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GMAC v. Bach Respondent's Brief Dckt. 38647

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GMAC,)	Docket No. 38647-2011
)	
Plaintiff-Respondent,)	
)	Case No. CV 2009-172
vs.)	
)	
CINDY LEE BACH (DECEASED) an)	
individual and JOHN NICHOLAS BACH,)	
an individual,)	
)	
Defendants-Appellants.)	

BRIEF OF RESPONDENT

Appeal from the District Court of the Seventh Judicial
District of the State of Idaho, In And For The
County of Teton

Honorable Gregory W. Moeller
District Judge

Laura E. Burri, ISB No. 3573
Residing at P. O. Box 2773., Boise, ID 83701, (208)342-4591
For Respondent

John N. Bach, pro se
Residing at P.O. #101, Driggs, ID 83422, (208)354-8303
For Appellant

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STATEMENT OF THE CASE

I. Factual Background

Cindy Lee Bach purchased a 2007 Chevrolet Equinox from Ressler Motor Company of Bozeman, Montana on January 6, 2007. She signed a contract entitled "GMAC Flexible Finance Plan" (hereafter referred to as the "Contract"). R., pgs. 001 and 006. Appellant John Bach did not sign the Contract. The amount financed was \$24,047.00. The contract required monthly payments of \$498.00 each. R., pgs. 001 and 006. The payments became in default. At the time the Verified Complaint was filed on April 24, 2009, payments were five (5) months past due for the months of December, 2008 through April, 2009. R., 002. The outstanding balance due on the Contract was \$17,059.18 as of March 30, 2009. R., 002.

The Contract provides that Ms Bach was granting a security interest in the vehicle. R., pgs. 006 and 007. The Contract also states that, upon default, the vehicle can be repossessed. R., p. 007. At the bottom of the first page of the Contract, the document provides "Seller assigns its interest in this contract to XX GMAC". R, p. 006. The first page of the contract further provides that "The contract contains the entire agreement between you and us relating to this contract. Any change to the contract must be in writing and we must sign it. No oral changes are binding." R., p. 006.

After the Contract was signed, Ms Bach died. R., p.0042. John Bach was the spouse of Cindy Lee Bach. R. p. 0042. On December 1, 2008 a Decree of Summary Administration was entered in the probate estate of Cindy L. Bach in Teton County. R. pgs. 0042 and 0043. The

Decree provides that John Bach is the surviving spouse and sole heir of Cindy Bach. R. p. 0042. The Decree further provided that the property of the estate included a 2007 Chevrolet Equimax [sic] , VIN 2CND123F576064987. R. p. 0043. The vehicle was distributed to John Bach. R. p. 0043. The Decree provided that John Bach “shall assume and be responsible for all indebtedness which might be a claim against the estate.” R. p. 0043.

2. Procedural Background

The Complaint in this matter was filed on April 24, 2009. R. pgs. 001 - 007. The suit was a replevin action under Idaho Code §8-301 to recover possession of the 2007 Chevrolet Equinox. Mr Bach was personally served with the Summons and Complaint on May 7, 2009. R. p. 0011. The Complaint was verified. R. p. 004. On May 27, 2009, Mr Bach filed a “Notice of Motion & Motions by Defendant John N. Bach, Specially Appearing to Strike, Void any Purported Service of Process, His Person and Over Purported Subject Matters Jurisdiction, etc.” R. pgs. 008-0013. The Motion was heard before the District Court on July 7, 2009. R. pgs. 0014-0017. The District Court issued its Memorandum Decision denying the Motion on July 21, 2009. R. pgs 0020-0024. Mr Bach filed an Answer on May 6, 2009. R. pgs. 0025-0030.

GMAC filed a Motion for Summary Judgment on December 9, 2009. R. pgs. 0034 - 0035. On May 3, 2010, the District Court entered its Memorandum Decision after hearing Plaintiff’s Motion for Summary Judgment. R. pgs. 0090-0098. The Court granted Summary Judgment in favor of Plaintiff and dismissed the Counterclaim filed by John Bach. R. pgs. 0090-0098. On May 17, 2010, John Bach filed various motions objecting to the Memorandum Decision of the Court. R. pgs. 0099-0109. These motions include a Motion for Reconsideration,

for an order of relief, for a new hearing and for an order allowing amended pleadings. R. pgs. 0099-0109. On July 6, 2010, John Bach filed a further Memorandum in Support of His Motions Filed May 17, 2010. R. pgs. 0110-0114. On September 3, 2009, the District Court entered its Amended Memorandum Decision again granting the Motion for Summary Judgment filed by GMAC and denying Mr Bach's other motions. R. pgs. 0141-0155. The Final Judgment Against John Bach was entered by the lower Court on February 1, 2011. R. pgs. 0158-0159. Mr Bach filed a Notice of Appeal on March 15, 2011. R. pgs. 0160-0165.

3. Standard of Review

The standard of review on an appeal from a summary judgment is the standard of review properly applied by the trial court when originally ruling on the motion. The court must review the pleadings, depositions, affidavits, and admissions on file. The Court should liberally construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Featherston v. Allstate Insurance Co.*, 125 Idaho 840, 875 P.2d 937 (1994).

ATTORNEY FEES ON APPEAL

GMAC requests attorney fees on this appeal. The Contract provides for an award of attorney fees "If we hire an attorney who is not our salaried employee to collect what you owe, you will pay the attorney's reasonable fee and court costs the law permits." R. p. 007. Idaho Code 12-120(1) allows for an award of attorney fees where the amount plead is twenty-five thousand dollars (\$25,000.00) or less. Idaho Code 12-120(3) also provides for an award of

attorney fees on an open account or contract relating to the purchase or sale of goods, to the prevailing party. Idaho Code 12-121 allows for attorney fees to the prevailing party.

ARGUMENT

1. Issues on Appeal.

The Notice of Appeal filed by Mr Bach contained a total of seven issues on appeal. R. pgs. 0160-0164. The Appellant's Opening Brief contains a list of four issues on appeal. This brief will address the four issues on appeal as stated in Appellant's Opening Brief.

2. Was Jurisdiction and Venue Required to be in Montana.

The first issue on appeal is whether jurisdiction and venue of this action was required to be in the State of Montana. The vehicle in question was purchased on January 6, 2007 in Montana from Ressler Motor Company of Bozeman, Montana. R. p. 006. The Contract states that "Federal law and Montana law apply to this contract." R. p. 007. The automobile was titled in the State of Idaho on January 18, 2007. R. p. 0140. The address used for Mrs Bach on the title was 400 N 152 E, PO Box 101, Driggs, Idaho 83422.

The Complaint was filed in this matter for recovery of the 2007 Chevrolet Equinox in Idaho. This is an *in rem* action under Idaho Code §8-301 to recover possession of the vehicle after payments became in default. By the very nature of the type of action involved, the suit was required to be filed in the State where the vehicle was located. If the suit had been filed in Montana, GMAC would be unable to obtain possession of the vehicle located in Idaho with a Montana Writ of Possession. The suit necessarily had to be filed in the State where the vehicle was located, the State of Idaho.

In addition, Idaho Code §5-404 requires that an action be tried in the County in which the defendant resides at the commencement of the action. It is undisputed that Mr Bach resided in the State of Idaho when the action was commenced. R. p. 0142. He was personally served with the Summons and Complaint in Teton County, Idaho. R. p. 011. Mr Bach further admitted that the vehicle was present in the state of Idaho. R. p. 0147.

Idaho Code §5-514 is Idaho's "Long Arm Statute". The statute provides under subsection (a) that acts subjecting a person to Idaho jurisdiction include transacting business within the state. This term is defined as "the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person"

Mr. Bach has transacted business in Idaho within the meaning of Idaho Code §5-514. He filed a Petition for Summary Administration in Teton County, Idaho. R. pgs. 0042-0043. The Petition was filed under Idaho Code §15-3-1205. This statute allows a surviving spouse to file a summary administration of a deceased spouse's probate estate. A Decree of Summary Administration was obtained distributing assets and debts of the estate to Mr Bach. R. 0042.¹

The District Court was correct in finding that jurisdiction and venue of this matter was in the State of Idaho. As stated by the Court, "The Court has *in personam* jurisdiction over Bach's person because he has admitted that he resides within the state of Idaho. The Court also has *in rem* jurisdiction over the subject matter of this case because Bach has admitted that the vehicle is

¹The Transcript in this matter has the Decree of Summary Administration at page 0042-0043. This document was actually attached to the Affidavit of Laura E. Burri in support of Plaintiff GMAC's Motion for Summary Judgment, pages 0044-0045 of the transcript. The Decree should be viewed as an attachment to the Affidavit for the purposes of this appeal.

present in the state of Idaho.” R. p. 0147. This Court should find that the District Court of Teton County, Idaho was the proper forum for the action filed by GMAC to recover possession of the 2007 Chevrolet Equinox.

3. Was Plaintiff’s Complaint Properly Verified.

Mr Bach next asserts the issue as to whether the Complaint filed by GMAC was properly verified for the purpose of the Summary Judgment Motion. The Complaint was verified by Kathleen FitzGerald. The verification stated that Ms FitzGerald was an employee of Semperian, Inc., agent for General Motors Acceptance Corporation. The verification provided that Ms FitzGerald had personal knowledge of the facts and believed the facts to be true and correct. The verification was notarized in the state of Arizona. R. P. 004.

Idaho Rule of Civil Procedure 11 (c) provides that a verification:

shall be a written statement or declaration by a party or the party’s attorney of record sworn to or affirmed before an officer authorized to take depositions by Rule 28, that the affiant believes the facts stated to be true, unless a verification upon personal knowledge is required. When a corporation is a party, the verification may be made by an officer thereof.

In this matter, the verification was signed by Ms. FitzGerald as an employee of an agent of GMAC. An agent is defined as “a person authorized by another to act for him, one intrusted with another’s business.” Blacks Law Dictionary, 5th Ed. 1983. As such, Ms FitzGerald could act in place of GMAC in executing the verification. As required by Idaho Rule of Civil Procedure 11(c), the verification states that she believes the facts stated to be true.

Although a corporation is a party in this matter, the verification is not required to be signed by an officer. Idaho Rule of Civil Procedure 11(c) provides that the verification may be

made by an officer. The statute does not say that an officer shall make the verification. As stated in Blacks Law Dictionary, 5th ed. 1983, use of the word “may” instead of the word “shall” is indicative of discretion or choice between two or more alternatives. Therefore, a corporate officer may sign a verification but it is not required in order for a corporation to execute a verification.

Nowhere in Idaho Rule of Civil Procedure 11(c) is there any requirement that a verification be notarized by an Idaho notary. Idaho Rule of Civil Procedure 28(a) provides that depositions shall be taken before a person authorized by the laws of the state of Idaho, by the United States, or of the place where the examination is held, within or without the state of Idaho. Therefore, a notary public for the state of Arizona may properly notarize a verification to be used in a Court of the State of Idaho.

The District Court found that the verification in this matter was sufficient. The Court held that Mr. Bach had failed to produce any evidence that the party verifying the complaint was legally incompetent to do so. The Court further found that the Arizona notarization was sufficient. R. p. 0146. This ruling is in accordance with the laws of the State of Idaho and should be upheld.

4. Did the District Court give Personal Hearsay Testimony.

Mr Bach claims that the District Court inserted personal comments into its decisions that were hearsay. Although it is unclear from the briefing, it appears that Mr Bach asserts this issue on the basis of the Court’s comments pertaining to the weather conditions in Teton County, Idaho as contained in its Memorandum Decision. R. pgs. 0090-0098. The other matter raised is

apparently the assumption of liability under the Decree of Summary Administration. R. p. 0119. The Memorandum Decision was withdrawn and replaced by the Amended Memorandum Decision dated September 3, 2010. R. p. 0141. The Court addressed these issues in its Amended Memorandum Decision, R. 0149-0151.

Judicial Notice can be made of facts that are not subject to reasonable dispute, are generally known within the jurisdiction of the trial court or are capable of accurate and ready determination. Idaho Rule of Evidence 201(b). The Court's recognition of winter weather in Teton County is a fact generally known by anyone that resides within the County. Any statement by the Court about the weather in a location where the Court resides is a matter appropriate for judicial notice as an item not reasonably in dispute. In addition, the court noted that "there is no reason why such a statement would indicate any bias against Bach by the Court. Nevertheless, in order to clear the record of unnecessary issues, the Court has removed the statement from this amended order." R. p. 0150.

As to the reference to the summary administration, Idaho Code §15-3-1205 provides that a surviving spouse that files a summary administration is distributed assets and debts of the deceased spouse. The court could raise the issue sua sponte. *See Parkwest Hones, LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010), R. p. 0150. In addition, the Decree of Summary Administration was attached to the Affidavit of Laura E. Burri in Support of Plaintiffs GMAC's Motion for Summary Judgment. R. p. 0042-0043. Therefore, the Court could properly consider the information in deciding the Motion for Summary Judgment filed by GMAC.

5. Did GMAC Mislead or Abuse the Process and Fail to State a Cause of Action.

GMAC did not mislead the court or Mr Bach in this matter. There is no evidence in the record to show that GMAC did anything other than file its Complaint and later a Motion for Summary Judgment. The procedure throughout the case has not been an abuse of process. GMAC has availed itself of the available remedies under Idaho law.

GMAC did clearly state a cause of action. The verified Complaint set forth the information required under Idaho Code §8-301. R. pgs. 001-007. Ms. Bach purchased the vehicle. GMAC was assignee of the seller and held the security interest in the vehicle. The payments were delinquent. All of these facts are undisputed by Mr Bach. GMAC requested that a judgment and writ of possession be entered entitling it to assistance of the Teton County Sheriff to obtain possession of the vehicle. These facts state a cause of action on the part of GMAC. This Court on appeal should find that there was no misleading or abusive actions on the part of GMAC. Further GMAC has stated a cause of action entitling it to relief.

CONCLUSION

The Final Judgment against John Bach should be upheld by this Court. GMAC has properly brought before this court a cause of action for claim and delivery under Idaho Code §8-301. Jurisdiction was proper in Teton County, Idaho where both the vehicle and Mr Bach were located. The Complaint was properly verified for the purposes of the Summary Judgment Motion filed by GMAC. The lower court did not abuse its discretion as to judicial notice taken

by the Court. GMAC asks this Court to affirm the decision of the lower Court and award attorney fees to it for defending this appeal.

DATED is 2nd day of September, 2011.

RINGERT LAW CHARTERED

By Laura E. Burri
Laura E. Burri
Attorney for GMAC

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of September, 2011, I served a true and correct copy of the foregoing document by delivering the same to the following pro se defendant, by the method indicated below, addressed as follows:

John N. Bach
PO Box 101
Driggs, ID 83422

US Mail, Postage Prepaid

Laura E. Burri
Laura E. Burri