STATE OF MICHIGAN

COURT OF APPEALS

JASMINE BROWN,

Plaintiff-Appellant,

V

DETROIT FEDERAL EMPLOYEES CREDIT UNION,

Defendant-Appellee.

UNPUBLISHED
April 26, 2002

No. 230218
Wayne Circuit Court
LC No. 99-918131-CK

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from trial court orders granting defendant summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Fact and Proceedings

In June 1996, plaintiff Jasmine Brown entered into a lease agreement with Kelvin Leasing, Inc. entitling her to lease a 1997 Ford F-150 Supercab for a period of three years at a monthly rate of $218.18. The lease agreement provided that Kelvin Leasing's interest would be assigned to Defendant Detroit Federal Employees Credit Union, and also contained provisions requiring plaintiff to insure the vehicle and permitting defendant the right to repossess the vehicle if the vehicle was not insured. Specifically, the lease provided in part:

> VEHICLE INSURANCE: Lessee must insure the Vehicle for the term of this Lease and give Lessor evidence of the insurance. This insurance must protect Lessee and Lessor with (i) comprehensive fire and theft insurance if the Vehicle is a car, or fire, theft and combined additional coverage is [sic] the Vehicle is a truck, with a deductible amount of not more than $500.00; and (ii) collision and upset insurance with a deductible amount of not more than $500.00; and (iii) automobile liability insurance with limits of not less than $100,000 for any one person for bodily injury or death, $300,000 for any one accident for bodily injury or death, and $50,000 for property damage.
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> * * *

> If Lessee does not keep all the required insurance in force, Lessor may buy the insurance to protect their interest. However, if so, Lessee must repay the amounts advanced either with the rental payment, or in one lump amount, as Lessor tells Lessee. . . .
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> * * *
>
> IF LESSEE DOESN'T KEEP THE INSURANCE IN FORCE AT ALL TIMES, LESSOR HAS THE RIGHTS LISTED IN THE "DEFAULT" SECTION.
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> * * *
>
> (9a) Default: Lessee is in default under this Lease if:
>
> * * *
>
> b. Lessee doesn't keep the required insurance in force.
>
> * * *
>
> f. Lessee breaks any of its promises, does not meet any of its obligations or fails to keep any agreement under this Lease.
>
> * * *
>
> If Lessee is in default under this Lease, Lessor may, in addition to any and all rights or remedies available at law or in equity, which it may exercise:
>
> A. End all Lessee's right to have possession of the Vehicle.
>
> B. Take the Vehicle peacefully wherever it is located, and Lessee specifically agrees that Lessor may go on Lessee's property to retake the Vehicle.

It is undisputed that at the commencement of the lease agreement, plaintiff insured the vehicle with Allstate Insurance Company, however Allstate Insurance subsequently canceled plaintiff's insurance because of non-payment. On August 23, 1996, defendant sent plaintiff a letter informing her that it was aware that Allstate no longer insured the vehicle, and inquiring whether she had changed insurance policies without its knowledge. The letter went on to state:

> If you did not obtain insurance from a different company, it is imperative that you do so immediately! Lack of full coverage insurance on a vehicle being used as collateral on a loan causes the collateral to be in jeopardy, and will cause the Credit Union to take whatever steps are necessary to prevent this danger.

Plaintiff did not respond to defendant's letter, and therefore defendant contacted plaintiff by telephone on or around September 5, 1996.[1] Plaintiff asserts that she promised in that telephone conversation that she would have insurance coverage for the vehicle by 5:00 p.m. that day. On September 6, 1996, defendant received a telephone call from a gentleman claiming that plaintiff had purchased insurance for the vehicle. According to defendant's records, this gentleman neither identified himself nor provided proof of the claimed insurance to defendant by fax, as defendant requested. However, in response to defendant's motion for summary disposition, plaintiff disputes the accuracy of defendant's records through an affidavit from Joseph Bailey of Consolidated Agency, Inc. Mr. Bailey avers in his affidavit that he was the gentleman that called defendant, and that he had identified himself, both by name and as plaintiff's insurance agent.[2] Bailey's affidavit also stated that plaintiff had the "required no-fault insurance," but the affidavit did not state clearly and unambiguously that plaintiff had purchased comprehensive fire and theft insurance, and collision insurance, as required by the lease agreement.

On September 8, 1996, at approximately 3:00 p.m., plaintiff's vehicle, which was parked in plaintiff's driveway, was repossessed for lack of insurance. Plaintiff testified during her deposition that she informed the repossession agents that she had insurance, and that she showed the agents proof of insurance. However, it is undisputed that plaintiff did not provide defendant any documentary proof that plaintiff had any type of insurance on the vehicle until plaintiff faxed defendant a "certificate of no-fault insurance" on September 10, 1996, two days after the repossession. It is also undisputed that plaintiff never produced a declaration sheet or an actual insurance policy establishing that the "certificate of no-fault insurance" was reflective of plaintiff's purchase of comprehensive fire and theft insurance, and collision insurance, as opposed to solely automobile liability coverage. Similarly, the "certificate of no-fault insurance" did not verify whether the automobile liability coverage said to be existing under the purported policy was the $100,000/$300,000 coverage required by the lease agreement. The "certificate of no-fault insurance" also did not establish that the vehicle had been insured between the date Allstate cancelled her insurance through September 6, 1996.

Plaintiff filed the instant complaint against defendant, alleging that defendant's repossession of the vehicle amounted to: (1) breach of contract, (2) invasion of privacy, (3) violation of the Michigan Consumer Protection Act (MCPA), (4) negligence, (5) intentional or negligent infliction of emotional distress, and (6) conversion. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that because both the lease agreement and the Uniform Commercial Code provided defendant with the right of repossession after default on the lease, and because plaintiff admitted that the insurance on the vehicle had lapsed, there was no genuine issue of material fact that plaintiff had defaulted on the lease and repossession was appropriate, and that defendant was entitled to judgment as a matter of law.

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[1] According to defendant's records, plaintiff was called on September 5, 1996; however, plaintiff testified during her deposition that she believed she received the phone call on September 6, 1996.

[2] The affidavit does not indicate that Bailey faxed proof of insurance to defendant or that defendant informed him that a faxed proof of insurance was unnecessary.

Plaintiff responded to defendant's motion by arguing that because plaintiff had not missed any payments to defendant, the Motor Vehicle Sales Finance Act, MCL 492.101 *et seq*., precluded defendant from repossessing plaintiff's vehicle. Plaintiff also argued that the Uniform Commercial Code - - Leases, MCL 440.2801 *et seq*., specifically provides that the Motor Vehicle Sales Finance Act has precedence over any UCC provisions that entitled defendant to repossess plaintiff's vehicle after plaintiff defaulted on the lease. Plaintiff further argued that defendant did not declare her in default, but instead sent her a letter directing her to get insurance for the vehicle, and that because plaintiff relied on that letter and purchased insurance for the vehicle, defendant lost any right to declare her in default and repossess the vehicle.

The trial court granted defendant summary disposition, finding that "once she no longer had the insurance coverage, she was automatically in default pursuant to the contract." The trial court further found that

> if there's one thing that's very clear in [the contract] is [sic] that [plaintiff's] gotta [sic] maintain insurance on that vehicle. And as soon as she stops having coverage on that vehicle, they have a right to take possession of the vehicle. And that's what happened in this case.
>
> I don't see any factual disputes with regard to those issues, so I'm going to grant the motion for summary judgment.

Therefore, the trial court entered an order granting defendant summary disposition and dismissing the case. Plaintiff then moved for reconsideration, which was denied by the trial court on September 19, 2000. Plaintiff now appeals.

II. Standard of Review

This Court's review of a trial court's grant or denial of summary disposition is de novo in order to determine whether the moving party was entitled to judgment as a matter of law. *Scharret v City of Berkley*, ___ Mich App ___; ___ NW2d ___, issued 1/29/02 (Docket No. 233038), citing *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 659; 633 NW2d 1 (2001). In reviewing a trial court's grant of summary disposition under MCR 2.116(C)(10) motion, we are to consider all the documentary evidence in the light most favorable to the nonmoving party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Scharret*, *supra*.

In addition, the construction and interpretation of an unambiguous contract is a question of law that we review de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998); see also *Mich Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998), and *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Whether terms of a contract are ambiguous is also a question of law, which we review de novo. *Henderson*, *supra*; *Port Huron Ed Ass'n v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996). In determining whether a contract provision is ambiguous, we are to give the language used its ordinary and plain meaning, *Mich Nat'l Bank*, *supra*, to see if "its words may reasonably be understood in different ways." *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 656-657; 550 NW2d 577 (1996). Thus, "if a word or phrase is unambiguous

and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts," summary disposition should be granted to the proper party. *Henderson, supra,* citing *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993).

III. Analysis

Plaintiff first argues that the trial court erred when it found that under the lease agreement, plaintiff was in default when her insurance lapsed. We disagree. As we noted previously, the lease agreement explicitly stated that if plaintiff, as lessee, did not have the vehicle insured "at all times," then defendant, as lessor, was entitled to pursue all of "the rights listed in the 'default' section." These rights included defendant's right to terminate plaintiff's possession of the vehicle by repossessing the vehicle from "where it [was] located," including plaintiff's property.

Here, it is undisputed that plaintiff failed to insure the vehicle from sometime prior to August 23, 1996, until at least September 6, 1996. As such, it is apparent that plaintiff failed to insure the vehicle "at all times," and was therefore in default under the lease agreement. In addition, it is clear that under MCL 440.2951, 440.2973(1)(a), (f), (3) and 440.2975(2) of the UCC, defendant was entitled to repossess the vehicle as a result of plaintiff's default.[3] Thus, the

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[3] MCL 440.2951 provides:

> (1) Whether the lessor or the lessee is in default under the lease contract is determined by the lease agreement and this article.
>
> (2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this article and, except as limited by this article, as provided in the lease agreement.
>
> (3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may . . . enforce the lease contract by self-help . . . in accordance with this article.

MCL 440.2973(1)(a), (f), and (3) provides:

> (1) If a lessee wrongfully . . . fails to make a payment when due . . . the lessee is in default under the lease contract and the lessor may do any of the following:
>
> (a) Cancel the lease contract.
>
> * * *
>
> (f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(continued…)

trial court correctly held that plaintiff had defaulted under the lease agreement, and that, under the terms of the lease, defendant had the right to repossess the vehicle as a result of plaintiff's default.[4] Further, to the extent that plaintiff's argument can be construed to contend that defendant was required to provide express notice to plaintiff and her husband that defendant considered plaintiff in default before it could repossess the vehicle, we note that MCL 440.2952 states that a "lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement." As such, we find that defendant was not required to notify plaintiff that she was in default or notify her that defendant was going to exercise the self-help remedy of repossession, expressly permitted by both the lease agreement and the UCC.

Plaintiff also argues that defendant's letter to plaintiff, informing her to insure the vehicle immediately if it was not presently insured, constituted a written waiver of defendant's right to declare plaintiff in default. Plaintiff further asserts that she detrimentally relied on that letter by purchasing insurance for the vehicle, and that therefore defendant should be estopped from declaring plaintiff in default and repossessing the vehicle. However, plaintiff failed to raise this defense in response to defendant's summary disposition motion but instead first asserted these

(…continued)

* * *

> (3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract.

MCL 440.2975(2) provides, in part:

> After a default by the lessee under the lease contract . . . or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods.

We note that at the time the lease agreement between plaintiff and defendant became effective, MCL 44.2975(2), stated that "the *lessee* has the right to take possession of the goods". However, it is clear from reading the title, subsections (1) and (3) of § 2975, the comment, the model version of the Uniform Commercial Code, ULA § 2A-525(2), and MCL 440.9503, that the word "lessee" was a typographical error, and that the proper word was "lessor." This typographical error was corrected in PA 2000, No 348, which amended § 2975 to read "lessor" instead of "lessee." Because it is clear that PA 2000, No 348, was a remedial statute, it is given retroactive effect. *Saylor v Kingsley Area Emergency Ambulance Service*, 238 Mich App 592, 598; 607 NW2d 112 (1999).

[4] While not raised on appeal, we note that below plaintiff contended that the Motor Vehicle Sales Finance Act precludes repossession in this situation. However, assuming that the Motor Vehicle Sales Finance Act applies to lease agreements (which we need not decide in this case), we note that § 114(c) of that act clearly provides for the "right of repossession of a motor vehicle" as long as the vehicle is repossessed in accordance with § 9503 of the Uniform Commercial Code (UCC), MCL 440.9503. MCL 492.114(c). Section 9503 of the UCC provides that "[u]nless otherwise agreed a secured party has on default *the right to take possession of the collateral.*" MCL 440.9503.

claims in her motion for reconsideration. Because the facts necessary to consider these legal theories were present at the time of defendant moved for summary disposition but plaintiff failed to assert them in response to the motion, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). See also *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Thus, because plaintiff did not properly raise these arguments before the trial court, we conclude that plaintiff has waived appellate review of these issues. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 130; 602 NW2d 390, 400 (1999); *Cox v D'addario*, 225 Mich App 113, 130; 570 NW2d 284 (1997); see also *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

In any event, we note that while the letter did inform plaintiff to insure the vehicle immediately, the letter also indicated that defendant would "take whatever steps [were] necessary to prevent . . . danger" to the vehicle. We also note that while plaintiff may have provided evidence that she had obtained "no-fault insurance" for the vehicle, plaintiff has failed to provide any evidence,[5] either below or on appeal, that she ever purchased comprehensive fire and theft, and collision insurance, or that the "no-fault insurance" referenced in the relied upon certificate provided $100,000/$300,000 liability coverage for the vehicle as required by the lease. Accordingly, even if this argument had been properly preserved for appellate review, we conclude that defendant never waived its right to repossess the vehicle, see *H J Tucker & Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999), quoting *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719; 79 NW2d 252 (1970), that plaintiff failed to establish the necessary elements of equitable estoppel, *Conagra, supra* at 140-141, and that plaintiff failed to establish a genuine issue of material fact on the question whether the vehicle was insured as required by the lease agreement.

Because plaintiff's brief on appeal only addresses whether plaintiff was in default, and whether defendant properly repossessed her vehicle as a result of that default, we conclude that plaintiff has abandoned her claims of invasion of privacy, violations of the MCPA, negligence, intentional or negligent infliction of emotional distress, and conversion, and has therefore waived any error concerning the dismissal of those claims. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001); *Phillips v Jordon*, 241 Mich App 17, 24, n 2; 614 NW2d 183 (2000); see also *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 N.W.2d 387 (1996).

IV. Conclusion

The record in this case clearly establishes that plaintiff failed to insure her leased vehicle at all times as required by the lease agreement. The record also establishes that there is no genuine issue of material fact on the question whether the vehicle was insured against fire, theft, or collision when the vehicle was repossessed. Furthermore, the lease agreement and the UCC permit defendant to exercise the remedy of repossession after default by plaintiff, and the letters sent by defendant to plaintiff do not constitute waiver of defendant's right to repossess the

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[5] A copy of the declaration sheet or the actual policy issued would have been conclusive evidence on this regard.

vehicle. Accordingly, we find that the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10). In addition, since plaintiff failed to assert the legal theories of waiver and estoppel as defenses at the time of defendant's motion for summary disposition, the trial court appropriately exercised its discretion to deny plaintiff's motion for reconsideration. Finally, plaintiff has abandoned her claims of invasion of privacy, violations of the MCPA, negligence, distress, and conversion, since these claims were not briefed on appeal.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder