STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

NISSAN MOTOR ACCEPTANCE CORPORATION,
Plaintiff,
vs. Case No. 18-3069-CB

MACOMB MOTORS 1 LLC,
DEARBORN MOTORS 1 LLC,
AIRPORT ROAD MOTORS N. LLC,
HALL ROAD N. HOLDINGS LLC,
MICHIGAN AVENUE N. HOLDINGS, LLC,
ALL PRO AIRPORT ROAD N. 4 LLC,
ALL PRO AIRPORT ROAD DETAIL 3 LLC,
AIRPORT ROAD MOTORS DETAIL, LLC,
MICHAEL S. SAPORITO,
JESSIE W. ARMSTEAD,
ANTONIO D. PIERCE,
Defendants,
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OPINION AND ORDER

Plaintiff Nissan Motor Acceptance Corporation ("NMAC") filed a motion for partial summary disposition under MCR 2.16(C)(10) on Count I (Breach of Loan and Guaranty Agreements) of its First Amended Complaint.

I. Background

NMAC seeks to collect on various credit agreements, financing agreements, commercial mortgage loan agreements and personal guarantees that it entered with Defendants relating to the operation of three Nissan dealerships. NMAC provides wholesale credit to authorized Nissan and Infiniti dealers for the purchase of vehicle inventory and for working capital—commonly called "floorplan financing." Answer ¶2. Starting in 2014, NMAC extended floorplan and other financing to defendants Dearborn Motors 1, LLC d/b/a All Pro Nissan of Dearborn ("Dearborn Motors"), Macomb Motors 1,

LLC d/b/a All Pro Nissan of Macomb ("Macomb Motors"), and Airport Road Motors N., LLC d/b/a Hazleton Nissan ("Airport Road Motors" or together as "Dealerships"). Answer ¶3. NMAC provided financing of more than 55 million dollars to the Dealerships. Answer ¶4.

Defendants Michael Saporito, Jessie Armstead and Antonio Pierce ("Owners") own and/or control the Dealerships. *Id.* The Owners also control defendants Michigan Ave. N Holdings, LLC, Hall Rd. N Holdings, LLC, All Pro Airport Rd. N4, LLC, All Pro Airport Rd. Detail -3, LLC and Airport Road Motors Detail, LLC (together as "Entities") which are affiliates of the Dealerships. *Id.* ¶5. Owners executed guarantees of various loans NMAC made to the Entities and Dealerships. *Id.* ¶ 5-6.

NMAC provided loans and credit to Defendant Michigan Ave. N Holdings, LLC for the construction of the Dearborn dealership. *Id.* ¶17. NMAC provided loans and credit to Hall Rd. N Holdings, LLC for the construction and benefit of the Macomb Motors dealership. *Id.* ¶ 18. NMAC provided loans and credit to All Pro Airport Rd. N 4, LLC, All Pro Airport Rd. Detail -3, LLC, and Airport Road Motors Detail, LLC for the benefit and construction of the Hazleton dealership. *Id.* ¶ 19-21.

Each of the Dealerships entered into an Automotive Wholesale Finance and Security Agreement ("WSA") with NMAC, under which they agreed to promptly repay to NMAC, upon the retail sale of each vehicle, the monies that NMAC had advanced when the Dealerships purchased that vehicle at wholesale. *Id.* ¶7. The failure to pay NMAC upon retail sale is a default under the WSAs, commonly called "sale out of trust" or "SOT". *Id.* According to NMAC, all credit it extended to the Dealerships was cross guaranteed and cross collateralized jointly and severally. Amended Complaint Exhibit

H. NMAC attached the loan and guarantee agreements as exhibits to its Amended Complaint.[1]

[1] For Macomb Motors, NMAC cites to a WSA dated June 6, 2017, A Capital Loan Agreement dated April 3, 2017, a CAP Loan dated May 20, 2017, a Lease Plan dated July 1, 2017, Continuing Guaranty Agreement of Soporito dated April 4, 2017, Continuing Guaranty Agreement of Armstead dated May 20, 2017, Continuing Guaranty Agreement of Pierce dated May 20, 2017, Reaffirmation of Guarantors dated May 20, 2017, and Reaffirmation of Guarantors dated June 6, 2017. Amended Complaint Exhibits B1-B9.

For Airport Road Motors, NMAC cites to a WSA dated February 12, 2015, a $2,350000 Capital Loan dated March 5, 2016, Continuing Guaranty Agreements of Soparito and Reaffirmation dated February 12, 2015 and March 5, 2016, Continuing Guaranty Agreement of Armstead and Reaffirmation dated February 12, 2015, Continuing Guranty Agreement of Pierce and Reaffirmation dated February 12, 2015 and March 5, 2016, and Reaffirmation of Guarantors dated March 5, 2015. *Id.* C1-C7.

For Dearborn Motors, NMAC cites to: a WSA dated February 12, 2015; a Lease Plan Financing and Security Agreement dated July 19, 2015; Continuing Guaranty Agreement of Michael Saporito dated February 12, 2015; Continuing Guaranty Agreement of Jessie Armstead dated February 12, 2015; and a Continuing Guaranty Agreement of Antonio Pierce dated February 12, 2015. Amended Complaint Exhibits A1-A5.

For Michigan Ave. N Holdings, LLC, NMAC cites to a Promissory Note dated May 14, 2014 for $5,800,000, Construction Mortgage dated May 14, 2014, First Amendment to Promissory Note dated December 1, 2015, Guaranty of Completion dated May 14, 2014, and a Payment Guaranty dated May 14, 2014. *Id.* Exhibits D1-D5.

For Hall Rd. N Holdings, LLC, NMAC cites to a Promissory Note dated December 21, 2017 for $8,150,000, a Construction Mortgage dated December 21, 2017, Owner's Guaranty dated December 21, 2017, and a Completion Guaranty dated July 23, 2014. *Id.* Exhibits E1-E4.

For All Pro Airport Rd. N4, LLC, NMAC cites to a Promissory Note dated April 30, 2015 for $7,380,000, Open-End Construction Mortgage dated April 30, 2015, Amended Promissory Note and Reaffirmation dated September 1, 2016, Amended Promissory Note and Reaffirmation dated February 2017, Amended Promissory Note and Reaffirmation dated May 1, 2017, Guaranty of Completion dated April 30, 2015, and a Payment Guaranty dated April 30, 2015. *Id.* Exhibits F1-F7.

For All Pro Airport Rd. Detail -3, LLC, NMAC cites to a $4,630,000 Promissory Note dated April 30, 2015, Open-End Construction Mortgage dated April 30, 2015, Amended

On the allegation of default under the various financing agreements, On March 4, 2019, NMAC filed an Amended Complaint alleging: count I, breach of loan and guarantee agreements against all defendants, and count II, conversion against Dealerships and Owners.

The parties stipulated to interim injunctive relief, and according to NMAC, the Dearborn Motors and Macomb Motors Dealerships were sold to third parties. Defendants voluntarily surrendered certain collateral to NMAC which NMAC sold at auction and applied the proceeds to the indebtedness of Defendants.

On June 13, 2019, NMAC filed its present motion for summary disposition of Count I. Defendants filed a Response on July 1, 2019. NMAC filed a Reply on July 25, 2019. The Court heard oral argument on July 29, 2019 and took the matter under advisement. Defendants filed a supplemental brief in opposition on August 5, 2019.

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

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Promissory Note dated September 1, 2016, Amended Promissory Note dated February 1, 2017, Amended Promissory Note dated May 1, 2017, Guaranty of Completion dated April 30, 2015, and Payment Guaranty dated April 30, 2015. *Id.* Exhibits G1-G7.

the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments, Law and Analysis

A. Liability

NMAC argues that Defendants defaulted on financing agreements and related guarantees in connection with the operation of three dealerships. Therefore, NMAC seeks summary disposition on its breach of contract claim. In Response, Defendants do not contest liability—indeed, at oral argument Defendants conceded liability under count I. However, Defendants argue that a question of material fact remains as to damages.

In order to establish a breach of contract, a plaintiff must establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller–Davis Co v Ahrens Consruction., Inc (On Remand),* 296 Mich App 56, 71; 817 NW2d 609 (2012).

In the present case, Defendants present no argument or evidence challenging the existence and validity of the various agreements, the breach of those agreements, or that NMAC suffered damages as a result of such breaches. A motion for summary disposition may be granted when, "Except as to the amount of damages, there is no genuine issue as to any material fact. . ." MCR 2.116(C)(10). Since the parties only

dispute the amount of damages, NMAC is entitled to summary disposition as to liability on Count I of its Amended Complaint.

B. Damages

Regarding damages, NMAC argues that Defendants conducted no discovery, fail to offer any evidence to create a genuine issue of fact for trial, and only offer mere speculation regarding the calculation of a deficiency balance.

Defendants argue in Response that NMAC has the burden of showing commercial reasonableness under both the terms of the various contracts and the UCC. Defendants argue that NMAC only supports its claim of damages in excess of $23 million with a self-serving affidavit from its own employee with no evidence that it disposed of the collateral in a commercially reasonable manner. Specifically, NMAC does not identify which vehicles it sent to auction, the market value of each vehicle, or the auction proceeds, according to Defendants. Therefore, Defendants conclude, NMAC presented an insufficient basis for summary disposition on damages under count I of the Amended Complaint.

Under the Michigan Uniform Commercial Code, after a default, a secured party may sell or dispose of collateral in a commercially reasonable manner. MCL 440.9610(1). "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." MCL 450.9610(2).

Disposition of collateral is commercially reasonable if "made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." MCL

440.9627(2). "The fact that a greater amount could have been obtained by a . . . disposition . . . at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the . . .[disposition] was made in a commercially reasonable manner." MCL 440.9627(1).

In an action arising from a transaction in which the amount of a deficiency is in issue, the secured party has the burden of establishing the commercial reasonableness of the disposition. MCL 440.9626(b). If a secured party fails to prove that the disposition was commercially reasonable under the UCC, the liability of a debtor for a deficiency is limited to an amount "by which the sum of the secured obligation, expenses, and attorney fees exceeds the . . . amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions" of the UCC. MCL 440.9626(c)(ii). "The burden of proving commercial reasonableness generally is placed upon a secured party who has repossessed the collateral and disposes of it in a manner which impairs a third party's rights." *Wayne Bank v Dore*, 119 Mich App 634, 637; 326 NW2d 588 (1982), see again MCL 440.9626. "When there are contested issues of fact, the issue of commercial reasonableness is one for the trier of fact." *Jones v Morgan*, 58 Mich App 455, 458; 228 NW2d 419 (1975) citations omitted.

In the present case, both the Uniform Commercial Code as adopted by Michigan and the terms of the parties' WSAs require commercial reasonableness in the disposal

of collateral.[2] The WSAs provide that NMAC "shall have the right to dispose of any Collateral repossessed under this Agreement by any commercially reasonable means." Amended Complaint Exhibits A1 and B1, Section 5.3. Further, Section 5.3 of the WSA's provide that,

> Dealer agrees that the sale by NMAC of any new or unused Property repossessed by NMAC to the Vendor of the Property, or to any person designated by such Vendor at the invoice cost to Dealer less credit granted to Dealer related to the Property and reasonable cost of transportation and reconditioning, shall be deemed a commercially reasonable means of disposing of the Property. Dealer further agrees that if NMAC solicits bids from three or more other dealers in the type of Collateral repossessed by NMAC under this Agreement, any sale by NMAC of such Collateral in bulk or in parcels to the bidder submitting the highest cash bid shall also be deemed a commercially reasonable means of disposing the Collateral. In any event, it is expressly understood that such means of disposal shall not be exclusive . . .

Id. In sum, under the terms of the WSAs, the parties agreed that disposition of the collateral would satisfy the requirement of commercial reasonableness if NMAC sold the vehicles to the manufacturer at the dealer invoice cost, accounting for expenses, or if NMAC solicited bids from at least three other dealers and sold the vehicles to the highest bidder. However, the parties also expressly agreed that "such means of disposal shall not be exclusive."

In its motion and supporting briefs, NMAC does not address the manner, method, time or place in which it disposed of the subject collateral—whether it complied with the agreed upon definition from the WSAs or with MCL 440.9627(2). NMAC simply offers no basis for the Court to conclude that it disposed of the collateral in a commercially reasonable manner.

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[2] Parties may not disclaim, but may define by agreement, obligations of good faith, diligence, reasonableness and care under the UCC. MCL 440.1302(2).

Instead, NMAC relies on MCR 2.116(G)(4) to argue that under the court rules and related law governing summary disposition, Defendants failed to first offer evidence sufficient to create a question of material fact as to the calculation of any deficiency. NMAC dismisses Defendants' arguments as idle speculation or mere denials, which are inadequate on a motion under MCR 2.116(C)(10).

However, NMAC ignores the plain language of MCL 44.9626(b) that shifts the burden of establishing compliance with commercial reasonableness to the secured party when a debtor places compliance in issue. See also, *Wayne Bank*, 119 Mich App at 637 ("The burden of proving commercial reasonableness generally is placed upon a secured party . . ."); see also non-binding but persuasive decisions, *Chem Bank v Long's Tri Co Mobile Homes, Inc*, unpublished per curium Opinion of the Court of Appeals, issued May 21, 2013 (Docket No. 309126) p, 5; *United States v Willis*, 593 F2d 247, 258 (CA 6, 1979) (Great weight of authority holds that defense of commercial reasonableness shifts the burden of proof to the secured party).

Given that Defendants have raised the issue of commercial reasonableness, NMAC bears the initial burden of showing it disposed of the assets in a commercially reasonable manner. The burden of opposing such a showing does not shift upon Defendants until NMAC first supports its position. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). On the current record, the Court has an insufficient basis at this time to conclude that NMAC is entitled to judgment on the basis of its calculation of damages. As a result, NMAC's motion for summary disposition on count I of the Amended Complaint is denied as to damages.

However, the analysis above regarding commercial reasonableness applies only

to the disposition of collateral that NMAC controlled. See again MCL 440.9610(1) (Requiring commercial reasonableness for assets that the *secured party* sells); Amended Complaint Exhibits A1, B1 ("Dealer agrees that the *sale by NMAC . . .*"). The damages NMAC seek here also include assets of which the Dealerships controlled the disposition—such as vehicles sold out of trust, inventory or the sale of real property. NMAC Exhibit 1 and 2, Affidavits of Hugh Johnson and Jason Langer. Clearly, borrower-controlled sales do not require the protection of the doctrine of commercial reasonableness. Therefore, the commercial reasonableness requirement only arises here regarding those vehicles the Dealerships voluntarily surrendered to NMAC and NMAC later sold. Notwithstanding, the Court has an insufficient basis to determine as matter of law the amount of damages NMAC is entitled to relating to the vehicles disposed of by the Dealerships.

In conclusion, NMAC's motion for summary disposition is granted as to liability. As to damages, the matter shall be set for a hearing to determine the amount of damages.

IV. Conclusion

For the reasons set forth above, NMAC's motion is GRANTED in part and DENIED in part. Specifically, NMAC's motion for summary disposition on count I of its Amended Complaint is granted as to liability but denied as to damages.

In accordance with0 MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: OCT 10 2019

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge

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