[Cite as *Ford Motor Credit Co. v. Jones*, 2009-Ohio-3298.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92428

FORD MOTOR CREDIT COMPANY

PLAINTIFF-APPELLEE

vs.

FREDERICK A. JONES, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-595106

BEFORE: McMonagle, J., Rocco, P.J., and Boyle, J.

RELEASED: July 2, 2009

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Alfreda Moore, appeals from the trial court's judgment granting the summary judgment motions of plaintiff-appellee, Ford Motor Credit Company and third-party defendant-appellee, Mullinax Ford East Inc. Finding no merit to the appeal, we affirm.

I. Background

{¶ 2} Ford Credit is a Michigan limited liability company that loans money to finance the lease or purchase of automobiles. Mullinax is an automobile dealership that sells and leases cars.

{¶ 3} On August 6, 2001, defendant Frederick Jones signed a lease with Mullinax for a new 2001 Ford Taurus. Under the lease, Jones agreed to make 36 monthly payments of $523.70. Jones's sister, Moore, cosigned the lease. Mullinax then assigned the lease to Ford Credit.

{¶ 4} Jones repeatedly failed to make his payments on time and in December 2003, stopped making payments entirely. Ford Credit repossessed the Ford Taurus on November 16, 2004, and then sold the car at auction for $5,700, leaving a deficiency balance of $7,997.52.

{¶ 5} Ford Credit sued Jones and Moore for the deficiency balance.[1] Moore filed a counterclaim against Ford Credit and a crossclaim against

[1]Jones did not answer or appear and the trial court entered a default judgment

Mullinax. In her crossclaim, she alleged that Mullinax had violated Ohio's Retail Installment Sales Act ("RISA"), R.C. 1317.01 et seq., and Ohio's Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., because Jones's lease included a provision that allowed the supplier to seek attorney fees related to default "where permitted by law." Moore also alleged that Mullinax had violated the CSPA by "knowingly taking advantage" of her inability to understand the terms of the lease (specifically, the amount that would be due upon default), and by including a punitive liquidated damages clause. Moore's counterclaim against Ford Credit made the same claims as against Mullinax and alleged that Ford Credit was derivatively liable for Mullinax's violations of the RISA and the CSPA as an assignee of the note. Finally, Moore claimed that Mullinax and Ford Credit had entered into a civil conspiracy to violate the RISA and the CSPA.

{¶ 6} The parties filed cross-motions for summary judgment. The trial court subsequently granted Ford Credit's and Mullinax's summary judgment motions and denied Moore's motion for summary judgment.

{¶ 7} Regarding Ford Credit, the trial court held that: (1) the RISA did not apply to appellant's claims because the lease was a true lease not covered by the RISA; (2) Ford Credit was exempt from appellant's RISA and CSPA claims as a "dealer in intangibles"; (3) Ford Credit was not derivatively liable under the

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against him. Jones did not file a notice of appeal and has not otherwise appeared in this appeal.

CSPA for Mullinax's actions because Ford Credit was a holder in due course of the lease, and the lease did not contain the required anti-holder in due course language to establish derivative liability; and (4) Moore's civil conspiracy claim failed as neither Mullinax nor Ford Credit had committed any wrongful acts.

{¶ 8} With respect to Mullinax, the trial court held that: (1) the RISA does not apply to true leases such as the lease Moore cosigned; (2) Moore's CSPA claim was barred by the two-year statute of limitations; and (3) Moore's civil conspiracy claim failed because neither Ford Credit nor Mullinax had committed any wrongful acts.

II. Assignments of Error

{¶ 9} Moore raises eight assignments of error. Assignments one, two, and three assert that the trial court erred in granting Mullinax's and Ford Credit's motions for summary judgment and denying Moore's motion. Assignment of error four asserts that the trial court erred in finding that the RISA did not apply to the lease transaction. Assignments of error five and six assert that the trial court erred in ruling that Ford Credit was exempt from Moore's RISA and CSPA claims and that it was not derivatively liable on the claims. Assignments of error seven and eight assert that the trial court erred in finding that Moore's civil conspiracy claim was barred by the statute of limitations and that Ford Credit and Mullinax had not committed any underlying wrongful acts that would give rise to a civil conspiracy claim.

III. Standard of Review

{¶ 10} Civ.R. 56(C) provides that summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. We review the trial court's judgment de novo using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

IV. Discussion

A. RISA Claim

{¶ 11} We need not decide, as the trial court did, whether the RISA applied to the lease because even if it did, we find that Moore sustained no damages for the alleged RISA violation and therefore cannot prevail on her claim.

{¶ 12} Moore's only RISA claim was that the lease violated the RISA because it contained a provision providing for recovery of attorney fees "where permitted by law." It is well established that in Ohio, a provision in a note for payment of attorney fees upon default thereof is contrary to public policy and void. *Miller v. Kyle* (1911), 85 Ohio St. 186, paragraph one of the syllabus; see,

also, R.C. 1317.07 ("No retail installment contract *** shall evidence any indebtedness in excess of the time balance fixed in the written instrument ***.")

{¶ 13} Under R.C. 1317.08(A)(1), a retail installment contract that evidences an indebtedness greater than that allowed by law is not enforceable "with respect to that excess indebtedness or charge ***." Thus, as this court recognized in *Nissan Motor Acceptance Corp. v. Pedro*, 8th Dist. No. 89285, 2008-Ohio-2805, R.C. 1317.08 permits a debtor to avoid the specific indebtedness or charges that were unlawful. Id. at ¶11. When a provision offensive to Ohio law is included in a contract, that provision is void, while the remainder of the contract remains enforceable. Accordingly, in *Pedro*, this court found that "assuming, without deciding, that attorney fee charges included as part of a boilerplate installment sales contract are illegal, the remedy available is to cancel the illegal portion of the indebtedness and to refund monies already paid. Since Pedro's indebtedness did not include any attorney fees, and no attorney fees, were, in fact, paid, Pedro is entitled to no damages. Accordingly, summary judgment was correctly granted on this claim." Id.

{¶ 14} Likewise, in this case, it is undisputed that neither Ford Credit nor Mullinax ever sought, let alone collected, any attorney fees from Moore. Thus, even if the inclusion of the attorney fees provision in the lease were illegal, as Moore paid no such fees, she sustained no damages and, therefore, summary judgment was properly granted to appellees.

{¶ 15} Our reasoning is further supported by the language of the lease, which specifically provided that attorney fees would be sought only "where permitted by law." The lease also contained a severability provision that stated "if the law [of the state where the lessor's place of business is located] does not allow any of the agreements in this lease, the ones that are not allowed will be void. The rest of the lease will be good."

{¶ 16} We hold, as did the Fourth District in *Vannoy v. Capital Lincoln-Mercury Sales, Inc.* (1993), 88 Ohio App.3d 138, 144, that "the phrase 'where permitted by law' in the contract sub judice means exactly what it says: that the retail buyer agrees to pay the attorney fees upon default in those jurisdictions where enforcement of such a provision is permitted by law. As noted above, such a provision is void in Ohio. *Miller*, supra, at paragraph one of the syllabus. However, such a provision may be enforceable elsewhere.

{¶ 17} "Thus, the covenant that a retail buyer would pay a seller's attorney fees upon default *where permitted by law* refers to the law of each particular jurisdiction. In jurisdictions such as Ohio where these provisions are void, they are merely excluded from the contract. This interpretation follows the rule that courts must, when possible, construe a contract to be consistent with the law in existence at the time of its execution. ***." (Emphasis in original.)

{¶ 18} Because the lease provided for attorney fees only "where permitted by law," and such fees are not permitted in Ohio, the contract provision

regarding attorney fees was simply excluded from the lease. Accordingly, even if the RISA were applicable to the lease, the attorney fee provision was unenforceable.

{¶ 19} In any event, Moore sustained no damages as a result of the attorney fee provision and hence, as a matter of law, could not recover on her RISA claim. Accordingly, the trial court properly granted summary judgment to appellees on Moore's RISA claim.

B. CSPA Claims

{¶ 20} The court also properly granted summary judgment on Moore's CSPA claims. Under R.C. 1345.10(C), any suit alleging a violation of the CSPA must be brought within "two years after the occurrence of the violation which is the subject of the suit." This is an absolute time limit to which the discovery rule does not apply. *Weaver v. Armando's Inc.*, 7th Dist. No. 02 CA 153, 2003-Ohio-4737, ¶37.

{¶ 21} Moore signed the lease on August 6, 2001. All of her claims arise out of the lease transaction, which occurred on August 6, 2001. She filed her cross-claim against Mullinax on September 22, 2005, more than two years later. Accordingly, Moore's CSPA claims were time barred against Mullinax and no derivative liability could therefore arise on these claims against Ford Credit.

{¶ 22} Furthermore, for liability to attach under the CSPA, the transaction upon which the claim is based must be a consumer transaction in an action

brought against a supplier. See R.C. 1345.02 and 1345.03. As assignee of the lease, Ford Credit was not a supplier within the meaning of R.C. 1345.01(C) and thus not subject to a CSPA claim. *Dartmouth Plan Inc. v. Haerr* (Dec. 4, 1990), 3rd Dist. No. 8-89-25. Moreover, the lease did not contain the language required by the Federal Trade Commission to abrogate the holder-in-due-course doctrine and indicate that any subsequent holder of the lease would be subject to all claims and defenses the debtor could assert against the seller. See Section 433.2(a), Title 16, C.F.R. Without this language, Ford Credit, as assignee, did not assume any derivative liability for Mullinax's alleged violations of the CSPA (or the RISA, for that matter). See, e.g., *Nations Credit v. Pheanis* (1995), 102 Ohio App.3d 71, 78. Accordingly, the trial court properly granted summary judgment to appellees on Moore's CSPA claims.

C. Civil Conspiracy Claim

{¶ 23} Moore argues that the trial court erred in granting summary judgment to Mullinax and Ford Credit on her civil conspiracy claim. She contends that even if her CSPA claims against Mullinax were barred by the statute of limitations, that does not mean that Mullinax did not commit an unlawful act for purposes of establishing a conspiracy claim.

{¶ 24} But, as this court stated in *Cully v. St. Augustine Manor* (Apr. 20, 1995), 8th Dist. No. 67601, "[a] claim for conspiracy cannot be made [the] subject of a civil action unless something is done which, in the absence of the conspiracy

allegations, would give rise to an independent cause of action. Thus, the applicable statute of limitations for the underlying cause of action applies to the civil conspiracy charge." (Internal citations omitted.)

{¶ 25} This same principle was more recently applied in *West v. Kysela, D.D.S., Inc.* (Jan. 13, 2000), 8th Dist. No. 75594, wherein this court affirmed the trial court's grant of summary judgment in favor of appellees on appellant's conspiracy to commit defamation claim because appellant had not commenced suit within the applicable statute of limitations for the underlying defamation claim.

{¶ 26} Here, Moore failed to commence her action within the two-year statute of limitations for CSPA claims. Accordingly, her civil conspiracy claim, based on alleged violations of the CSPA, is likewise barred.

{¶ 27} All of Moore's assignments of error are overruled.

Affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR