, but was not able to find a buyer. Additionally, there is no evidence that defendant acted in bad faith; to the contrary, defendant went beyond the requirements of the statute in trying to contact plaintiff, and defendant apparently gave plaintiff a two-year grace period on his unpaid account rather than the statutorily required 180 days.

Concerning the price, § 9627(1) of the UCC clearly states that a low price, standing alone, will not support a finding that a sale was commercially unreasonable. Additionally, § 5(14) of the MBSLA expressly allows a facility owner to bid "all or a portion of his or her claim" on the item. We are not persuaded that the sale was commercially unreasonable merely because the only bidder offered the amount of the indebtedness.

We therefore conclude that plaintiff failed to show that a genuine issue of material fact existed with regard to whether the boat was sold at a commercially reasonable sale.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper