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Utah Supreme Court

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Recommended Citation
Reply Brief, *Arnold Machinery Co. v. Balls*, No. 16934 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY,	:	
Plaintiff-Appellant,	:	
vs.	:	No. 16934
DAVID M. BALLS and RICHARD S. JOHNS II, co-partners, dba UTAH EXCAVATING,	:	
Defendants-Respondents.	:	

APPELLANT'S REPLY BRIEF

Appeal from a Judgment
of the Third District Court of Salt Lake County
The Honorable Homer F. Wilkinson, Judge

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FILED

AUG 18 1980

Clerk, Supreme Court, Utah

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UTAH EXCAVATING, :

Defendants-Respondents. :

STATEMENT OF FACTS

Arnold disagrees with many of defendants' statements. In defendant's statement of facts, it is asserted (p.4) that Arnold was willing to have the rental continue beyond six months so long as payments were kept current. That is true, but it is not significant, because all that was discussed insofar as having the lease extend beyond six months was extension for one or two months (T.266), not three years.

Defendants point out (p.4) that Arnold filed a financing statement. Arnold did so in order to protect its priority in the event the option was exercised, since a UCC-1 must be filed within ten days of delivery:

> If the secured party files with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing. 70A-9-301(2).

Because of the risk of loss of priority for failure to file, even though a security interest was not intended, the code was

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amended to provide that filing is not a factor in determining whether or not a lease is intended as security.

> A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in section 70A-9-402. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security [section 70A-1-201(37)]. However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing. 70A-9-408.

Thus, the filing of a financing statement is no indication as to whether there is a lease or a security interest.

Defendants assert (p.5) that attempts were made to get financing to enable them to exercise the option; but, before that could be done, Arnold entered into a lease with Salt Lake County. The evidence is to the contrary:

> Q. ...When did you wish to exercise the option, at the end of the six months?
>
> A. We had intended to do that. However at the end of the six months we had not made six payments. We didn't feel like we could obtain the financing at that time with the little amount that we had accrued, so we didn't even attempt to finance the machine at the end of six months. (Johns T.212)
>
> Q. All right. State what was said concerning termination, Arnold terminating?
>
> A. ...He finally told me that he did not have the money. In his words, 'I guess I will have to forget it.' (Welch of Arnold T.318)

Arnold acted reasonably in attempting to dispose of the property, by lease or sale, when the defendants indicated they couldn't finance it and would have to "forget it."

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Defendants point out (p.5) that Arnold did not give them notice that it was entering into the lease with Salt Lake County or that it intended to dispose of the equipment, seemingly implying that defendants were not aware that Arnold would re-lease or sell the equipment. The evidence is:

> A. The last conversation that I finally had with Mr. Balls, I told him it was subject to future rental and that we did have people looking to rent this machine. (Welch of Arnold T.318)

Defendants assert (p.5) that it was stipulated between the parties that if defendants exercised their option to purchase, then the various amounts would have to be paid depending on the date selected. The stipulation was as to the correctness of computation, but that stipulation had nothing to do with any recognition that the option could be extended to any later dates after the six-month lease had terminated.

Defendants assert (p.7) that their financial situation was not typical of the seventy-five to eighty percent of those entering into equipment leases with Arnold, who do not exercise their option to purchase. Defendants' financial situation was typical. Their inability to raise a down payment was one of the very reasons that a lease instead of a contract of sale was chosen by them.

> A. ...And because of our financial condition, not having sufficient money to make a down payment and being aware that these kinds of alternatives were available, we elected to use that kind of an arrangement rather than have to come up with that much capital at that time in order to get the equipment to put it to use. (Johns of Utah Excavating T.195)

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Defendants assert (p.7) that most of those who do not exercise the option have only a temporary need for the equipment and that there was no testimony from Mr. Balls or Mr. Johns that the reason for the lease was to give them time to determine whether their work would last. To the contrary, the other reason that a lease instead of a contract of sale was chosen by defendants was that they only had work "more or less" committed.

> Q. What was that?
>
> A. That we were interested in obtaining a backhoe so that we could use it to perform work that we had more or less had committed to us if we had that type of equipment. (Johns of Utah Execavating T.169)
>
> A. ...nor were they sure if the type of work they had was going to last for this two or three-year period. So in lieu of buying the piece of equipment we then elected to rent it to them until they found out if the work was going to hold out. (Byerline of Arnold T. 110, 111)

Defendants reiterate (p.7) that they attempted to arrange financing right up until the time the equipment was leased to Salt Lake County. The evidence is to the contrary (supra p.2).

Defendants assert (p.8) that Mr. Johns did contemplate what the machine would be worth after six months, but had not made any calculations as to an exact figure. His testimony is not properly represented. He testified that he had no such anticipation:

> Q. Did you form an expectation as to what the equipment, or an anticipation as to what the equipment, would be worth after one year?
>
> A. No. I don't recall having done that. (T.190)

Defendants assert (p.8) that they did not terminate the lease, but attempted to arrange financing even after the equipment was returned. As pointed out above, Mr. Johns testified,

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"We didn't even attempt to finance the machine at the end of six months." (T.212) and that they would have to "forget it." (T.318)

Defendants assert (p.8) that the court did not state that it was a waste of its time to consider the intention of the parties as to when the option would be exercised. The court stated:

> MR. DIBBLEE:
> Well, I mean I didn't, I thought that that issue was more or less concluded and there wasn't any sense of wasting the Court's time.
>
> THE COURT:
> I think it really is myself...

DEFENDANTS' ARGUMENT POINT I.

Defendants assert (p.8) that they had the option to acquire the equipment for no additional consideration and that, therefore, the lease was intended as security. Their argument is based upon the construction of the provision in the written lease relating to the term of the lease. It is submitted that defendants and the lower court erroneously concluded that Arnold could not terminate the lease at any time unless the defendants were in default and that the lease could thus run forever. By extending the term to whatever long enough period at which rentals would necessarily exceed the option price, obviously a point is reached at which no additional consideration would have to be paid. As pointed out in appellant's brief, such is not a reasonable construction of the lease. The provisions for default relate to reasons for termination while the lease is in effect rather than being a limitation on the right to terminate.

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The construction of this written lease as made by the lower court is not binding upon this Supreme Court and, in fact, the lower court's "views thereon are not indulged any special credit." This court said in Ephraim Theater Company v. Hawk 7 U 2d 163, 321 P2d 221, 223:

> Unless uncertainty opens the door to extraneous explanation, the trial court is in no position of advantage in interpreting documents, and his views thereon are not indulged any special credit as are findings on issues of fact.

As stated in 5A CJS Appeal and Error, § 1660:

> Since the interpretation of a written instrument presents a question of law, however, a reviewing court is not bound by the conclusion of the trial court. Thus, the appellate court is not bound by the trial court's construction of unambiguous language of a written document, or by the construction of a written instrument based solely on the terms of the instrument, where no extrinsic evidence was introduced on the issue of its proper construction, or where the evidence is without conflict and not susceptible of conflicting inferences, and if a finding is in conflict with an express provision of a written agreement of the parties, which is the controlling fact in the case, the finding will be disregarded by the appellate court.

There was testimony as to extension of the lease term for a few months, but there was no evidence relating to whether or not the lease was perpetual insofar as the lessor was concerned other than the lease document itself. Consequently, it is the prerogative of this court to properly construe the written instrument.

With a proper construction of the termination provision in the lease, the authorities cited by defendants in their Point I. are inapplicable. Furthermore, as pointed out in our Appellant's Brief, even if applicable their rationale is fallacious and should not be followed.

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DEFENDANTS' ARGUMENT POINT II.

Defendants argue that under the three tests set forth in FMA Financial Corp. v. Pro-Printers, __ U 2d __, 590 P2d 803 the lease was intended as security.

Test 1. (Compare the option price with the original list price or the price of the property.) Obviously, when any lease term is infinitely extended, total lease payments will exceed the price of the property, and thus no additional consideration would have to be paid upon exercise of the option to acquire title. But when viewed as of the time the parties entered into the transaction, at which time they intended that the option, if exercised, would be exercised at the end of the six-month lease, payment of the substantial option price of $75,736.50 would have been necessary as compared with the $92,220 original value. That is not a nominal consideration.

Test 2 (Compare the option price with "sensible alternatives.") Defendants argue that Arnold's salesman represented that Utah Excavating was building up an equity with each payment. It could have become an "equity" if defendants had work to do to utilize the machine at the end of the six months, and if defendants could get financing at the end of six months, and if they then elected to convert the lease to a contract of purchase. At the time the lease was entered into, defendants were not sure that they had work, nor that they could finance it in the future. With either foresight or hindsight, as to need for the machine and as to ability to finance, there was a sensible alternative to the payment of an additional $75,736.50 in order to acquire a

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machine, which was, to begin with, worth $92,220 and which would have had an additional six months' "wear and tear." That sensible alternative was to not agree to buy it if it was then neither needed nor affordable.

Test 3 (Compare the option price with the fair market value at the time the option is to be exercised.) Defendants again rely upon values and option prices at various dates beyond the intended lease period assuming that the option could be exercised at any time in perpetuity. Even if those values were relevant, defendants' estimates of value at the various times selected by them (p.17) are high, as shown by comparing their estimate for March 1979 of $81,000 with the $66,400 paid by Salt Lake County in March 1979 in an arms-length sale with competitive bidding.

DEFENDANTS' ARGUMENT POINT III.

Defendants argue that the trial court's "finding" that the agreement is intended as a security instrument should be sustained. This is more a conclusion of law than it is a finding of fact, and it is based upon the trial court's construction of the equipment rental agreement that it could be terminated by Arnold only for cause and that, so far as defendants were concerned, it would continue in perpetuity and that the option could be exercised at an infinite time in the future.

As pointed out previously (supra ps. 5, 6), the construction of a written agreement by the lower court is not binding upon this court because interpretation of a written instrument presents a question of law. Ephraim Theater v. Hawk 7 U2d 163, 321 P2d 221; 5A CJS Appeal & Error §1660. A reasonable construction

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of the lease is that either party could terminate without cause after six months. If such a reasonable construction is given by this court, then the argument of defendants that the option could be exercised with the payment of no consideration at an infinite time in the future is inapplicable. The inescapable alternate conclusion is that a substantial consideration would have to have been paid at the time when the parties intended the option was to be exercised.

Defendants argue (p.21) that "the purpose of the equipment rental agreement was to enable Utah Excavating to acquire an equity in the excavator." That statement is misleading. A correct statement would be that "the purpose of the equipment rental agreement was to enable Utah Excavating to determine at a later date whether or not its jobs were such that it would need to purchase the excavator. In the meantime if rental payments were made during a sixth month period, Utah Excavating could then, if it desired, exercise its option to purchase the equipment and then enter into a contract to purchase it, applying rental payments as a down payment."

DEFENDANTS' POINT IV.

Defendants assert that Arnold would not be entitled to recover the unpaid rental payments because Arnold had not given written notice of the sale to Salt Lake County as required by the UCC for conditional sale repossessions. Defendants cite FMA as authority therefor.

There are three possibilities with authorities for each position as to the effect of failing to comply with the require-

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ments of the code: (1) award damages to lessee, (2) bar any deficiency award to lessor, or (3) presume lessor has no deficiency. A Utah Law Review article summarizes these alternatives as follows:

> Section 9-507(1) permits the debtor to recover from the secured party any loss caused by the secured party's failure to comply with the provisions of part 5. Although the Code speaks no further on this issue, three distinct positions have emerged regarding the effect of a failure to notify the debtor upon the secured party's right to recover a deficiency. The first is the "sole remedy" rule which limits the debtor to the remedy that a strict reading of Section 9-507 provides: 'the debtor can either bring a separate action or assert a setoff or counterclaim in the deficiency suit to recover for the damages caused by the failure to notify.' Second is the 'no deficiency rule,' which makes notice by the secured party a condition precedent to recovery of deficiency judgment. Third is the 'Arkansas Rule,' under which a failure to notify does not result in a bar to a deficiency judgment, but rather triggers a presumption that the collateral was worth at least the amount of the debt. The burden is then placed on the secured party to prove what would have been realized from a commercially reasonable sale.
> Utah Law Review, 1979 No. 3, 567, 573 Leases As Security Agreements And The Effect of A Failure To Notify On A Secured Party's Recovery Of A Deficiency Judgment: FMA Financial Corp. v. Pro-Printers

It is not clear from the FMA decision which of the three rules should apply if the lease here were, as a matter of law, a conditional sale. This court said that FMA Financial Corp. "did not meet the burden of proving all aspects of the sale where commercially reasonable." FMA Financial (supra at 807-808). This language indicates that the court was applying what was referred to above as the "Arkansas Rule," which does not bar recovery if it is shown that the sale was commercially reasonable and that the proceeds therefrom were insufficient to discharge the debt. Here the sale was to the county, a disinterested third party, and

