STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER J. YATOOMA,

Plaintiff-Appellee,

v

RUSSELL E. BARKER, a/k/a RUSSELL BARKER, a/k/a RUSS BARKER, METROSWEEP ENVIRONMENTAL SERVICES, INC., METROSWEEP, INC., METRO SWEEP CONTRACTING SERVICES, L.L.C., and CEO CAPITAL GROUP, LLC,

Defendants,

and

INDEPENDENT BANK CORPORATION, INDEPENDENT BANK, and INDEPENDENT BANK EAST MICHIGAN,

Defendants-Appellants.

UNPUBLISHED
December 28, 2010

No. 294932
Oakland Circuit Court
LC No. 2008-096649-CK

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Defendants Independent Bank Corporation, Independent Bank, and Independent Bank East Michigan (hereinafter the "Bank") appeal by leave granted the trial court's order denying their motion for summary disposition, which was premised on MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

At issue in this case is whether plaintiff Christopher J. Yatooma had a secured interest in a right of first refusal. On July 17, 2006, Ronald C. Omilian, United Soils, Inc., Earth Products, Inc., Earth Supplies, Inc., and C.A.R.D. Properties, L.L.C., entered into a loan agreement with

Yatooma associated with his lending them $230,000. The loan agreement stated in pertinent part:

> Security: This Loan Agreement and all obligations of Borrower under it are secured by *all of the assets* and personal property of Borrower. This security interest attaches the Creditor's interest to *all collateral*, including, without limitation, all of the issued and outstanding stock and membership interests of the following business entities: C.A.R.D. Properties L.L.C., Earth Products, Inc., Earth Supplies Inc., and United Soils, Inc.
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> This Security Interest shall be duly recorded with the State of Michigan in Five (5) separate UCC Financing Statements for each individual parties named in the beginning of the agreement who collectively comprise the Borrower. [Emphasis added.]

A Uniform Commercial Code ("UCC") Financing Statement was subsequently filed that purported to cover, among other things, the following collateral:

> All of the assets and personal property of the debtor, including, without limitation, a) all of debtors [sic] Accounts, Equipment, Inventory, Chattel Paper, General Intangibles, Deposit Accounts, Documents, Instruments, Goods, Fixtures, Investment Property, and Letter-of-Credit Rights; b) all property, *tangible or intangible, in which Debtor now has or later acquires any rights* . . . . [Emphasis added.]

The Bank had also made substantial loans to the above entities.

On December 7, 2006, United Soils filed for Chapter 11 bankruptcy. The Bank filed a motion for relief from the bankruptcy stay, which was granted consistent with a stipulation. On February 12, 2007, the Bank and various Omilian entities, including United Soils, entered into a Voluntary Surrender of Assets Agreement ("VSA Agreement"). Pursuant to this agreement, United Soils (and other entities) surrendered their assets to the Bank. The following "Right of First Refusal" clause was in the agreement:

> Upon the Bank agreeing to sell all or any part of the Collateral . . . to any third party in a private sale, the Bank shall give Omilian and United Soils' counsel, Michael I. Zousmer, Esq. written notice of the purchase price and terms of such sale . . . and Omilian or any entity controlled by him shall have seven (7) days from receipt of Bank's Notice to inform the Bank in writing, that he, or an entity controlled by him, agrees to purchase such Sale Assets on the same terms and conditions as set forth in the Bank's Notice . . . .

Ultimately, the Bank provided notice that it had agreed to sell part of the collateral to another entity. Omilian's counsel responded, advising that AKO Enterprises–Waterford, Inc. ("AKO Enterprises") intended to purchase the assets in accordance with the right of first refusal clause of the VSA Agreement.

Following a sale to AKO Enterprises, Yatooma sued the Bank for conversion and tortious interference with a contract. In essence, Yatooma claimed that the Bank failed to honor his secured interest in the right of first refusal, which he claimed was a secured asset covered by the loan agreement. The Bank moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the right of first refusal was created by the VSA Agreement *after* Yatooma had entered into the loan agreement, and that Yatooma's loan agreement granted him a security interest in Omilian and his entities' assets, but not their after-acquired assets. Accordingly, the Bank asserted that Yatooma had no secured interest in the right of first refusal. Yatooma opposed the motion and argued that a contractual interpretation of the loan agreement dictated that he was entitled to summary disposition under MCR 2.116(I)(2), or in the alternative, the Bank's motion should be denied because genuine issues of material of fact existed regarding whether Omilian and Yatooma intended that the security provisions contained in the loan agreement include future acquired property. The trial court declined to grant either party summary disposition, finding that the loan agreement was silent as to the inclusion of after-acquired property, which created a "sufficient question of material fact as to whether the after-acquired property was to be included in the [financing statement], or if it was an impermissible expansion of the rights granted" in the loan agreement.

II. STANDARD OF REVIEW

We review a trial court's grant or denial of summary disposition de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Id*. at 120.]

III. LAW AND ANALYSIS

UCC 9-204, MCL 440.9204(1), provides that "a security agreement may create or provide for a security interest in after-acquired collateral." UCC 9-108, MCL 440.9108, provides in pertinent part:

> (1) Except as otherwise provided in subsections (3), (4), and (5), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.
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> * * *
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> (3) A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

Preliminarily, there is no authority in Michigan for the proposition that the UCC Financing Statement can expand on the collateral granted by the security agreement. In fact, the opposite is true. In *Fed Land Bank of St Paul v Bay Park Place, Inc*, 162 Mich App 1, 7; 412 NW2d 222 (1987), this Court held:

> The purpose of a financing statement is to place third parties on notice of the existence of a security agreement. Although a financing statement may be used to assist in the interpretation of the security agreement, the financing statement does not create a security interest and cannot extend a security interest beyond what has been unambiguously described in a security agreement. [Citations omitted.]

Further, authorities from other jurisdictions expressly hold that there can be no such expansion. See *Dowell v D R Kincaid Chair Co*, 125 NC App 557, 561-562; 481 SE2d 670 (1997), citing *Idaho Bank & Trust Co v Cargill, Inc*, 105 Idaho 83; 665 P2d 1093 (1983), citing Ronald A. Anderson, Anderson on The Uniform Commercial Code, § 9-204:9; see also *Allis-Chalmers Corp v Staggs*, 117 Ill App 3d 428, 432; 453 NE2d 145 (1983) ("a broader description of collateral in a financing statement is ineffective to extend a security interest beyond that stated in the security agreement"); *In re Excalibur Machine Co, Inc*, 404 BR 834, 840 (Bankr WD Pa, 2009) ("A financing statement cannot expand the security provided for in the security agreement."). In construing the UCC, this Court "seek[s] guidance from the decisions of other jurisdictions." *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999). Thus, this case turns on whether the security agreement itself grants plaintiff an interest in the after-acquired right of first refusal.

The parties agree that the loan agreement does not include an explicit after-acquired property clause. They disagree, however, on whether the language provided in the loan agreement is sufficient to imply the inclusion of after-acquired collateral, specifically, the right of first refusal.

In *Mich Tractor & Machinery Co v Jocham Excavating, Inc*, 216 Mich App 94, 96, 98; 549 NW2d 27 (1996), the intervening defendants were assigned "all retainage fees due and owing" in exchange for release from a mortgage and the promise of a loan. This Court concluded that at the time of the assignment, there were no retainage fees due and owing. *Id*. at 99. This Court then looked at whether intervening defendants had a secured interest in after-acquired property. The *Mich Tractor* Court discussed the rule of *In Re Taylored Prod, Inc*, 5 UCC Rep Serv (Callaghan) 286, 290-291 (WD Mich, 1968), which held that "an after-acquired property clause in the security agreement was essential to allow after-acquired property of inventory to become collateral for a present obligation." *Mich Tractor*, 216 Mich App at 99-100. This Court then discussed the conflicting rule of *American Employers Ins Co v American Security Bank*, 241 US App DC 379, 387; 747 F2d 1493 (1984), in which the "court held that it is reasonable to read a security agreement granting an interest in all inventory or receivables to include after-acquired inventory or receivables." *Mich Tractor*, 216 Mich App at 100. Citing *Stoumbos v Kilimnik*, 988 F2d 949, 955 (CA 9, 1993), the *Mich Tractor* Court noted that the reason for this exception was that these assets are in constant flux and "'no creditor could reasonably agree to be secured by an asset that would vanish in a short time in the normal course

of business.'" *Mich Tractor*, 216 Mich App at 101-102. With respect to the retainage arrangements, which were a contingent account receivable, this Court concluded:

> [T]here is no indication that the security agreement would alert an ordinary creditor to the claim that retainage fees not "due and owing" at the time of the assignment were included in the assignment. Therefore, the security agreement cannot objectively be read to inform the ordinary creditor that after-acquired retainage fees . . . were also collateral securing defendant's debt to intervening defendants. Thus, even under *American Employers*, intervening defendants' security agreement would not be construed to include after-acquired property. [*Id*. at 101.]

Here, the security agreement referenced "*all of the assets*" and "*all collateral.*" Under MCL 440.9108, this did not sufficiently identify after-acquired assets as assets that would be covered. As noted, the cases recognizing "all" as sufficient to describe after-acquired assets concerned assets that by their nature are in constant fluctuation. While Yatooma avers that he and Omilian discussed that the assets would be fluctuating, the reference to "all assets" does not indicate *by reference to the security agreement* that an after-acquired right of first refusal would be covered.

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

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens