1984

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

V.

No. 19383

MICHAEL RAY LARSEN,

Defendant-Appellant.

# APPELLANT'S REPLY 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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APPELLANT'S REPLY BRIEF

On a motion for summary judgment the trial court and appellate court must construe all facts and inferences most favorably toward the party opposing the motion, even as to those issues upon which the opposing party would have the trial burden. Wilkins v. Lane County, 671 P 2d 1178 (OrApp,1983).

So construed, the facts are that in 1977 defendant needed to finance the acquisition of a crawler-loader. The financing was eventually arranged by United Leasing (Chuck Brazier) of Salt Lake City with plaintiff. Following the negotiations, plaintiff paid Mountain West Machinery of Salt Lake City the total price of the equipment amounting to approximately $33,000.00. The equipment was delivered directly by Mountain West Machinery to defendant. (R 53-57). To complete the transaction the defendant then entered into the "lease" arrangement with plaintiff (R 5-8). The written

instrument called for 60 monthly payments of $858.71 for a total of $51,522.60. It further provided for annual extensions thereafter for no rental.

Plaintiff claims the written instrument is a true lease whereas defendant's claim is that it is a security agreement.

At the time of the lease it was the trade custom and usage to accord the lessees an option to purchase the equipment at the end of the lease for its residual value (R 53-57).

At the time of the lease defendant was granted an oral option to purchase the equipment at the end of the lease for its residual value (R 53-57).

In granting summary judgment, the trial court assumed that the only factor was the option and because it was not contained in the written agreement evidence to establish it would be inadmissible at trial because of the statute of frauds and parol evidence rule. There was thus left remaining the question of true lease versus security agreement determined upon an analysis of the appropriate criteria for such distinction.

By the terms of Sec70A-1-201(37), U.C.A., 1953, whether a lease creates a security interest is to be determined by the facts of each case. The key factor is the intention of the parties. Section 70A-9-102,U.C.A., 1953. The terms of the agreement itself are obviously relevant in determining the intent of the parties. Just as the inclusion in the lease of a purchase option does not of itself imply a secured installment sale,-the exclusion of one does

not automatically imply a true lease. FMA Financial Corp. v. Pro-Printers, 590 P 2d 803 (Utah, 1979); Matter of Fashion Optical, Ltd., 653 F 2d 1385 (10CCA, 1981); 76 ALR 3rd, Sec. 21[a].

Oral or extrinsic evidence is admissible and not subject to the prohibition of the parol evidence rule as proof of the true nature of the purported lease agreement. McKeeman v. Commercial Credit Equipment Corp., 320 F.Supp. 938 (DC Neb., 1970); Messick v. PHD Trucking Service, Inc., 615 P 2d 1276 (Utah, 1980); Pendleton Grain Growers v. Pedro, 530 P 2d 85, 271 Or. 24 (1975); Story v. Hamaker, 423 P 2d 185, 248 Or. 584 (1967).

Evidence as to usage and custom in the trade is also admissible to establish the option. Section 70A-2-202, U.C.A., 1953 (a written contract may be explained or supplemented "(a) by course of dealing or usage of trade * * * or by course of performmance * * *"); State ex rel. Nichols v. Safeco Ins. Co., 671 P 2d 1151 (New Mex App, 1983); 17 ALR 3rd 1010 Sec. 11[b].

The evidence as to the option renders the integration clause of the lease in question ineffective. FMA, supra.

Where a lease does not contain a specific option to purchase but permits renewal of the lease for rentals considerably less than the rentals contained in the original lease terms, the lease is intended for security. 76 ALR 3rd 11 [UCC-Equipment lease as security interest].

Other factors indicated in the case of Burroughs Corporation v. Century Steel, Inc., 664 P 2d 354 (Nev., 1983) are present in this case and are reasonable and imperative for consideration in connection with the factual determinations as to whether a

particular transaction between parties is a true lease or one intended as security. In the instant case a factual issue remains which can only be resolved by a determination of factors within the analytical framework dictated by and within the pervue of, Sections 70A-1-201(37) and 70A-9-102, U.C.A., 1953.

The ultimate inferences to be drawn from the facts contained in the present record are in favor of defendant's claim of security interest or agreement; or such inferences are not clear and therefore summary judgment is not appropriate. Bigger v. Freemont Nat. Bank & Trust Co., 340 NW 2d 142 (Neb., 1983).

The authorities cited by plaintiff pertain to issues not present here with the exception of In re Atlantic Times, Inc., 295 F. Supp. 820 (N.D. Georgia, 1966) in which the holding of the court is that where the option is not contained in the written instrument, the transaction is one of lease, and In re Financial Computer Systems, Inc., 474 F 2d 1258 (9th Cir., 1973) where the court held evidence of an oral option to be inadmissible as in violation of the statute of frauds. The rule as stated in those cases is otherwise in Utah.

RESPECTFULLY SUBMITTED,

ROYAL K. HUNT

I hereby certify that I mailed two true and correct copies of the foregoing Appellant's Reply Brief to L. Edward Robbins attorney for plaintiff-respondent, at his last known address as

follows. 1657 East 9400 South, Sandy, Utah 84092, by first-class mail, postage prepaid, in a sealed envelope, on February 1, 1984.

ROYAL K. HUNT