Cite as 2013 Ark. App. 373

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-88

ROGER DALE MIDKIFF and MELINDA MIDKIFF APPELLANTS	**Opinion Delivered** June 5, 2013
V.	APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, SOUTHERN DISTRICT [NO. CV-2010-5SD]
CRAIN FORD JACKSONVILLE, LLC APPELLEE	HONORABLE DAVID G. HENRY, JUDGE
	REVERSED AND REMANDED

ROBIN F. WYNNE, Judge

Roger Dale Midkiff and Melinda Midkiff appeal from an order of the circuit court granting summary judgment in favor of Crain Ford Jacksonville, LLC. The Midkiffs argue that the grant of summary judgment in favor of Crain was improper. Due to the presence of unresolved issues of material fact, we reverse and remand.

On January 31, 2009, the parties executed several documents in connection with the purported sale of a 2009 Ford Mustang. The parties executed a retail purchase order (RPO), an agreement for delivery prior to sale, and a retail-installment contract and security agreement (RICSA). The Midkiffs did not put any money down on the vehicle, nor did they trade in another vehicle.

The RPO states that the Midkiffs agreed to pay the total cash price of the vehicle, minus a $1000 rebate, which came to a total cash balance due of $23,200.54. The RPO

includes a paragraph that states, "All deals are subject to finance approval upon completion of checking my credit by the finance company or bank. I agree to return this vehicle to Crain if for any reason my credit is denied." Next to this paragraph is a signature line that contains the signature of Roger Midkiff. The RPO also contains the following language:

> The above, together with the conditions on the reverse side hereof comprises the entire agreement pertaining to this purchase and no other agreement of any kind, verbal understanding, oral promises by salesmen, representation or oral promise whatsoever will be recognized. The undersigned Purchaser and Co-Purchaser if any agree to purchase the vehicle listed herein for the price specified herein and subject to the terms and conditions set forth in this Retail Purchase Order.

Underneath this statement are the signatures of Roger and Melinda Midkiff.

The agreement for delivery prior to sale states that the vehicle was being delivered to the Midkiffs prior to the approval of financing and prior to the execution of a contract for sale. The agreement gives the buyer the right to cancel the purchase if financing cannot be obtained under the terms agreed on by the parties. It also prohibits the seller from depositing a down payment or selling a trade-in until the financing is approved. The agreement allows the seller to recover the vehicle without resort to judicial process if the buyer decides not to purchase the vehicle and fails to return it within forty-eight hours if the recovery does not result in breaking or entering or breach of the peace. The agreement was signed by appellants.

The RICSA states that appellants agreed to pay $605.34 per month for seventy-two months at 18 percent interest for a total amount paid of $43,694.18 if the payments are made on schedule. The first payment was due on March 17, 2009. The document also states that Crain is being granted a security interest in the vehicle in order to secure payment. The

second page of the RICSA states that the buyer will be in default if the buyer fails to perform any obligation under the contract or if the seller believes in good faith that the buyer cannot or will not perform his or her obligations under the contract. If the buyer defaults, the seller may, as one of its available remedies, immediately take possession by legal process or self-help as long as the seller does not breach the peace or unlawfully enter onto the buyer's premises.

After these documents were executed, the Midkiffs took the vehicle home with them. A short time later, the Midkiffs found a receipt from a body shop in the vehicle indicating that the vehicle, which was sold as new, had sustained damage that had been repaired. This prior alleged damage had not been disclosed to the Midkiffs. In early February 2009, Crain informed the Midkiffs that it had been unable to obtain financing for the vehicle. According to an affidavit sworn to by Eric Havniear who, at the time, was the finance manager at Crain, the Midkiffs' financing was denied because they failed to provide statements from a personal banking account verifying Roger Midkiff's reported monthly income. Havniear contacted Roger Midkiff and asked if he could obtain financing for the vehicle, and Mr. Midkiff indicated that he could not. Havniear then requested that the Midkiffs return the vehicle to Crain based on the financing language contained in the RPO. The Midkiffs refused and placed the vehicle in a locked garage on their property, allegedly on the advice of counsel. On February 13, 2009, Crain arranged for a company known as Justice Brothers to repossess the vehicle. Justice Brothers broke into the garage on appellants' property and removed the vehicle on or about February 18, 2009, allegedly causing damage to the garage in the process. At the time the vehicle from Crain was removed, the Midkiffs had apparently purchased

another Ford Mustang from a different dealership.

