

1968

## Spencer Auto Sales, Inc., A Corporation v. First Security Bank Of Utah : Brief of Respondent

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\*\*\*\*\*

SPENCER AUTO SALES, INC.,  
a Corporation,

Plaintiff-Respondent,

-v8-

Case No. 10942

FIRST SECURITY BANK OF UTAH,

Defendant-Appellant.

\*\*\*\*\*

STATEMENT OF FACTS

On or about July 11, 1965, a Dealer's Protective Reserve Agreement was entered into between the parties, the sum and substance of which are as follows: that Dealer may sell various retail sales agreements to the Bank and the Bank, at its option, may purchase said contracts, to be governed in accordance with the terms thereof. Said Agreement was executed on printed forms prepared and furnished by the Appellant. It should be specifically noted that by express language said

contract specifically provided that the sales were at the exclusive option of each party and the parties were never under any obligation to submit contracts for purchase or to purchase any contracts submitted. This is controlled by paragraph #1 which reads as follows:

"The Bank will purchase from the Dealer such contracts as are offered for sale by the Dealer and which are in such form and substance as may be acceptable to the Bank, and nothing herein shall obligate the Bank to discount or purchase any contract or contracts from the Dealer nor obligate the Dealer to offer any contract or contracts for sale to the Bank. The Bank shall have the right at all times to refuse any and all contracts offered by the Dealer." (emphasis supplied)

Parties operated pursuant to the terms of said Agreement up until the fore part of 1966. However, the Respondent was having difficulty in obtaining from the Appellant his excess reserves as provided in said Agreement. Verbal demand was made for the payment of said excess reserves, but was refused. (Byron Cheever deposition, p.11,12) Following the refusal by Appellant to pay the excess reserves, written notice was submitted, (Brief P. 4, Exhibit #1) and acknowledged to be a demand

for payment (Byron Cheever deposition, p4).

This dissatisfaction of the Respondent over the non-payment of his excess reserves was apparently noted by the Appellant (Deposition supra, p. 15). At any rate the flow of business from Respondent to Appellant declined with the last contract being sold on or about the 20th of July, 1966. The grounds of refusal given was that the paper purchased by Appellant was under review and that the Appellant had the right to withhold all reserves should they feel the contracts previously accepted by them were in any way undesirable.

(Deposition supra p. 12). The Appellant continued to withhold the excess reserves and the Respondent as a result thereof, continued to channel his retail paper to other financial institutions. It is of specific note that Appellant admits it is common in the industry to have several outlets for retail paper. (Brief, supra p. 1; Deposition supra p. 18). On or about January 9, 1967, a second written demand for the excess reserves was made and not complied with.

Following the later demand, suit was filed and an Answer filed alleging default on the part of the Dealer as grounds for validly refusing payment of excess reserves. Respondent filed Motion for Summary Judgment. Appellant in defense thereof filed countering Affidavit alleging default of the Dealer as justification of non-payment of said excess reserves. The matter was set for hearing and shortly before the hearing date a Supplemental Affidavit was filed by Appellant alleging termination on or about October 21, 1966 on the part of the Respondent. The Motion was postponed and the deposition of Byron Cheever, Heber Branch Manager, was taken. Mr. Cheever admits in the deposition that there was no such notification of any termination as set forth in the Affidavit and further acknowledges that such was the result of Appellant's own conclusion derived from their interpretation of the statements and acts of the Respondent. (Deposition p. 19, 20, 16 and 15).

At the hearing of the Motion for

Summary Judgment parties stipulated that the deposition be published and that the same may be considered as evidence in support of the Motion for Summary Judgment. It was also admitted in the deposition, page 19, that there was no issue of default.

Following the taking of the deposition a notice of termination then was given by the Appellant which is more particularly set forth in the Affidavit of record.

At all times involved there was an excess of reserves over and above the 5% holdback as provided for in the Reserve Agreement. It has been stipulated of record that the Judgment is mathematically correct so far as the amounts set forth therein.

Pertinant points to be considered are as follows:

- (a) That out of all of the hundreds of thousands of dollars of business transacted over the last years that not one dollar has ever been lost by the Appellant.



