

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SOUTHERN MICHIGAN BANK & TRUST,

Plaintiff-Appellant,

v

MICHAEL L. THOMPSON and CHEMICAL  
BANK SHORELINE,

Defendants-Appellees.

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UNPUBLISHED

November 10, 2005

No. 263402

Branch Circuit Court

LC No. 04-007434-PD

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendants and dismissing the case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case concerns ownership of, or priorities of claims to, an Extec double screener, a piece of heavy earth-moving or construction equipment. Defendant Thompson was the sole owner and operator of Thompson Asphalt Products, Inc., until the corporation was dissolved in late 2001. Defendant Thompson maintains that he purchased the screener in dispute in May 2001. An invoice reflecting that timing lists both Thompson personally and his corporate operation, and a purchase price of \$189,000. The seller is first listed as "EXTEC OF MICHIGAN," then given also as "S.A. Thompson." The latter is unrelated to defendant Thompson, and is not party to this litigation.

S.A. Thompson was a sales representative of Extec, and also sold Extec parts and equipment in his own right. Plaintiff lent S.A. Thompson money for his business, and, for collateral, perfected a security interest in all of his personal property. The security agreement specifies that "the Collateral shall be on a non-remittance basis," then details that "[i]n the ordinary course of its business, Debtor may use, process, manufacture, display, demonstrate or otherwise deal with inventory and may sell, lease or dispose of inventory (except for bulk sales) and collect, hold and use all proceeds from disposition of inventory."

Defendant Chemical Bank Shoreline's predecessor in interest agreed to lend defendant Thompson, or his corporation, \$125,000 to purchase the screener. Chemical Bank Shoreline now claims first lien on the screener, as collateral for that loan. However, plaintiff continues to

claim an interest in the screener, despite S.A. Thompson's alienation of it. In granting summary disposition to defendants, the trial court stated as follows:

[S.A. Thompson] clearly was in the business of buying and selling heavy equipment, at some point, entered into the security agreement with plaintiff . . . . The security interest . . . indicated that he may use, possess, manufacture, display, demonstrate or otherwise deal with inventory and may lease or dispose of inventory and collect, hold and use all proceeds from disposition of the inventory.

. . . The issues, I suppose to say the least, are curious, are peculiar, are suspicious, perhaps even to some extent, unclear but not . . . any of the material facts which otherwise might be in dispute. The defendant does not have to prove any facts beyond those already available. . . . And looking at those facts in the light most favorable to the plaintiff, the Court has no conclusion but to determine that the screener in this particular case was inventory within the meaning of the security agreement. It was in fact sold to defendant, Michael Thompson, with then security in Michigan National Bank, later transferred to defendant, Chemical Bank Shoreline. And the Court really in looking at those facts in the light most favorable to the plaintiff [has] no option but to grant the defendant's motion for summary disposition.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

Plaintiff concedes that summary disposition was appropriate if defendant Thompson "purchased the Screener from Samuel Alan Thompson in May 2001 in the ordinary course of business and at the time of the purchase the Screener was inventory of Samuel Alan Thompson . . .," but argues that genuine questions of material fact exist concerning whether defendant Thompson purchased the screener in his individual capacity, and whether any such transfer of the screener occurred in the ordinary course of business by S.A. Thompson.

There appears to be no dispute that, when the present controversy began, S.A. Thompson owned the screener in his individual capacity, and thus that any alienation of it for which he arranged implicated his security agreement with plaintiff. That the screener, in S.A. Thompson's hands, was inventory, as opposed to some other kind of property, seems hardly to be at issue. Inventory in this situation is "[g]oods held for sale or lease or furnished under contracts of service . . . ." Black's Law Dictionary (6th ed, 1990), p 824, citing UCC § 9-109(4). Plaintiff asserts that whether S.A. Thompson sold the screener as inventory is in dispute, but does not suggest how such equipment in S.A. Thompson's hands could be other than inventory.

And, despite plaintiff's concern over the matter, whether defendant Thompson acquired the screener for himself, or for his then-existing corporation, is of no consequence to plaintiff. The question, for purposes of the security agreement with S.A. Thompson, is whether the latter alienated the screener in his normal course of business, not whether he alienated it to defendant Thompson personally or to defendant Thompson on behalf of his corporation.

However, the trial court observed that certain issues underlying this case are "curious, . . . peculiar, . . . suspicious, perhaps even to some extent, unclear," then declared that the screener

was “in fact sold to defendant.” In deciding motions for summary disposition, “[t]he court may not make factual findings or weigh credibility.” *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). But “[w]hen a motion under subrule (C)(10) is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must . . . set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). The question, then, is whether the trial court correctly recognized that all the evidence offered could be interpreted only to indicate that S.A. Thompson sold the screener, or whether the trial court improperly resolved an evidentiary disagreement.

Plaintiff maintained that defendant did not purchase the screener in the ordinary course of business from S.A. Thompson, but rather that the two were in fact engaged in some kind of business deal in the matter. A “buyer in the ordinary course of business” is one who

buys goods in good faith, without knowledge that the sale violates the rights of another person in the good, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. . . . A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. [MCL 440.1201(9) (footnote omitted).]

A purchaser of an item that is subject to another party's perfected security interest does not thereby violate the rights of that party, because “a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.” MCL 440.9320(1).

However, plaintiff asserts that there is no evidence that defendant Thompson ever actually disbursed funds to S.A. Thompson for that equipment. But the invoice from S.A. Thompson to defendant Thompson and his corporation is evidence of a sale, even if not conclusive evidence of the transfer of funds. And plaintiff points to no evidence to suggest that no consideration was tendered at all, but instead channels all argument concerning any questions over payments to S.A. Thompson in the direction of asserting that it was defendant Thompson's corporation, not defendant Thompson himself, who took the screener as its asset.

Because plaintiff does not assert, let alone point to evidence to show, that S.A. Thompson never alienated the screener in the first instance,<sup>1</sup> and because whether the latter sold to defendant Thompson personally or through him to defendant Thompson's corporation does not

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<sup>1</sup> Plaintiff does not suggest why a seller of such inventory who retains a part interest in one such piece thereby operates outside of his normal course of business. Moreover, if plaintiff's position were that S.A. Thompson retained some interest in the machinery in fact, then plaintiff should have named S.A. Thompson as a defendant and pursued that interest directly.

bear on whether such a transaction was in the normal course of business, plaintiff's innuendoes about what, when, and how consideration changed hands are inapt.

All indications in evidence are that S.A. Thompson did in fact alienate the screener. The trial court thus correctly acknowledged that the evidence allows no other conclusion, despite "curious," "peculiar," "suspicious," and "perhaps . . . unclear" details in other respects.

Although plaintiff shows that the evidence does not clearly resolve whether it was defendant Thompson personally, or his corporation, who initially took the screener from S.A. Thompson, plaintiff fails to show that any genuine question of material fact exists concerning whether it was sold, whether it was inventory, or whether the transaction fell within S.A. Thompson's ordinary course of business. Because the transaction destroyed plaintiff's security interest as set forth in its and S.A. Thompson's security agreement, the trial court properly granted summary disposition to defendants and dismissed the case.

Affirmed. Defendants may tax costs.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter