FOR PUBLICATION

Appeal No. 00-030

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

TRIPLE J SAIPAN, INC. dba TRIPLE J MOTORS,
Plaintiff/Appellee,

v.

FRANK C. AGULTO,
Defendant/Appellant.

OPINION

Cite as: ***Triple J Saipan, Inc. v. Agulto,* 2002 MP 11**

Civil Action No. 98-0399
Argued and submitted March 29, 2001
Decided May 22, 2002

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, Associate Justice:

&1 Defendant Frank C. Agulto [hereinafter AGULTO] timely appeals a lower court order granting summary judgment in favor of Triple J Saipan, Inc., dba Triple J Motors [hereinafter TRIPLE J] in this action involving AGULTO'S nonpayment of monthly installments under a car loan agreement. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC ' 3102(a). We reverse.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 The sole issue presented for our review is whether the trial court erred in granting TRIPLE J'S motion for summary judgment. We review a grant of summary judgment *de novo.* *See Aldan-Pierce v. Mafnas*, 2 N.M.I. 122, 131 (1991).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On November 17, 1994, Jesus DLC. Cabrera [hereinafter Cabrera] entered into a Credit Sale Contract [hereinafter Agreement] with TRIPLE J for the purchase of a 1989 Mitsubishi Montero automobile. The parties agreed upon a purchase price of $9,587.50 with a monthly payment of $501.13. TRIPLE J then assigned the Agreement to the Bank of Hawaii [hereinafter Bank].

¶4 In March 1995, Bank entered into a Transfer of Equity Agreement [hereinafter Equity Transfer] with Cabrera and AGULTO. Under the terms of the Equity Transfer, Cabrera sold his rights in the automobile to AGULTO, who agreed to pay and perform Cabrera's obligations

under Agreement. Cabrera agreed to be responsible for the obligations if AGULTO failed to pay or perform them. Subsequently, Bank reassigned all of its rights in Agreement and Equity Transfer to TRIPLE J. Sometime thereafter Cabrera and AGULTO stopped making payments on the automobile.

¶5 On November 26, 1999, TRIPLE J filed its complaint naming Cabrera and AGULTO as defendants. AGULTO filed an answer denying liability; Cabrera never answered. On April 3, 2000, arguing that there were no genuine issues of material fact and that it was therefore entitled to summary judgment as a matter of law, TRIPLE J moved for summary judgment.

&6 In an attempt to defeat TRIPLE J'S motion, AGULTO filed a memorandum opposing summary judgment. In support of his motion, AGULTO also filed a document, labeled in his own hand writing "extended warranty," that he claimed was sold to him along with the automobile. AGULTO cited two instances in which TRIPLE J allegedly breached the Agreement and argued that these breaches excused his duty to perform his end of the contract. AGULTO'S first claim was that Bank had raised his installment payments from $501.13 to $590.01 without his consent, which he claimed amounted to a breach of the Equity Transfer. His second claim was that TRIPLE J had sold the automobile with the extended warranty, but had subsequently breached the contract by refusing to repair defects that were covered by warranty.

&7 The trial court found that neither of AGULTO'S arguments showed a disagreement over genuine issues of material fact and, as such, granted the motion for summary judgment.

ANALYSIS

¶8 On appeal, an order granting summary judgment will be upheld only in cases where there are no genuine issues of material fact. *See Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518

(1993). A moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment by demonstrating the absence of a genuine issue of material fact in the record before the court. *See Santos v Santos*, 4 N.M.I 206, 210 (1995) (*citing Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991)). A fact in contention is considered material only if its determination may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). After the moving party meets the initial burden, it falls to the non-moving party to show that a genuine issue of material fact is still in question. *Castro v. Hotel Nikko, Saipan, Inc.*, 4 N.M.I. 268, 272 (1995). A determination regarding the existence of genuine issues of material fact is made viewing the evidence in a light most favorable to the nonmoving party. *Estate of Mendiola v. Mendiola*, 2 N.M.I. 233, 240 (1991).

&9 The trial court found that TRIPLE J met its initial burden of demonstrating an absence of dispute over any genuine material fact in its prima facie case. AGULTO argues that the trial court erred in granting summary judgment. He reasons that the two alleged breaches of contract committed by TRIPLE J are genuine issues of material fact that entitled him to stop his performance. "[W]hen performance of a duty under a contract is due any non-performance is a breach@. *Reyes v. Ebeteur*, 2 N.M.I. 418, 429 (1992) (*citing* RESTATEMENT (SECOND) OF CONTRACTS ' 235(2) (1981)). Once a party materially breaches a contract, that party cannot insist on the second party's performance of the same contract. *Windward Partners v. Lopes*, 640 P.2d 872, 874 (Haw. Ct. App.1982). The material breach of an "entire" contract by one party justifies termination by the nonbreaching party. *See* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW ' 804 (9th ed. 1987). We examine the alleged breaches separately in order to determine

whether, viewed in a light most favorable to AGULTO, either presents a genuine issue of material fact.

1. Increase in Monthly Installment Payments

&10 AGULTO'S first allegation involves the increase in his monthly installment payments. AGULTO dedicates much of his appellate brief to the argument that the trial court was presented with sufficient evidence proving that the amount of his monthly payment was increased without his consent. However, AGULTO fails to show how such an increase, if proved, would constitute a breach of contract. The Agreement clearly states, "[M]onthly payments may be increased to provide for payment of the additional amount and additional finance charge." Since the Agreement allowed for an increase in monthly payments, we see no reason why the Bank's decision to increase monthly payments would represent a breach. Whether or not the rate was raised has no effect on the case's outcome and is therefore not a genuine issue of material fact.

2. Extended Warranty

&11 Second, AGULTO argues that a breach of contract occurred when TRIPLE J refused to honor his extended warranty. After examining the hand-labeled document that AGULTO claimed was an extended warranty the trial court stated, "it appears that the defendant bought a service contract . . . [the document] does not state that it is a warranty of any kind." The trial court found that there was no statement obligating TRIPLE J to make any repairs. We find otherwise.

The Agreement indicates that $995 was apparently earmarked for "Extended Warranty." While AGULTO failed, in any of the papers submitted to this court, to discuss or even raise this

particular issue, the term suggests that the car was, in fact, covered by an extended warranty. If nothing else, the term, typed on the Agreement, lends credence to AGULTO'S argument that there was a material fact in question.

&12 Even if the explicit mention of an extended warranty on the Agreement is insufficient to show a question as to a material fact, the failure, on the part of TRIPLE J, to disclaim all implied warranties justifies a denial of the motion for summary judgment. It is a matter of basic contract law that a sales contract includes an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. *See* 5 CMC § 2314 and § 2315. A seller of goods can exclude these warranties with "expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." 5 CMC § 2316 (3)(a).

&13 In the present case, the Agreement clearly reads that the automobile was being sold "as is . . . [with] no warranty of merchantability, no warranty of fitness for a particular purpose, nor any other implied warranty," unless "we enter into a service contract with you on the date of this contract or within the next 90 days." It would appear that, if the document presented to the court was in fact a service contract, by entering into a service contract with AGULTO, TRIPLE J negated its own attempts to exclude all implied warranties. If an implied warranty was in place there would be an issue as to whether TRIPLE J breached the contract by refusing to repair the automobile.

&14 Viewing the evidence in the light most favorable to the nonmoving party, the evidence is such that a reasonable trier of fact could find that TRIPLE J'S refusal to service AGULTO'S automobile was a breach of the Agreement. A finding that AGULTO was excused from performance on the Agreement would alter the outcome of the case.

CONCLUSION

&15 A reasonable trier of fact could conclude that TRIPLE J did materially breach the Agreement between itself and AGULTO. This finding would be an outcome-determinative conclusion and, therefore, is a material fact that is in contention. Summary judgment should not have been granted until the issue was resolved. Accordingly, we REVERSE the trial court=s decision in favor of Appellee and REMAND for further proceedings consistent with our ruling.

SO ORDERED this 22ND day of May 2002.

/s/
MIGUEL S. DEMAPAN, Chief Justice

/s/
ALEXANDRO C. CASTRO, Associate Justice

/s/
JOHN A. MANGLONA, Associate Justice