COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2599-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ROSEMURGY MOTORS, INC.,

PLAINTIFF-RESPONDENT,

V.

JOHN NOEL, D/B/A TRAVEL GUARD INTERNATIONALE, AND TRAVEL GUARD, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. This is an appeal[1] of a summary judgment granted to Rosemurgy Motors, Inc., in an action arising out of an automobile lease agreement

[1] This is an expedited appeal under RULE 809.17, STATS.

between Rosemurgy, the lessor, and John Noel, the lessee.2 Rosemurgy moved for summary judgment on its claim that the agreement required Noel to guarantee a residual value of $30,000 for the automobile at the end of the lease term. Noel moved for summary judgment for dismissal of the complaint, asserting that the agreement merely afforded him the option to purchase the auto at the end of the term for the guaranteed price of $30,000. The trial court accepted Rosemurgy's construction of the agreement. We conclude that summary judgment for either party would be inappropriate because the ambiguous terms of the agreement require inquiry into the parties' intent.

Noel contracted with Rosemurgy to lease a new Mercedes Benz for five years. The terms of the lease agreement were contained in four documents. At the end of the lease term, Noel returned the car to Rosemurgy, which then sold it to an out-of-state dealer for $18,500, its wholesale value. Rosemurgy thereafter filed this action against Noel, claiming that he owed an additional $11,500 under the agreement.3

At issue is the meaning of a handwritten notation on one of the documents used to perfect the lease transaction:

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[2] For purposes of this discussion we treat the defendants, John Noel and Travel Guard, Inc., as a single entity.

[3] Rosemurgy also evidently made a claim for an undisclosed number of airline tickets. The trial court dismissed that claim for lack of proof and it is not an issue on appeal.

LEASE END VALUE &
PURCHASE OPTION

GUARANTEED BY
LESSEE. $30,000

Rosemurgy, seizing upon the word "guarantee," claims that this language requires Noel to buy the car at the end of the lease term for the guaranteed price of $30,000. Noel, pointing to the word "option," asserts that this provision affords him the opportunity to purchase the car at a guaranteed price. The trial court adopted Rosemurgy's position on the basis that: (1) the parties must have intended that the car have some value at the end of the term;[4] (2) lessees always have some purchase obligation;[5] (3) the parties decided to substitute the $30,000 for the figure that would have resulted had the parties used the value formula set out in one of lease documents because the formula was too

[4] "There has to be some value left at the end, because it's the opinion of this Court that the value of the car could not have been amortized out over that five year period of time." We note that the trial court was not furnished the car's value: "It would have been valuable to this Court to furnish it with the sticker price of the car …." "I just took the $50,000 value for the car because I don't have a value, but I think it was worth at least that, probably more."

[5] "There had to be some value left in that car. And to let the lessee walk without purchasing at some value, or some value as fixed, would be contrary to every lease that I've ever seen, either finance or a net." We note, however, paragraph 12a contemplates that the lessee may, indeed, return the vehicle without obligation to purchase: "Unless the Lessee purchases the vehicle, pursuant to paragraph 13a [pertaining to Finance Leases, which the one at issue concededly is not], the Lessee shall return the same to the Lessor, in as good condition as when first received, ordinary wear and tear excepted …." Subparagraph d refers to sums due upon return: "Upon any purchase, return or repossession, Lessee shall promptly pay Lessor all Monthly, Per Mile and Operating Rentals and other sums payable hereunder with respect to the vehicle up to the time of such purchase, return or repossession."

complicated;[6] (4) it is industry standard to guarantee some type of end value in some form;[7] (5) the language was written on a form entitled "Motor Vehicle Purchase Contract;" and (6) under these circumstances the word "guarantee" signified Noel's promise to buy the car for $30,000 at the end of the lease term.[8]

Summary judgment is inappropriate when the contract at issue is ambiguous and the parties' intent is disputed. ***Leitzke v. Magazine Marketplace, Inc.***, 168 Wis.2d 668, 673, 484 N.W.2d 364, 366 (Ct. App.1992). While construction of a contract to ascertain the parties' intent is normally a matter of law for this court, ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App.1991), where a contract is ambiguous, the question of intent is for the trier of fact. ***Armstrong v. Colletti***, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App.1979). Whether a contract is ambiguous in the first instance is a question of law which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417

[6] "And I think simply what happened here is that they just decided that that was too complicated, and where the $30,000 number came from I have no idea. But that was inserted …."

[7] "So also the law states that in interpreting an unambiguous contract provision, the Court --that gives the effect to each party of the contract resulting in surplusage or unfair or unreasonable results, and it's just not an industry standard to not guarantee some type of end value in some form. It's just not done."

[8] "Well, what everybody's kind of skipping around here is the word guaranteed. What does that mean? If the defendant can walk not paying anything in addition, that's not a guarantee."

N.W.2d 914, 916 (Ct.App.1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id***.

We conclude that the language in question is ambiguous. We perceive several reasonable and contradictory constructions that the provision would bear. For example, it could be construed that the lessee was offered and accepted the option to purchase for a guaranteed $30,000 at the inception of the lease term. Alternatively, it can be read such that the lessee guaranteed the $30,000 buyout at the end of the lease or that the *lessor* has the option of selling it to the lessee for $30,000 at the end of the term. It may indeed signify, as Noel argues, that the lessee has the option to purchase for the guaranteed figure of $30,000 at the end of the term.

The trial court, based upon the record before it, perceived the difficulty in determining the parties' intent by the language of the Purchase Contract.[9] The court attempted to resolve this problem without an evidentiary

[9] "First of all, I think that what happened here is that the information furnished to the Court leaves some open-ended questions which were not provided to me, because it would give me some better ideas from the way I was looking at the situation to try to make a determination as to the intent of the parties." "It would have been valuable to this Court to furnish it with the sticker price of the car for this reason, because with the sticker price of the car and based on the payments that were made, it would give me some indication of whether or not the price as paid for the car over the term of the lease would have in fact paid for interest and profit, and that when you reach the end, there would have been a wholesale value left." "So what's also interesting is that Schedule A attached to the lease, which refers to it as a net lease, does not have filled out the original value or the monthly depreciation rate. And that to me raises the question, why?" "The problem with the intent part of this is that's where I come up a little short based on what information was furnished to the Court."

basis for its conclusions. It used unsupported assertions[10] to find the facts it relied upon to determine the parties' intent. Under well-established summary judgment methodology, it was not permitted to do this; the parties, not the court, supply the summary judgment proofs. Section 802.08(3), STATS. Further courts are not to make findings of fact on summary judgment. ***State Bank v. Elsen***, 128 Wis.2d 508, 515-16, 383 N.W.2d 916, 919 (Ct. App.1986).

In conclusion, we hold that the trial court erred when it went beyond the record before it to determine the parties intended that Noel guaranteed that he would purchase the vehicle at the end of the lease term for $30,000 or else make Rosemurgy whole in that amount. The case is remanded for the trier of fact's determination of the parties' intent.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

[10] Examples of suppositions that the summary judgment affidavits fail to support: lessees are never permitted to return the car at the end of the lease term without further financial obligation to the lessor; leases always have an end value; the lease term did not represent the total value of the car. With regard to the latter, while generally probably true, it would seem to depend at least upon record evidence of the original fair market value of the car. *See* notes 4 and 5, infra.