1981

David L. Nielsen and Garwood H. Walton v. Mft Leas Ing, et al. : Respondent's Reply Brief

Utah Supreme Court

SUPREME COURT OF THE STATE OF UTAH

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

RESPONDENT'S REPLY BRIEF

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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TEXT AND TREATISES

CASES CITED

STATEMENT OF THE NATURE OF THE CASE

Respondents would add to Appellant's statement that although fraud was alleged against Marvin Pursinger and Pursinger Company, Inc., no fraud was alleged against MFT Leasing. The ground for Respondents action for rescission was primarily based upon failure of consideration.

DISPOSITION IN LOWER COURT

Appellant's statement that the Court found "there was no fraud as alleged in plaintiff's complaint committed by defendant MFT Leasing Company" is incorrect. No fraud was alleged against MFT Leasing Company but only against the other defendants.

Appellant's contention that the Judgment and Findings were entered by the Court before Appellant had a chance to object are not well taken. The Court entered an Order revising the Findings following some of the points raised in the Appellant's Objection to Findings.

STATEMENT OF FACTS

Appellant will hereafter be referred to as MFT Leasing and Respondents will be referred to by their surnames Nielsen and Walton or as Respondents.

Respondents will state the salient facts in numbered paragraphs rather than in narrative form in the interest of clarity and conciseness:

1. Some time in late December 1978 MFT Leasing received a package from Dividend Leasing requesting that they handle the leases enclosed therein, among which were two proposed leases for Mr. Nielsen and one for Mr. Walton.

2. On January 11, 1979, Mr. Barr of MFT Leasing made a trip to California where he discussed the leasing program with Mr. Pursinger and his attorney. At that time, he had in his possession a credit report and/or a Dun & Bradstreet report which showed numerous cases under litigation and claims against Pursinger by other computer companies. (R. 107-111)

3. Thereafter, MFT Leasing prepared leases on their own forms and Mr. Barr traveled to Logan and met briefly with Mr. Nielsen and with Mr. Walton and obtained their signatures on the leases. This was the only personal contact of MFT Leasing with Respondents. At that time, he was told:

a. That the equipment was there in boxes. (R. 23)

b. That Pursinger himself would be subleasing the equipment. (R. 78,88) (R. 27)

4. The lease documents, prepared by MFT, specifically state that to be included is: "Systems installation, site inspection, installation ... function and operation testing ... hard wiring as necessary ..." and software and other equipment identified by thirty or more serial or model numbers for each lease. None of

these items were ever completed or supplied and these facts were known by Mr. Barr. (R. 115) He made no attempt to look at the equipment.

5. While the computer units were at the Plaintiff's premises, Mr. Teuscher copied all of the numbers on the equipment and stated that there were no other numbers on the equipment. The numbers copied by him show no resemblance to any of the numbers on the leases. There was only one number for each piece of equipment and only two pieces of equipment for each lease.

6. On the 24th of January, 1979, without further contacting the Plaintiffs, Mr. Barr paid to Pursinger Company through their agent $70,561 for the Nielsen equipment and $35,280 for the Walton equipment.

7. From the above payments the following amounts were retained by MFT:

a. $2,032 as the first month payment on the Nielsen leases. (R. 230)

b. $1,016 as the first month payment on the Walton lease.

c. $7,084 as a security deposit on the Nielsen leases, representing 10% of the equipment cost which was to apply on the oral option to purchase at the end of the lease. (R. 230)

d. $3,528 as a security deposit from Pursinger on the Walton lease, representing 10% of the equipment cost which was to apply on the oral option to purchase at the end of the lease. (R. 214-15)

e. In addition to the foregoing, MFT received $25,000. from Pursinger which was first in the form of a thrift certifica which was later surrendered by Pursinger as a security deposit against the Walton & Nielsen leases. (R. 268)

8. Respondents were given oral options to purchase the equipment at the end of the lease for 10% of original cost. The 10% option price was prepaid by Pursinger. (R. 119, 124-5,

9. In early February, before any payment was due from the Respondents, MFT learned that Pursinger was under criminal conviction and was due to go to jail. (R. 128) (R. 215-6)

10. Although MFT Leasing contended at the trial that the first payment on the leases was due on March 10th, the leases clearly show and the testimony establishes that the first month payments had already been made by Pursinger.

11. MFT made no demand whatsoever for payment from the Respondents until after the rescission letter of April 11, 1979. (R. 220)

12. On April 1, 1979, Plaintiff Nielsen received a call fro Datapoint Corporation advising that they owned all of the equip-

ment consisting of eleven computer units in 22 boxes in Nielsen's building. Datapoint demanded delivery of the equipment but Nielsen refused to deliver it. (R. 285)

13. On April 11, 1979, a rescission letter was sent to Defendant MFT Leasing on the ground of failure of consideration.

14. On April 11, 1979, Mr. Barr of MFT Leasing made a trip to Portland, Oregon where he conferred with Pursinger. He admitted that he knew that Pursinger had not delivered all of the equipment and that lessee performance was impossible. (R. 255-56)

15. On April 16, 1979, Defendant MFT caused their attorneys to write a demand letter which was subsequently mailed to Respondents. Said demand letter gave Respondents ten days to make payment. (R. 261)

16. On April 18, 1979, Mr. Nielsen and Mr. Walton were served with a temporary restraining order by Datapoint Corporation accompanied by an undertaking for $110,000.00 and a replevy action for the equipment. Datapoint alleged it was the owner of the equipment. Thereafter, pursuant to court process the Sheriff of Cache County picked up the equipment for Datapoint and removed it from Respondents premises.

17. On April 18, 1979, MFT Leasing was served by Respondents with a summons and thereafter a Complaint for Rescission.

18. Thereafter, MFT Leasing intervened in the Datapoint case and by way of a settlement in November of 1979, received delivery of six boxes containing certain equipment the numbers on which were dissimilar to any numbers on the lease agreements At no time were Respondents ever advised where the said equipment was kept by MFT Leasing nor was any effort made by MFT Leasing to sell or lease or redeliver said equipment to the Respondents. (R. 131)

ARGUMENT

I. THE UTAH SUPREME COURT HAS DECIDED THAT A LESSEE IS ENTITLED TO RESCIND IN A CASE WHERE THE FACTS ARE VERY NEARLY SIMILAR IN ALL RESPECTS.

In its brief, Appellant makes no reference whatsoever to the case of FMA Financial vs. Hansen Dairy Inc. 617 P.2d 327, decided by the Utah Supreme Court August 21, 1980.

In the Hansen case the court held that there was sufficient contact between lessor and the seller such that the lessor knew or should have known that the leased equipment had not all been delivered and installed despite the recitals in the lease.

The facts in the instant case are even stronger. In the Hansen case, the lessee made substantial payments on the lease even though the major part of the equipment was never delivered. They also signed a lease which had substantially the same langua

in it i.e., that the equipment had been received and was in good order and acceptable as delivered or installed. The lessor argued that such language estopped the lessee from claiming a failure of consideration. The Supreme Court of Utah upheld the trial court's finding that FMA knew or should have known when they released the $36,000 that the building as a workable silo at Hansen's premises was not in existence. The Supreme Court then upheld the conclusion of the trial court that the Defendant lessee was not estopped from setting forth facts indicating the silo was not completed even though they had signed the acceptance notice in the lease.

As to failure of consideration, the instant case is very much stronger. The equipment was not all delivered or installed as in the Hansen case. In addition, before MFT Leasing had sent any formal demand for payment a third party intervened and ultimately replevied what equipment there was. Thus, rather than a partial failure of consideration there was complete failure of consideration.

Further, Mr. Barr had at least as much information about the equipment as FMA did in the Hansen case. He was told it was still in boxes; he had advance information that judgments and lawsuits were pending against Pursinger exceeding $100,000 and that said claims involved in nearly every instance computer or leasing

companies. He also learned in early February that Mr. Pursinger had been convicted of a crime and that the equipment was so incomplete that it was impossible for lessees to perform. He also knew of the claims of Datapoint Corporation and did nothing to keep the equipment that was there in the possession of the Respondents.

Although it does not appear in the court's opinion, it is assumed that estoppel was pleaded in the Hansen case. It is not pleaded as an affirmative defense in the instant case in any event, and since the rules clearly state that estoppel is an affirmative defense, MFT Leasing has waived any defense of estoppel. U.C.R.P. Rule 8 (c)

II. APPELLANT MADE NO VALID OBJECTION TO THE ADMISSION OF ANY PAROLE EVIDENCE. IN ANY EVENT THE PAROLE EVIDENCE RULE DOES NOT APPLY TO EVIDENCE ON FAILURE OF CONSIDERATION.

Appellant's primary point apparently is that the Trial Court erred in allowing Respondents to present parole evidence. No references whatsoever to any objections made by the MFT Leasing counsel appears in their brief. On page 9 of the brief the statement is made "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 allowed plaintiffs to testify and to introduce numerous exhibits....." No reference to the record is given.

Examination of the record shows very clearly that not only were no pertinent objections made to the introduction of any parole evidence but that most of the parole evidence was brought out by MFT Leasing counsel themselves on cross examination or in examining their own witnesses.

As a general rule, an appellate court will not entertain a claim of error in improperly admitting evidence unless the question was properly raised and reserved in the trial court. 5 Am Jur 2d. 66 State vs. Gillies 40 Utah 541, 123 Pacific 93.

It is well settled that with the exception of evidence precluded by statute and furtherance of public policy the failure to object to the introduction of evidence is a waiver of the right to do so and its admission even if incompetent is not a proper basis for appeal. State vs. Lowery 213 SE 2d. 255.

In this case, it is not at all apparent that the parole evidence rule applies. No objections were made to the admission of evidence adding to or varying the terms of the written lease agreement. No attempt was made to substitute a new and different contract for the one evidenced by the writing. The entire thrust of Respondent's contentions was that

there had been a complete or partial failure of consideration. The equipment listed in the lease agreements was incomplete, the equipment shown by serial number in the lease agreements was not the same as the equipment delivered. What equip there was disappeared through a replevy action.

The real objection to the use of parole evidence is not th it is oral, as distinguished from written, but that it is extri and tends to prove what is not a term of the contract. 30 Am J 2d. 153

The parole evidence rule presupposes an action based on an existing valid contract and if the issue is as to the validity or legality of the contract the rule, by its very terms, has no application, and extrinsic evidence is admitted to determine that issue. 30 Am Jur 2d. 171

Parole or extrinsic evidence is also generally admissible at least as between the parties themselves to show that there wa an absence or want of consideration or to show a failure of consideration. 30 Am Jur 2d. 193

Generally speaking, no rule of evidence is violated by admitting parole evidence of the consideration for a promissory obligation if the purpose is to show that the consideration failed....and so far as failure of consideration arising after the execution of the contract is concerned, it must obviously,

be shown by parole evidence if it is to be shown at all. 30 Am Jur 2d. 196

III. NO APPROPRIATE EQUITABLE PRINCIPLES WERE MISAPPLIED IN ALLOWING RESPONDENTS TO RESCIND.

MFT Leasing contends that Respondents should not have been permitted to rescind because they were guilty of the first breach of the contract. The evidence is to the contrary. The court found and the record supports the fact that Pursinger himself paid the first month's lease payments for both Nielsen and Walton. Therefore, no payment was due for either until April 10, 1979. (R. 230) No written demand whatsoever for payment was made by the MFT Leasing until April 16, 1979, which was five days after Mr. Nielsen had written his rescission letter. (R. 261)

MFT Leasing's contention that the Respondents did not have "clean hands" is not well taken. Nowhere does it appear that there was any fraud or misrepresentation or any other misconduct of any nature whatsoever on the part of Nielsen or Walton. To the contrary it was well established that before any payments were due under the leases, agents of MFT Leasing learned that Mr. Pursinger was under criminal conviction and was due to go to jail. (R. 128, 215-216) Further, prior to MFT Leasing making any payment to Pursinger and his company for the equipment, MFT Leasing had credit reports and a Dun & Bradstreet

report which showed claims and judgments in excess of $100,000 against Pursinger by other leasing companies and computer companies. (R. 107-111) This information was not communicate Respondents until after MFT Leasing had made payment to Pursin

There is no merit in MFT Leasing's contention that Nielse and Walton created the circumstances themselves. Appellant's agent came to Logan and induced Nielsen and Walton to execute the leases. No prior contact was made with MFT Leasing by eith Nielsen or Walton. All of the arrangements were made directly between MFT Leasing and Mr. Pursinger and his company.

IV. WHETHER OR NOT MFT LEASING HAD TECHNICAL TITLE IS IMMATERIAL SINCE THE EQUIPMENT WAS REPLEVIED FROM RESPONDENT'S POSSESSION. MFT LEASING DID NOT ACT IN A COMMERCIALLY REASONAB MANNER AFTER RESPONDENTS WERE DEPRIVED OF POSSESSION.

MFT Leasing makes the point of trying to utilize Article 9 of the Uniform Commercial Code in establishing that as between MFT Leasing and Datapoint the Seller, MFT Leasing had ownership and title to the leased property. Whether or not that is corre cannot affect the rights of Respondents. The facts are that the equipment was picked up by Datapoint, the Seller, under claim of ownership and that MFT Leasing did nothing to get pos- session of the equipment until November of 1979. Since that time, MFT Leasing did nothing toward leasing or selling or othe

acting in a commercially reasonable manner to dispose of the equipment.

In Respondent's point of view it is really immaterial as to whether Datapoint's claim was valid. Respondents were deprived of possession by Datapoint under a claim of ownership. If MFT Leasing's argument is valid, then they should have been able to regain immediate possession by Motion for Summary Judgment or some other remedy provided by the rules such as putting up a bond and regaining immediate possession and returning it to Respondents.

In effect, what MFT Leasing is trying to do is get a deficiency. This follows since the equipment was replevied and has never been returned nor has any offer to return been made to the Resopndents. This is even assuming that the equipment is that which is listed in the lease.

In FMA Financial Corporation vs. Pro Printers 590 P. 2d. 803 the issue is whether or not Plaintiff can get a deficiency against the Defendant lessee. The court held that FMA did not act in a commercially reasonable manner when it did not give the proper notice and did not sell the property for about eleven months after it re-took possession. The court concluded FMA could get no deficiency.

The facts in the instant case are even stronger. MFT Leas. has not disposed of the collateral in any way permitted under §70a-9-504(3). No sale was made. Had sixty percent or more of the payments been made, sale would have been mandatory within ninety days. Since sixty percent or more of the payments had not been made, it follows that MFT Leasing had additional time in which to make a sale or in the alternative, keep the collater full satisfaction. However, nothing was done after Respondents were deprived of possession. It should follow as a matter of law that MFT Leasing did not act in a commercially reasonable manner. This is particularly true since the equipment in questi depreciates rapidly and would have only a nominal value at the end of a five year lease.

Under Uniform Commercial Code § 70a 9-504(3), every aspect of the disposition of collateral following default must be commercially reasonable. §70a 9-504(2) requires the exercise of commercial reasonableness in proceeding to collect from an account debtor. Such provisions imply that the secured party must exercise commercially reasonable judgment in determining whether to resell the collateral or merely to retain it. 69 Am J. 2d. § 606 footnote 50.

If the property is to be sold, the sale can apparently be made at any time or place but the place and time must be

subject to the requirement of commercial reasonableness. 69 Am Jur 2d. §606.

The instant case is also stronger than Pro Printers, in that MFT Leasing is here attempting to get the benefit of its bargain and not just recover a deficiency as is permitted under the Uniform Commercial Code.

V. CONCLUSION

The court made very extensive Findings of Fact which are all supported by the record. From this the court properly concluded that the Respondents had a right to rescind. There was complete failure of consideration not only in the fact that the equipment as delivered was incomplete but in the further fact that the serial numbers in no way matched the numbers of the equipment on the leases. Moreover, the overwhelming failure of consideration occurred when the property was replevied by Datapoint claiming to be the owner. MFT Leasing did nothing to remedy that situation so far as lessee Respondents were concerned.

Respondents therefore respectfully submit that the Judgment should be affirmed.

Respectfully submitted this 13 day of April, 1981.

BARRETT & MATHEWS

W. Scott Barrett

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Respondent's Reply Brief to:

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Said copies were mailed first class, postage prepaid, on the 17 day of April, 1981.

J. Hansen
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