Circuit Court for Baltimore County
Case No.: 03-C-17-9892

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 588

September Term, 2019

WALTER BURCH NOEL III et al.

v.

TD AUTO FINANCE LLC

Reed,
Wells,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: July 2, 2020

Walter B. Noel, III and Lincoln Sedan Services, Inc., appellants, filed a complaint on June 1, 2017 in the Circuit Court for Baltimore City against appellee, TD Auto Finance, LLC ("TDAF"), and four other defendants, for claims arising out of the repossession of Noel's 2016 Chevrolet Camaro. TDAF filed an answer and a motion to dismiss, or in the alternative, to transfer to the Circuit Court for Baltimore County. The court approved the transfer, and on November 6, 2017, TDAF filed a motion to dismiss, or in the alternative, for summary judgment. The Circuit Court for Baltimore County held a hearing on TDAF's motion on January 29, 2018, and issued its Memorandum Opinion dated February 21, 2018, granting TDAF's motion for summary judgment.

Over one year later, on May 8, 2019, appellants asked the court to reconsider the grant of summary judgment, which the court denied. Appellants noted a timely appeal and ask one question which we have rephrased as two separate questions:[1]

> 1. Whether the circuit court erred in granting summary judgment in TDAF's favor when it found that the Maryland Consumer Debt Collection Act ("MCDCA") did not prohibit TDAF from collecting a fee from appellants as provided for in the Retail Installment Sale Contract ("RISC")?
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> 2. Whether the circuit court erred in granting summary judgment in TDAF's favor when it found that TDAF was entitled under the RISC to seek reimbursement for amounts it paid to Heritage Chevrolet to preserve its collateral and payment of a repossession fee as a condition for returning the

[1] In their brief, appellants' sole question states, "Since TD[AF] admitted that it had given no notice to Appellants before repossessing the Car and that it demanded that Appellants pay TD[AF]'s expenses of retaking the Car, was it wrong for the trial court to grant TD[AF] summary judgment on the Appellants' claims that TD[AF]'s collection of those expenses was improper?"

collateral to appellants, despite TDAF's failure to provide a discretionary pre-repossession notice?

We hold that the MCDCA did not prohibit TDAF from collecting a repossession fee under the RISC. And, appellants do not contest that the repair costs incurred by Heritage were reasonable. However, we conclude that the circuit court erred in finding that the $250 repossession fee was proper under the RISC because TDAF failed to send appellants a timely discretionary pre-repossession notice per the MCDCA as a predicate to collecting such a fee. We therefore vacate that award and otherwise affirm.

BACKGROUND

In January 2016, Walter Noel III and his company, Lincoln Sedan Services, (hereafter, collectively referred to as "Noel" (he/him)) financed the purchase of a Chevrolet Camaro from Criswell Chevrolet pursuant to a Retail Installment Sale Contract ("RISC") between appellants and Criswell. Under the contract, Criswell assigned its rights to TD Auto Finance, LLC ("TDAF") and thereby transferred its security interest in the Camaro to TDAF. Ten months later, on October 31, 2016, Noel noticed smoke coming from the Camaro's exhaust and took the vehicle to Heritage Chevrolet-Buick, Inc. ("Heritage") for repairs, which Noel and Heritage presumed was covered by a warranty. However, on November 5, 2016, a mechanic from Heritage informed Noel that, upon further inspection, the Camaro's warranty had been voided due to changes Noel made to the software controlling the car's engine. Given the extensive damage to the engine, Heritage instructed Noel that the vehicle required a new engine at a cost of approximately $19,000.00; the cost of removing the engine was $4,500.00; and the cost of putting the car back together would

be another $4,500.00. Insisting that he did not authorize Heritage to remove the engine, Noel refused to pay for any of the services rendered, and the Camaro remained at Heritage.

On November 11, 2016, Heritage, through its parent corporation, Atlantic Automotive Corporation ("Atlantic"), sent a demand letter to Noel and TDAF, as the registered owners and lien holder of the Camaro, demanding payment of the outstanding $2,400.00 service bill and removal of the Camaro. Atlantic informed the parties "if this bill is not paid AND the vehicle is not picked up within ten (10) days of the notice being mailed, the vehicle will be referred to an outside lien and auction company." Four days later, on November 15, a Heritage mechanic offered to reassemble the Camaro, but Noel refused. On November 25, 2016, Heritage again called Noel, this time informing him that it had reassembled the Camaro against Noel's instructions. However, on December 9, 2016, Noel contacted Heritage to retrieve the Camaro, to which Heritage agreed, but told Noel the Camaro's removal required a tow truck. Although Noel came to collect the Camaro later that day, Heritage refused to release the Camaro to him until he paid the outstanding charges. Noel refused to pay and left without the Camaro.

On December 23, 2016, TDAF paid Heritage $4,754.36 for the services rendered and surrendered possession of the Camaro to Quality Auto Recovery ("Quality"). Three days later, on December 27, TDAF sent Noel a Surrender Notice, explaining that Noel's failure to execute a written acknowledgment that he surrendered the car -- a "Return of Collateral" form -- would lead TDAF to assume that "[Noel] agree[d] that [he] abandoned or voluntarily surrendered the vehicle." Noel then contacted TDAF, who disclosed that it

paid the Heritage bill on Noel's behalf and required repayment of the $4,754.36 plus an additional $250.00 repossession fee in order to release the Camaro back to him.

Hearing nothing from Noel, on January 10, 2017, TDAF sent a Notice After Repossession or Voluntary Surrender ("Repossession Notice"), advising Noel that TDAF obtained the Camaro through "voluntary surrender of your vehicle" and the vehicle would be sold at auction on January 26, 2017 unless Noel paid the "repossession, storage, repair and preparation costs (to date)" totaling $5,005.89. To prevent the auction sale of the Camaro, on January 20, 2017, Noel paid TDAF the $5,005.89 per the Repossession Notice.

Noel subsequently sued TDAF, Heritage, Atlantic, Quality, and General Motors in the Circuit Court for Baltimore City.[2] Noel alleged TDAF's actions constituted prohibited debt collection practices under the Maryland Consumer Debt Collection Act ("MCDCA"), Md. Code, Com. L. Art. ("CL") § 14-202(5), (8), and unfair or deceptive trade practices under Maryland Consumer Protection Act ("MCPA"), Md. Code, Com. L. Art. §§13-301(1), (2)(i), (3), (7), (9), and (14)(iii), (vi) when it demanded Noel pay a $250.00 repossession fee in addition to the Heritage repair bill in order to recollect the Camaro. TDAF filed an answer and a motion to dismiss, or alternately, to transfer to the Circuit Court of Baltimore County. The court approved the transfer, and on November 6, 2017, TDAF filed a motion to dismiss, or alternately, summary judgment.

[2] The circuit court granted appellants' voluntary motion to dismiss as to their claims against General Motors on January 15, 2019. A joint stipulation of voluntary dismissal of appellants' claims against Heritage and Atlantic was filed on May 3, 2019.

After a hearing on January 29, 2018, the circuit court issued its memorandum opinion, granting TDAF summary judgment. The court determined there was no genuine issue of material fact that TDAF acted pursuant to its contractual rights in the RISC. It reasoned that the RISC provisions granted TDAF the right to repossess the vehicle in the event of Noel's default, which it determined he did in exposing the Camaro to "seizure, confiscation, or involuntary transfer." In accordance with *Davis v. Toyota Motor Credit Corp.*, 251 F. Supp. 3d 925 (2017), the circuit court held that TDAF did not violate the MCDCA, "or, derivatively, the [MCPA]," and awarded TDAF $250.00, representing the costs to repossess the Camaro. Noel filed this timely appeal.

DISCUSSION

I. The Maryland Consumer Debt Protection Act and the Maryland Consumer Protection Act

Noel argues that the circuit court improperly granted TDAF's motion for summary judgment in determining that TDAF had the right, pursuant to the parties' contract, to protect its perfected security interest, to repossess the Camaro, and to charge fees in connection with the repossession. Specifically, Noel reasons that TDAF violated the MCDCA and MCPA by requiring him to pay repossession fees and associated costs in order to recover the Camaro. TDAF, however, contends that it acted to protect its security interest in the Camaro, which falls outside the scope of MCDCA. Consequently, in TDAF's opinion, the circuit court properly granted summary judgment in its favor.

Under Maryland Rule 2-501(f), a court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any

material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." We review a circuit court's grant of a motion for summary judgment *de novo*. *Hector v. Bank of New York Mellon,* 244 Md. App. 322, 328 (2020).

Because the circuit court found that there were no material facts in dispute and that TDAF was entitled to judgment as a matter of law, "[t]he standard of appellate review, therefore, is whether the trial court was legally correct." *Remsburg v. Montgomery*, 376 Md. 568, 579 (2003) (internal citations and marks omitted). To determine whether the court's decision was legally correct, we must first determine whether there was any genuine dispute of material fact. *Hector*, 244 Md. at 328 (internal citations omitted). "Any factual dispute is resolved in favor of the non-moving party." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006) (citing *Jurgensen v. New Phoenix Atlantic Condominium Council of Unit Owners*, 380 Md. 106, 114 (2004)). As such, the party opposing the motion "must present facts that are detailed and admissible in evidence." *Mitchell v. Balt. Sun Co.*, 164 Md. App. 497, 507 (2005). "A dispute as to facts relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment." *Id.* (citing *Lippert v. Jung*, 366 Md. 221, 227 (2001) (internal citation omitted)). "[O]nly where such a dispute is absent will we proceed to determinations of law." *Remsburg*, 376 Md. at 579.

Noel relies on both the Maryland Consumer Debt Collection Act, Md. Code, Com. Law Art. §14-201 through § 14-204 (MCDCA), the Maryland Consumer Protection Act,

Md. Code., Com. Law Art. § 13-101 through §13-501[3] (MCPA) (collectively, "the Acts"), and Maryland's closed-end credit provisions, Md. Code, Com. L. Art. §12-1001 through § 12-1029 ("CLEC") to argue, essentially, that TDAF's imposition of fees relating to the repossession of the Camaro was improper. His argument is two-fold: (1) both statutes prohibited TDAF from charging the appellants repossession fees; and (2) TDAF did not provide the requisite pre-repossession notice as required under the statutes. Conversely, TDAF contends that it recovered the Camaro to preserve its security interest in the vehicle, which falls outside either statute but within TDAF's rights under the RISC. Further, the RISC permitted TDAF to seek reimbursement of the associated charges before releasing the car to Noel.

The MCDCA provides, in pertinent part, that a "collector may not . . . claim, attempt, or threaten to enforce a right with knowledge that the right does not exist[.]" CL § 14-202(8). However, the MCDCA makes clear that its provisions only apply to attempts to collect on a consumer transaction debt, as it defines "collector" as a "person collecting or attempting to collect an alleged debt arising out of a consumer transaction." CL § 14-201(b). A "consumer transaction," then, is "any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household purposes." CL § 14-201(c). As the court stated in *Davis, supra,* "the mere act of repossessing property does not satisfy the statutory definition of collecting or attempting to collect a debt within the meaning of the MCDCA." 251 F. Supp. 3d at 932. Rather, the

[3] Although appellants assert that TDAF violated the MCPA, they make no claims or arguments pursuant to the MCPA. As such, we will not address it.

repossession of a vehicle is the enforcement of a security interest, defined as "an interest in personal property or fixtures that secures payment or performance of an obligation." CL § 1-201(b)(35); *Davis*, 251 F. Supp. 3d at 932 (internal citation omitted).

Despite the *Davis* court's classification of repossession as an enforcement of a security interest, Noel reasons that *Davis* can be easily distinguished from the facts here. There, the parties entered into a RISC for the installment purchase of a Toyota Camry. *Id.* at 928. After the appellee, Toyota Motor Corporation ("TMCC"), "concluded Davis was late on her payments under the RISC," it began the repossession process on the vehicle through a third-party towing service named "C.A.R.S." *Id.* When an agent of C.A.R.S came to collect the vehicle, a violent physical altercation ensued between Davis and the agent. *Id*. at 928-29. Davis then sued, among other things, for TMCC's violations of the MCDCA and MCPA, arguing that the MCDCA "prohibits a 'collector', while collecting or attempting to collect a debt, from using or threatening force or violence." *Id.* at 932-33 (citing CL § 14-202(1)). As discussed, *Davis* held that TMCC's "mere repossession" was not a debt pursuant to the MCDCA, but was rather the protection of a security interest it had in the vehicle. *Id*. "Mere repossession does not fall within the activity regulated by Maryland's laws governing collectors or collection agencies." *Id*. at 933. Noel urges us to consider that *Davis*' holding is not applicable here, as the creditor in *Davis* "neither demanded nor received any payment" from the debtor. Noel avers that when TDAF demanded repayment of the repair bill it paid on his behalf, it asserted a right to payment that it did not have in violation of the MCDCA and the MCPA.

More on point, in Noel's view, is our holding in *Allstate Lien & Recovery Corp. v. Stansbury*, 219 Md. App. 575 (2014), *aff'd*, 445 Md. 187 (2015). In *Allstate*, the appellee, Mr. Stansbury, brought his vehicle into a repair shop after it was struck by another vehicle. *Id*. at 578. When the repair work was complete, Stansbury requested a payment plan on the outstanding bill. *Id*. However, the repair shop required the bill be paid in full. *Id.* Fifteen days after the repair shop informed Stansbury of the payment due date and with the bill still outstanding, the shop, together with appellant, Allstate, began the process of selling Stansbury's vehicle. *Id.* The Lien Notice provided that Allstate would sell Stansbury's vehicle at a public auction unless Stansbury paid the $6,630.37 repair charges and "Costs of Said Process" for an additional $1,000. *Id*. at 579. The trial court determined, and this Court affirmed, that Allstate did not have the right to include a processing fee as part of the garageman's lien for the repair work under CL § 16-202. *Id*. In so concluding, we reasoned,

> The plain language of CL § 16-202 is clear and unambiguous. A person who provides a service to, or materials for, a vehicle has a "motor vehicle lien" only for those charges incurred for repair or rebuilding, storage, or tires or other parts or accessories. A processing fee is not included as part of the lien.
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> A review of the statutory scheme as a whole does not, as appellants argue, suggest a different conclusion. Although processing fees may be recovered if the vehicle is sold or if judicial proceedings are instituted, the statutory scheme does not suggest that processing fees constitute a part of the lien that may be included as a part of the amount the consumer must pay to redeem the vehicle.

Id. at 587.

Despite Noel's contention, as we see it, the case at bar is more similar to *Davis* than to *Allstate*. We agree with the discussion in *Davis* as it pertains to the facts at hand, namely, the repossession of a vehicle is not a collection of a debt but is the enforcement of a security interest. Provided that TDAF did not participate in a collection of a debt, it stands to reason that the MCDCA does not apply here, because, as we discussed, MCDCA applies only to a collector who is collecting or attempting to collect a debt, which TDAF is not.

The facts in *Allstate* can also be easily distinguished from this case. *Allstate* concerned a mechanic's lien, which is not at issue here. It is not Heritage, the repair shop, who demanded additional fees in order to prevent the repossession process. Rather, it is the secured interest holder, TDAF, who applied those fees pursuant to the RISC. Although we conclude that MCDCA does not apply to the current case, this does not end our analysis. We must now look to the RISC to determine the rights of the parties outside of the statutory framework of the MCDCA and the MCPA.

II. Retail Installment Sales Contract

To facilitate the sale of the Camaro, Noel and Criswell Chevrolet entered into a retail installment sales contract, or, as noted, RISC. Criswell later assigned its rights to TDAF. Under the RISC, Noel "agree[d] not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If [TDAF] pay[s] any repair bills, storage bills, taxes, fines, or charges on the vehicle, [Noel] agree[s] to repay the amount when [TDAF] asks for it." Noel also agreed to

> give [TDAF] a security interest in: the vehicle and all parts or goods installed in it; All money or goods received (proceeds) for the vehicle; All

> insurance, maintenance, service, or other contracts we finance for you; and All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds or premiums or charges from the contract.

If Noel made a late payment or broke other covenants under the RISC, *i.e.* defaulted, he further agreed that "[TDAF] may demand that [Noel] pay all [sums] owe[d] on the contract at once, subject to any right the law gives you to reinstate this contract." "Default," pursuant to the RISC, includes untimely payments, giving "false, incomplete, or misleading information on a credit application," initiating bankruptcy proceedings, or any breach of the RISC agreements. The RISC also expressly provides, "Federal law and Maryland law apply to this contract. This contract shall be subject to the Credit Grantor Closed End Credit Provisions (Subtitle 10) of Title 12 of the Commercial Law Article of the Maryland Code [("CLEC")]."

The parties disagree about what rights the CLEC grants them vis a vis the RISC. Noel contends that CLEC required TDAF to send him a pre-repossession notice in order to collect repossession fees under the RISC. TDAF answers that the RISC simply gave it the right to demand Noel repay the cost of the repair bill and "fines or other charges on the vehicle," including the $250 repossession fee. If anything, TDAF contends, it fulfilled its own promises under the RISC when it notified Noel he was required to reimburse TDAF for the repair bill and demanded the repossession fee before appellants could reclaim the car. We agree with Noel and explain.

CLEC authorizes a credit grantor to "repossess tangible personal property securing a loan under an agreement, note, or other evidence of the loan, if the consumer borrower is

in default." CL § 12-1021(a)(1). Here, we conclude that the record establishes that Noel was in default under the RISC. CL § 12-1021(c)(1) provides that, "*At least 10 days before a credit grantor repossesses any tangible personal property, the credit grantor* **may** serve a written notice on the consumer borrower of the intention to repossess the tangible personal property." (emphasis supplied). Further, CL § 12-1021(c)(2)(i)-(ii) requires that the notice must "[s]tate the default and any period at the end of which the tangible personal property will be repossessed; and [] [b]riefly state the rights to the consumer borrower in the case the tangible personal property is repossessed." To redeem the property subject to repossession,

> [. . .] the consumer borrower **shall**:
> (1) Tender the amount due under the agreement at the time of redemption, without giving effect to any provision which allows acceleration of any installment otherwise payable at that time;
> (2) Tender performance of any other promise for the breach of which the property was possessed; and
> (3) *If the discretionary notice provided for in subsection (c) of this section was given*, pay the actual and reasonable expenses of retaking and storing the property.

CL § 12-1021(h)(1)-(3) (emphasis supplied).

As a preliminary matter, we note that Noel did not allege any RISC violations against TDAF in his original complaint before the circuit court. He did, however, raise this issue during the motion for summary judgment without any noted objection, and the circuit court considered this argument in its grant of TDAF's motion. Generally, appellate courts "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131(c). However, we "may decide

such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." *Id.* We recognize that Rule 8-131 is a means to ensure the "basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *Hiltz v. Hiltz*, 213 Md. App. 317, 330 (2013) (citing *Medley v. State*, 52 Md. App. 225, 231 (1982)). Given that TDAF has not objected to nor raised the issue of Noel's failure to properly plead his RISC claim in any of its court filings, and in the spirit of judicial economy and the orderly administration of law, we shall review Noel's RISC claim.

We hold that the CLEC provisions governing the RISC required TDAF give Noel the discretionary written notice of its intention to repossess the car 10 days before repossession in order to collect any repossession fees. In its answer to Noel's complaint, TDAF "admits that Heritage surrendered possession of the vehicle to Quality on Friday December 23, 2016" after TDAF paid the outstanding $4,754.36 repair bill to Heritage. TDAF also acknowledges that it required Noel to pay the $4,754.36 repair bill and an extra $250 repossession fee, imposed by TDAF, to release the Camaro. Under CLEC, then, in order for TDAF to properly demand the actual and reasonable expenses of retaking and storing the Camaro upon its repossession, the $250 fee, TDAF was required, at the latest, to give Noel notice of its intent to repossess the Camaro by December 13, 2016.

TDAF claims in its answer that it sent Noel "notice" on December 27, 2016, four days after repossession[4] and a Notice After Repossession or Voluntary Surrender on

[4] This notice is not found in the record.

January 10, 2017. Not only do these dates fall outside of the 10-day pre-repossession window, they fall *after* the date of repossession. Although, as CLEC expressly states, the written pre-repossession notice is indeed discretionary, the timely pre-repossession notice was required if TDAF wanted to properly charge Noel with the $250 fee. Because TDAF failed to provide such notice, under the RISC and CLEC, it was barred from charging that fee. And the circuit court erred in assessing the same. We therefore vacate that award.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS REVERSED. CLERK TO VACATE THE AWARD OF $250.00. APPELLEE TO PAY THE COSTS.