S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TONI PLUMMER,

Plaintiff-Appellee,

v

FINISH LINE POWER SPORTS INC,

Defendant-Appellant.

UNPUBLISHED
November 24, 2009

No. 285992
Oceana Circuit Court
LC No. 07-006654-AV

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

This case arose out of a dispute over the purchase of a used snowmobile. Plaintiff purchased a snowmobile from defendant in March 2007, then soon after delivery discovered that the price paid for the snowmobile was more than expected and that the snowmobile had dents and dings of which she had not been aware. Plaintiff brought suit in the district court alleging a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The district court found no violation of the MCPA, but nonetheless awarded plaintiff damages of $1,299. Plaintiff appealed to the circuit court, and the circuit court found that defendant violated the MCPA as a matter of law and ruled in favor of plaintiff. Defendant appeals by leave granted from the order of the circuit court. We reverse and remand for further proceedings.

Defendant first argues that the circuit court erred in overturning the district court's verdict that defendant did not violate MCL 445.903(1)(n). We agree.

We review a trial court's findings of fact for clear error and review de novo a trial court's conclusions of law. MCR 2.613(C); *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364, 760 NW2d 856 (2008), criticized on other grounds *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009). "A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made." *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

Plaintiff argued at the district court bench trial that she was surprised after signing the documents, in part based on the fact that the price of the snowmobile did not match her expectation. The price listed on the invoice was $5,998.54 plus interest, whereas plaintiff expected it would be $3,000 based on her conversations with Mike Blohm, who had helped plaintiff negotiate the purchase of the snowmobile.

As the trial court pointed out, plaintiff's legal rights and remedies were outlined in the papers defendant provided. Plaintiff could have eliminated any confusion she may have had if she had taken even a moment to read, or at least skim, the documents before she signed them. Because if she had even a glanced at the bottom line of either the invoice or the credit document she signed, she would have seen that the selling price of the snowmobile was $5,998.54. And although the interest rate was not set forth in the original credit document, the amount of each monthly payment ($119.00) and the number of payments (60) was included. A simple calculation would have provided plaintiff with the total cost of credit.

Moreover, Blohm testified that he knew right away that the snowmobile as delivered was not what he had requested, as it did not have a rev chassis.[1] But he did not say anything because he thought he had three days to return it. Blohm apparently intended to use the snowmobile, or, presumably, he would have rejected delivery and obtained the expected snowmobile with the rev chassis, as agreed upon, at a later date. But instead of rejecting the snowmobile, Blohm and plaintiff accepted delivery and assumed that they could return it later. Neither party inquired about the return policy. Further, although Blohm may have been unaware of the return policy, it was included in the documents plaintiff signed. One of the documents plaintiff signed, titled "Affidavit," prominently contained the following in large print on the page:

THERE IS NO COOLING OFF PERIOD

> Michigan law does not provide for a "cooling off" or other cancellation period for vehicle lease or purchase contracts. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign a motor vehicle purchase or lease contract, it may only be cancelled with agreement of the seller/lesser or for legal cause such as fraud.

Although the parties do not agree on the facts, defendant presented evidence that a representative spoke to plaintiff by phone on the day of the sale about the price and terms of the sale, before she signed the sales documents. At minimum, at the time of delivery, defendant's driver was nearby when plaintiff signed each document. Plaintiff did not ask any questions, did not ask for more time, and did not request any clarification. Instead, plaintiff blindly signed the documents, including those documents that outline plaintiff's legal rights and obligations.

The trial court is in the best position to judge the credibility of witnesses. MCR 2.613(C); *Fletcher v Fletcher*, 447 Mich 871, 890; 526 NW2d 889 (1994). Here, after viewing the witnesses testify, and weighing all the evidence, the trial court concluded that plaintiff's rights, obligations, and remedies were set forth in the sales documents.

We decline to extend the MCPA to nullify all of a consumer's responsibility for voluntarily entering into trade or commerce. It has long been established that "[o]ne who signs a contract cannot seek to invalidate it on the basis that he or she did not read it or thought that its

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[1] Blohm testified that a rev chassis makes the snowmobile sit up higher.

terms were different, absent a showing of fraud or mutual mistake." *Dombrowski v City of Omer*, 199 Mich App 705, 710; 502 NW2d 707 (1993). Plaintiff has not demonstrated fraud or mutual mistake; therefore, we cannot invalidate the contract. The trial court correctly concluded that plaintiff received adequate notice of the terms and conditions of the transaction and knowingly signed the documents.

Defendant next argues that the circuit court erred in finding that the trial court abused its discretion in failing to consider MCL 445.903(1)(o) despite the fact that plaintiff failed to cite the statute in her pleadings. We agree. We review a trial court's findings of fact for clear error and a trial court's conclusions of law de novo. *Waterous*, *supra* at 364.

Under MCR 2.118(C)(1), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment."

Plaintiff argues that defendant consented to have an alleged violation of MCL 445.903(1)(o) heard at the district court. Nonetheless, even if defendant impliedly consented to the court's consideration of whether section (o) of the MCPA was violated, plaintiff did not amend her pleadings to include this allegation. Moreover, there are two reasons the court should not have considered it. First, a pleading includes only the following: a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to a complaint, cross-claim, counter-claim, or third-party complaint, and a reply to an answer. MCR 2.110. Despite plaintiff's argument that she raised section (o) in her response to defendant's motion for summary disposition, this is not adequate because that document is not a pleading. Plaintiff did not move to amend her pleading. Further, raising an issue in a pretrial proceeding does not mean the issue was "tried" by the parties consent under MCR 2.118(C)(1). *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). Second, although the circuit court looked to defendant to explain whether defendant was prejudiced, it was plaintiff who carried the burden. MCR 2.118(C)(1) clearly states that where an amendment is sought to conform to the evidence, the party desiring to amend the pleadings should move to do so. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002). Here, plaintiff was the party seeking to amend the pleadings. Because plaintiff did not raise section (o) in her pleadings and did not later move to amend her pleadings to conform with the evidence, the district court properly declined to consider the issue for resolution, and the circuit court erred in its ruling that the trial court should have.

Although not raised in a cross appeal, plaintiff argues that the district court erred in failing to award prejudgment interest or taxable costs. We may consider this issue because it is one of law for which the necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

While the district court found that defendant had not violated the MCPA, it nevertheless awarded plaintiff damages of $1,299. Defendant has not appealed this award. Pursuant to MCL 600.6013(8), plaintiff is entitled to statutory interest from the date the complaint is filed through the date of the judgment. See *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). Therefore, we remand to the district court to determine the appropriate award of prejudgment interest and costs.

Based on the above findings, we need not decide the remaining issue on appeal.

We reverse and remand to the district court for computation of prejudgment interest and costs. Neither party having fully prevailed, no taxable costs are awarded. MCR 7.219. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey