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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002303-MR
AND
NO. 2010-CA-002332-MR

DELPHI AUTOMOTIVE
SYSTEMS, LLC

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01478

CAPITAL COMMUNITY ECONOMIC/
INDUSTRIAL DEVELOPMENT
CORPORATION, INC.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

KELLER, JUDGE: The parties appeal and cross-appeal from an order of the

Franklin Circuit Court granting summary judgment in favor of Capital Community

Economic/Industrial Development Corporation, Inc. (Capital Community). For the following reasons, we affirm.

FACTS

This case involves a priority dispute between two creditors, Delphi Automotive Systems, LLC (Delphi) and Capital Community, as to the liquidation proceeds realized from a sale of equipment - the Komatsu Press. The relevant facts are undisputed.

Capital Community is a Kentucky nonprofit corporation and was established under the Local Industrial Development Authority Act, now codified under Kentucky Revised Statutes (KRS) 154.50-301 to 154.50-346. Capital Community is a joint city/county effort for industrial development in Frankfort and Franklin County, Kentucky, and the statutes governing it permit it to acquire equipment. Capital Community purchased the Komatsu Press as a result of funds made available through the Community Development Block Grant made by the Commonwealth of Kentucky Department for Local Government to Franklin County, Kentucky.

In April 2001, Capital Community entered into an agreement with Certified Tool and Manufacturing of Kentucky, Inc. (Certified Tool), an Illinois Corporation, regarding the Komatsu Press. Although the agreement is entitled a "Lease Agreement," the true nature of the agreement is in dispute. The agreement required Certified Tool to make monthly payments to Capital Community in the amount of \$3,394.10 for 84 months. The agreement further provided that, upon

completing all payments due and owing under the agreement, Certified Tool would become the sole owner of the equipment, including the Komatsu Press.

In February 2008, Certified Tool executed a Security Agreement (the WCS Security Agreement) granting Working Capital Solutions, Inc. (WCS), a continuing security interest in all of Certified Tool's now-owned and hereafter acquired assets, including all machinery and equipment of Certified Tool. WCS subsequently filed Uniform Commercial Code (UCC) Financing Statements with the Kentucky and Illinois Secretary of State's Offices.

In May 2008, Certified Tool entered into a loan agreement with Delphi wherein Delphi agreed to loan Certified Tool \$250,000 on an as-needed basis. The parties executed a promissory note in favor of Delphi, and in June 2008, the parties entered into a First Amended Promissory Note, which increased the line of credit to \$275,000. As security for the notes, Certified Tool executed a Security Agreement (the Delphi Security Agreement) granting Delphi a continuing security interest in all of Certified Tool's now-owned or hereafter acquired property and assets, including machinery and equipment. At the time the Delphi Security Agreement was executed, the Komatsu Press was in Certified Tool's possession. Delphi subsequently filed UCC Financing Statements with the Kentucky and Illinois Secretary of State's Offices.

In August of 2008, Certified Tool defaulted under the terms of the First Amended Promissory Note and the Delphi Security Agreement when Certified Tool announced that it was going out of business. Certified Tool also

defaulted under the terms of the WCS Security Agreement. On December 11, 2008, Delphi and WCS entered into a Purchase and Sale Agreement wherein Delphi acquired all of WCS's right, title and interest in the WCS Security Agreement and all other related documents and instruments owned by WCS in relation to Certified Tool.

On August 27, 2009, Delphi initiated this litigation by filing a declaratory action in the Franklin Circuit Court. The Komatsu Press was liquidated, and by agreement of the parties, the net proceeds of \$185,370 were placed in an interest-bearing account with the Franklin Circuit Court pending resolution of the case. Delphi and Capital Community both claimed they were entitled to the entire \$185,370.

Delphi and Capital Community filed cross-motions for summary judgment, and the trial court held a hearing on May 19, 2010.¹ Capital Community argued that its agreement with Certified Tool was a true lease of the Komatsu Press, and that, as the lessor, its interest in the Komatsu Press was superior to that of Delphi. To the contrary, Delphi argued that the agreement between Certified Tool and Capital Community was not a lease but rather an unperfected and inferior security agreement pursuant to KRS 355.1-203.

On October 11, 2010, the trial court entered an order granting summary judgment in favor of Capital Community. In its order, the trial court concluded that the agreement between Capital Community and Certified Tool

¹ We note that a copy of the May 19, 2010, hearing was not included in the record on appeal.

constituted a security interest and not a lease. However, the trial court held that Capital Community's security interest was exempt from the perfection requirements of Kentucky's Uniform Commercial Code as a matter of public policy pursuant to Kentucky's economic development statutes - the Local Industrial Development Authority Act.

Delphi subsequently filed a motion to alter, amend or vacate the trial court's order arguing that Capital Community's security interest was subject to the perfection requirements of Article 9 of the UCC, and that Capital Community's unperfected security interest was inferior to Delphi's perfected security interest. Thereafter, the trial court entered an order denying Delphi's motion to alter, amend or vacate. This appeal and cross-appeal followed.

STANDARD OF REVIEW

“The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Summary judgment is only proper when “it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In *Steelvest*, the word “‘impossible’ is used in a practical sense, not in an

absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the court is required to construe the record “in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor.” *Steelvest, Inc.*, 807 S.W.2d at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481.

ANALYSIS

1. Nature of the Capital Community Agreement

The first issue on appeal is whether the trial court correctly determined that the agreement between Capital Community and Certified Tool constituted a security interest and not a lease. We believe the trial court was correct.

At the time Capital Community and Certified Tool entered into the agreement in April 2001, KRS 355.1-201(37) set forth the rule for determining whether an agreement created a lease or a security interest.² This statute provided as follows:

² This section is currently found in KRS 355.1-203(2).

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration of the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee; and

- (a) The original term of the lease is equal to or greater than the remaining economic life of the goods;
- (b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
- (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

The first step in our analysis is to determine “if the consideration of the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee.” KRS 355.1-201(37). The agreement in question provides that the consideration Certified Tool was to pay Capital Community for the right to possess and use the equipment was for \$3,394.10 per month, which was an obligation for the term of

the agreement - 84 months. Additionally, this obligation was not subject to termination by Certified Tool. Thus, the first requirement was satisfied.

For a purported lease to qualify as a security interest, it must also satisfy one of the additional requirements set forth in KRS 355.1-201(37)(a)-(d). As correctly noted by the trial court, the agreement satisfies both KRS 355.1-201(37)(b) and (d). Specifically, the agreement provides that, “Upon expiration of the Lease . . . and after Lessor has received all sums due it, Lessee shall become the sole owner thereof and Lessor aggress [sic] to take such action as may be necessary to transfer title thereto.” This provision satisfies KRS 355.1-201(37)(b) because Certified Tool was “bound to become the owner” of the Komatsu Press. Further, the requirement set forth in KRS 355.1-201(37)(d) was also met because Certified Tool was to become the owner of the Komatsu Press for no additional consideration upon compliance with the agreement. Therefore, we conclude that the trial court correctly determined that the agreement between Capital Community and Certified Tool created a security interest in the Komatsu Press.

2. Applicability of Article 9

Having concluded that the Capital Community Agreement created a security interest, we now address whether Article 9 of the Kentucky UCC applies to that security interest. The priority and perfection of a security interest is governed by Article 9 of the UCC. As set forth in KRS 355.9-109(1), Article 9 applies to transactions which create a security interest in personal property by contract unless

an exemption applies.³ Thus, the Capital Community Agreement granting Capital Community a security interest in the Komatsu Press is subject to Article 9 unless it is exempt by other means.

Capital Community argues that that the trial court incorrectly determined that its security interest was not exempt under KRS 355.9-109(4)(q). We agree.

KRS 355.9-109(4)(q) provides that “[t]his article does not apply to . . . [a] public-finance transaction or a transfer by a government or governmental unit.”

First, we note that the parties do not dispute that Capital Community is a governmental unit as defined by KRS 355.9-102(as).⁴ However the parties disagree as to whether there was a “transfer by” a governmental unit in this case. Capital Community contends that the trial court erred in concluding that the “transfer by” language in KRS 355.9-109(4)(q) only applies to transactions where the government or governmental unit is the borrower or debtor.

As set forth in *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011):

³ Although Capital Community’s security interest was granted prior to the effective date of the 2001 amendments to Article 9, revised KRS 355.9-109 applies. See KRS 355.9-702 (stating that the revisions to Article 9 apply “to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.”).

⁴ KRS 355.9-102(as) provides that a “[g]overnmental unit” is

a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a State, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States[.]

In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006). We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky. 2008); *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87 (Ky. 2005). We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181 (Ky. 1992). Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts. *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193 (Ky. 2009); *Knotts v. Zurich*, 197 S.W.3d 512 (Ky. 2006); *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

We note that “transfer” is not statutorily defined, and that there does not appear to be any Kentucky caselaw that provides guidance on the applicability of this exception. However, we do note the following legislative history and commentary to KRS 355.9-109(4)(q). It appears that, prior to the 2001 amendments, Article 9 exempted governmental issuers of assets and revenues from the perfection requirements. However, the 2001 amendments apparently eliminated this exemption that applied to governmental issuers. In the 2002 legislative session, the General Assembly added subsection (4)(q) to KRS 355.9-109. As noted in the commentary, an emergency was declared to exist because

Kentucky state and local government issuers of debt were going to be subject to the perfection and filing requirements of the revised Article 9, and were going to be required to comply with these requirements on July 1, 2002. *See* KRS 355.9-705. Thus, the General Assembly added subsection (4)(q) prior to July 1, 2002, to prevent Kentucky state and local government issuers of debt from being subject to the perfection and filing requirements of Article 9.

Based on this legislative history and commentary to KRS 355.9-109(4)(q), we believe that this section exempts governmental issuers of assets and revenues from the perfection and filing requirements. Accordingly, we conclude that the trial court erred in concluding that KRS 355.9-109(4)(q) applies to transactions where the government or governmental unit is the borrower or debtor.

In this case, Capital Community issued an asset, the Komatsu Press. Thus, we believe that, pursuant to KRS 355.9-109(4)(q), Capital Community's security interest in the Komatsu Press was exempt from the perfection and filing requirements of Article 9. Because Capital Community's security interest in the Komatsu Press was created in 2001, it was prior in time to Delphi's 2008 security interest. Therefore, Capital Community had a superior right to the proceeds of the sale of the Komatsu Press. Accordingly, we affirm the order of the trial court granting summary judgment in favor of Capital Community. *See Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (noting that an appellate court may affirm a lower court for any reason supported by the record).

Because we conclude that Capital Community's security interest in the Komatsu Press is exempt from Article 9 pursuant to KRS 355.9-109(4)(q), we need not address whether the trial court correctly concluded that a public policy exemption applies.

CONCLUSION

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS AND ORAL
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