

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CV-12-586

WILLIAMS TRACTOR, INC.  
APPELLANT

V.

ANB VENTURE, LLC  
APPELLEE

Opinion Delivered MAY 29, 2013

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. CV-10-3824-6]

HONORABLE DOUG SCHRANTZ,  
JUDGE

AFFIRMED

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## BILL H. WALMSLEY, Judge

Appellant Williams Tractor, Inc., appeals from the Benton County Circuit Court's order finding that appellee ANB Venture, LLC,<sup>1</sup> was entitled to possession of a 2002 New Holland excavator and \$45,000 in detention damages. Williams Tractor raises three arguments on appeal: (1) the trial court erred in awarding supplemental damages, (2) the evidence does not support the damages awarded, and (3) the trial court erred in refusing to allow setoff for repairs and storage fees. We affirm.

Kevin Higgins obtained a loan through ANB Financial, N.A., which was secured, in part, by collateral consisting of several pieces of construction equipment, including an excavator. Higgins later traded the excavator to Williams Tractor. Higgins then defaulted on the loan and filed for bankruptcy. ANB subsequently demanded possession of the excavator,

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<sup>1</sup>ANB Financial, N.A., was the original holder of the promissory note referred to herein, and the FDIC, as receiver for "the failed bank," entered into a loan contribution and assignment agreement with appellee ANB Venture, LLC.



but Williams Tractor refused to deliver it. ANB filed a complaint against Williams Tractor, seeking replevin and, alternatively, conversion. In its answer to the complaint, Williams Tractor asserted that it had a paramount interest in the excavator by virtue of a mechanic's lien.

Bryan Ferguson, a collector, testified that he explained to Doug Williams, president of Williams Tractor, that, because ANB held a perfected security interest in the excavator, ANB was entitled to possession. Ferguson testified that Williams nevertheless refused to relinquish the excavator unless ANB paid for repairs made to the excavator and storage fees.

Eric Tesch testified that he had dealt with construction equipment for approximately twenty-three years and used sources, such as Machinery Trader and Ritchie Brothers, to determine the value of equipment. According to Tesch, the current value of the excavator was approximately \$48,000. Tesch testified that the excavator's rental value was from \$4500 to \$5000 per month. Tesch stated that his valuations were based on the excavator's being in average operating condition.

Doug Williams testified that he gave Higgins \$45,000 for the excavator as a trade-in and that Higgins had told him there were no liens on it. Williams then listed the excavator for sale at \$45,000 and later made repairs to make the excavator more saleable. Williams testified that he agreed to deliver the excavator to ANB, if ANB paid for repairs totaling approximately \$1500 and storage fees of \$50 per day, but that ANB refused to do so.

The trial court rejected Williams Tractor's contention that it had a mechanic's lien on the excavator and ruled that Williams Tractor could not recover for repairs and storage fees.



The trial court determined that Williams Tractor failed to deliver the excavator upon ANB's demand, thus depriving its lawful owner of the use of the equipment for sixteen months. The trial court found that the detention damages were \$45,000.

On appeal from a bench trial, we review the findings of the trial court *de novo*, but we do not reverse the trial court's findings unless the findings are clearly erroneous or clearly against the preponderance of the evidence. *Billingsley v. Planit Dirt Excavation & Concrete, Inc.*, 2012 Ark. App. 266, 399 S.W.3d 729. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* We give due deference to the trial judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

#### I. *Detention Damages*

Williams Tractor argues that the trial court erred in awarding detention damages where ANB failed to mitigate its damages by seeking an order of delivery, writ of replevin, or other means to secure possession of the excavator.

After default, a secured party may take possession of the collateral. Ark. Code Ann. § 4-9-609(a)(1) (Repl. 2001). A secured party may proceed pursuant to judicial process or without judicial process if it proceeds without breach of the peace. Ark. Code Ann. § 4-9-609(b); *see also* Ark. Code Ann. § 4-9-601(a)(1) (Supp. 2011) (“A secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure.”). “In an action to recover the possession of personal



property, judgment for the plaintiff may be for the delivery of the property, or for the value thereof in case a delivery cannot be had, and damages for the detention.” Ark. Code Ann. § 18-60-820(a) (Repl. 2003). The measure of damages is the usable value of the property during its detention. *Cont’l Gin Co. v. Clement*, 176 Ark. 864, 4 S.W.2d 901 (1928).

On appeal, Williams Tractor has abandoned its claim of a mechanic’s lien with respect to the excavator. ANB introduced documents into evidence establishing its perfected security interest in the excavator. After Higgins defaulted on his loan, ANB demanded possession of the excavator from Williams Tractor. Williams Tractor refused to relinquish possession of the equipment, forcing ANB to file suit. The trial court granted relief provided for in Ark. Code Ann. § 18-60-820(a) by awarding ANB possession of the excavator, as well as damages for its detention. We cannot say that the trial court clearly erred in awarding detention damages, since ANB attempted to exercise its right to possession of the collateral.

## II. Usable Value

Williams Tractor maintains that evidence of usable value was “scant” and that Tesch admitted that it was impossible for him to determine the excavator’s actual rental value given that he had never seen the excavator in question. According to Williams Tractor, the usable-value award resulted in a windfall for ANB and amounted to unjust enrichment.

The trial court was entitled to believe and rely on Tesch’s testimony as to the average rental value of the excavator. While there were limits to Tesch’s testimony, which were pointed out by Williams Tractor on cross-examination, the trial court determines the weight to be accorded to a witness’s testimony. *Billingsley, supra*. ANB offered evidence that the



excavator's usable value was \$4500 per month. To the extent Williams Tractor's claim of unjust enrichment is preserved, we fail to see how ANB was unjustly enriched when an award of detention damages is expressly permitted by statute. One is not unjustly enriched by receipt of that to which he is legally entitled. *Smith v. Whitener*, 42 Ark. App. 225, 856 S.W.2d 328 (1993). We are not left with a firm conviction that a mistake was made with regard to the trial court's award of detention damages based on the evidence presented.

### III. *Setoff for Repairs and Storage Fees*

Williams Tractor argues that it pled and proved entitlement to setoff for repairs and storage fees because ANB enjoyed the benefits of those services without compensating Williams Tractor.

An element of damages that a defendant may claim is the reasonable costs of storage when the plaintiff improperly refuses to accept a tender of the property. *See Affiliated Food Stores, Inc. v. Bank of Ne. Ark., Inc.*, 259 Ark. 690, 536 S.W.2d 693 (1976). Because Williams Tractor conditioned delivery of the excavator on ANB's payment for repairs and storage fees, the offer was not a tender. A tender must be without conditions to which the creditor can have a valid objection. *McCourt Mfg. Corp. v. Rycroft*, 2010 Ark. 93, 360 S.W.3d 138.

As noted above, Williams Tractor cannot prove unjust enrichment on the part of ANB because possession of the excavator and damages for its detention are specifically permitted by Ark. Code Ann. § 18-60-820(a). Although Williams Tractor asserts that ANB's collateral was secured and preserved "thanks to Williams Tractor's efforts," Williams Tractor undertook repairs to the excavator to make it more saleable, i.e., for the sole benefit of Williams Tractor.



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Also, Williams Tractor did not store the excavator for the benefit of ANB. Despite ANB's perfected security interest, Williams Tractor chose to "hold [the excavator] hostage," subject to ANB's payment for repairs and storage fees. Under these circumstances, we hold that the trial court was not clearly erroneous in failing to award any setoff.

Affirmed.

PITTMAN and WOOD, JJ., agree.

*Cullen & Co., PLLC*, by: *Tim J. Cullen*, for appellant.

*Donald E. Wilson, P.A.*, by: *Donald E. Wilson*, for appellee.