

STATE OF MICHIGAN
COURT OF APPEALS

OLD KENT BANK, assignee of J & M MARINE,
INC.,

Plaintiff-Appellant,

v

KAL KUSTOM, INC., and KAL KUSTOM
ENTERPRISES,

Defendants-Appellees.

FOR PUBLICATION
February 28, 2003
9:10 a.m.

No. 231915
Berrien Circuit Court
LC No. 99-003886-CK

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Plaintiff Old Kent Bank (Old Kent) filed suit in this action as an assignee of J & M Marine Inc.'s rights against defendant Kal Kustom Enterprises (Kal Kustom).¹ The trial court granted summary disposition to Kal Kustom. We reverse and remand.

I. Factual Background

The factual and procedural history of this case is somewhat complex. In February 1997, Daniel Popp purchased a powerboat through J & M Marine. Old Kent financed the sale, with J & M Marine acting as guarantor. J & M Marine contracted directly with Kal Kustom to provide the boat, which was manufactured by Magic Powerboat Sales, Inc. The transfer of the boat occurred sometime in the summer of 1997, and the boat did not conform to Popp's specifications. These defects resulted in correspondence from J & M Marine's attorney to Kal Kustom, dated August 20, 1997, notifying it of the defects in the boat. On September 11, 1997, Kal Kustom's attorney sent a response letter requesting "whatever documentation you have regarding the alleged deficiencies in the boat so we will have specific information to work from." On September 17, 1997, Old Kent's attorney sent a letter promising pertinent information, but it is unclear whether any further correspondence was received.

Meanwhile, in November 1997, Old Kent filed suit (the 1997 suit) against Popp and J & M Marine for the balance due on the installment sales contract for the boat. Popp filed a

¹ Kal Kustom, Inc. was dismissed from the instant case and plaintiff does not appeal the dismissal.

counterclaim against Old Kent and a cross-claim against J & M Marine, alleging misrepresentation/fraud, breach of contract, violation of the Consumer Protection Act, and indemnification. In August 1998, Popp, J & M Marine, and Old Kent entered into a stipulated order permitting Old Kent to sell the boat and apply the proceeds to the balance of the sales contract. Popp and J & M Marine waived their rights to notice with regard to the sale, and J & M Marine assigned Old Kent all of the rights and claims it had against Magic Powerboat Sales, Inc. and Kal Kustom. In October 1998, J & M Marine and Popp entered into a settlement agreement and general release of all claims under which Popp was released from all further liability for the boat and J & M Marine agreed to pay Popp \$4,800. Old Kent sold the boat for \$40,500, leaving a deficiency of \$26,436.05. Popp refused to pay the deficiency and was released from that lawsuit in March 2000. However, Old Kent's claim against J & M Marine remained.

In April 1999, Old Kent, as assignee of J & M Marine, filed the instant action against Magic Powerboat Sales, Inc and Kal Kustom.² In its complaint and amended complaint, Old Kent alleged Kal Kustom breached its contract and warranty of sale with J & M Marine with regard to the boat. Both parties thereafter filed cross motions for summary disposition. Kal Kustom asserted that Old Kent is without the right to assert claims against it because Old Kent failed to provide proper notice of the previous 1997 litigation between Old Kent, Popp, and J & M Marine. According to Kal Kustom, J & M Marine was required to have placed Kal Kustom on notice of the previous lawsuit, and because it did not, Old Kent was now precluded from bringing the instant action. Further, Kal Kustom contended that J & M Marine's liability to Old Kent was based on the retail installment sales contract between Popp and J & M Marine, and because Kal Kustom was not a party to that contract, J & M Marine has no liability in excess of the \$4,800 settlement amount.

Old Kent insisted that Kal Kustom had multiple opportunities to step forward and defend the previous case but chose not to. Further, Old Kent claimed that Kal Kustom was made aware of the defects in the boat through the August 1997 letter. Old Kent, however, admitted that while Kal Kustom was on notice of the defects, it did not become aware of the previous litigation until the instant action was filed in 1999 and did not have written notice or tender of J & M Marine's defenses until May 2000 and July 2000, when Old Kent's attorney wrote to Kal Kustom advising it of the suit against J & M Marine and requesting whether it wished to vouch in with regard to that lawsuit.

The trial court granted summary disposition to Kal Kustom pursuant to MCR 2.116(C)(10). In its opinion, the court concentrated its decision on the notice provision in MCL 440.2607(5)(a), finding that Kal Kustom did not receive proper notice of the 1997 lawsuit. Further, the court held that the notices given in May and July 2000 were not timely:

The only notification consisting of the opportunity to "vouch in" the 1997 lawsuit arrived with the May 18 and July 6 [2000] letter to KKE. However, the posture of the 1997 lawsuit since its inception has fundamentally changed. A

² A default was entered against Magic Powerboat Sales, Inc. and it is not a party to this appeal.

partial list of fundamental changes would include sale of the boat, waiver of Popp and J & M is [sic] rights under the UCC, waiver of public notice of the sale of the boat, inability to bid on the boat during its public sale, among others. All these events prejudice KKE. Accordingly, the Court finds that the May and July letters offering KKE an opportunity to defend J & M were not seasonable receipt of notice within the meaning of MCL 440.2607(5). KKE was entitled to timely notice so that its interests could be protected. No timely notice was given here.

Therefore, because Kal Kustom did not receive proper notice of the 1997 suit, the court found there were no genuine issues of material fact and granted summary disposition to Kal Kustom.³

Old Kent now argues that the lower court erred in granting Kal Kustom summary disposition. Old Kent contends that, although Kal Kustom did receive notice of the 1997 litigation, MCL 440.2607(5)(a) does not *require* notice to be given.

II. Standard of Review

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Singerman v Muni Serv Bureau, Inc.*, 455 Mich 135, 139; 565 NW2d 383 (1997). Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue as to any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Questions regarding the interpretation and construction of statutes are questions of law, which this Court also reviews de novo. *Stozicki v Allied Paper Co*, 464 Mich 257, 263; 627 NW2d 293 (2001).

III. Analysis

In granting Kal Kustom's motion for summary disposition, the trial court focused its decision on MCL 440.2607(5)(a), which provides for the giving of notice by a buyer to a seller of an action against the buyer for an obligation for which the seller is liable. The trial court summarily decided that the notice of the 1997 lawsuit given by Old Kent to Kal Kustom was not timely and, thus, granted summary disposition to Kal Kustom in the present suit. In deciding that the notice was not timely, the trial court implicitly found that notice was required to have been given. However, it is important to note that in the current proceedings, Old Kent is not attempting to bind Kal Kustom to the 1997 proceedings. Further, there is no authority suggesting that "vouching in" is the only method of recovery from a party potentially liable for a non-conforming sale. Thus, our analysis rests with the statutory language in MCL

³ We note, that in November 2000, a judgment was entered in the 1997 lawsuit between Old Kent and J & M Marine in favor of Old Kent in the amount of \$52,103.76.

440.2607(5)(a) to determine whether the statute required notice to have been given to Kal Kustom and possibly the effect of the failure to give that notice.

We begin by addressing plaintiff's argument that MCL 440.2607(5)(a) is inapplicable because the buyer of the defective boat did not accept the boat. Plaintiff claims that MCL 440.2607 applies only to buyers who accept goods, not to buyers who reject them. According to plaintiff, Popp and J & M Marine clearly rejected the defective boat. We decline to address the issue whether MCL 440.2607(5)(a) applies to a buyer who rejects the goods because the issue whether MCL 440.2607(5)(a) required notice to be given is controlling.⁴

MCL 440.2607(5)(a) states:

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the 2 litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

MCL 440.2607(5)(a) is Michigan's Uniform Commercial Code codification of the common law practice of vouching in parties to a lawsuit who may ultimately be liable for a non-conforming sale. *Ford Motor Co v Bendix Corp*, 83 Mich App 108, 111-112; 268 NW2d 305 (1978). By its terms, this statute applies to force a seller, who receives proper notice, to defend in a suit brought by a third party against the buyer, or be bound by any factual determinations made during that suit in any future suit brought by the buyer against the seller.

The only published Michigan case interpreting MCL 440.2607(5)(a) is *Ford, supra*. That case involved a claim for indemnification from the defendant arising out of a jury verdict against the plaintiff in a personal injury case. This Court determined that because notice of the prior litigation was reasonable, the defendant was properly vouched in and the judgment entered on the jury's verdict in the personal injury case against the plaintiff, including the factual determinations, was binding against the defendant in the subsequent indemnification litigation. However, in that case, this Court addressed whether the notice given to the seller was reasonable notice, not whether the notice was required to be given. Therefore, that case is of little use for resolution of the issue presently before this Court.

⁴ We note Kal Kustom's contention that Old Kent's claim is actually based on recourse liability pursuant to an installment sales contract to which defendant was not a party, which precludes Kal Kustom from liability. Beyond the fact that Kal Kustom cited little legal support for its contention, the trial court did not specifically address this issue; therefore, we need not address it. See *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). However, we note that although Old Kent made references to recourse liability, it claimed that Kal Kustom delivered a nonconforming boat in breach of contract and implied warranties between J & M Marine and Kal Kustom. We are unable to find that Old Kent has not properly pursued Kal Kustom for all claims held by J & M Marine.

The primary goal of statutory interpretation is to determine and give effect to the intent of the Legislature. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000). The Court must first look to the language of the statute, *Stozicki, supra* at 263, affording each word used its common and ordinary meaning, *Nawrocki, supra*. If the statutory language is clear and unambiguous, it reflects the intent of the Legislature and judicial construction is not permitted. *Michalski v Bar-Levav*, 463 Mich 723, 731; 625 NW2d 754 (2001). This Court will not read anything into a statute that is not within the manifest intent of the Legislature. *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

The language of MCL 440.2607(5)(a) is clear and unambiguous. The statute's plain language reflects its discretionary nature. Again, the statute states that where a buyer is sued for breach of warranty or other obligation for which his seller is liable, he "may give his seller written notice of the litigation." MCL 440.2607(5)(a)(emphasis added). The word "shall" is generally used to designate a mandatory provision, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002), while "may" designates discretion, *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). As a general rule, "the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense." *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drainage Dist*, 210 Mich App 559, 565; 534 NW2d 168 (1995). Therefore, the Legislature's use of the word "may" signifies that it intended the section to outline a permissive, as opposed to mandatory, action available to a buyer.

Further emphasizing the permissive nature of subsection (5)(a) is the fact that a review of other subsections set forth in MCL 440.2607(5) indicates that the Legislature intentionally made some portions of the statute mandatory, while others permissive. Subsections (3)(a) and (3)(b) contain the mandatory "must" in terms of notice.⁵ If the Legislature intended subsection (5)(a) to be mandatory, it would have used similar mandatory language.

The trial court erred in finding the notice provision in MCL 440.2607(5)(a) to be mandatory. Because the explicit language in the statute does not require notice to be given, the trial court erred in granting summary disposition to defendant, based exclusively on the failure to provide proper notice.

⁵ Specifically, MCL 440.2607(3)(a) and (b) state:

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like . . . and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

MCL 440.2607(5)(a) was codified in the Uniform Commercial Code and adopted in Michigan without modification. See UCC 2-607. Nothing in the statute requires a buyer to give the seller notice of the litigation against the buyer or be forever barred from bringing subsequent litigation against the seller.⁶ The statute works to bind the seller to factual determinations made in the prior litigation against the buyer if the buyer gave the seller proper notice of the litigation and the seller refuses to defend. Therefore, it follows that under the statute, the only effect the failure to provide proper notice in this case could have is that Kal Kustom is not bound to the factual determinations in the 1997 lawsuit. MCL 440.2607(5)(a) does not completely bar Old Kent from bringing action against Kal Kustom.

Old Kent requests that in reversing the trial court's decision, this Court order summary disposition in Old Kent's favor. The trial court did not specifically address the issues of breach of contract and implied warranties in denying Old Kent's motion for summary disposition; therefore, this Court need not address the propriety of summary disposition regarding these claims. See *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Based on the record, we are unable to determine that there exist no genuine issues of fact material to the disposition of Old Kent's claims as assignee of J & M Marine.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot

⁶ See, e.g., 3 Friedman and Frumer, *Products Liability*, § 15.08(3), p 15-176.