SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1268-15T1

MARK S. GOLD,

Plaintiff-Appellant,

v.

WELLS FARGO NATIONAL BANK
& WELLS FARGO DEALER SERVICES,

Defendant-Respondents.

Submitted February 16, 2017 – Decided April 5, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-0926-14.

Jeffrey L. Gold, attorney for appellant.

Buchanan Ingersoll & Rooney PC, attorneys for respondents (Patrick D. Doran and Mark Pfeiffer, of counsel; Mr. Doran, on the brief).

PER CURIAM

Plaintiff Mark S. Gold sued defendant Wells Fargo National Bank,[1] claiming it breached their retail installment contract and security agreement (collectively, the Agreement or car loan), violated the covenant of good faith and fair dealing, and violated the New Jersey Consumer Fraud Act (CFA). Prior to this suit, defendant repossessed and sold plaintiff's automobile after he defaulted on his car loan. After discovery, the Law Division granted summary judgment to defendant on plaintiff's claims as well as defendant's counterclaim for a deficiency judgment.

Plaintiff argues the record does not show defendant sold the automobile in a commercially reasonable manner. Because defendant hired an independent national vehicle remarketing service to sell the automobile to an independent third party at a private auction, we disagree with plaintiff and affirm the trial court.

I.

We discern the following facts from the record. On December 1, 2009, defendant extended a car loan to plaintiff to finance his purchase of a Saturn Aura. The Agreement obligated plaintiff to make total payments of $12,831.12 over the course of the six-year car loan. The Agreement stated if plaintiff failed "to perform any obligation" under the contract and agreement, defendant could

[1] Plaintiff sued both Wells Fargo National Bank and one of its divisions, Wells Fargo Dealer Services. For ease of reference, we refer to both entities as defendant.

require him "to immediately pay [it], subject to any refund required by law, the remaining unpaid balance of the amount financed, finance charges and all other agreed charges." Defendant could repossess the vehicle under the same circumstances. The Agreement also stated, "By choosing any one of these remedies, we do not waive our right to later use another remedy."

On November 4, 2013, defendant agreed plaintiff could defer his September and October 2013 payments until November 15, 2013. Plaintiff never paid defendant again. On December 26, 2013, defendant sent an invoice to plaintiff, stating he owed $569.26 by January 15, 2014. On January 21, 2014, plaintiff's mother sent defendant a $569.26 check and a letter, inexplicably stating an enclosed $4,450.90 check was "payment in full" and asking defendant to "forward [t]itle directly to" plaintiff. On January 25, 2014, plaintiff incurred an additional late fee of $10.00. According to defendant's collections manager, on January 29, 2014, defendant "assigned [p]laintiff's vehicle to be repossessed." Defendant received the $569.26 check and letter on January 31, 2014.

Defendant repossessed the automobile on February 4, 2014. The same day, plaintiff sent defendant a letter claiming his mother had paid his entire loan balance. The next day, defendant sent plaintiff a notice of its intention to sell the automobile unless he paid "the full amount [he] owed (not just the past due

payments), including [its] expenses." On February 10, 2014, plaintiff's mother sent defendant another letter claiming she had paid plaintiff's entire loan balance. On February 12, 2014, plaintiff's father sent defendant a letter claiming plaintiff had paid his entire loan balance; he further requested defendant sell the automobile at a public sale in order to ensure it received "fair market value." The January 25, 2014 invoice stated plaintiff owed $757.47. The invoice also stated plaintiff's loan balance was $4,450.90.

Plaintiff did not pay defendant, so it arranged for Manheim New Jersey[2] to sell the automobile at auction. On February 22, 2014, Manheim inspected the automobile, finding it in "below

---

[2] Manheim's website states:

> Manheim is North America's leading provider of vehicle remarketing services, connecting buyers and sellers to the largest wholesale used vehicle marketplace and most extensive auction network. Through 125 traditional and mobile auction sites and a robust digital marketplace, the company helps dealer and commercial clients achieve business results by providing innovative end-to-end inventory solutions. Approximately 18,000 employees enable Manheim to register about 8 million used vehicles per year, facilitate transactions representing nearly $57 billion in value and generate annual revenues of more than $2.6 billion.
>
> [About Manheim, Manheim.com, https://publish.manheim.com/en/about-manheim.html (last visited Mar. 22, 2017).]

average" condition and requiring $3,974.62 worth of repairs. Manheim held a private auction and sold the automobile for $2,500 to PLJ Auto Sales Inc., located in Brooklyn, New York, on March 12, 2014.

The same day, plaintiff filed a complaint alleging his parents had paid his automobile loan from defendant. On April 7, 2014, defendant deposited the $569.25 check from plaintiff's mother. On April 15, 2014, plaintiff filed an amended complaint admitting his parents paid only part of his car loan. Plaintiff also claimed defendant violated their loan agreement and the covenant of good faith and fair dealing when it sold the automobile after (1) his parents had said they were paying plaintiff's entire loan when they paid only part of it, and (2) he and his parents had told defendant not to sell the automobile at a private auction. Plaintiff further claimed these facts established defendant had violated the CFA.

Defendant filed its answer and counterclaim for breach of contract on May 8, 2014. After discovery, defendant filed a motion for summary judgment. After hearing oral argument, the court entered an order and nine-page written decision granting defendant's motion on May 29, 2015.

Plaintiff sent a notice of motion for reconsideration on June 12, 2015. The court did not receive it until September 8, 2015.

It denied the motion on October 9, 2015. The court observed plaintiff asserted "he filed the motion for reconsideration timely," and declined to find otherwise. The court nonetheless denied the motion because plaintiff did not bring "any new evidence or changed circumstances to [its] attention [n]or [did] plaintiff assert[] any legal or factual argument sufficient enough to overturn the [c]ourt's May 29, 2015 order." This appeal followed.

II.

A. Contract

In reviewing a grant of summary judgment, this court applies the same standard as the trial court. Prudential Prop. Cas. & Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We consider the evidence presented on the motion in the light most favorable to the non-moving party to determine whether the prevailing party is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). In making that determination, we consider the standard and allocation of the burden of proof at trial. Ibid. Pursuant to N.J.S.A. 12A:9-610(a), when a secured creditor is secured under the terms of a retail installment contract, the secured creditor is entitled to "sell, lease, license, or otherwise dispose" of the repossessed vehicle. That entitlement, however, has boundaries:

> Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.
>
> [N.J.S.A. 12A:9-610(b).]

The Legislature has provided guidance on commercial reasonableness. Pursuant to N.J.S.A. 12A:9-627(a), a debtor's evidence of a higher book value for the vehicle 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." A secured creditor has the burden of proving the commercial reasonableness of the sale in order to recover a deficiency. Sec. Sav. Bank v. Tranchitella, 249 N.J. Super. 234, 240 (App. Div. 1991).

To meet that burden, the secured creditor may demonstrate commercial reasonableness by making one of the showings specified in N.J.S.A. 12A:9-627:

> (b) . . . A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or

> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

These methods of disposition, however, are not "required or exclusive." Cmt. 3 to N.J.S.A. 12A:9-627. "[C]ommercial reasonableness should be viewed as a flexible concept, based upon a consideration of all relevant factors presented in each individual case." Tranchitella, supra, 249 N.J. Super. at 239. When a secured creditor seeks a deficiency judgment and fails to prove commercial reasonableness, the secured creditor must overcome a "presumption that the value of the collateral at least equaled the debt it secured." Id. at 245.

The Law Division has previously held, "[W]here collateral is financed at the retail level, a resale at retail may be a prerequisite to a finding of a fair and reasonable disposition." Caterpillar Fin. Servs. Corp. v. Wells, 278 N.J. Super. 481, 509 (Law Div. 1994) (emphasis added) (citing Cal. Airmotive Corp. v. Jones, 415 F.2d 554 (6th Cir. 1969); Ford Motor Credit Co. v. Jackson, 466 N.E.2d 1330, 1331-32 (Ill. App. Ct. 1984)). In that case, the Law Division observed the secured creditor had "disposed of the collateral via a limited wholesale market, its own retail dealer network." Ibid. "It should be noted, further, that [the secured creditor], without any truly reasonable justification, sold the [the collateral] to Carter, [the secured creditor's]

affiliate, even though [its] own net public auction figure was some $13,000 higher for [the collateral]." Ibid. The secured creditor had also failed to notify the debtor of its intent to sell the collateral. Id. at 512. The court therefore concluded, "The limited wholesale market used by [the secured creditor], under the unusual circumstances of this case, was not commercially reasonable." Id. at 509.

Plaintiff argues, "In this case at bar there was no proof nor testimony what was a 'commercially reasonable manner[.']" He provides two printed pages from Kelley Blue Book's website showing it valued the automobile at $4,396 if in "good condition" and $3,785 if in "fair condition." The copies do not show the time of valuation, but plaintiff included them in his opposition to defendant's motion for summary judgment.

We nevertheless affirm the trial court. Defendant contracted with Manheim, a national vehicle remarketing service, to sell the automobile at a private auction. The automobile was in "below average" condition and required $3,974.62 worth of repairs. Pursuant to N.J.S.A. 12A:9-627(a), plaintiff's evidence of a higher book value for the automobile is not "of itself sufficient to preclude [plaintiff] from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner." When defendant contracted with Manheim to

sell the automobile at a private auction, it disposed of the automobile "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." N.J.S.A. 12A:9-627(b)(3).

The case under review also lacks the "unusual circumstances" found in Wells, supra, 278 N.J. Super. at 509. Defendant notified plaintiff of its intent to sell the automobile. It hired an independent party to sell the automobile. The independent party did not sell it to an affiliate of defendant. More importantly, defendant had no reason to believe a public sale would elicit an additional $13,000. We conclude defendant disposed of the automobile in a commercially reasonable manner. We consequently also conclude defendant was not subject to the "presumption that the value of the collateral at least equaled the debt it secured." Tranchitella, supra, 249 N.J. Super. at 245.

B. Covenant of good faith and fair dealing

"[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing." Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (citing Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010)). This obligation requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Ibid. (quoting Kalogeras, supra, 202 N.J. at 366).

However, the implied covenant of good faith cannot "alter the terms of a written agreement" and therefore may not "preclude a creditor from exercising its bargained-for rights under a loan agreement." Glenfed Fin. Corp., Commercial Fin. Div. v. Penick Corp., 276 N.J. Super. 163, 175 (App. Div. 1994) (citations omitted), certif. denied, 139 N.J. 442 (1995).

Plaintiff argues defendant violated the covenant of good faith and fair dealing when it "did nothing" after plaintiff and his parents sent it letters claiming they had paid the entire loan. He also contends defendant should have complied with his request to sell the automobile at a public auction.

We disagree and affirm the trial court. Under the terms of the contract, plaintiff defaulted after January 15, 2014, when he should have paid defendant $569.26. Defendant had already permitted plaintiff to defer payment in the past. It was within its contractual rights to repossess the collateral at this time. Even if defendant had accepted the $569.26 check on January 31, 2014, plaintiff would have remained in default because of the $10 late charge. Defendant was therefore within its contractual rights when it repossessed the automobile on February 4, 2014. Because the implied covenant of good faith cannot "alter the terms of a written agreement" and therefore may not be invoked "to preclude a creditor from exercising its bargained-for rights under a loan

agreement," we conclude defendant did not violate the covenant of good faith and fair dealing in this case. Penick Corp., supra, 276 N.J. Super. at 175 (citations omitted).

C. Consumer Fraud Act

"To prevail on a CFA claim, a plaintiff must establish three elements: '1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss.'" Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 484 (App. Div. 2015) (quoting Zaman v. Felton, 219 N.J. 199, 222 (2014)), appeal dismissed, 224 N.J. 523, 524 (2016). N.J.S.A. 56:8-2 defines "unlawful conduct" as:

> unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.

"Further, '[t]he Legislature included "services" within the definition of "merchandise," a term that encompasses "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale."'" Myska, supra, 440 N.J.

Super. at 485 (quoting D'Agostino v. Maldonado, 216 N.J. 168, 187 (2013)).

Plaintiff argues defendant violated the CFA when it (1) failed "to communicate holding the check until after the repossession and sale," (2) privately sold the automobile, and (3) cashed the $569.29 check after the sale. First, plaintiff's mother must have known defendant held the check because the $569.29 remained in her account. Defendant was within its contractual rights to remedy plaintiff's default under the terms of the contract and cash the check only after it found those remedies insufficient. Second, defendant properly sold the automobile at a private action because it contracted with Manheim, a national vehicle remarketing service, to ensure it disposed of the automobile in a commercially reasonable manner. N.J.S.A. 12A:9-610(b). Third, plaintiff still owed defendant money after the sale, and plaintiff's mother declined to cancel the check, so defendant was within its contractual rights to cash the $569.29 check. Because plaintiff has failed to show "unlawful conduct by defendant," we affirm the trial court's summary judgment in favor of defendant. Myska, supra, 440 N.J. Super. at 484 (quoting Zaman, supra, 219 N.J. at 222).

Affirmed.