

STATE OF MICHIGAN
COURT OF APPEALS

MCDONALD PONTIAC GMC CADILLAC
OLDSMOBILE, INC.,

UNPUBLISHED
July 25, 2006

Plaintiff-Appellee/Counter-
Defendant,

v

No. 267106
Saginaw Circuit Court
LC No. 04-054094-CZ

DRIVE FINANCIAL SERVICES, LP,

Defendant-Appellant/Counter-
Plaintiff.

Before: Donofrio, P.J., and O’Connell and Servitto, JJ.

PER CURIAM.

Defendant, Drive Financial Services, LP (Drive), appeals as of right, the trial court’s grant of summary disposition in favor of plaintiff, McDonald Pontiac GMC Cadillac Oldsmobile, Inc. (McDonald). Because the trial court improperly accessed extrinsic evidence when it interpreted the contract at issue and erred when it *sua sponte* granted summary disposition on Drive’s claims for fraud and breach of contract, we reverse and remand.

This case arises out of a contract between the parties known as “Dealer Retail Agreement.” In sum, the agreement provided that Drive could purchase automobile retail installment contracts from McDonald at a discounted rate. This particular matter involves an automobile retail installment contract that McDonald executed on February 2, 2004 with a consumer, Mary Douglas. The contract provided for the sale of a new Pontiac Grand Am with a total vehicle purchase price of \$22,770.98.¹ The contract specified a down payment of \$6,500 on

¹ This schedule sets forth the separate charges constituting the total vehicle purchase price:

Motor Vehicle Cash Price	\$20,116.02
Michigan Sales Tax	\$ 1,206.96
Extended Warranty	\$ 1,000.00
Ownerguard	\$ 450.00

(continued...)

the total vehicle purchase price, leaving a balance owing of \$16,270.98 to be financed over sixty months. The record displays that \$6,000 of the cash down payment was a manufacturer's rebate and Douglas provided \$500. The annual interest rate specified on the installment contract was 24.95 percent representing \$12,355.02 in total interest to be paid over the life of the loan. As such, the monthly installment payment amount required under the installment contract was \$477.10. McDonald submitted the executed installment contract to Drive for purchase under the Dealer Retail Agreement. Drive purchased the installment contract from McDonald.

Shortly thereafter, Douglas defaulted on the loan and filed a bankruptcy petition. It appears from the record that Drive only received one installment payment in the amount of \$477.10 from Douglas. Drive demanded in writing that McDonald repurchase the Douglas installment contract under remedy provisions in the Dealer Retail Agreement alleging breach of the agreement and fraud and threatened litigation in Texas. McDonald refused to repurchase the installment contract and filed suit in Michigan seeking declaratory relief setting forth causes of action for promissory estoppel, waiver, and good faith and fair dealing. Drive responded, and counterclaimed alleging breach of contract, common law fraud, and silent fraud.

Drive moved for summary disposition on all claims under MCR 2.116(C)(10). Drive argued in the trial court that McDonald committed fraud under the Dealer Retail Agreement when it did not disclose that it had included a \$6,000 manufacturer's rebate as part of the cash down payment in Douglas's installment sale contract. Drive asserted that McDonald's nondisclosure of the \$6,000 manufacturer's rebate misled it into believing that Douglas had provided the entire \$6,500 cash down payment. Drive stated that it made the decision to purchase the installment sale contract based on the fact that Douglas had a certain credit-worthiness and financial stability due to the fact that she could provide a \$6,500 down payment from her own funds.

After hearing oral argument on the motion, the trial court issued an order stating that it held Drive's motion in "abeyance until the Court has had occasion to rule on the declaratory relief requested" apparently referring to McDonald's claims for declaratory relief. Drive filed a motion for reconsideration arguing that it had moved for summary disposition on all claims before the trial court in the case. The trial court did not entertain additional argument, and instead issued an opinion and order *sua sponte* granting summary disposition in favor of McDonald pursuant to MCR 2.116(I)(2). The trial court reviewed the Dealer Retail Agreement and found that under the terms of the agreement and the facts presented, no fraud existed and McDonald was not in breach of the agreement. It is from this order that Drive appeals.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252

(...continued)

<u>Title/Transfer</u>	\$ 23.00
= Total Vehicle Purchase Price	\$22,770.98

Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under MCR 2.116(C)(10), a court considers the admissible evidence in a light most favorable to the nonmoving party. *Id.* at 30-31. In addition, the proper interpretation of a contract is a question of law, which we review de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

On appeal, Drive first argues that the trial court improperly considered extrinsic evidence to interpret the parties' contract where it made no finding that the terms of the contract were ambiguous. If a contract is unambiguous, its meaning is a question of law for the court to decide. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). However, if a contract is ambiguous, its meaning must be determined by a jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). "Hence, in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous." *D'Avanzo, supra*. (emphasis in original). When the contract is not ambiguous, the intent of the parties must be determined only from the language used; extrinsic evidence of the parties' intent is not permitted. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

In the trial court's opinion and order, the trial court analyzed whether McDonald committed fraud and breached the parties' agreement when it did not disclose that it had included a \$6,000 manufacturer's rebate as part of the cash down payment. The trial court stated that the threshold question was whether a "rebate" constitutes "cash" within the meaning of the parties' contract. In doing this analysis, the trial court seems to suggest that the terms of the agreement between the parties was unambiguous and could be interpreted as a matter of law. But the trial court never stated that the word "cash" was ambiguous, so as to allow access to extrinsic evidence to ascertain the meaning of the term "cash." The trial court cites three websites² and a nationally televised CBS news story³ that it referenced to support its conclusion that "it is common practice in the industry to include manufacturer's rebates in the down payments on automobile purchases."

While we are aware that the tools available to a court in determining the meaning of a phrase include the "common understandings of which the court can take notice, as well as other sources such as specialized dictionaries or publications," to access these website materials was plainly error. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 357; 596 NW2d 190 (1999). The trial court's research included more than dictionary definitions and instead included independent review of extrinsic evidence from various car purchasing websites in attempts to bolster its conclusion that rebates equal cash. This was error because if the contract was not ambiguous, the trial court had to determine the intent of the parties only from the language used

² 1) www.internetautoguide.com/auto-rebates/01-int/gmc/

2) www.intellichoice.com/carBuying101/WhatPrice

3) www.aaa-calif.com/westways/0103/overdrive.asp

³ See www.cbsnews.com/stories/2004/08/13/earlyshow/saturday/main635862.html.

and was not permitted to use extrinsic evidence to determine the parties' intent. *Zurich Ins Co, supra* at 604. Although unstated, the trial court's opinion displays that the word "cash" in the context of the parties' agreement is subject to more than one interpretation and as such, it is ambiguous, and its meaning is a question of fact for the jury. *Klapp, supra* at 469. The trial court therefore erred when it *sua sponte* granted summary disposition on Drive's claims for fraud and breach of contract.

We remand for trial Drive's fraud and breach of contract claims as well as any other claims remaining that are appropriate for the jury.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto