1983

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

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, LARSEN BROTHERS CONSTRUCTION CO., a general partnership; MICHAEL RAY LARSEN and JODY EARL LARSEN, individuals; MICHAEL RAY LARSEN and JODY EARL LARSEN partners in and doing business as LARSEN BROTHERS CONSTRUCTION COMPANY, Defendants-Appellant.	Case No. 19384

BRIEF OF RESPONDENT

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Appeal from a Judgment and Order of the District Court

Third Judicial District Court, in and for Salt

Lake County, State of Utah, Honorable

Judith M. Billings, Presiding

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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, LARSEN BROTHERS CONSTRUCTION CO., a general partnership; MICHAEL RAY LARSEN and JODY EARL LARSEN, individuals; MICHAEL RAY LARSEN and JODY EARL LARSEN partners in and doing business as LARSEN BROTHERS CONSTRUCTION COMPANY, Defendants-Appellant.	Case No. 19384

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COLONIAL LEASING COMPANY OF NEW ENGLAND, INC., a Massachusetts corporation, d/b/a COLONIAL-PACIFIC LEASING CO., Plaintiff-Respondent, vs. LARSEN BROTHERS CONSTRUCTION CO., a general partnership; MICHAEL RAY LARSEN and JODY EARL LARSEN, individuals; MICHAEL RAY LARSEN and JODY EARL LARSEN partners in and doing business as LARSEN BROTHERS CONSTRUCTION COMPANY, Defendants-Appellant.	Case No. 19384

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

This is an action for damages resulting from breach of an equipment lease (R-2-8). Upon motion by plaintiff-respondent Colonial-Leasing Company of New England, Inc., a Massachussetts corporation, d/b/a Colonial-Pacific Leasing Co. (hereinafter referred to as "respondent"), the Third District Court, Honorable Judith M. Billings presiding, granted summary judgment against

defendants Michael Ray Larsen and Larsen Brothers Construction Co. (R-68-69). Defendant Michael Ray Larsen (hereinafter referred to as "appellant) appeals.

DISPOSITION IN THE LOWER COURT

The District Court granted respondent's motion for summary judgment (R-68-69).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the summary judgment granted below.

STATEMENT OF FACTS

On or about the 23rd day of September, 1977, respondent leased a crawler-loader on a 60-month lease (R-23, 25-26). Subsequently, appellant defaulted (R-23). Respondent repossessed and sold the equipment (R-23). The net proceeds from this sale were $6,000.00 (R-23). After crediting the proceeds of sale, appellant's liability to respondent was $27,716.10, plus attorney's fees and costs (R-23).

The lease in question contains an integration clause, cf. paragraph 23 (R-26), and expressly requires the return of the leased equipment upon expiration of the lease term. Paragraph 12 expressly provides as follows:

> "Upon the expiration or earlier termination of this lease, lessee, at its expense, shall return the equipment in good repair, ordinary wear and tear resulting from the proper use thereof alone expected, by delivering it, packed and ready for shipment, to such place or carrier as lessor may specify."(R-26).

ARGUMENT

POINT I. THERE ARE NO ISSUES OF FACT REMAINING SINCE THE PAROL EVIDENCE RULE BARS THE ALLEGED ORAL OPTION AS A

MATTER OF LAW AND RESPONDENT IS THEREFORE ENTITLED TO AFFIRMATION OF ITS SUMMARY JUDGMENT.

A. The parol evidence rule remains a matter of substantive law, this court's decision in FMA Financial Corp. v. Pro-Printers, 590 P. 2d 803 (Utah, 1979) notwithstanding.

The thrust of appellant's argument is that an alleged oral option to purchase creates an issue of fact regarding the commercial reasonableness of respondent's disposition of the leased property under Article IX of the Utah Uniform Commercial Code. In so arguing, appellant acknowleges that the written lease grants no such option and asserts that reliance must be placed on alleged oral representations made prior to the execution of the lease in question (R-56). Appellant has not alleged fraud.

Respondent respectfully submits that the parol evidence rule operates as a matter of law to abort appellant's theory. This is true, respondent submits, under either Utah or Oregon law.1/ In Rainford v. Rytting, 22 Utah 2d 252, 451 P. 2d 769 (1969), this court held that the defendant's affidavit created no issue of fact concerning oral conditions of performance where the agreement stated that it was the entire agreement of the parties:

> "We must agree with respondent that appellants are trying to vary the terms of the written agreement by

1/The lease provides that the "legal effect of this lease shall be governed by the laws of the State of Oregon." (R-26). Respondent does not believe a choice of laws analysis to be necessary since it appears that the law of both jurisdictions is substantially the same. Respondent would suggest, however, that it would be inappropriate to develop "new" law for Utah on the basis of an agreement which references Oregon law.

parol evidence, i. e., to establish a different contract on facts known at the time of reducing their understanding to a written form.

> '* * * The rule is well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contained the whole of the agreement between the parties, that it is a complete memorial of such agreement, and that parol evidence of contemporaneous conversations, representations, or statements will not be received for the purpose of varying or adding to the terms of the written document.* * *'[Citing B. T. Moran, Inc. v. First Security Corp., 82 Utah 316, 329, 24 P. 2d 384, 389 (1933).]"[Emphasis supplied.] 22 Utah 2d at 254-255, 451 P. 2d at 770-771.

Similarly, in Ruff v. Boltz, 252 Or. 236, 448 P. 2d 549 (1968), the Oregon Supreme Court said:

> "The parol evidence rule is a rule of substantive law and will be applied whether or not objection is made to the admission of the evidence which violates the rule." 448 P. 2d at 550. cf. Deering v. Alexander, 281 Or. 607, 576 P. 2d 8 (1978); Wall v. S. E. C. Co., Inc., 270 Or. 553, 528 P. 2d 1054 (1978).

Along these same lines, this court in Overson v. United States Fidelity and Guaranty, 587 P. 2d 149 (Utah, 1978) adopted a line of cases from the State of Washington stating that:

> "....'Interpretation of a written contract is usually a question of law for the court. If its terms are clear and unambiguous, summary judgment is proper." [Citing Central Credit Collection Corp. v. Grayson , 7 Wash. App. 56, 499 P. 2d 57 (1972).] 587 P. 2d at 151.

Subsequently, this court has affirmed the granting of summary judgment on several occasions by citing the rule of Overson v. United States Fidelity and Guaranty, supra. cf. Mason v. Commercial Union Assur. Companies, 626 P. 2d 428 (Utah, 1981), Boise Cascade Corporation, Building and Materials Distribution Division v. Stonewood Development Corporation, 655 P. 2d 668 (Utah, 1982); Morris v. Mountain States Tel. & Tel. Co., 658 P.

2d 1199 (Utah, 1983).

Appellant seems to believe that this court's decision in FMA Financial Corp. v. Pro-Printers, 590 P. 2d 803 (Utah, 1979) creates an exception for leases from the rules of construction regularly applied to other written agreements. In that case, the lessor tried its case on the assumption that an option to purchase existed, even though none was stated in the written lease. After losing, the lessor appealed, attempting to raise the issue of the parol evidence rule. This court rejected that attempt noting that the lessor's own witnesses had acknowledged the granting of options to purchase as a matter of course. Respondent submits that FMA Financial Corp. v. Pro-Printers, supra, insofar as it relates to the parol evidence rule, constitutes nothing more than judicial recognition of the accepted rule of appellate procedure that a party cannot try a case on one theory, lose, and then appeal on another. cf. Guaranteed Food of Neb., Inc. v. Rison, 207 Neb. 400, 299 N. W. 2d 507 (1980). In the present case, the parol evidence rule is not new matter raised by a losing party for the first time on appeal. Therefore, the procedural rule of FMA Financial Corp. v. Pro-Printers, supra, does not apply and the lower court's granting of summary judgment should be affirmed by this court as consistent with established precedents of both Oregon and Utah law.

B. This lease is a fully integrated agreement which requires the lessee to return the equipment at the end of the lease term. Therefore, parol evidence of an option to purchase has no legal relevance and respondent is entitled to affirmation of its summary judgment as a matter of law.

The lease in question states, "This instrument constitutes the entire agreement between lessor and lessee...." (R-26). Further, paragraph 12 of the lease requires the lessee to surrender the equipment on termination of the lease term:

> "Upon the expiration or earlier termination of this lease, lessee, at its expense, shall return the equipment in good repair, ordinary wear and tear resulting from proper use thereof alone expected, by delivering it, packed and ready for shipment, to such place as lessor may specify." (R-26).

Appellant attempts by parol evidence to stand the written agreement on it's head. Not only, according to appellant, is there no agreement to surrender the equipment at the end of the lease term, there is in addition a contractual right of purchase at such time. All of this squarely contradicts the written agreement. For these reasons, the parol evidence rule operates as a matter of law to preclude any issue of fact regarding the existence of an option to purchase. Rainford v. Rytting, supra; Ruff v. Boltz, supra.

Other provisions of the lease make it clear that ownership of the equipment is to remain with the respondent at all times. Paragraph 22 thereof expressly provides, "The equipment is, and shall remain, the personal property of lessor; and lessee shall have no right, title or interest therein or thereto except as expressly set forth in this lease." (R-26). And further, while it is true that, as appellant suggests, paragraph nine of the lease provides for renewal of the lease at the end of the initial lease

term(R-26), upon renewal the lessee must continue to pay the rentals required by the agreement. Indeed, pursuant to paragraph nine, the lessee never becomes entitled to retain possession and use of the leased equipment without making monthly rental payments. All of this is wholly inconsistent with appellant's theory of an eventual ownership right acquired through exercise of an alleged oral option to purchase.

Appellant asserts in passing the existence of a custom and usage as a means of avoiding the parol evidence rule. However, there is nothing in the record to show that appellant had any knowledge of any custom or usage contrary to the written agreement nor any reliance on the same. Moreover, usage cannot contradict the express terms of a written agreement. Rest. 2d, Contracts, Section 221.

In In Re Atlantic Times, Inc., 259 F. Supp. 820 (N. D. Georgia, 1966), the Court concluded that the lease in question was a true lease even though the lease apparently did not direct the lessee to return the equipment at the end of the lease term. The Court found that an entire agreement clause together with a provision that the agreement was intended by the parties to be a lease formed a sufficient basis for the conclusive presumption of the parol evidence rule. In the present case, respondent presents an even stronger case for the application of the parol evidence rule since the disposition of the equipment on termination of the lease is expressly addressed. Therefore, the summary judgment granted below should be affirmed.

POINT II. THE STATUTE OF FRAUDS SET FORTH IN SECTION 70A-2-201(1) UTAH CODE ANNOTATED (1953) AS AMENDED BARS ANY CONTENTION THAT THE LEASE HEREIN IS IN FACT AN AN AGREEMENT OF PURCHASE AND SALE AS A MATTER OF LAW.

Section 70A-2-201(1) Utah Code Annotated (1953) as amended provides that "a contract for the sale of goods for the price of $500 or more is not enforceable by way or action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties...." The application of this section to the present case is clear: Appellant acknowleges that the only writing present here is a lease, not a contract of sale, and that resort must be had to alleged oral representations to prove that a sale has occurred. Since there is no written contract of sale and the price of the goods would clearly be in excess of $500.00, appellant's argument fails as a matter of law.

In Re Financial Computer Systems, Inc., 474 F. 2d 1258 (1973) is squarely on point. Therein, the trustee in bankruptcy sought to enforce the lessee's rights under an alleged oral option to purchase. The District Court allowed him to do so. On appeal, the Ninth Circuit reversed on the basis of a California state statute identical to Section 70A-2-201(1) Utah Code Annotated (1953) as amended. The lease in that case contained an integration or entire agreement clause and provided that at the end of the lease term, "Lessee will return the property to lessor in as good condition as received less normal wear, tear and deprciation." 474 F. 2d at 1259. The Ninth Circuit concluded that since the only written agreement, the lease, contained "no

mention of an option to purchase," Ibid., and "clearly and expressly [provided] for a straight lease with ownership remaining with [the lessor] at all times," Ibid., the trustee's attempted action was improper. There was no "writing sufficient to indicate that a contract for sale [had] been made between the parties...." 474 F. 2d at 1260.

In the present case, there is no writing to indicate that a contract for sale has been made between the parties. Therefore, respondent is entitled to affirmation of its summary judgment as a matter of law.

CONCLUSION

Neither Oregon nor Utah has created any special exception for leases from the parol evidence rule. Indeed, the general rule for equipment leases appears to be no different from that for other kinds of agreements:

> "Where a contract contains an 'entire agreement clause,'...the general rule has been that such a statement is conclusive as to an integration." [Emphasis supplied.] Bender's Uniform Commercial Code, Section 29A.06[1][a].

Respondent submits that there is nothing in the present case to warrant any departure from the general rule. Appellant received a full and fair opportunity to present his defense. Indeed, at the hearing on respondent's motion for summary judgment the Court asked the appellant whether he had anything to add by way of allegation, i. e., fraud, and the appellant indicated that he did not (R-68).

Moreover, the statute of frauds as set forth in Section 70A-2-201(1) bars any contention that the lease in question is in fact an agreement of purchase and sale as a matter of law.

For these reasons, respondent respectfully submits that the judgment of the District Court in favor of respondent should be affirmed.

DATED this 29 day of December, 1983.

By: _____
L. Edward Robbins
Attorney for Plaintiff-Respondent
Colonial-Pacific Leasing Co.

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Respondent's Brief to the following individual, first class postage fully prepaid, this 29 day of December, 1983:

Mr. Royal K. Hunt, Esquire
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