

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

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FEDERATED CAPITAL SERVICES,

Plaintiff / Counter-Defendant-  
Appellee,

v

DEXTOURS, INC., and ANTHONY B.  
DEXTOR, a/k/a ANTHONY B. DEXTER,

Defendants / Counter-Plaintiffs /  
Third-Party Plaintiffs-Appellants,

and

EQUIPMENT SYSTEMS, INC., and WILLIAM  
ADAMS,

Third-Party Defendants-Appellees.

UNPUBLISHED

April 26, 2002

No. 228208

Oakland Circuit Court

LC No. 99-017114-CK

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Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendants appeal as of right, challenging the circuit court's order granting plaintiff summary disposition on its complaint for breach of a lease financing agreement, as well as its order dismissing defendants' counter-claim. We affirm.

As a threshold matter, we reject plaintiff's argument that this Court lacks jurisdiction to review the dismissal of the counter-claim. Although the order dismissing the counter-claim was entered on June 1, 2000, the order granting plaintiff summary disposition on its complaint was not entered until June 5, 2000. The latter order constitutes the "final order" from which an appeal of right could be taken. MCR 7.202(7). Defendants' claim of appeal was timely filed on June 26, 2000. MCR 7.203(A)(1); MCR 7.204(A)(1)(a). "Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

Defendants argue that summary disposition of plaintiff's complaint and dismissal of the counter-claim was improper because several questions of material fact remained for trial. A circuit court's decision on a motion for summary disposition is reviewed de novo to determine

whether the moving party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 and n 2; 597 NW2d 28 (1999). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or documentary evidence that a genuine issue of disputed fact exists. *Quinto, supra* at 361-362. The party may not rest on the mere allegations or denials contained in the pleadings but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Id.* at 362, 371. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra* at 367, 371-372 (a question of fact exists where there is sufficient evidence to allow a reasonable jury to find in the nonmoving party's favor).

Defendants next argue that summary disposition of plaintiffs' complaint and dismissal of their counter-claim was improper because a question of material fact remained concerning fraud.

The elements of fraud are: (1) a material misrepresentation, (2) that was false, (3) made with knowledge of its falsity or recklessness of its truth, (4) made with the intent that the claimant rely upon it, (5) that the claimant did rely on the misrepresentation, and (5) that the claimant thereby suffered injury. *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). Here, defendants did not raise fraud either as an affirmative defense to plaintiff's complaint and did not raise fraud in their counter-claim against plaintiff. Instead, defendants alleged fraud and misrepresentation only against third-party defendant Adams. In any event, pursuant to the terms of the lease agreement, defendants expressly disclaimed any reliance on any statements or representations made by plaintiff. By its plain terms, the agreement negates the reliance element necessary to prevail on a claim of fraud. Therefore, defendants cannot establish a question of fact concerning fraud.

Defendants also argue that questions of fact existed concerning whether plaintiff committed the first material breach of the agreement and whether the bus was defective. Under the terms of the lease agreement, however, defendants' obligation to pay the basic lease payments was absolute and unconditional, "and not subject to any abatement, defense, counterclaim or offset for any reason whatsoever." The agreement also provides that defendants "shall pay all expenses with respect to the use and operation" of the bus and that plaintiff "shall not be obligated to provide any maintenance, repairs, labor, parts or service for any Vehicles." Further, defendants agreed to bear "[a]ll risk of damage to or loss . . . [and] no such damage, loss or destruction shall abate or reduce [defendants'] . . . obligation to pay the Basic Rent."

The agreement also contains a capitalized disclaimer of all warranties, stating that defendants made the selection of the vehicle based upon their own judgment, that defendants were expressly disclaiming any reliance upon any statements or representations made by plaintiff, and that plaintiff "makes no representations or warranties . . . of any kind . . . including without limitation . . . condition, quality, durability . . . manufacture or performance of vehicle, and disclaims any implied warranty of merchantability or fitness for a particular purpose." The same disclaimer states that plaintiff "shall have no liability to defendants for any demand, claim,

costs, loss, damage or liability of any kind . . . nor shall there be any abatement of payments, arising out of or in connection with (i) any deficiency[,] defect or inadequacy, whether or not known or disclosed to [plaintiff], [or] (ii) the use or performance of the vehicle[.]”

In light of the foregoing, the fact that the bus may have been in poor condition and may have needed repairs would not constitute a breach of the contract. Further, the implied warranty of merchantability was expressly and conspicuously disclaimed. Thus, unless defendants could avoid the clear language of the agreement, the trial court properly found that there was no genuine issue of material fact concerning whether plaintiff committed the first material breach of the agreement, nor whether the bus was defective in a manner that precluded summary disposition.

In an attempt to avoid portions of the lease, defendants claim that the agreement is unreasonable or unconscionable, and that plaintiffs acted unreasonably or unconscionably. A court may invalidate or modify, in whole or in part, a lease agreement that was unconscionable as a matter of law at the time the contract was made. MCL 440.2808(1). “The examination of a contract for unconscionability involves inquiries for both procedural and substantive unconscionability.” *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998). Accordingly, there is a two-prong test to determine unconscionability:

(1) What is the relative bargaining power of the parties, their relative economic strengths, the alternative sources of supply, in a word, what are their options?; [and] (2) Is the challenged term substantively unreasonable? [*Id.*, quoting *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294, 302; 412 NW2d 719 (1987).]

Here, defendants failed to submit any evidence addressing the parties’ options, bargaining power, relative economic strengths, or alternative sources of financing. Therefore, the circuit court correctly determined that defendants failed to establish a genuine issue of material fact concerning unconscionability.

Defendants further argue that questions of fact existed concerning whether plaintiff improperly failed to mitigate its damages and whether it disposed of the collateral in a commercially unreasonable manner.

Concerning the sale of the collateral, the agreement states that, upon defendants’ default, plaintiff may “(d) sell any and all of the Vehicles at a public or private sale, with or without notice to [defendants] or advertisement, or otherwise, (sic) dispose of, hold, use, operate, lease to others or keep idle any such Vehicle, all as [plaintiff] in its sole discretion may determine and all free and clear of any rights of [defendants] and without any duty to account to [defendants] for any proceeds with respect thereof[.]” The agreement also provides that defendants “shall continue to be liable for all its indemnities and other obligations under this Lease and for all legal fees and costs and expenses arising in connection with the foregoing defaults or the exercise of [plaintiff’s] remedies[.]” Further, to the extent permitted by applicable law, defendants also agreed to “waive[] any rights now or hereafter conferred by statute or otherwise which may require [plaintiff] to sell, lease or otherwise use any Vehicle in mitigation of [plaintiff’s] damages or that may otherwise limit or modify any of [plaintiff’s] rights or remedies hereunder.”

Thus, defendants contractually waived any right they had to (1) compel plaintiff to mitigate its damages, and (2) compel plaintiff to hold a commercially reasonable sale of the collateral. Also, as previously noted, defendants have failed to show that these provisions should be set aside on grounds of unconscionability.

Insofar that defendants argue that the circuit court failed to state its reasons for dismissing the counter-claim, we find no merit to this issue. It is apparent that the court addressed each of defendants' counter-claims in the context of explaining its decision on plaintiff's motion for summary disposition.

Defendants also claim that the circuit court erred in granting summary disposition without allowing them to conduct discovery. We disagree. Generally, summary disposition is premature if it is granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition is not premature if the requested discovery "does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition." *Id.*

In this case, plaintiff filed its complaint on August 25, 1999, and served defendants on November 2, 1999. Defense counsel filed an appearance on December 8, 1999, along with a motion for summary disposition of plaintiff's claims. That motion was denied by order dated February 4, 2000, and defense counsel filed an answer to plaintiff's complaint on February 17, 2000. According to trial court's 1999 scheduling order, the discovery cutoff date was March 12, 2000. On March 23, 2000, after the close of discovery, the trial court approved the parties' stipulation allowing defendants to file a counter-claim and a third-party complaint. However, defendants did not actually file the counter-claim and third-party complaint until April 14, 2000.<sup>1</sup>

Plaintiff then filed a motion for summary disposition on its original complaint, as well as a motion for summary disposition on defendants' counter-complaint. The trial court conducted oral arguments on those motions on May 17, 2000. At that hearing, plaintiff argued that discovery had long since closed and that no genuine issues of material fact existed, entitling plaintiffs to judgment as a matter of law. Defendants disagreed that discovery had closed, but on the sole ground that the third-party complaint had not yet been served. There is no indication in the record that defendants ever requested that the trial court extend discovery on plaintiff's original complaint or defendants' counter-claim. Indeed, there is no indication in the record that defendants even attempted to conduct any discovery before the discovery cutoff date. Under these circumstances, we conclude that summary disposition was not premature.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski  
/s/ Patrick M. Meter

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<sup>1</sup> It does not appear that defendant ever accomplished service on the third-party defendant.