1983

Colonial Leasing Company of New England, Inc., A Massachusetts Corporation, D/B/A Colonial-Pacific Leasing Co. v. Michael Ray Larsen : Appellant's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

COLONIAL LEASING COMPANY OF NEW ENGLAND, INC., a Massachusetts corporation, d/b/a COLONIAL-PACIFIC LEASING CO.,

Plaintiff-Respondent,

No. 1938

V.

MICHAEL RAY LARSEN,

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from a Judgment and Order of the District Court
Third Judicial District, in and for Salt
Lake County, State of Utah, Honorable
Judith M. Billings, Presiding

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NATURE OF THE CASE

Plaintiff's action is for the aggregate of items (unpaid rentals, sales tax, late charges, residual value and sales tax thereon, costs and personal property tax, costs of court and attorney fees) due under an equipment lease, less sale proceeds after repossession. Defendant by his answer contended the lease was intended as security and subject to the provisions of the UCC's Article 9, and that plaintiff's failure to comply with the Article 9 requirements as to disposition of repossessed collateral precludes plaintiff from recovery in this action. Plaintiff moved for summary judgment.

DISPOSITION IN LOWER COURT

The lower court granted plaintiff's motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Reversal of the lower court's summary judgment.

MATERIAL FACTS

On September 23, 1977, defendant obtained a crawler-loader (equipment) from plaintiff on a 60-month lease. The equipment was purchased by plaintiff from a supplier specifically for defendant (R-5-8). Defendant defaulted and the equipment was repossessed and eventually sold (the complaint states the net proceeds of sale to be $3300.00 [R 3]; Tal Kennedy's affidavit [R 23] states the sale proceeds to be $6000.00).

The lease (R-5-8), after identifying the equipment, states the amount of each monthly payment, including sales tax, to be $817.82 for "rental", and $40.89 per month for "use tax", that payments are to be made "monthly", that the initial term of the lease is "5 years", that the number of payments is "60", that the security deposit is "none", and that the renewal rental "after the initial term" is "none, payable annually in advance."

The lease is silent as to an option. However, at the time of the transaction there was a verbal agreement between plaintiff and defendant that defendant had an option to purchase the equipment at the end of the lease for its "residual value" of $3386.45 and sales tax, and custom and usage dictated such an arrangement (R 53-54A, 56). In September 1982 the market value of the equipment was $16,500 (R-54).

The lease-end responsibility of defendant is to "return

the equipment in good repair, ordinary wear and tear resulting from proper use thereof alone expected [sic], by delivering it, packed and ready for shipment, to such place or carrier as lessor [plaintiff] may specify." Under the renewal provisions of paragraph 9 of the lease, after the initial term of five years, the lease is automatically renewed each year for a term of one year, for no rent, and otherwise upon the terms and conditions of the lease, unless defendant gives plaintiff written notice of cancellation at least thirty days before the expiration of the preceding term.

Under the lease, defendant is required to make all necessary repairs to the equipment, and to bear the entire risk of loss, theft, damage or destruction of the equipment from any cause whatsoever; and defendant is to pay all taxes, maintenance, insurance and other costs relating to the equipment, and provides an agreement for defendant to indemnify plaintiff and hold plaintiff harmless from any claims arising from the use of the equipment, and to give defendant the benefit of the supplier's warranties. It further provides that plaintiff made no representations or warranties with respect to the equipment, and was not liable to the defendant for any damage due to delays in delivery or installation of the equipment, and plaintiff did not select or inspect the equipment.

There is nothing in the record to indicate the relation between rental charges and depreciation, obsolescence or that the rentals were normal or that the defendant was not acquiring

an equity in the equipment.

A disputed issue of fact exists concerning the correct balance which is due under the lease (R-23, 57).

Defendant's discovery of relevant information (R-63-66) was cut short by the lower court's entry of summary judgment.

ARGUMENT AND AUTHORITY

The true lease versus security interest was improperly resolved by the lower court.

On a motion for summary judgment the issues are defined by the pleadings. Security Pacific Nat. Bank v. Adamo, 191 Cal Rptr 134 (CalApp,1983). Plaintiff's complaint averred a true lease whereas defendant's answer contended the lease was a purchase agreement. The contention precipitates a genuine issue of fact which would preclude the granting of a summary judgment. Boise Cascade Corporation v. Stonewood Development Corp., 655 P 2d 668 (Utah, 1982). The trial court was required to resolve the disputed fact of true lease versus security interest and by its grant of summary judgment impliedly found that the agreement and transaction forming the basis of this lawsuit was a lease that did not create a security interest subject to the provisions of UCC's Article 9. The resolution of the issue suggests that a genuine issue exists.

The broad scope of UCC's Article 9 is stated in Section 70A-9-102, U.C.A., 1953, "Except as otherwise provided * * *, this chapter applies to (a) any transaction (regardless of its form)which is intended to create a security interest in

personal property." Therefore, if a transaction in the form of a lease is actually intended to be a sale, reserving to the "lessor" a security interest, it falls under the ambit of Article 9. FMA Financial Corp. v. Pro-Printers, 590 P 2d 803 (Utah,1979).

Section 70A-1-201(37), U.C.A., 1953, as amended, provides in relevant part, "Whether a lease is intended as security is to be determined by the facts of each case; however (a) the inclusion of an option to purchase does not of itself make the lease one intended as security, and (b) an agreement that upon compliance with the terms of the lease, the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

The lower court apparently was of the opinion the assertion by defendant of an oral option, and the existence of an option based on custom and usage, posed inadmissible evidence because of the parol evidence rule and therefore could not be considered in connection with the factual determination as to whether the transaction between plaintiff and defendant is a true lease or one intended as security.

An assertion that a custom and usage exists does not involve an opinion and is theefore admissible. 7 J. Wigmore, Evidence, Section or Paragraph 1954 (Chadburn rev. ed. 1978); DiMarzo v. American Mut. Ins. Co., 449 NE 2d 1189 (Mass.,1983).

The lease is completely silent with respect to the option and therefore the parol evidence rules does not preclude evidence of an oral option because there would be no contradiction of the

lease terms. Vol 1972, No. 3, Law Forum, "Equipment Leasing."

A question remains as to the nominality of the option price; but the fact that an option price is not nominal, or that no option exists, does not foreclose construing a purported lease as a purchase agreement. Western Enterprises v. Arctic Office Mach., 667 P 2d 1232 (Alaska,1983).

On plaintiff's motion for summary judgment it had the burden of showing that there are no genuine issues of material fact and that it was entitled to judgment as a matter of law. Carnes v. Carnes, 668 P 2d 555 (Utah,1983). The lease provisions themselves, as well as the existence of an option and its nominality, are apposite in making the determination of true lease versus purchase agreement. 76 ALR 3rd 1; Ford Motor Credit Company v. Dowdy, 284 SE 2d 679 (Ga.App.,1981).

CONCLUSION

Questions of fact remain for trial as to whether the intention of the parties was the creation of a true lease or security for sale of the equipment; and, if a security instrument, whether the disposition by plaintiff was commercially reasonable.

RESPECTFULLY SUBMITTED,

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On November 21, 1983, two copies of this Appellant's Brief were mailed first-class, postage pre-paid, in a sealed envelope, to L. Edward Robbins, attorney for plaintiff-respondent, at his last known address as follows: 1657 East 9400 South, Sandy, Utah 84092.

ROYAL K. HUNT