FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

H. B. McGRATH LEASING CORP.,
Plaintiff-Appellant,

vs.

GARLAND BAMSEY,
Defendant-Appellee.

Filed August 26, 1980

0-173
2-64037

Appeal from Linn District Court - Roger F. Peterson, Judge.

Plaintiff appeals judgment for defendant in action to recover deficiency judgment for default in payments on automobile lease. Defendant cross-appeals from judgment for plaintiff on counterclaim seeking civil penalty award pursuant to section 537.5201, The Code 1979. - AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.

Daniel Den Beste & James W. Affeldt, of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for Plaintiff-appellant.

Donald C. Hoskins, of Fishel & Hoskins, Marion, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

Plaintiff-automobile lessor, H. B. McGrath Leasing Corporation, appeals from a judgment for defendant-lessee, Garland Bamsey, in McGrath's suit to recover a deficiency judgment for Bamsey's default in payments on an automobile lease. McGrath contends the trial court erred in ruling that McGrath's failure to send Bamsey a notice of right to cure default pursuant to sections 537.5110 - .5111, The Code 1979, prior to McGrath's sale of the automobile voluntarily surrendered by Bamsey precluded McGrath's recovery under the lease. McGrath further contends that as a consequence of the above-stated error, the trial court erred in awarding attorney fees to Bamsey and in overruling McGrath's motion for a new trial. Bamsey cross-appeals from the trial court's judgment for McGrath on Bamsey's counterclaim for a civil penalty award as provided for in section 537.5201, The Code 1979, for McGrath's noncompliance with certain disclosure provisions and for failure to provide a timely notice of right to cure. Bamsey also seeks attorney fees incurred on appeal. We affirm on McGrath's appeal and reverse and remand on Bamsey's cross-appeal.

Our review is for correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact in this case tried to the court have the effect of a special verdict. Id. Those findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The parties entered into an automobile lease agreement dated March 1, 1975. Bamsey was required to pay $161.64 per month for thirty-six months. Bamsey missed his September and October 1975 payments, but an arrangement was worked out with McGrath to both parties' satisfaction. In January 1977, Bamsey brought the automobile in for repairs. An adjustment was made to make the automobile operational, but a notation was made on the service document that other maintenance and repairs would be necessary. In early February 1977, McGrath contacted Bamsey regarding the necessary maintenance and repairs and regarding the January payment which was overdue at that time. Bamsey brought the automobile in on February 7, 1977, and at that time, McGrath noted numerous items of abnormal and excessive wear and tear on the automobile. Bamsey expressed his dissatisfaction with the automobile, but also expressed an interest in its purchase price. Further communications between the parties indicated Bamsey's desire to cancel the lease.

On February 10, 1977, Bamsey brought the automobile in along with a release that he requested McGrath to sign. When McGrath refused to sign the release, Bamsey left the premises leaving the automobile behind. McGrath then sent Bamsey a letter dated February 17, 1977, reminding Bamsey of his request that the lease be cancelled, and advising him of the amount of certain reconditioning costs, the amount of accrued unpaid rent, and the highest wholesale offer for purchase of the automobile accompanied by a request that he either accept that sales price as the termination value or make other arrangements for the determination of that value. The letter also stated the depreciation value of the automobile, and requested that Bamsey respond to the letter within five days of the date of the letter.

After receiving no response from Bamsey, McGrath again contacted him and offered to sell him the automobile for the highest bid wholesale price. Bamsey refused the offer. On March 29, 1977, McGrath sold the automobile through the Des Moines Auto Auction. McGrath then sent Bamsey a letter dated March 30, 1977, advising him that the automobile had been sold and advising him of the amount that remained owed under the lease. Bamsey did not respond to that letter, and when McGrath phoned him on April 30, 1977, regarding the March 30 letter, Bamsey advised McGrath to contact his attorney. McGrath then contacted Bamsey's attorney and forwarded a copy of the March 30 letter. McGrath's attorney then sent Bamsey a letter dated May 12, 1977, and captioned "Notice of Right to Cure Default." After Bamsey again failed to respond, McGrath brought this action to recover the amount owed. Bamsey counterclaimed seeking attorney fees and costs, and also an award of a civil penalty pursuant to section 537.5201, The Code 1979, for McGrath's failure to provide a timely notice of right to cure and for McGrath's noncompliance with certain of the disclosure provisions in section 537.3202, The Code 1979.

The trial court ruled that McGrath's failure to provide Bamsey with a notice of right to cure default pursuant to sections 537.5110 - .5111, The Code 1979, prior to the sale of the automobile precluded McGrath from recovering. Consequently the trial court denied McGrath's claim, awarded Bamsey $500 for attorney fees, and taxed the costs of the action to McGrath. With regard to Bamsey's claim for civil penalties, however, the trial court apparently concluded that Bamsey was not entitled to such penalties in the absence of a showing of actual damages.

I. The trial court concluded, as do we, that this lease transaction falls within the purview of the Iowa Consumer Credit Code, Chapter 537, The Code. This was a consumer lease as defined in section 537.1301(14), and thus qualified as a consumer credit transaction as defined in section 537.1301(12). A consumer's obligation under a consumer credit transaction is enforceable only after compliance with the cure of default provisions of section 537.5110. § 537.5110(1), The Code 1979. Section 537.5110(2) provides that if a consumer is in default, a notice of a right to cure the default as described in section 537.5111 must be given before the creditor may take any steps to enforce the obligation. First Northwestern National Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980).

McGrath contends that these notice provisions are not applicable to the situation in which the debtor has voluntarily surrendered possession of the goods covered by the agreement. This would be true if McGrath had accepted Bamsey's voluntary surrender of the automobile in full satisfaction of any debt owing on the lease. § 537.5110(3), The Code 1979. Since this was not the case, however, we must adhere to Iowa's strict rule regarding notice to debtors on default in the analogous context of article nine of the UCC (§§ 554.9501 - .9507, The Code 1979), as stated in Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 496 (Iowa 1977), and as applied to the consumer credit transaction context in First Northwestern National Bank v. Crouch, 287 N.W.2d 151, 154 (Iowa 1980). This rule states that the giving of a notice of right to cure is an absolute prerequisite to taking steps to enforcing a debtor's obligation. See Crouch, 287 N.W.2d at 153.

McGrath argues, however, that the sale of the automobile was not a step taken to enforce Bamsey's obligation under the lease, but rather was merely a means of ascertaining the value of the automobile. Accordingly, McGrath was not required to give a notice of right to cure prior to the sale, and the notice of right to cure sent after the sale but before the suit was sufficient to comply with the requirement. We find McGrath's argument unpersuasive. The sale of the automobile not only ascertained the value of the automobile, but also transferred its ownership. Although McGrath was proceeding under the understanding that Bamsey wished to cancel the lease agreement, Bamsey still had a right under section 537.5110 to change his mind and cure his default after receiving notice of default. Bamsey's election to cure the default would have allowed the parties to continue under the lease agreement. However, by selling the

automobile while Bamsey still had a right to cure the default, McGrath stripped Bamsey of his right to cure the default and continue to lease the automobile. Consequently, we conclude that the sale of the automobile was a step taken toward the enforcement of Bamsey's obligation under the lease such that McGrath was required to give Bamsey a notice of right to cure default prior to that time. The trial court did not err in concluding that McGrath's failure to give notice of right to cure prior to the sale of the automobile precluded recovery of the amount owed under the lease. Since McGrath's other contentions on appeal regarding the award of attorney fees and the overruling of the motion for new trial required a favorable ruling on that first issue, we go no further than to state our affirmance with regard to those trial court rulings.

II. Bamsey contends on cross-appeal, that the trial court erred in not awarding a penalty for McGrath's alleged violations of certain provisions of Chapter 537. It is not clear from the trial court's conclusions of law whether the trial court addressed itself to the provision in section 537.5201 providing for the recovery of a penalty in addition to actual damages. The trial court concluded that since Bamsey failed to show any actual damages, he was not entitled to receive any damages. It is therefore possible that the trial court concluded that a showing of actual damages was a prerequisite to a recovery of a penalty under section 537.5201. Such a conclusion is misplaced. Crouch, 287 N.W.2d at 154; Kan. Stat. Ann. § 16a - 5 - 201 app. (1974) (Kansas Code Comment 1). Consequently, we reverse the trial court's denial of an award of a civil penalty pursuant to section 537.5201 and remand for a determination regarding the allegations contained in Bamsey's counterclaim and regarding the applicability, if any, of section 537.5201(7) under which a violation of the chapter does not result in liability.

With regard to Bamsey's claim for attorney fees incurred in the prosecution of this appeal, we conclude that such an award is proper, see Crouch, 287 N.W.2d at 154, but that the proper setting for a determination of the amount of those attorney fees to be awarded for the appeal is the trial court, id., to which we remand for a determination of that issue as well.

AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.