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2013 IL App (3d) 120400-U

Order filed March 5, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

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|-----------------------------------|---|-------------------------------|
| TERRY J. MERCER, |) | Appeal from the Circuit Court |
| |) | of the 14th Judicial Circuit, |
| Plaintiff-Appellant, |) | Henry County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-12-0400 |
| |) | Circuit No. 11-CH-71 |
| TUMBLESON AUTOMOTIVE GROUP, and |) | |
| PEOPLES NATIONAL BANK OF KEWANEE, |) | Honorable |
| |) | Charles H. Stengel, |
| Defendants-Appellees. |) | Judge, Presiding |

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

- ¶ 1 Held: Trial court properly granted summary judgment in favor of defendant bank where it was not subject to liability as a holder under a retail installment contract where no contract existed between alleged wrongdoer and plaintiff.
- ¶ 2 Plaintiff Terry Mercer filed an action against defendants Tumbleson Automotive Group and Peoples National Bank of Kewanee, alleging violations under the Magnuson-Moss Warranty Act (15 U.S.C. § 2310(d) (West 2010)) and the Illinois Vehicle Code (625 ILCS 5/3-112.1(c)(West 2010). The trial court granted summary judgment in favor of Peoples National Bank, finding the contracts

at issue did not impose liability on Peoples National Bank for Tumbleson's alleged wrongdoing. We affirm.

¶ 3

FACTS

¶ 4 In May 2009, plaintiff Terry Mercer executed a retail installment contract with Taylor & Son for the purchase of a 2006 Dodge Dakota. The contract included the following mandated language:

“NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOOD OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.” 16. C.F.R. 433.2 (2010) (hereinafter Holder Rule).

¶ 5 The contract was immediately assigned to defendant Peoples National Bank of Kewanee. In April 2010, Mercer traded the Dakota for a 2005 Chrysler 300 Touring from defendant Tumbleson Automotive Group. Peoples National Bank agreed to substitute the new vehicle as its security interest and entered into a substitution of collateral agreement with Mercer. The agreement referenced the original agreement dated May 20, 2009 and was signed by Mercer and Ryan McHenry for Peoples National Bank. The substitution of collateral agreement stated:

“The undersigned acknowledge substitution of the above-described collateral, it being understood that all of the terms and provisions of the original agreement, heretofore executed by the undersigned shall apply thereto and shall continue in full force and effect, and that the substituted collateral

shall be security for the unpaid balance owing.”

¶ 6 Mercer thereafter sought to revoke acceptance of the Chrysler on the basis of breaches of warranties. He filed a complaint in May 2011 and an amended complaint in June 2011, seeking injunctive relief and asserting claims under the Magnuson-Moss Warranty Act (15 U.S.C. § 2310(d) (West 2010)) and the Illinois Odometer Act (625 ILCS 5/3-112.1© (West 2010)) against Tumbleson and “derivatively, under the Holder Rule” against the Bank. The Bank filed a motion for summary judgment, arguing that the Holder Rule was inapplicable as no contract or assignment existed between Mercer, Tumbleson and the Bank. It attached to the summary judgment motion an affidavit of Tumbleson’s owner in which he attested that there was no contract between Tumbleson and Mercer assigned to Peoples National Bank; there was no contract at all in its transaction with Mercer because it was a value-for-value trade; and there were no credit applications and Peoples National Bank was involved only as to the substitution of collateral. Also attached was an affidavit of Ryan McHenry of Peoples National Bank, in which he attested there was no application for or credit to Mercer regarding the Chrysler; no assignment of contract; and the substitution of collateral form incorporated the contract between Mercer and Taylor & Sons assigned to the Bank.

¶ 7 The trial court entered summary judgment in favor of Peoples National Bank. It made the following factual findings. There was no contract between Mercer and Tumbleson and no assignment to Peoples National Bank. The substitution of collateral did not include an assignment from Tumbleson to Peoples National Bank. It found that there was no contract between Mercer and Peoples National Bank or an assignment and thus no derivative liability on the part of the Bank per the Holder Rule. Mercer filed a motion to modify the summary judgment order, arguing that if there was no contract, Peoples National Bank should return all the payments he made to it under the May

2009 assignment. Mercer also filed an amended motion to modify the summary judgment order, arguing as above, and additionally seeking Illinois Supreme Court Rule 304(a) language. Ill. Sup. Ct. R. 304(a) (effec. Jan. 1, 1967). The trial court denied Mercer's motion in part, finding that the Holder Rule does not apply to Tumbleson's misconduct. It granted Mercer's request for Rule 304(a) language. Mercer appealed.

¶ 8

ANALYSIS

¶ 9 On appeal, we must determine whether the trial court erred in granting Peoples National Bank's motion for summary judgment and in denying Mercer's motion to modify the summary judgment order. Mercer argues that Peoples National Bank is liable under the terms of the retail installment contract, specifically the Holder Rule provision. He argues in the alternative that if the Holder Rule provision does not apply, the contract itself is inapplicable and the Bank must refund the monthly payments he made on the installment contract.

¶ 10 Summary judgment is properly granted when the pleadings, depositions, admissions on file and any affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c)(West 2010); *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). In determining a motion for summary judgment, the facts are construed strictly against the movant and in a light most favorable to the non-movant. *Happel*, 199 Ill. 2d at 186. We review a trial court's grant of summary judgment de novo. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 395 (2008).

¶ 11 The "Holder Rule" provides:

"In connection with any sale or lease of goods or services to consumers, in or affecting commerce as 'commerce' is defined in the Federal

Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.” 16 C.F.R. § 433.2 (2010).

¶ 12 The Holder Rule, which eliminated a creditor’s holder-in-due-course protection, was designed to preserve the claims and defenses of a consumer and to restore his or her right of nonpayment. *Felde v. Chrysler Credit Corp.*, 219 Ill. App. 3d 530, 536 (1991). The Holder Rule subjects the assignee to liability regarding the claims and defenses the debtor could assert against the seller. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 53 (2001). Under the Holder Rule, a vehicle buyer may withhold payment to the seller or assignee when it becomes apparent the vehicle is “a lemon.” *Jackson*, 197 Ill. 2d at 54.

¶ 13 Under the circumstances at bar, there are no genuine issues of material fact and the Bank is entitled to judgment as a matter of law. As the trial court found, because there was no contract between Mercer and Tumbleson, there can be no assignment to the Bank under which it would be

subject to liability under the Holder Rule. The substitution of collateral document also does not provide an assignment between Tumbleson and the Bank. It expressly incorporates the “terms and provisions of the original agreement, heretofore executed by the undersigned” and provides that the terms and provisions “shall continue in full force and effect.” The original contract, dated May 30, 2009, was executed between Mercer and Taylor and Sons and assigned to the Bank. The only document evidencing Mercer’s acquisition of the Chrysler from Tumbleson was the substitution of collateral, which was executed by Mercer and the Bank.

¶ 14 Mercer misconstrues the factual circumstances that occurred in the vehicle transactions, as demonstrated in his complaint where he alleged that the finance contract was “entered into by Mercer and Tumbleson, and subsequently assigned by Tumbleson” to the Bank. Tumbleson did not execute any finance contract or assignment with Mercer or the Bank. As attested to by Tumbleson, there was no contract between Tumbleson and Mercer for the acquisition of the Chrysler, which was a value-for-value transaction; there was no contract between Tumbleson and Mercer making an assignment to the Bank; there were no credit applications executed by Tumbleson and Mercer; and the Bank’s only involvement in the transaction was to agree to a substitution of collateral. In his affidavit, the Bank’s employee, McHenry, averred that there was no finance or credit application submitted to it by Mercer regarding the Chrysler; there was no assignment of any contract regarding the Chrysler; and the original contract between Mercer and Taylor & Son was incorporated into the substitution of collateral agreement.

¶ 15 Because there was no contract with Tumbleson and thus no assignment to the Bank of any Tumbleson contract, the Bank is not subject to derivative liability for any wrongdoing by Tumbleson. Similarly, the substitution of collateral agreement, which involved only Mercer and the Bank, did not

create liability on the Bank's' behalf for Tumbleson's actions. Accordingly, we find that the trial court properly granted summary judgment in favor of the Peoples National Bank.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed.

¶ 17 Affirmed.