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SUPREME COURT OF THE STATE OF UTAH

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DAVID L. NIELSEN and GARWOOD H. WALTON, Plaintiffs/ Respondents,	)	
vs.	)	Case No. 17522
MFT LEASING, et al., Defendant/ Appellant.	)	

APPELLANT'S BRIEF ON APPEAL

Appeal From the Decision of the District Court of Cache County, State of Utah, the Honorable VeNoy F. Christofferson, Judge, granting Judgment in favor of Plaintiffs, David L. Nielsen and Garwood H. Walton and against Defendant and Counterclaimant, MFT Leasing Company

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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DAVID L. NIELSEN and GARWOOD H. WALTON, Plaintiffs/ Respondents,	APPELLANT'S BRIEF ON APPEAL
vs.	
MFT LEASING, et al., Defendant/ Appellant.	Case No. 17522

INTRODUCTION AND DESIGNATION OF PARTIES

This matter comes to this court from an appeal of the decision of the District Court of Cache County, State of Utah, wherein the Honorable VeNoy F. Christofferson granted a judgment in favor of the plaintiffs, David L. Nielsen and Garwood H. Walton, and against the defendant and

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counterclaimant, MFT Leasing Company. Said judgment allowed plaintiffs to rescind their contracts with MFT Leasing. Throughout this brief the plaintiffs will be referred to either by name or in their capacity as plaintiffs, or the respondents. Defendant and counterclaimant, MFT Leasing will be referred to either by name or as defendant or appellant.

STATEMENT OF NATURE OF CASE

Plaintiffs filed an action against defendant, MFT Leasing and Dr. Marvin Pursinger and Pursinger Company, Inc. asking that plaintiffs' leases with defendant, MFT Leasing, be rescinded, and further that plaintiffs be granted compensatory and exemplary damages from Marvin W. Pursinger and Pursinger Company, Inc. as a result of fraud committed by said Marvin W. Pursinger and Pursinger Company, Inc. in inducing plaintiffs to enter into their lease agreements with MFT Leasing Company. Defendant, MFT Leasing, counterclaimed asking the court to find the plaintiffs liable to defendant under their lease agreements and requesting the court to award MFT Leasing a money judgment based upon the accelerated amount due under the leases as a result of plaintiffs' breach.

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DISPOSITION IN LOWER COURT

This case was heard before the Honorable VeNoy Christofferson without a jury in October, 1980. Judge Christofferson held during the trial that there was no fraud as allegded in plaintiffs' complaint committed by defendant, MFT Leasing Company, that the leases between the parties were initially entered into with all the prerequisites to be binding agreements, and that the equipment had in fact been delivered to plaintiffs.

After the trial was completed, post-trial memoranda were submitted and oral argument took place. Subsequently, the court entered a Memorandum Decision. Judge Christofferson ruled that plaintiffs were entitled to a rescission of their lease agreements with defendant, MFT Leasing Company, due to the fact that defendant, MFT Leasing Company, knew, or should have known, that the supplier of the equipment, namely, Pursinger Company, was not in an economincally sound position and that certain serial numbers on the equipment were not the same as the ones on the lease agreements, and therefore, the defendant, MFT Leasing Company, could not deliver clear title to the equipment. Plaintiffs' counsel then submitted proposed Findings of

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Fact, Conclusions of Law and Judgment. Before defendant's counsel had an opportunity to object as to the form of the documents, Judge Christofferson, without notice, entered judgment in favor of the plaintiffs on their complaint and against the defendants.

A subsequent Memorandum Decision was entered by the court amending certain of the original Findings of Fact and reducing the costs awarded to plaintiffs. An amendment to the original Findings of Fact, together with an amended Judgment was then prepared and submitted to the court, which amended Judgment was signed by the court on January 26, 1981. This appeal is prosecuted from the Judgment of the court allowing the plaintiffs to rescind their contracts with defendant, MFT Leasing Company. Defendants, Marvin W. Pursinger and Pursinger Company, Inc. never answered plaintiffs' complaint against them, and therefore, a Default Judgment was entered against said defendants in January, 1981. Said defendants are not a part of this appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decision of the lower court allowing the plaintiffs to rescind their contracts with MFT Leasing reversed, to have an order entered granting

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defendant and counterclaimant, MFT Leasing, judgment against the plaintiffs as prayed for in their complaint, or in the alternative, remanding this action for a new trial before the District Court.

STATEMENT OF FACTS

On or about November 30, 1978, plaintiff/respondent, Garwood H. Walton entered into several agreements with Pursinger Company, Inc. (Tr. page 21 and defendant's Ex. 3 and Ex. 4). Prior to the signing of the agreements, Mr. Walton had worked for Pursinger Company on a consulting basis for several months and had visited the Pursinger Company offices in Los Angeles, California where a leasing program had been explained by Dr. Pursinger to Mr. Walton (Tr. page 21). The program called for Pursinger Company to deliver the equipment to plaintiffs and have plaintiffs arrange a financing lease with a leasing company, and subsequently lease the same equipment back to Pursinger Company. On or about December 4, 1978, David L. Nielsen entered into several agreements with Pursinger Company which appeared at trial as defendant's Exhibits 5 through 10. Dr. Pursinger explained to both Mr. Nielsen and Mr. Walton that they would be leasing Dr. Pursinger's computers through a

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separate leasing company and that Dr. Pursinger and his company would sign a guarantee with Mr. Walton and Mr. Nielsen wherein Dr. Pursinger would reimburse them for the lease payments that they were required to make to the leasing company. (Tr. pages 21 and 60). In exchange for Mr. Walton and Mr. Nielsen using their credit rating to procure leases of Dr. Pursinger's equipment, they were to receive the investment tax credit, together with interest free loans during the period of the leases in the amounts of $30,000 for Mr. Nielsen and some smaller amount for Mr. Walton. (Tr. pages 21 and 82). At the time that Dr. Pursinger entered into his agreements with Mr. Walton he verbally agreed to pay Mr. Walton a 3% to 5% commission on any leases which were entered into as a result of Mr. Walton introducing Dr. Pursinger to other prospective Lessees. (Tr. page 36). Based upon the agreements which Mr. Nielsen and Mr. Walton had with Dr. Pursinger, it did not make any difference to them how the computers were used, how they were set up, or the amount of use of the computers as Dr. Pursinger was to receive all the monies from the rental of the computers. (Tr. pages 48, 49, 81, and 82).

Pursuant to the agreements between Pursinger

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Company and Mr. Nielsen and Mr. Walton, the computer units were delivered to plaintiffs sometime between Christmas and New Year's of 1978 at the offices of David Nielsen. During the latter part of December, 1978, MFT Leasing Company received from Dividend Financial Company (another Leasing Company not a party to this action) the information, including financial background, on several proposed leases wherein Mr. Walton and Mr. Nielsen, among others, would be Lessees of certain equipment supplied by Pursinger Company. (Tr. 107). Mr. Robert Barr, an employee of MFT Leasing Company, contacted Mr. Nielsen and Mr. Walton in late December, 1978, to see if they were indeed interested in entering into a lease with MFT Leasing Company. After reviewing the financial statements submitted by Mr. Nielsen and Mr. Walton, and making several preliminary credit checks, Mr. Barr arranged to meet with Mr. Nielsen and Mr. Walton in Logan, Utah on the 15th of January, 1979, for the purpose of executing the lease agreements. (Tr. pages 204 and 205). On or about January 15, 1979, Mr. Barr met with Mr. Walton in his office and with Mr. Nielsen at the office of George Daines, Esq. in Logan, Utah, at which time both Mr. Walton and Mr. Nielsen signed the lease agreements which are defendant's Exhibits 1 and 2. As part of their exe-

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cuting the lease agreement, both Mr. Walton and Mr. Nielsen executed a separate page of the lease agreement entitled, "Acknowledgment of Delivery" wherein they stated that the equipment listed on Exhibit "A" to the lease agreement had been delivered to them, was in good condition and repair, that they accepted the equipment as satisfactory, and further, that they had examined the invoice for the equipment and specifically requested MFT Leasing to pay the amount of said invoice to the supplier (Pursinger Company). (Defendant's Exhibits 1 and 2). After the leases were executed by Mr. Walton and Mr. Nielsen, Mr. Barr returned to Salt Lake and after the credit checks had been completed on Mr. Walton and Mr. Nielsen and both were found to be credit worthy, and the leases had been approved by MFT Leasing Company, MFT Leasing paid Pursinger Company for the computer units. Mr. Walton and Mr. Nielsen had already paid to Pursinger Company the first and last months' payment, and thus, when the funds were disbursed a credit was given to Mr. Walton's and Mr. Nielsen's account in the appropriate amounts. (Defendant's Exhibits 23, 24, and Tr. pages 21 and 22). After the leases were executed, Mr. Walton and Mr. Nielsen failed and refused to make any payments under said leases. On or about April 11, 1979, Mr. Nielsen attempted

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to rescind his lease through a letter sent by his attorney to MFT Leasing Company. (Plaintiff's Exhibit 37). On or about April 16, 1979, written demand was sent to both Mr. Walton and Mr. Nielsen informing them that they were in default in their lease payments and demanding that they bring their leases current, or MFT would accelerate the entire remaining unpaid balance pursuant to the lease agreements. (Defendant's Exhibits 35 and 36). Subsequent to MFT Leasing's demand letters being sent to Mr. Walton and Mr. Nielsen, a Complaint asking for rescission of the contracts was filed by them on April 19, 1979. On or about May 3, 1979, MFT Leasing filed its Answer and Counterclaim asking the court to award MFT Leasing Company compensatory damages for the breach of the lease agreements.

During the trial, plaintiffs were allowed to take the stand and testify concerning their extraneous agreements with Dr. Pursinger which agreements were never mentioned in the written documents between the plaintiffs and MFT Leasing Company.

Over the objection of counsel for the defendant, MFT Leasing Company, that the testimony and exhibits were parole evidence and not properly introduced, the court

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allowed plaintiffs to testify and to introduce numerous exhibits pertaining to their agreements with Marvin Pursinger and Pursinger, Co., Inc.

As additional facts may become necessary to the argument in this brief, they will be presented in the argument.

ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE PLAINTIFFS TO PRESENT PAROLE EVIDENCE TO CONTRADICT THE CLEAR AND UNEQUIVOCAL LANGUAGE OF THE WRITTEN CONTRACTS BETWEEN PLAINTIFFS AND MFT LEASING COMPANY.

The uncontroverted facts in this case show that Mr Walton and Mr. Nielsen did indeed sign and execute lease agreements with MFT Leasing Company obligating them to the terms as set forth in said lease agreements. It is also undisputed that MFT Leasing Company, relying upon the repre-sentations of Mr. Walton and Mr. Neilsen, paid Pursinger Company good and valable consideration for the computers which were the subject matter of MFT Leasing's leases with Mr. Walton and Mr. Nielsen. The law in the State of Utah concerning contracts is that unless there is some ambiguity

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in the contract, the terms of the contract must speak for themselves, and unless the subject matter of the contract is illegal or otherwise unenforceable, the courts cannot rewrite the contract, but must enforce the contract pursuant to its terms. Lamb v. Bangart, 525 P.2d 602, Strout Western Realty Agency, Inc. vs. Broderick, 522 P.2d 144. In the Strout v. Broderick case, supra, Justice Ellett commented on the underlying reasons for the court's refusal to allow extraneous evidence in to contradict a written agreement and quoted the Minnesota Supreme Court wherein it stated:

> Without that rule there would be no assurance of the enforceability of a written contract. If such assurance were removed today from our law, general disaster would result, because of the consequent destruction of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts.

Justice Ellett specifically states at page 145 the following:

> However, under the general rule which is applicable here, parole evidence may not be given to change the terms of a written agreement which are clear, definite and unambiguous. To permit that would be to cast doubt upon the integrity of all contracts and to leave a party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who in the subsequent light of events discovers that he made a bad bargain.

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Justice Ellett's comments in the Strout case are equally applicable to the case at bar. The trial court erred in allowing plaintiff to, in effect, modify the terms of an unambiguous contract through the use of parole evidence in the form of oral testimony given solely by the plaintiffs. It was not until the plaintiffs realized Dr. Pursinger was not going to live up to his extraneous agreements with them that they decided not to honor their contract with MFT Leasing. During cross-examination by defendant's counsel, the following admission was made by Mr. Nielsen:

> Q. Mr. Nielsen, is it fair say that you decided not to pay MFT Leasing Company on your lease when you discovered that Dr. Pursinger was not going to pay you?
>
> A. I would guess that would be fair to say that. (Tr 85).

There is simply no ambiguity in the contracts between plaintiffs and defendant, MFT Leasing Company, which justifies the allowance by the trial court of parole evidence to modify the terms of the leases.

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POINT II

THE TRIAL COURT FAILED TO APPLY APPROPRIATE EQUITABLE PRINCIPLES IN ALLOWING PLAINTIFFS TO RESCIND THEIR LEASES WITH MFT LEASING

Plaintiffs suit for rescission is a suit in equity. Mortensen vs. Berzell, 429 P.2d 945, 102 Arizona, 348 (Arz. 1967), to which the trial court was required to apply equitable principles.

The trial court either misapplied or failed to apply the equitable principles set forth below in deciding that plaintiffs were entitled to rescind their contracts.

A. Equity will not aid a party who has himself been guilty of the first breach of the contract. (17 Am.Jur 2d on Contracts at §365.

This doctrine is referred to in the California case of Joshua Tree Towncite Co. vs. Joshua Tree Land Company, 224 P.2d 85, wherein the court stated at page 90:

> A party to a contract who has defaulted cannot seek rescission. Fairchild - Gilmore - Wilton Co. vs. Southern Refining Company, 158 Cal. 264, 110 P. 91; North America Drudging Company vs. Outer Harbor Dock and Warf Company, 178 Cal. 406, 173 P. 756.

The uncontraverted evidence at trial established

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the fact that the leases were executed by Mr. Walton and Mr. Nielsen on or about January 15, 1979. The first payments were due on those leases on or about March 10, 1979. Both Mr. Walton and Mr. Nielsen admitted under oath that they never did make any payment on their leases with MFT Leasing Company. Mr. Nielsen attempted to rescind his lease on or about April 11, 1979 and Mr. Walton attempted to rescind his lease on or about April 19, 1979. Both attempts at rescission were more than one month after Mr. Walton and Mr. Nielsen were in default in their payment on their leases.

The lease itself, (Paragraph 21) does not require any notice of failure to pay the amounts due thereunder prior to the Lessor exercising its remedies granted in Paragraph 21. Nevertheless, MFT did in fact send written notice to both Walton and Nielsen demanding that the leases be brought current or payments would be accelerated. (Exhibits 1, 2, 35, and 36).

B. Plaintiffs do not have "clean hands".

Plaintiffs must have clean hands in order to ask a court to use its equitable powers in rescinding their lease agreements. This they simply cannot due. The facts are uncontroverted that Mr. Walton and Mr. Nielsen had the com-

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puters in their possession for a period of approximately one month prior to their entering into their lease agreements with MFT Leasing Company. Both Mr. Walton and Mr. Nielsen had dealt extensively with Pursinger Company. Mr. Walton was working for Pursinger Company at the time of the execution of his lease with MFT. Mr. Walton was to receive a commission from Pursinger Company of from 3% to 5% of the monies received by Pursinger Company from MFT in funding the leases. Both Mr. Walton and Mr. Nielsen were to receive interest free loans or pledges of substantial amounts of money if and when the leases were funded. As a result of the promises made to Mr. Walton and Mr. Nielsen by Dr. Pursinger, they decided to sign and execute the lease agreements with MFT Leasing Company, since to have the leases executed meant immediate economic benefit to them, supposedly without the attendent risk normally involved in a business transaction.

In Jacobson vs. Jacobson, 557 P.2d 156, (Utah 1976), plaintiff sought to have certain deeds construed as equitable mortgages. The Supreme Court in refusing to exercise its equitable powers made the following statement at page 158:

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> It is inherent in the nature and purpose of equity that it will grant relief only where fairness and good conscience so demand. Correlated to this is the precept that equity does not reward one who has engaged in fraud or deceit in the business under consideration, but reserves its reward for those who are themselves acting in fairness and good conscience, or as is sometimes said, to those who come into court with clean hands.

As in the Jacobson case, Supra, it was the plaintiffs who chose to deal secretly with Dr. Pursinger and Pursinger Company and enter into extraneous agreements calling for Dr. Pursinger to guarantee plaintiffs' leases, all of which were not disclosed by the plaintiffs to defendant, MFT Leasing.

C. Equity will not assist one in extricating himself from circumstances which he created.

In Battistone vs. American Land Development, 607 P.2d 837, (Utah 1980), Justice Hall stated:

> A court in equity will generally not assist one in extricating himself from circumstances which he has created. Plaintiff is solely responsible for putting Hales in a position to convey the property, she having conveyed the property to Hales by Warranty Deed, and Hales having properly recorded it.

This basic principal was also followed by the Utah Supreme Court in the case of Pacific Metals Company vs.

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Tracy Collins Bank and Trust, 21 U.2d 400, 446 P.2d 303, wherein it stated:

> We are not very much impressed with the equity of Tracy's position thus essayed: That even though it committed a wrong in cashing the check, it was the responsiblity of the drawee bank of Salt Lake to promptly refuse to pay the check and warn Tracy so it could save itself from loss. It is the general principal that one who commits a wrong must take the consequences and cannot complain that someone else does not rescue him therefrom.

In the instant case, plaintiffs, after dealing with Pursinger Company directly, and after having possession of the computer units for approximately one month, executed a written Acknowledgment of Delivery requesting defendants to pay Pursinger Company for the computers.

Any failure of plaintiffs to receive the computers was the result of their own careless acts. Had they not signed the Acknowledgment, MFT Leasing would not have paid Pursinger and the loss would have been avoided.

At best, plaintiffs' actions fall in the category outlined by this court in the case of G. Eugene England Foundation vs. Smith's Food King #6, 542 P.2d 753 at page 755, wherein it stated:

> There is another doctrine in the administration of justice which bears upon the situation here and

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harmonizes with the decision of the trial court: where one or two innocent parties must suffer a loss because of the misconduct of the third (First Federal Corporation), the law generally leans towards placing the loss upon the one who made the choice and created the circumstances out of which the loss came about. It was England who chose to get involved with First Federal Corporation and the troubles that emanated therefrom.

In the case at bar, it was Mr. Walton and Mr. Nielsen who chose to get involved with Pursinger Company. It was they who chose to enter into guarantee agreements wherein Dr. Pursinger guaranteed the payment of the leases. It was Mr. Walton and Mr. Nielsen who used their credit to obtain funds for Pursinger's benefit as well as their own. It was they who anticipated receiving a hidden benefit from the transaction in the form of either a commission or interest free loans, or both. And finally, it was they who were to receive the investment tax credit under the leases. As stated in the Eugene England Foundation, case Supra, MFT Leasing should not be punished because Mr. Walton and Mr. Nielsen now find that they cannot collect on their judgment which they are entitled to as against Dr. Pursinger for his misrepresentations and failure to reimburse Mr. Walton and Mr. Nielsen for the lease payments which they were required to make to MFT. MFT was simply not a party to the extra-

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neous agreements entered into between Dr. Pursinger and Mr. Walton and Mr. Nielsen, and should not be punished as a result of those agreements. (See also Heaston vs. Martinez, 282 P.2d 833.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT, MFT LEASING DID NOT HAVE GOOD AND MARKETABLE TITLE TO THE COMPUTER UNITS

It is undisputed by Plaintiffs that Pursinger Company purchased from Datapoint Corporation the computers and subsequently had them delivered to Logan, Utah for the benefit of the defendant. Mr. Walton testified that he knew the Pursinger computers were manufactured by Datapoint and in fact, had talked to Datapoint personnel prior to the execution of his lease with MFT. (Tr. page 296).

Is there a defect in title from Datapoint to Pursinger Company? The law clearly says, "no". Plaintiff directs the court to §70A-2-401(1) and (2), Utah Code Annotated, as amended. This section reads as follows:

> (1) . . .Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reser-

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vation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

. . .

The trial court took judicial notice of the pleadings in a Civil No. 17817. Said pleadings included the sales agreement between Datapoint Corporation and Pursinger Company whereby Datapoint sold to Pursinger the computers which were ultimately delivered to the defendants. This sales agreement was marked and entered as Exhibit 22 at trial. Plaintiff calls the court's attention to paragraph 3 of the sales agreement which reads:

> Seller [Datapoint] warrants that Buyer [Pursinger] shall acquire the equipment purchased hereunder, free and clear of all liens and encumbrances except for Seller's purchase money security interest. ([ ] supplied).
>
> . . .

This reservation is in accordance with the appli-

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cable law; to-wit: §70A-2-401(1), Utah Code Annotated, which reads:

> . . .Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. . . .

Thus, upon the delivery of the units to Pursinger Company, title passed to Pursinger Company subject to Datapoint's security interest.

Pursinger then delivered the goods to defendants, Nielsen and Walton, who accepted delivery, acknowledged that they were satisfied and requested that plaintiff make payment, which it did in the total sum of $92,461.73.

Did the purchase of the equipment by MFT eliminate Datapoint's security interest in the goods? "Yes". The interrelationship of §§70A-2, et seq. and 70A-9, et seq., is determinative on this issue. §70A-9-307(1) clearly handles the problem of retained security interests as are present under the present fact pattern. It states:

> PROTECTION OF BUYERS OF GOODS. -(1) A Buyer, [MFT] in ordinary course of business (subsection (9) of §70A-1-201) other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by his seller even though the security

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interest is perfected and even though the buyer knows of its existence. ([ ] and emphasis supplied).

Thus it is clear that when MFT purchased the computers from Pursinger, MFT acquired good, clear and unencumbered title to the goods.

Plaintiffs argued that since the numbers used to identify the units delivered do not match with the numbers used to identify them on the lease, that they should not be held to the terms of the lease. The issue of the serial numbers is a feeble attempt to now extricate the plaintiffs from their acknowledgment of delivery. It was this acknowledgment that defendant and counteclaimant, MFT Leasing, relied upon when disbursing the funds to Pursinger Company. The court's allowance of such an argument not only resulted in an unjust result in this case, but also placed in jeopardy every commercial transaction where a lessor relies upon an lessee's right to inspection, and based upon the lessee's own representations, disburses funds to the supplier and/or manufacturer.

Although the transaction between MFT Leasing Company and defendants, Nielsen and Walton, is not a sale, the Commercial Code helps shed light on the proper outcome

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of defendants, Nielsen and Walton's contention regarding the serial number discrepancies.

Section 70A-2-601 gives the buyer the right to inspect the goods. It states:

> BUYER'S RIGHTS ON IMPROPER DELIVERY - Subject to the provisions of this chapter on breach in installment contracts (§70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:
>
> (a) reject the whole; or
> (b) accept the whole; or
> (c) accept any commerical units or units and reject the rest.

Defendants, Nielsen and Walton, testified that the goods were delivered aproximately one month before the lease agreement was signed (Walton, Tr. 40). It was not until some time after April 11, 1979, nearly four months later, and after MFT Leasing had relied upon their acceptance that they took any action to attempt to reject the goods. This area of timely rejection in regards to sales is treated in _Anderson Second Edition_ where the author states:

> If the buyer does not reject the goods within a reasonable time he is deemed to have accepted them. _City Miron v. Yonkers Raceway, Inc._, 5 UCCR 576, affd. (CA2) 400 F.2d 112.

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The author further states:

> A reasonable period for inspection overlaps a reasonable opportunity to inspect. Thus, if inspection disclosed a defect, there remains the obligation to reject within a reasonable time. But in any case where the buyer passes up a reasonable opportunity to inspect, he thus fails to reject within a reasonable time. (City Miron v. Yonkers Raceway, supra.) (Emphasis supplied).

Under the present situation the plaintiffs, Nielsen and Walton, had the equipment in their possession for nearly one month prior to executing the lease, obviously enough time to inspect the equipment for defects, etc. They had even prior to delivery of the equipment made arrangements (unbeknownst to MFT Leasing) to sublease the same equipment back to Pursinger Company so as to hopefully eliminate their exposure under the lease. To say now that the serial numbers were incorrect is an attempt to reject delivery. Due to their delays, etc., they have lost any right they might have had to reject the goods.

The question of serial numbers is in essence a sub part of plaintiffs' contention that MFT Leasing never had title to the computer units and/or did not deliver the equipment described on the lease. This was contrary to the court's own finding made during the trial wherein it stated:

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THE COURT: Fraud is out.

MR. HOWELL: Is delivery out too, your Honor?

THE COURT: Delivery is -- it was delivered, but as to their responsibility of what they're going to have to pay for on this lease, there's nothing here that -- (Tr. 167-168).

For the above-stated reasons, it is clear that under the laws of the State of Utah, defendant, MFT Leasing Company, acquired good and marketable title when it paid Pursinger Company valuable consideration for the computer units already in the possession of plaintiffs.

POINT IV

EVEN IF MFT LEASING KNEW OR SHOULD HAVE KNOWN OF THE FINANCIAL CONDITION OF PURSINGER COMPANY OR ITS PRIOR AGREEMENTS WITH THE PLAINTIFFS, SAID KNOWLEDGE IS NOT GROUNDS FOR RECISSION OF THE LEASES

Judge Christofferson, in his Memorandum Decision, stated as follows:

> The court also feels that under the circumstances since all contracts were with Pursinger and MFT until MFT brought the leases to the plaintiffs, they were aware of the arrangement (Record p. 140).

Judge Christofferson went on to state that as a result of MFT's knowledge of Pursinger's financial problem,

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and its agreement with plaintiffs, the plaintiffs were entitled to rescind their contract with MFT. It is respectfully submitted that there is no basis, either at law or equity, for the recission of plaintiffs' contracts with MFT Leasing based upon the findings of Judge Christofferson as stated above. The arrangements with Pursinger Company and the plaintiffs were separate agreements signed approximately one month prior to plaintiffs entering into their leases with MFT. (Defendant Ex. 4, 8, 9, and 10). These agreements were guarantee and recourse agreements between Marvin Pursinger, Pursinger Company, Inc. and the plaintiffs. The agreements specifically contemplated that the plaintiffs would obtain leasing from independent leasing companies, the payment of said leases to be guaranteed to the plaintiffs by Dr. Pursinger and his Company. The fact that Dr. Pursinger failed to live up to his contracts with plaintiffs in no way excuses plaintiffs from liability on their separate contracts with MFT Leasing.

Defendant's counsel has not been able to find any case law to support Judge Christofferson's ruling on a rescission of the leases between plaintiffs and MFT Leasing based upon the supposed knowledge of MFT, of either

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plaintiffs' prior agreements with Pursinger Company or the financial condition of Dr. Pursinger and his Company.

CONCLUSION

Plaintiffs entered into binding lease agreements with MFT Leasing Company. Relying upon plaintiff's signed Acknowledgment of Delivery, MFT Leasing paid in excess of $90,000.00 to Pursinger Company for purchase of the computer units leased by MFT to plaintiffs. There are no grounds for plaintiffs' claim for the equitable relief of rescission which was granted by the trial court. The law in the State of Utah is clear that a party may not rescind a contract after he is in default, or when the loss was occasioned by negligence or misconduct by the party asking for the rescission. Plaintiffs fall squarely within the aforementioned bars to the relief requested by them. Given the facts established at trial and applying those facts to the law as it relates to rescission of contracts, it is respectfully submitted that the trial court's Judgment should be reversed and defendant, MFT Leasing, be given judgment against David L. Nielsen in the amount of $101,712.02, and Garwood H. Walton in the amount of $50,872.01, together with reasonable attorneys' fees and costs of court as pro-

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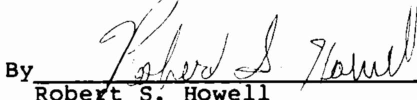
vided for in the contract, or in the alternative that this matter be reversed and remanded for further proceedings in the trial court.

RESPECTFULLY SUBMITTED this 24th day of March, 1981.

TIBBALS, ADAMSON, PETERS
& HOWELL

By
Michael Z. Hayes



By
Robert S. Howell

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing Appellent's Brief on Appeal to be mailed to W. Scott Barrett, Attorey for Plaintiffs, at 300 South Main Street, Logan, Utah 84321, this 24th day of March, 1981.

Michael Z. Hayes

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