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DISTRICT II

November 30, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2038

Harley-Davidson Credit Corp. v. Daniel T. Storm
(L.C. #2015CV350)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Daniel T. Storm and Sandra A. Baumgartner (collectively, "Storm") appeal pro se from a judgment for replevin entered in favor of Harley-Davidson Credit Corporation (HDCC) and an order dismissing Storm's third-party complaint against the Harley-Davidson Motor Company Group, LLC (HDMCG). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2013-14).¹ We affirm the judgment and order, but deny HDCC's motion for attorney fees and costs.

Storm financed the purchase of two separate motorcycles through Eaglemark Savings Bank (ESB). After Storm failed to make scheduled payments on both loans, HDCC brought an action for replevin. The complaint alleged that HDCC held a valid and perfected security interest in both motorcycles by virtue of an assignment of promissory note and security agreement from ESB. HDCC filed a motion for summary judgment along with supporting affidavits from Marietta Svoboda, an HDCC vendor management analyst and records custodian.

Storm then filed a third-party complaint against HDMCG alleging seven claims, including violations of Wisconsin's Lemon Law (claim one) and the Magnuson-Moss Warranty Act (claim four). HDMCG filed a motion to dismiss the complaint along with supporting papers concerning the warranty repair orders for both motorcycles. Based on the inclusion of these papers, HDMCG moved for summary judgment on claims one and four. Storm filed a competing motion for partial summary judgment and a motion to stay proceedings acknowledging HDMCG's summary judgment request.

Following a hearing on all motions, the circuit court granted summary judgment in HDCC's favor, determining that its motion together with supporting papers set forth a prima facie case for replevin and that Storm failed to submit any evidence raising an issue of material fact. The circuit court dismissed Storm's third-party complaint against HDMCG. Specifically,

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the court granted summary judgment in HDMCG's favor on claims one and four and dismissed Storm's remaining causes of action on the pleadings.

Storm argues that HDCC was not entitled to summary judgment because it failed to establish the assignments from ESB and therefore lacked standing to sue. We review a circuit court's decision to grant summary judgment de novo, applying the same methodology as the circuit court. *Fifer v. Dix*, 2000 WI App 66, ¶5, 234 Wis. 2d 117, 608 N.W.2d 740. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We reject Storm's arguments. First, the assignments to HDCC were written into the very contracts signed by Storm and Baumgartner on March 11 and March 19, 2011.² Second, Svoboda's affidavits establish the corporate relationship between HDCC and ESB, its subsidiary, as well as the existence of the assignments.³ Third, Storm's misguided argument that the assignments ran afoul of WIS. STAT. §§ 241.02(1)(a) and 422.409 was not raised in the circuit court and is forfeited on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

² The promissory note and security agreement contracts signed by Storm and Baumgartner specifically provide:

21. Notice of Assignment. Upon receipt and funding of this contract by ESB, the Contract will automatically be assigned to Harley-Davidson Credit Corp., pursuant to the Master Assignment Agreement in effect between ESB and Harley-Davidson Credit Corp.

³ We also reject Storm's contention that the circuit court erred in permitting HDCC to submit a supplemental affidavit from Svoboda supporting the existence of the assignment. Storm raised this issue orally and for the first time at the original summary judgment hearing. The circuit court properly continued the hearing to afford HDCC the opportunity to provide additional support for a previously undisputed assertion.

Next, we conclude that the circuit court properly granted summary judgment in favor of HDMCG on claims one and four. The attachments to HDMCG's motion to dismiss established a prima facie showing that Storm was not entitled to relief. *See* WIS. STAT. § 802.06(3) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment ..."). Storm filed a competing summary judgment motion but failed to provide any affidavits to rebut HDMCG's prima facie case.⁴

For the first time on appeal, Storm argues that the circuit court erred by converting HDMCG's motion to dismiss claims one and four into a motion for summary judgment "without notice to the parties." Storm never raised this "notice" argument in the circuit court and we deem it forfeited. *See Paape v. Northern Assurance Co.*, 142 Wis. 2d 45, 53, 416 N.W.2d 665 (Ct. App. 1987) (appellant Paape forfeited appellate review of circuit court's sua sponte decision to grant summary judgment on an issue not raised by any of the parties "because Paape made no effort to point out the error or move for reconsideration thereby affording an opportunity for the trial court to correct the error.").⁵

⁴ Though Storm's third-party complaint alleged that the motorcycles were subject to four unsuccessful attempts to repair the same warranty defect or were out of service for a total of thirty or more days, the exhibits to HDMCG's motion demonstrated that the motorcycles were serviced once or twice. The declaration submitted with Storm's motion for partial summary judgment did not include opposing affidavits or other proofs to refute or dispute the service history established by HDMCG.

⁵ Regardless, Storm had notice that the circuit court might decide these claims on summary judgment. Additionally, we agree with the circuit court that because Storm filed a competing motion for partial summary judgment, it was authorized to award summary judgment to HDMCG under WIS. STAT. § 802.08(6).

We further conclude that the circuit court properly dismissed Storm’s remaining five claims against HDMCG on the pleadings. The circuit court explained on the record and in detail why each claim was legally insufficient. With the exception of his “Deceptive Trade Practices” claim, Storm does not even address the court’s rulings, instead asserting in a conclusory fashion that the circuit court held him to a “heightened standard of pleading.” We will not consider Storm’s undeveloped and unsupported argument. See *State v. McMorris*, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322.

In dismissing Storm’s WIS. STAT. § 100.18 Deceptive Trade Practices claim, the circuit court determined it was time barred by § 100.18(11)(b)3. (“No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action.”). Subdivision 100.18(11)(b)3. is a statute of repose. *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶19, 248 Wis. 2d 172, 635 N.W.2d 640. Storm was thus required to bring his claim within three years of the alleged misrepresentation which induced the motorcycle purchases. The circuit court properly determined that the latest Storm could have commenced this action was three years after the March 2011 purchases and that the claim brought in June 2015 was untimely as a matter of law.⁶

We also reject Storm’s argument that in dismissing his Lemon Law claim, the circuit court improperly ignored “admissions” purportedly made by HDMCG. Aside from Storm’s

⁶ On appeal, Storm asserts that the circuit court erroneously “converted the ‘Deceptive Trade Practices’ claim to one for ‘Fraudulent Advertising.’” His argument on this ground is amorphous and insufficiently developed and we will not address it further. See *Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). To the extent Storm believes the three-year statute of repose does not apply to a Deceptive Trade Practices claim, he is simply wrong. WISCONSIN STAT. § 100.18(11)(b)3. applies to any cause of action brought under § 100.18 regardless of whether it is delineated a “Deceptive Trade Practices” claim or a “False Advertising” claim.

failure to adequately develop or support this argument, the purported “admissions” have no bearing on this appeal. As explained by the circuit court, Storm’s request for admissions concerned alleged defects in HDMCG’s 2013 and 2014 models, not the motorcycles at issue in this litigation.

Finally, we deny HDCC’s WIS. STAT. RULE 809.25(3) motion for attorney fees and costs for a frivolous appeal. An appeal is not frivolous merely because the court disagrees with the appellant’s argument. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 614, 345 N.W.2d 874 (1984). While we reject Storm’s arguments, there is nothing to suggest that those arguments were not made in good faith.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the Harley-Davidson Credit Corporation’s motion for attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3) is denied.

Diane M. Fremgen
Clerk of Court of Appeals