

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001223-MR

SIM JETT

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE JOHN D. CAUDILL, JUDGE
ACTION NO. 97-CI-00035

PEOPLES BANK AND TRUST OF HAZARD;
AND WHITE HALL MOBILE HOMES

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOFF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Sim Jett (Jett) appeals from a summary judgment of the Perry Circuit Court dismissing his claim against Peoples Bank and Trust of Hazard (Bank). Jett argues that he was entitled to a judgment in his favor and statutory damages as provided in KRS 355.9-625 due to the Bank's failure to send the required notice of sale after repossession of his mobile home. Although we disagree with some of the trial court's reasoning, the trial court did not clearly err in finding that Jett has suffered no damages from the Bank's

failure to send the required notice. Therefore, the circuit court's judgment is affirmed.

In 1992 Jett purchased a mobile home using a bank loan from Appellee Peoples Bank & Trust of Hazard. The mobile home was defective and unusable. Jett attempted to have the manufacturer repair the defect and multiple attempts at such repair were made. Despite the manufacturer's attempts to repair the defect, the mobile home continued to be wet and mildewed in inclement weather. In 1996, on the advice of counsel, Jett sent notice to all parties of his revocation of the purchase, demanded refund of payments made, stopped further payment, took a security interest in the collateral, and invoked his remedies under both the Uniform Commercial Code and the Mobile Home Sales Act. The letter of August 15, 1996 to the Bank and the manufacturer stated, in pertinent part:

Mr. and Mrs. Jett hereby cancel the purchase contract, demand a full refund of all payments and claim a security interest in the mobile home until they have recovered all payments, incidental damages, and other expenses they have incurred.

Id., at p. 2.

Jett rejected and revoked his acceptance of the mobile home pursuant to KRS 355.2-601 and KRS 355.2-608. Jett's complaint states that he "cancelled the purchase contract,

demanded a full refund of all payments and claimed a security interest in the mobile home until all payments, incidental damages and other incurred expenses had been recovered under the provisions of KRS 355.2-711." This complaint showed that Jett was claiming damages for the contract, such as were recoverable, and that he retained an interest in the settlement of the claim. The manufacturer settled all claims against Jett.

The Bank of Hazard refused Jett's revocation and declared Jett to be in default of his purchase agreement. The Bank filed an action demanding payment and possession of the home in circuit court. Jett was never served with that action. The Perry Circuit Court entered an order permitting the Bank to repossess the home. Upon receipt of that order, counsel for Jett required the Bank to set aside the order because it was obtained without giving Jett the opportunity to be heard. The Bank set aside the order on those grounds.

Jett continued to live in the mobile home, but did not continue to make payments on the home. Jett asserts that this action was permissible in conjunction with his revocation. The Bank contended that the continued possession was inconsistent with Jett's claim to have revoked acceptance of the home. Jett claims that he had a right under the law to hold and use the goods as security for his damages until he is compensated for his losses.

The caselaw contemplates continued possession by a buyer who has revoked the contract. In such circumstances the seller may require a set-off of any damages claimed, due to the benefit the buyer gains through continued use. Johnson v. General Motors, 668 P.2d 139 (Kan. 1983). No such setoff was claimed by the bank in the present case. Continued use does not preclude recovery of statutorily permitted damages by the buyer. Id., at 141. The Bank has not provided authority supporting its position. The continued use and possession has a bearing on the damages recoverable, but does not invalidate the revocation claim. The Court's findings of fact hold KRS 355.2-711 required Jett to make an attempt to resell the property. This finding is inconsistent with law, but does not affect the claims made in this action. No reversible error is shown in this ruling by the court.

In 1997, the Bank invoked its right to repossess the home under the Security Agreement. An agreed order of repossession for the home was entered in November, 1997. The parties, through counsel, arranged for transfer of possession of the home, with Jett retaining all his rights and claims. The Bank did not refund payments made to Jett or acknowledge the validity of the revocation. The Bank did not proceed against Jett for any further payments on the contract, or any fees associated with its repossession of the mobile home.

Within months of the repossession, the Bank sold the home at private sale for \$12,000.00. The Bank failed to provide notice of the sale to Jett. Jett amended his complaint to add a claim that the Bank violated KRS 355.9-507 (now KRS 355.9-625). KRS 355.2-706(4) requires that a seller who resells goods at a private sale must give the buyer reasonable notice of its intent to resell. Jett asserts that the statute authorizes damages in the sum of \$20,849.40 for finance charges and an additional \$1,890.90 for ten percent of the purchase price, as authorized by the statute. That sum is the penalty provided for in KRS 355.9-625 sections (2) and (3), that being ten percent of the principle plus ten percent of the cash price of the item, and a \$500 fine applicable where no notice of sale is given. The findings of fact properly state that the Bank was permitted to resell the property after Jett revoked acceptance of it, pursuant to KRS 355.2-703.

The Bank asserts that KRS 355.2-703 permitted it to sell the home after Jett revoked acceptance of it. The Bank claims, with supporting authority, that after it obtained possession of the property, the provisions of Article Nine of the UCC no longer applied to it. The Bank contends that it cancelled the contract for the mobile home, and did not hold Jett liable for any damages under the contract, and that this should be sufficient to prevent imposition of any damages

against it. The Bank argues that Jett failed to comply with the requirement that he relinquish possession and use of the home pursuant to KRS 355.2-608. The Bank contends that KRS 355.2-711 required Jett to return or dispose of the collateral after revoking acceptance of it. The Bank claims that KRS 355.2-703(f) permitted it to cancel the contract and sell the property under those circumstances. Additionally, the Bank contends that it was reasonable for it to believe that Jett had no further claim to the mobile home.

KRS 355.2-711 deals with a buyer's remedies and interest in rejected goods. KRS 355.2-703 deals with a seller's remedies, and permits a seller to resell goods which are not accepted by the buyer, or to cancel the contract between the parties, among other damages. KRS 355.9-625(2) provides that a secured party who sells goods without providing notice and opportunity to cure to a debtor may be liable for any loss incurred by the debtor. The bank contends that as Jett suffered no loss, he was not entitled to any damages for the failure to provide notice. Jett contends that Article II of the Uniform Commercial Code does not relieve a bank of its duty to provide notice of impending sale to the debtor. Under the law, the purpose of the notice requirement is "to give the debtor sufficient time to protect his interests" in the property. Holt v. Peoples Bank of Mt. Washington, 814 S.W.2d 568, 570 (Ky.

1991). As the Bank notes, Jett had no further interest in the property, and thus no notice of the sale was required.

The Agreed Order of November 14, 1997, states, in pertinent part:

Whereas the Defendant does not elect to remain in the mobile home for any longer period than needful and that he promises to voluntarily surrender possession of the mobile home to the Plaintiff, with the understanding that the Defendant does not waive any of his claims which he has or may have in the pending companion case which has been filed by the Defendant.

Id. The Bank asserts that Nelson v. Monarch Investment Plan of Henderson, Inc., 452 S.W.2d 375 (Ky. 1970) permitted it to assume that Jett had waived any claim to the property. Jett has made no showing that he had any continued interest in the property such as would require notice of the sale. Under such circumstances, the Bank's failure to provide notice of the sale was not harmful to Jett such that damages may properly be recovered. For the foregoing reason, we affirm the circuit court's denial of Jett's claim for damages.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas C. Dodd
Louisville, Kentucky

BRIEF FOR APPELLEE, PEOPLES
BANK AND TRUST OF HAZARD:

Frank C. Medaris, Jr.
Hazard, Kentucky