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Arnold had every reason to sell at the highest price obtainable. There is nothing to show that, had notice been given any better or higher price, would have been obtained on the sale of the equipment. If this court had been adopting the "no deficiency rule" in FMA, it could have ended its analysis upon finding a failure to notify and would not have needed to discuss the failure to conduct a commercially reasonable sale. The fact that this court did discuss the failure to conduct a commercially reasonable sale suggests that it was leaning tward the "Arkansas Rule," under which commercial reasonableness becomes relevant once the failure to notify is established. Assuming that rule to be applicable, Arnold did show that it sold in a commercially reasonable manner to the county and realized $66,400 from such sale. If, as a matter of law, there was a conditional sale instead of a lease, then the "amount of the debt" would be the option price of $92,220 plus the option charges of $17,291 (1¼% per month for the fifteen months from the date of the contract to date of sale to the county) or a total of $109,511. Subtracting payments received:

Defendant's rental payments	$ 17,095	(Ex. D9)
Salt Lake County rental payment	22,000	(T.97,142, Ex. D10)
Salt Lake County purchase pay't	66,400	(Ex. 6, T.127)
Total Payments	$105,495	

the difference would be $4,016. Thus, even if the lower court's conclusion that a security interest was created were correct, Arnold would still be entitled to a $4,016 deficiency.

Defendants argue (p.23) that "the law abhors a forfeiture" but then misapplies the rule. The effect of the lower court's

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decision is to forfeit the lessor's right to rentals just because of a technical failure to give a notice of sale which it did not know it had to give because, understandably, it thought it was dealing with a lease and not a sale. Written notice would not have changed matters, inasmuch as defendants were already aware that Arnold intended to dispose of the machine and defendants had stated they would have "to forget it because they did not have financing." (T.318) The notice, therefore, would have accomplished nothing.

Defendants cite dollar figures (p.23) showing total amounts received from Arnold from all sources. Defendants failed in their analysis to recognize the fact that monthly short-term rental payments are usually higher than monthly long-term contract payments because of the difference in overhead and depreciation. More importantly, defendants' analysis omits the 1¼% per month option charge which according to the terms of the option must be added to the price of the equipment to cover that overhead, the principal item of which is interest on the funds tied up in the equipment.

CONCLUSION

The lower court was in error for the following reasons:

1. It misconstrued the lease agreement as being in perpetuity so long as rental payments were received insofar as the lessor was concerned, but being only for a six-month period and so long thereafter as lessee may desire it to continue insofar as the lessee was concerned. Construction of the written lease is a matter of law and this court should correct that misconstruction. When properly construed as being a six-month lease as to both

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parties, but to continue thereafter so long as both parties are in agreement that it should continue, the lower court's analysis fails. The point at which it is determined as to whether or not a substantial payment would remain to acquire title would then be at the end of six months, not at the ultimate time, which any lease in perpetuity would reach when the rental payments would exceed the initial value of the property.

2. Written notice of the sale to the county was not given because the parties thought there was a lease and not a sale, and that therefore no notice was needed. Defendants were actually aware that Arnold was going to dispose of the equipment. They also had indicated they were giving up any claim to same.

3. A sale would have been intended only if both parties were bound, Arnold to sell for the price and defendants to pay all or substantially all of same. Here, defendants were not bound to pay more than a small percentage of the price. The essential element of a sale, that both parties be bound, is lacking.

4. Even if there were, as a matter of law, a security interest, the court assumed that because written notice of sale was not given, as provided by the Code, Arnold forfeited its claim. Defendants thereby obtained free use of the machine. Such should not be the case where the sale is shown to be reasonable and where it is shown that nothing different would have occurred if notice had been given, which was shown here. There should be no forfeiture.

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5. The FMA decision is not controlling here because in FMA the lessee was bound to pay rentals during the full lease period of thirty-six months, and there then was truly only a nominal consideration left to be paid in order to capture the equipment. Here, the lessees were only bound to pay six months' rental at the end of which time they had the option to pay the substantial sum to purchase the equipment or to return the equipment without any obligation.

The option price at the end of six months, or at the time the property was sold to the county, was a very substantial sum which in no way could be deemed "nominal consideration."

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two copies of Appellant's Reply Brief to counsel for defendants on this 14 day of August, 1980, addressed as follows:

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