1981

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

Utah Supreme Court

Wayne G. Petty; Moyle & Draper; Attorneys for Plaintiffs;
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

PETITION FOR REHEARING

JAMES R. BROWN
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 401
Salt Lake City, Utah 84111
Attorney for Appellants

Wayne G. Petty
Moyle & Draper
600 Deseret Plaza Building
Salt Lake City, Utah 84111
Attorney for Plaintiff in Intervention-Respondent

Bryce K. Bryner
215 East Main Street
P. O. Box 444
Price, Utah 84501
Attorney for Defendants and Respondents

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BRIEF OF APPELLANTS UPON PETITION FOR REHEARING

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 separate 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

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)

ARGUMENT

POINT I

THE SUPREME COURT DID NOT ADDRESS THE ISSUE RAISED BY APPELLANT THAT MARGARET K. NICKLES DID NOT SIGN THE PURCHASE AGREEMENT.

Exhibit 8-I which purports to be the purchase agreement is executed by Centurian Corporation as purchaser and guaranteed by Richard Nickles only and not by Margaret K. Nickles. This court in its decision dated January 29, 1981 at Page 5 of said decision stated:

> "Construing both agreements together it was reasonable to conclude that Centurian commenced purchase of the tank trailer upon signing the "Agreement of Sale and Purchase", the incorporated prior "Lease Agreement" being merely a means to that end."

The agreement of purchase, Exhibit 8-I, would then supercede and negate any "lease" entered into between the parties. Since this court awarded judgment in the decision dated January 29, 1981 for the total purchase of said tank trailer the lease in fact becomes a nullity.

It is conceded that Margaret K. Nickles guaranteed performance of the lease, but she did not guarantee the performance of the purchase agreement.

POINT II

IF THE LEASE AGREEMENT IS VALID AS AGAINST MARGARET K. NICKLES IT WAS TERMINATED AS OF MARCH 25, 1974.

Exhibit 7-I which is the lease agreement which is guaranteed by Margaret K. Nickles provides the following:

"If any rental payment is not paid within ten (10) days after the due date thereof, this lease shall automatically expire. . . . 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 or other sums then due under the terms of this lease including but not limited to, the cost of repairs required to bring the property to good condition plus the final lease payment in full and in addition thereto, to pay 45% of the monthly rental multiplied by the number of months this lease has yet to run, which sum is to compensate owner for the greater costs and depreciation occurring during the first part of the lease as compared to the last part of the lease."

There was a payment due on or before March 15, 1974. That payment was not made nor any thereafter. As of March 25, 1974 there was no lease in force. It had been automatically terminated by the express language of the lease drafted and prepared by Petty Motor Lease, Inc. There would be twenty 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 $5,800.00. However, there was a deposit which was utilized expressly for the purpose of insuring the performance of the lease of $3,594.63 which leaves a net due as of Margaret K. Nickles of less than $2,000.00.

However, the foregoing analysis 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 (as to a lessee) the case of Brown vs. Rennels, 539 P.2d 1312 (Colo. 1975) states:

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

There are no actual damages in this instance because this court has heretofore as of January 29, 1981 impressed a judgment as against Centurian and Richard Nickles for the full value of said tank trailer under the terms of the purchase agreement. Therefore Petty is

estopped to assert any liquidated damages as against Margaret K. Nickles.

POINT III

THAT MARGARET K. NICKLES IS A LESSEE ONLY AND THEREFORE ABSENT NEGLIGENCE ON MARGARET K. NICKLES' PART CANNOT BE HELD FOR THE RISK OF LOSS OF THE TANK TRAILER.

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 fully 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

PETTY MADE AN ELECTION OF REMEDY.

Once a party has made an affirmative act of election of remedies, he is bound. Utah has adopted this view. In the cases of Utah Idaho C.R. Co. v. Industrial Commission, 86 Utah 364, 35 P.2d 842; Farmers & Merchants Bank v. Universal C. I. T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045; and Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 P. 196 all adopt and sustain the doctrine of election of remedies. Indeed, in Cook the court held:

> The true rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsisten; and (3) he must by actually bringing an action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsisten remedies. . . . With such elements present, an election once deliberately made by the institution of a suit, by which the remedy is sought to be recovered, is final, and his failure to secure satisfaction by means of the remedy which he has adopted furnishes no legal reason to permit him to resort to the other.

The rationale of this doctrine is that once a party has

acted in choosing between two or more different and coexisting modes of procedure and relief allowed by law that the party is thereafter precluded to a resort to the other remedy or relief.

Election of remedies differs from estoppel in that an election, to be effective, need not be acted upon by the other party by way of detrimental change of his position, provided the election is a decisive one.

Plaintiff elected to sue for a sale to Centurian and R. H. Nickles. Plaintiff therefore elected his remedy and cannot now seek an alternative relief as against Margaret K. Nickles on the theory of lease, which is inconsistent with a sale.

The election is absolute, irrevocable, final and conclusive. It matters not whether plaintiff actually gets final or even full relief, however, in this instance Petty did in fact receive full and complete relief. Under §32 Election of Remedies, 25 Am. Jur.2d p. 674, 675, it states:

> Where a party . . . makes an election between inconsistent remedies, . . . his election is final, conclusive, and irrevocable, and constitutes an absolute bar to any action, suit, or proceeding inconsistent with that asserted by the election. It is the first act of election that acts as a bar.

This is supported by the case of Salt Lake City v. Industrial Commission, 81 Utah 213, 17 P.2d 239, wherein the court concluded that it is the first decisive act of election that is binding.

Petty's first decisive act was filing the Complaint in Intervention whereas he sought a "sale" as opposed to a "lease".

CONCLUSION

It is essential that this court address this issue of the liability, if any, of Margaret K. Nickles in light of the decision of January 29, 1981. That in order to be consistent with that decision there cannot be any liability imposed or impressed upon Margaret K. Nickles based upon formal requirements as provided under Utah law 70A-2-201, Utah Code Annotated, 1953, as amended, nor is there any contractural obligation to be impressed upon Margaret K. Nickles for which recovery could be sustained in favor of Petty Motor Lease, Inc. Since Petty Motor Lease, Inc. has been fully compensated by the decision heretofore entered by this court. It is therefore respectfully submitted that the judgment heretofore entered against Margaret K. Nickles be vacated and reversed.

DATED this the 14 day of February, 1981.

JARDINE, LINEBAUGH, BROWN & DUNN

By _____
James R. Brown
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Appellants Upon Petition for Rehearing was mailed to:

Wayne G. Petty
Moyle & Draper
600 Deseret Plaza Building
Salt Lake City, Utah 84111

Bryce K. Bryner
215 East Main Street
P. O. Box 444
Price, Utah 84501

Mr. Walter A. Cripps
Helper, Utah 84526

on the 14 day of February, 1981, postage prepaid.