1980

Centurian Corporation v. A. L. Cripps and Walter Cripps et al : Brief of Appellants

Utah Supreme Court

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James R. Brown; Bryce K. Bryner; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTURIAN CORPORATION, Plaintiff and Appellant, vs. A. L. CRIPPS and WALTER CRIPPS, Defendants and Respondents.	SUPREME COURT No. 16971
PETTY MOTOR LEASE, INC., Plaintiff in Intervention, Respondent, vs. CENTURIAN CORPORATION, RICHARD NICKLES and MARGARET K. NICKLES, Defendants in Intervention Appellants.	

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PETER F. LEARY, JUDGE

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BRIEF OF APPELLANTS

NATURE OF CASE

Centurian Corporation ("Centurian") brought an action against A. L. Cripps and Walter A. Cripps ("Cripps"), claiming a delinquent amount due under a lease agreement to repossess a tank trailer, the subject matter of the lease. Subsequently, Petty Motor Lease, Inc. ("Petty"), claiming to be the owner of the vehicle leased by Centurian to Cripps moved to intervene in the action. The motion to intervene was granted. However, the case was filed in a separte number and file. Trial was held

July 13, 1976. The trial court, in a memorandum decision and in the judgment, held that it was without jurisdiction of the complaint of Petty against the defendants in intervention, Centurian Corporation, Richard Nickles and Margaret K. Nickles.

Petty appealed and Centurian and Nickles cross-appealed. This court remanded the matter back to the trial court and the trial court gave relief to Petty as against Centurian and Nickles but denied relief to Centurian and Nickles as against Cripps. Both Petty and Centurian/Nickles sought additional relief of the trial court by way of motions to amend, but both motions were denied. Centurian and Nickles timely perfected this appeal.

RELIEF SOUGHT ON APPEAL

Appellants Centurian and Nickles seek a reversal of the trial court and a judgment in their favor against Petty; or in the alternative a reduction in the judgment in favor of Petty together with relief against Cripps in whatever amount Petty obtains against Appellants.

STATEMENT OF FACTS

In February 1973, Centurian and Nickles leased a new 1973 trans-liner semi tank trailer from Petty. The lease is dated February 1, 1973 and is guaranteed by Richard H. Nickles

and Margaret K. Nickles individually. (Exhibit 7-I) At the same time an additional document was executed wherein Centurian, at the end of the lease agreed to purchase, after all payments under the lease have been paid, for the sum of $621.00. This document is guaranteed by Richard H. Nickles only and not by Margaret K. Nickles. (Exhibit 8-I)

Centurian used the trailer for a few loads and then leased the same to Cripps. Cripps was to hold Centurian and Nickles harmless under the terms of the lease and or purchase agreement. (Exhibit P-1) It was admitted by Cripps at trial that they were in default of the payments as required by Exhibit P-1 and the trial court granted judgment for all past due payments on the trailer to Centurian.

In February or March 1974, the tank trailer was stolen by a person or persons unknown. This theft was duly reported to the Carbon County Sheriff. (Record, 269; Exhibit 4-P) At the time of said theft, Centurian/Nickles was current on the obligation to Petty. (Exhibit 9-I)

Exhibit 7-I, which was drafted by Petty, specifically required Centurian/Nickles to provide insurance for public liability. The provisions relating to insurance coverage for fire, theft, comprehensive and collision have been left blank, but does recite that Petty may have in effect insurance coverage for fire, theft, comprehensive and collision and that if Centurian/Nickles furnishes a policy for this coverage, then Petty would cancel their own coverage.

The lease further provides for termination automatically if any rental payment is not paid within ten (10) days of the due date. There was a payment due on March 15, 1974 for March. No payment was made by either Centurian/Nickles and/or Cripps. There was a deposit of $3,594.63 made on February 1, 1973 to insure faithful performance of the lease and return of the property. If there is a violation of the lease agreement, Petty may retain such portion to compensate for the loss or damage. (Exhibit 7-I)

In the first proceeding, Centurian/Nickles was granted judgment only as to the past due installments per Exhibit P-1 and attorney's fees (Record 105-110), while specifically holding that the trailer had been stolen on/or about March 15, 1974 and that no evidence was introduced of Cripps' negligence or that Cripps had failed to properly take care of the trailer. (Record 109)

The trial court, on remand held that Petty and Centurian/Nickles (both Nickles) had entered into a purchase agreement and that the sum of $12,367.37 was due on said agreement. Although the court had heretofore dismissed Cripps' counterclaim (Record 110), the trial court concluded that Cripps owed no liability to Centurian/Nickles.

ARGUMENT

POINT I

THE COURT ERRED IN HOLDING THAT EXHIBITS 7-I AND 8-I CONSTITUTE A SALE.

There is no dispute that the parties executed Exhibits 7-I and 8-I, insofar as they bear the signatures of the respective parties. Exhibit 7-I is labelled "Lease." The terms all discuss a lease. There are no provisions of purchase in Exhibit 7-I.

Exhibit 8-I, labelled, "Agreement of Sale and Purchase," drafted by Petty, is conditional and does not constitute a sale under the Uniform Commercial Code. The language of condition is as follows:

> User has leased from Owner a 1973 trans-liner semi-tank trailer, Serial No. 151472, and desires to purchase said unit at the termination of the lease, after all payments called for by the lease have been paid, and the Owner desires to sell the unit to User at that time.

This is clearly a provision giving Centurian the right to purchase at the termination of the lease and <u>after</u> all payments have been made. The lease provides in paragraph 6.

> This lease may be terminated at any time during the period of the Lease. . . . If this Lease is terminated by either Owner or User for any reason or expires as provided in paragraph 1, hereof, User agrees to pay to Owner any and all past due payments . . . plus the final lease payment in full, and . . . 45 percent of the monthly rental multiplied by the number of months the lease has yet to run. . . . ."

Centurian had the right, at any time, to terminate the lease. If it had so elected, the trailer was to be returned less reasonable wear and tear and the liquidated damages as

provided in paragraph 6 would apply. The Uniform Commercial Code defines in Section 70A-2-106, Utah Code Annotated, 1953, as amended, a sale as:

> A "Sale" consists in the passing of title from the seller to the buyer for a price. . . .

Title to the trailer in question always remained in Petty during the term of the Lease. The language of Exhibit 8-I is controlling and discloses that only upon:

> . . . The termination of the lease, after all payments called for by the lease have been paid, and the Owner desires to sell unit to User <u>at that time</u>. (emphasis supplied)

is there an intent or desire to pass title to buyer from seller for a price. The words "at that time" refer back to the conditions of termination of the Lease and all payments called for by the lease have been made. The unrebutted testimony and admission by Petty is:

> Q. (By Mr. Petty) Now, Mr. Petty, I show you what's been marked as Exhibit 8-I, and I'll ask you if you recognize that document?
>
> A. Yes, I do.
>
> Q. Would you described it for the Court?
>
> A. Yes, it's a purchase agreement to be effective at the end of the lease which I just described. After the lease payments have been made, then the purchase agreement is for $621 to be effective at the end of the lease. (Record 276, 277)

Petty admitted the so called "sale" was to be effective <u>after</u> the lease payments have been made. Mr. Petty further testified at page 279:

Q. Has Centurian Corporation ever been delinquent on this lease?

A. Yes.

Q. Since what date?

A. Since March of '74. They were delinquent a little bit at--for short periods before that a time or two, but since March of '74 they have been delinquent.

The provisions of the lease state:

> That Owner hereby leases to User. . . . which lease shall be strictly under the following terms and conditions:
>
> 1. User agrees to pay to Owner as rental for the use of said property the sum of $580.00 per month. . . . If any rental payment is not paid within 10 days after the due date thereof, this lease shall automatically expire. (emphasis added)

This Lease expired, by its own terms, on the 25th day of March, 1974. At that point in time, not all of the payments called for under the lease had been made. These covenants and conditions precedent were not complied with and hence there could not be a valid enforceable contract of sale.

POINT II

EVEN IF THERE IS A CONTRACT OF SALE, MARGARET K. NICKLES IS NOT BOUND TO SAID SALE, SINCE SHE IS NOT A PARTY TO SAID AGREEMENT.

The trial court relied on a construction of both Exhibits 7-I and 8-I together to form a "sale." Exhibit 8-I does

not bear the signature of Margarent K. Nickles. It is elementary that in order to hold Margaret K. Nickles personally liable, she would have to be signatory to said agreement.

POINT III

THE LEASE AGREEMENT PLACES THE RISK OF THEFT ON PETTY ABSENT NEGLIGENCE ON BEHALF OF CENTURIAN/NICKLES.

The Lease agreement provides in part:

> The (_____) agrees to maintain. . . fire, theft, comprehensive . . . insurance on the above described property, which insurance shall provide protection for Owner and User as their interests may appear. . . . Owner may have in effect at the commencement of this lease fire, theft, comprehensive . . . insurance. If User furnishes Owner with evidence of satisfactory insurance coverage within fifteen days from the commencement of the lease, Owner's insurance policy shall be terminated with no expense to User. However, if evidence of satisfactory insurance coverage has not been furnished by User within fifteen days of the commencment of this lease, User shall pay to Owner the total premium under such insurance policy of Owner and that policy may be kept in full force and effect during the term of this lease.

Petty drafted the agreement. It is a form used over the years specifically prepared by Petty. Petty, in preparing this contract, filled in the preceding insurance provision wherein Centurian was made responsible for obtaining liability coverage. Petty left the fire and theft blank. By doing so Petty assumed that risk since Petty is the owner of the property and title had not passed. Centurian had no knowledge of whether Petty had fire and theft coverage, but the language would lead

one to believe Petty had this coverage in mind and had taken steps to cover this risk.

The uncontroverted evidence discloses that Petty had actual knowledge of the sub-lease agreement (and/or sale) to Cripps. At page 74 of the record there appears an assignment, wherein Petty acknowledges the Centurian-Cripps Agreement and gives Centurian all right and interest to pursue its cause of action. Centurian did not have possession of, nor control of, the trailer at the time of its loss by theft. Mr. Walter Cripps testified at page 269:

> Q. When was the last time that you saw the trailer.
>
> A. February of '74.
>
> Q. And where was it at that time?
>
> A. Henry Mills' property in Lower Middle Creek.
>
> Q. Where is that? Where is Lower Middle Creek?
>
> A. South of Price about four miles.
>
> Q. Carbon County?
>
> A. Carbon County.
>
> Q. Do you know where the trailer is today?
>
> A. I do not.
>
> Q. Have you a record--well, what has happened to the trailer? Do you know what has happened to it?
>
> A. The trailer was stolen, taken off from Henry Mills' property without permission.
>
> Q. Did you make any report of that to the authorities?

A. As soon as I found out it was stolen I reported it.

Q. Calling your attention to Exhibit 4P, were you the person who reported that missing trailer on that particular date?

A. To the best of my knowledge that is true and correct.

The trial court found, at page 109 of the record:

12. That on or about March 15, 1974, the tank trailer was stolen.

13. The record is absolutely devoid of any evidence that Defendants were negligent or failed to take proper care to the tank trailer so as to prevent it from being stolen.

Centurian/Nickles did not even have possession of the trailer at the time of the theft, but were seeking to obtain possession by way of a Writ of Replevin. The law has long been established under circumstances of bailment for hire that in the absence of negligence the bailee is not liable for an act of a third party intervenor. In 8 Am.Jur.2d Bailments §201 by the following language:

Unless a bailee has violated his contract he will not be liable in the absence of negligence, for loss of injury in respect to the thing bailed, resulting from the inherent nature of the property itself or some infirmity thereof, from disaster or accidental casualty or from robbery, burglary, or theft.

This general law has been applied by this court in the case of Barlow Upholstry and Furniture Co. v. Emmel, 533 P.2d 900 (Utah 1975). In the case of Stehle Equipment Co. v. Alpha Construction & Dev. Co., 247 Md. 210, 230 A.2d 654 (1967) the Maryland court in addressing this question stated at page 655:

> In its brief, appellee conceded that there was a bailment for hire which imposed upon the bailee an obligation to exercise ordinary care and diligence in using and safeguarding the bailed property and to return it in as good condition, ordinary wear and tear excepted, as when it was received. (citations omitted) Once appellant proved the delivery, the bailment for hire, and the unexplained failure to return the property in its condition when received, a prima facie case of negligence was made out. However, where the loss was accounted for as having been occasioned by a cause which would excuse the bailee, the defense was complete unless the bailor followed by showing that the bailee, by the exercise of ordinary care, might have avoided the injury. (citations omitted and emphasis supplied)

This same view has been held by the Texas court in Tuloma Rigging, Inc. v. Barge and Crane Rentals, Etc., 460 S.W.2d 510 (Texas 1970) wherein it states:

> We think it is the law that if a lessee, without fault, is denied useful possession of the leased property, the purpose of the lease agreement is so frustrated as to discharge lessee of his obligation further to pay rent. A mutual benefit bailee is not liable if the subject-matter of the bailment has been injured by some internal decay, by accident, or by some other means wholly without his fault, and in the absence of some special stipulation, as injury to or loss of the property usually falls on the bailor. The bailee, however, is required to exercise ordinary care to preserve and protect the bailed property in the absence of agreements providing otherwise. (citations omitted and emphasis supplied)

To the same effect is the Gray Eagles, Inc. v. Lucchese, 37 Mich. App. 322, 194 N.W.2d 373 (Mich. 1972). The act of theft was an independant act over which Centurian/Nickles had no control. The only possible thrust of negligence would be the choosing of Cripps as a sub-lessee. No allegation exists of

said negligence, nor was any proof offered by any party of any negligence on behalf of anyone. It is therefore submitted that:

A. Petty assumed the risk by the insurance provisions of the contract (Exhibit 7-1).

B. Petty as bailor assumed that risk as a matter of law absent any negligence on the part of Centurian/Nickles and/or Cripps.

Since the subject matter of the lease itself no longer exists, there can be no performance demanded of Centurian/Nickles by Petty absent that element of negligence. The lease was paid in full through the time of the theft. Thereafter, no further payments were due, since Petty could no longer perform its part of the bargain, to wit: no trailer.

POINT IV

CENTURIAN/NICKLES IS ENTITLED TO INDEMNIFICATION FROM CRIPPS

Assuming arguendo, that the trial court is correct Centurian/Nickles is entitled to indemnification from Cripps. Exhibit P-1 states in part:

> Purchaser [Cripps] agrees that he will hold seller [Centurian] harmless from and does hereby assume and agree to pay Exhibit "A" attached hereto.

Exhibit "A" to P-1 is the combination of the Lease and Agreement of Sale and Purchase. The trial court held that Centurian had requested PIE to ground the trailer and had therefore breached its lease with Cripps. Centurian had that

right under the PIE lease. Cripps was in default by their own admission at page 264:

> Q [by Mr. Bryner] Mrs. Cripps, do you admit there was a delinquency for the month of October.
>
> A. Yes.
>
> Q. And do you admit there was a delinquency for the month of November.
>
> A. Yes.

The agreement between Centurian and Cripps provides:

> In the event of any default in the payments reserved to seller herein, the seller shall have the right to repossess said tank trailer unit with or without legal process. . . . .

It was December 19, 1973, when Centurian "grounded" the trailer (well after the admitted default of Cripps). Mr. Cripps testified:

> Q. Well, my question was: Why did you not operate the trailer after December 19, 1973?
>
> A. Well, Mr. Nickles grounded it from PIE, and I cound't put it to work with PIE. (Record 269)

Mr. Nickles testified at page 255 and 256:

> Q. [by Mr. Bryner] During the month of December, and specifically around the 19th of December of 1973, isn't it true that you contacted Pacific Intermountain Express and asked them to ground that trailer?
>
> A. I believe that was as a--after the conclusion of a meeting with Mr. Cripps personally in our parking lot where he refused to give us the money from two checks he had in his possession. Then we asked that the equipment be grounded.
>
> The demand on him at that time was made for the equipment. We told him the transaction wasn't satisfactory.

Q. All right. I'm not asking you that. I'm asking whether or not you did contact anyone at PIE with the intent of essentially grounding the trailer?

A. I believe so; yes.

. . .

Q. If you contacted PIE for the purpose of having the trailer grounded, it's true is it not, then, the trailer was not in New Mexico?

A. We didn't know where the trailer was. The purpose of calling PIE was to put an end to--impound it in their yard when it came back. The object was not for them to let it go if it came back at all.

Q. In other words, you indicated to them that you did not want that trailer to further operate if it came into their yard?

A. Into their possession; yes.

Centurian had every contractual right to try and get possession of the trailer with or without legal recourse. Centurian had the right, as one of the lessors of the equipment, to instruct PIE to impound the same. PIE did not do so. Later, the trailer was stolen. Said act of "grounding" the trailer was in conformity with Exhibit P-1.

POINT V

DAMAGES ASSESSED ARE INAPPROPRIATE UNDER THE LAW, AND THE LIQUIDATED DAMAGES ARE IN THE NATURE OF A PENALTY.

The damages assessed by the trial court are based upon an agreement of purchase and does not take into consideration the terms of the lease and prospective sale. That point will

not be reargued here. However, the lease does provide that damages of 45% of the monthly rental ($580.00) for the remaining monthly payments left on said lease, together with the last monthly payment in full is to be paid if the lease is terminated early by either party. This is to apply even if termination is under paragraph 1 which states in part:

> If the rental payment is not paid within 10 days after the due date thereof, this lease shall automatically expire.

The March 15, 1974 payment was not made nor any thereafter. On March 25, 1974 there was no lease in force, it had been automatically terminated. There would be 20 installments due of $508.00 which equals $10,160.00. Forty-five percent of $10,160.00 equals $4,572.00, plus the last installment of $508.00 equals $5,080.00 less the deposit of $3,594.63 equals a net due of $1,485.37.

However, the foregoing really has no bearing to the actual damages sustained since the trailer was stolen and no damages were in fact incurred beyond Petty's own risk. In the case of Brown v. Rennels, 539 P.2d 1312 (Colo. 1975) the court held:

> . . . [L]iquidated damages are not recoverable in addition to actual damages." (citations omitted)

Therefore, Petty is, as a matter of law, entitled to actual damages. There are no actual damages in this instance because of the theft. Petty is also estopped to assert liquidated

damages since there can be no further rents due since the subject matter of the lease is no longer available for Centurian use.

POINT VI

PETTY OWES CENTURIAN/NICKLES THE SUM OF $3,594.63.

Petty either assumed the risk of theft unless the contractual arrangements on insurance coverage and/or assumed that risk as bailor. There was a deposit acknowledged received by Petty in the amount of $3,594.63 to insure performance of the monthly payments. The contract states in part:

> User agrees to deposit with Owner the sum of $3,594.63 to be held by Owner, without interest, until all terms of this lease have been faithfully performed and the property returned to Owner in a satisfactory condition, whereupon said deposit shall be returned to User.

Petty breached the lease agreement by not being able to give to Centurian/Nickles the quiet and peaceful prossession and use of the trailer after it was stolen, nor did Petty replace said trailer. Therefore, Centurian/Nickles is entitled to the return of the deposit since at the time of the theft all sums had been paid to the theft denied Centurian/Nickles the useful possession of the leased property. The lessee is discharged of any further obligation to pay rent thereafter, see Tuloma, supra, p. 513.

CONCLUSION

The trial court erred in concluding that there was a sale and should have held there was only a lease with a conditional future sale which did not materialize. Centurian/Nickles is entitled to a judgment in its favor as against Petty in the amount of $3,594.63 or in the alternative Centurian/Nickles is entitled to judgment against Cripps for full indemnification.

In no event should any judgment be entered as against Margaret K. Nickles since she is not a guarantor of the so called "Agreement of Sale and Purchase."

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Appellants was mailed to:

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