On January 26, 2010, the Midkiffs filed a complaint against Crain in which they alleged conversion, wrongful repossession, and violation of the Arkansas Deceptive Trade Practices Act (ADTPA). The Midkiffs sought statutory damages as well as punitive damages and damages for harm to their credit, loss of reputation, emotional distress, and anxiety. Appellants also requested that they be awarded costs and attorney's fees. On April 16, 2010, Crain filed an amended answer and counterclaim. In the counterclaim, Crain sought court costs, attorney's fees, and fees for repossession, repair, storage, and sale of the vehicle.

Crain filed a motion for summary judgment on January 18, 2011. In the brief that accompanied the motion, Crain argued that a sale of the vehicle never took place because financing for the vehicle was a condition precedent that was not met. Crain also argued that it had a right to repossess the vehicle. Finally, Crain argued that it did not violate the ADTPA. On February 7, 2011, the Midkiffs filed a response and cross-motion for summary judgment. In support of their motion for summary judgment, the Midkiffs submitted portions of their depositions, wherein they stated that they did not read the documents they signed and that they believed the financing was approved when they took the car off of the lot. In response, Crain submitted an affidavit from Eric Havniear stating that appellants' application for financing was "conditionally approved" pending the fulfillment of certain stipulations, including proof of income. Crain also submitted portions of the deposition of Mr. Havniear in which he stated that the financing was not approved because no third-party lender would approve the loan.

After a hearing on the competing motions for summary judgment, the circuit court entered an order on June 15, 2011, in which it granted Crain's motion for summary judgment and denied the Midkiffs' motion for summary judgment. On July 11, 2011, the Midkiffs filed a motion for issuance of a final order in which they asked the circuit court to dispose of Crain's outstanding counterclaim against them. Crain filed a motion for voluntary nonsuit of its counterclaim pursuant to Arkansas Rule of Civil Procedure 41(a) on July 20, 2011. On July 21, 2011, the circuit court entered an order in which it dismissed Crain's counterclaim without prejudice. The Midkiffs filed a timely appeal from the circuit court's summary-judgment order.[1]

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Benton Cty. v. Overland Dev. Co.*, 371 Ark. 559, 268 S.W.3d 885 (2007). Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving

[1]In an opinion dated February 29, 2012, this court dismissed a previous appeal in this case for lack of a final order due to Crain's outstanding counterclaim. *Midkiff v. Crain Ford Jacksonville, LLC*, 2012 Ark. App. 185. On December 3, 2012, the circuit court entered an order dismissing the counterclaim with prejudice, which eliminated the finality issue.

party. *Id.* Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Id.* After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Id.*

Genuine issues of material fact remain unresolved in this case. On January 31, 2009, the parties executed three documents in connection with the purported sale of the vehicle. Appellants argue that the RICSA alone constitutes the agreement between the parties. Appellee asserts that the RPO, which contains language that makes the sale contingent on finance approval, and the agreement for delivery prior to sale are also part of the parties' agreement. Appellee further asserts that finance approval was a condition precedent that had to be satisfied before a contract was formed. The RICSA does set out all the necessary terms of the financing. However, the RPO contains language stating that it is the sole agreement of the parties and contains a promise by appellee to sell the vehicle and by appellants to purchase the vehicle.

The RPO expressly states that the sale is contingent upon "finance approval." However, it is not clear under the terms of the contract what "finance approval" means. Furthermore, the parties disagree as to whether the contract for sale of the vehicle was finalized at the time appellants took possession of the vehicle. The trial court had before it deposition testimony from Eric Havniear that a third-party lending institution had to approve the loan before financing could be obtained. The Midkiffs, on the other hand, testified in their depositions, portions of which were also provided to the trial court, that they believed

the financing was approved when they left the dealership with the vehicle. Therefore, a question of fact remains as to whether the financing condition in the RPO was met and whether the parties intended for the RICSA to constitute the financing approval needed for a final agreement. Summary judgment was not proper at this point in the proceedings. The order of the circuit court is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

HARRISON and WHITEAKER, JJ., agree.

Keech Law Firm, P.A., by: *Kevin P. Keech*, for appellants.

The Barber Law Firm, by: *Michael L. Alexander*, *T. Kent Smith*, and *Rick Behring, Jr.*, for appellee.