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STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

KEVANDRE THOMPSON, d/b/a
NO HESITATION TRANSPORTATION,

Plaintiff,

vs.

Case No. 2015-2102-CB

ROBERT ANDERSON, d/b/a NORTH
SOUTH LEASING,

Defendant.

_____ /

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant has filed a response in which he requests that the motion be denied.

I. Factual and Procedural History

This matter arises out of September 26, 2014 equipment lease between the parties pursuant to which Plaintiff agreed to ultimately purchase a "Freightliner" truck ("Truck") by making four weekly payments per month in the amount of \$250.00 for twenty-four months and a one-time payment of \$1.00 at the end of the payment plan ("Agreement"). (See Complaint, at pp. 4-8.)

On May 7, 2015, Defendant allegedly personally seized the Truck and various items within the Truck. On June 17, 2015, Plaintiff filed his complaint in this matter alleging that Defendant's action constitutes conversion under the law. On August 26, 2015, Plaintiff filed his instant motion for summary disposition pursuant to MCR 2.116(C)(10). On September 23, 2015, Defendant filed his response to the motion. On

October 19, 2015, Plaintiff filed a brief and affidavit in support of his motion. On October 20, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In his motion, Plaintiff contends that Defendant's action in seizing the Truck was improper because he was up to date on the payments required by the Agreement at the time of the seizure. In support of his position, Plaintiff relies on his own affidavit in which he testified that he complied with all of the terms of the Agreement and was not given any notice of any claimed breach/default. (See Affidavit filed by Plaintiff on October 19, 2015.) Further, Plaintiff relies on his bank records which evidence that several payments were made from October 27, 2014 until the time that the Truck was seized. (See pp. 4-16 to October 19, 2015 Affidavit.)

In response, Defendant relies on his own affidavit in which he testified that Plaintiff was 4-6 weeks behind in payments at the time the Truck was seized. (See September 23, 2015 Affidavit.)

In this case, the parties have provided conflicting testimony as to whether Plaintiff had failed to make the payments as required by the Agreement at the time that the Truck was seized. Where the truth of a material fact depends on witness credibility, summary disposition is inappropriate. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). While Plaintiff has also supported his position with bank records which show multiple payments being made to "N.S. Leasing", that additional evidence merely supports Plaintiff's credibility and does not resolve the underlying question of fact at issue in this case.

Plaintiff also contends that Defendant was required to give him notice of the alleged breach 10 days before held in default and the Truck was repossessed, and that Defendant failed to provide the requisite notice and opportunity to cure. In support of his position, Plaintiff relies on the following provision of the Agreement:

Default. You will be in default a) if you do not pay any amount due within 10 days of when it first becomes due; or b) you break any of your promises or obligations in this Lease, or any other obligations with us, and do not cure the breach in 10 days from our giving you notice of it, or c) without our written consent or written direction, you turn over or attempt to turn over the Equipment to anybody else; or d) you give us reasonable cause to be insecure with your willingness or ability to pay.

(See Complaint, at p. 5.)

"[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law" and must be enforced as written. *Quality Prods & Concepts Co v Nagel Precision, Inc.* 469 Mich 362, 375; 666 NW2d 251 (2003). "In interpreting a contract,

courts must give the words their plain and ordinary meanings,” and they may not “impose an ambiguity on clear contract language.” *Coates v. Bastian Bros, Inc.*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

In this case, the notice provision at issue is found within subsection (b) of the section in question. However, the alleged breach of the Agreement fails within subsection (a) as it relates to Plaintiff’s alleged failure to make the required payment(s) within 10 days of the payment(s) becoming due. Accordingly, contrary to Plaintiff’s position, the cited portion of the Agreement does not require Defendant to give Plaintiff notice of his failure to pay before finding Plaintiff in default. Consequently, Plaintiff’s position is without merit.

Conclusion

For the reasons discussed above, Plaintiff’s motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: DEC 09 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge