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Dale L. Larson, Grethe Larson, and Systematic Builders, Inc., a Utah corporation v. Overland Thrift and Loan, a Utah corporation; Linda D. Milne, and Western Surety Company : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900411CA

IN THE UTAH COURT OF APPEALS

DALE L. LARSON, GRETHE
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corporation,

PLaintiffs-Appellants,

V.

No. 900411-CA

OVERLAND THRIFT AND LOAN, a
Utah corporation; LINDA D.
MILNE, and WESTERN SURETY
COMPANY,

Defendants-Appellees.

PETITION FOR REHEARING

Appeal from final summary judgments of the
Third Judicial District Court, State of Utah
Salt Lake County, Honorable Scott Daniesl, Presiding

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COMPANY,

Defendants and Appellees.

PETITION FOR REHEARING

Appellants herein herewith make and file their petition for rehearing pursuant to Rule 35, Utah R. App. P., and following state with particularity the points of law and fact the court has overlooked or misapprehended in its opinion filed October 17, 1991.

INTRODUCTION

The present controversy involves the efforts of defendant Overland to recover allowable damages for breach of an equipment lease. According to the agreement of the parties, payments required to be made under the lease agreement were secured not only by the equipment described in the lease but also purportedly by the residence of plaintiffs Larson through a trust deed irregularly executed by Grethe Larson who affixed her own signature to the trust deed as well as that of her husband Dale.

Because Overland commenced its recovery efforts by

non-judicial foreclosure procedures against the trust deed the parties are reversed from that usually encountered because it became necessary for plaintiffs to institute this action to have their rights and liabilities under the lease agreement and trust deed declared and determined, and if fraud be found, for rescission and damages. As the Court's decision recites, Overland is an assignee of the lease agreement and beneficiary in the trust deed

Plaintiffs properly demanded trial by jury of all issues. (Because the issues here involved the determination of the right to the possession of plaintiffs' residence they were entitled to jury trial on all issues of fact relating thereto. *Holland v. Wilson*, 8 Ut2d 11, 327 P.2d 150 (1958); *Hansen v. Stewart*, Utah Supreme Court Opinion filed July 28, 1988 #19383.)

Overland's right to recovery is limited by the provisions of the lease agreement that allow for the recovery of damages upon default of the lessee(s). If the lease agreement provides for liquidated damages, which is the case here, and the amount of liquidated damages is disproportionate to the possible compensatory damages (full contract [lease] price, less the current value of the equipment, and the time value of the payments), and constitutes a forfeiture or penalty, then defendant Overland may not recover. *Young Elec. Sign v. United Standard West*, 755 P.2d 162 (Utah 1988).

Plaintiffs claim fraud in the inducement on the part of agents of Overland's assignor and consequently Overland. It is plaintiffs claim that defendant Milne as agent and employee

participated in the fraud by falsely notarizing the trust deed and seeing to its recordation.

As the Court recites in its decision, Overland purchased Larsons' residence for \$51,864.90 at non-judicial foreclosure sale with full knowledge that Larsons were claiming the underlying trust deed was obtained through fraud and was otherwise irregular (forged by one of the purported signers). Overland thereafter did nothing to undo the sale or to adjust its position relative to the plaintiffs' claims. In fact, Overland sought and was granted summary judgment that "the execution of a Deed of Trust [the deed of trust] by Grethe Larson describing the Residence was valid, binding, and enforceable as a matter of law, and that it further created a severance of the joint tenancy of Dale L. Larson and Grethe Larson in the Residence. Pursuant to such transfer of interest by Grethe Larson and the subsequent foreclosure of the Deed of Trust by Overland, the Court orders that the present interests of Overland and Dale L. Larson in and to the Residence are that of tenants in common, each owning an individual one-half (1/2) interest therein; . . . thereby confirming purchase by Overland for \$51,864.90 at foreclosure sale. This would seem to conflict with the Court's analysis of the facts that ". . .the real property was sold to Overland for \$51,864.90" and "the [district] court . . . ordered the transfer of Grethe Larson's one-half interest in the Larsons' home to Overland."

Although without a legal determination of whether

due or not, under anyone's interpretation of the record, Larsons are entitled to have \$51,864.90 credited against any obligations under the lease agreement purportedly owing at the time of the sale. Using Overland's summary judgment proof (Affidavit of K. Douglas Anderson, r. 961-65) as a guide as to the amount owing on May 27, 1987 under the rule of damages (benefit of the bargain) stated above, there would be nothing due Overland on the lease after the application of \$51,864.90. Overland having purchased and paid \$51,876.90 for the property securing the lease agreement there was no further obligation thereunder for plaintiffs, or either of them, to pay anything. Overland, having elected to proceed as it did (non-judicial foreclosure) is bound by the results; and in that it sought no deficiency in the manner prescribed by statute (§57-1-32) cannot subvert the intent of that procedure by proceeding on a cause of action under the lease and guaranty agreement against plaintiff Dale Larson that does not exist. It is this theory of double recovery that plaintiffs espoused throughout these proceedings in the trial and appellate courts, and not, as the Court suggests "enforcement of the lease allowed double recovery and penalty because Overland only sought to recover amounts due after offset from sale proceeds."

All of the foregoing facts and inferences were properly before the trial court at the time of the summary judgments; each presents the issue of whether Overland (and Milne and her surety) were entitled to judgment as a matter of law.

The rule in Colonial Leasing [731 P.2d 483] applies here. Where certain lease provisions, e.g., those quoted in fn. 2 of the Court's decision, are the same or similar to provisions normally contained in security or sale agreements, an ambiguity is created concerning the intentions of the parties that can only be cleared up by extrinsic evidence which has been denied by the Court's decision in this case. In summary judgment proceedings it is for the proponent to establish the non-existence of factual issues, and that he is entitled to judgment as a matter of law. In this record whether the lease agreement is a true lease or a security agreement remains a question because ambiguities exist as to the intentions of the parties that can only be resolved by a jury.

In its decision the Court holds that because of procedural default appellants will not be permitted to challenge in this appeal the award of attorney's fees in the judgment against defendant Dale Larson. The sanction serves purely a technical interest; and again it is the case that in challenges to summary judgments it is for the proponent to establish that such judgment would be proper because no questions of material fact remain and movant is entitled to judgment as a matter of law. The record itself, devoid of showing of legal justification and professional reasonableness for the fee award, leaves questions of fact remaining as to the legal justification and professional reasonableness for the fee award.

In its decision the Court did not address the penalty or forfeiture issue as it is presented by appellants. Again, it was Overland's duty in its summary judgment motion to establish that it was entitled to judgment as a matter of law. In the trial and appellate courts appellants have contended that Overland did not establish its right to judgment under the liquidated damages provision of the lease agreement because it would result in a penalty or forfeiture. A penalty results for two reasons; first, in determining the amount of recovery there is no credit given the lessee for the current market value of the leased equipment; and, second, the lessor is allowed "a sum equal to one-third of the monthly payments that would have been paid if the lease had continued in full force and effect for [60 months], without consideration of the shortening of the term by reason of default." The provision is therefore unenforceable as a penalty, *Young Elec. Sign, supra*, because the amount of liquidated damages agreed to is disproportionate to the possible compensatory damages.

CONCLUSION

At the entry of summary judgments herein,

1. A question of material fact remained as to whether, or to what extent, the obligations under the lease agreement had been discharged at the time of Overland's counterclaim.

2. A question of material fact remained as to what obligations \$51,864.90 paid.

3. A question of material fact remained as to whether the lease agreement was a true lease or a sale agreement.

4. A question of material fact remained as to whether there was a commercially reasonable disposition of the leased equipment after default and repossession.

5. Overland had not established its right to judgment as a matter of law under the liquidated damages provision.

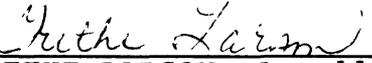
6. A question of material fact remains as to whether plaintiff was damaged by the fraudulent actions of the notary public.

WHEREFORE, appellants certify that this petition is presented in good faith and not for delay, and pray that the same be in all things granted.

DATED November 4, 1991.



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PROOF OF MAILING

On November 4, 1991, four copies of the foregoing mailed as follows:

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