- (b) That each contract purchased by the Appellant is secured by the vehicle in question, by the purchasers personal obligation, by the Respondent's personal obligation and by the 5% reserve holdback.
- (c) That at no time has there been any suggestion of the insolvency of the Respondent and at no time has there been a failure to meet any obligation pursuant to the terms of the Reserve Agreement by the Respondent.

ARGUMENT #1

THE ALLEGED EVIDENCE OF TERMINATION, IF BELIEVED, DOES NOT CREATE AN UNRESOLVED FACTUAL SITUATION.

Appellant relies upon the declaration of Byron Cheever concerning an alleged prior conversation with the agent of Respondent that is set out more particularly in the deposition of

Mr. Cheever, pages 15 and 16:

"....He again stated that he had been looking around and had seriously considered changing his financing connection. He pointed out that he does not get in a hurry. He is still thinking about the matter...."

"....This was the beginning of events which led up to the fact that he discontinued to do business. Now any formal statement on his part to the effect that 'I am through with you', I don't recall. Nor no letter to this effect that I recall. But he just phased out his business, his new business with us."

It is contended that the same is tantamount to notice of termination.

Any termination is denied by the Respondent.

If we consider the statement to be true there is still insufficient evidence to sustain the Appellant's burden of proof of termination. It should be recalled first of all that the contract under which the parties were operating required no party to submit any business to the other party. It is conceded that a contract might be terminated by means other than a written or verbal termination, i.e. by implied rescission.

The most common method of implied recision is by making of subsequent contracts that are inconsistent with the prior one. (12 Am Jur, Contracts, Sec 43) Appellant alleges that the lack of business submitted following the so called conversation is such an inconsistent position as to be tantamount to the termination. It should be pointed out that there is nothing inconsistent with diverting the respondent's business to other financial institutions wherein agreement in no way obligates party to submit any business to the Appellant. It should be further pointed out that at all times the paper was being diverted to the other financial institutions the Appellant was wrongfully withholding money of the Respondent. It is true that prior to the August 5th written demand, the demands for its excess reserve were made verbally by the Respondent.

It is submitted that at no time has there been any indication that the business flow to the Appellant would not be resumed in its ordinary volume should the Appellant fulfill its obligation under the Agreement and remit the funds of the Respondent.

Evidence of rescission or termination of a written contract by subsequent parallel agreement must be clear, positive and above suspicion (Heck vs Stafford Flour Mills Co., 289F43; 12 Am Jur, Contracts, Sec 432).

Although any termination by the Respondent is denied it is well established doctrine that there can be no forfeiture if the contract provides for the option to terminate unless the termination option expressly contains the condition of forfeiture. (12 Am Jur, Contracts, Sec 436, p. 1017):

".... and where the contract is revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either making the revocation."

The Courts will never permit a forfeiture to a party with dirty hands. The Appellant was in default on the date of the first written notice. Even the Affidavit of Byron Cheever acknowledges that at that time the Agreement was still in effect.

ARGUMENT #2

APPELLANT, IN EFFECT, URGES THE COURT  
TO ENFORCE A FORFEITURE.

It is conceded that termination at most would be a declaration on the part of the Appellant that it intended not to accept any additional paper but that such a termination as far as the Respondent is concerned would be a forfeiture of its right to receive its funds. Since the Appellant is under no obligation to accept any paper the net effect is strictly a forfeiture of the Respondent's right.

In order for the forfeiture to be enforced a very strict test must be met. Forfeitures are not favored by the law. Indeed they are regarded with disfavor. (12 Am Jur, Contracts, Sec 436) Before forfeiture can occur it must be clear that the parties understood and intended to provide for it in the contract under which it is attempting to be enforced. (Sec 436 supra) It should be noted that there is no condition of forfeiture expressed in the option to terminate. Its language is:

"This agreement may be terminated at any

ARGUMENT #2

APPELLANT, IN EFFECT, URGES THE COURT  
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It is conceded that termination at most would be a declaration on the part of the Appellant that it intended not to accept any additional payment but that such a termination as far as the Respondent is concerned would be a forfeiture of its right to receive its funds. Since the Appellant is under no obligation to accept any payment the net effect is strictly a forfeiture of the Respondent's right.

In order for the forfeiture to be enforced a very strict test must be met. Forfeitures are not favored by the law. Indeed they are regarded with disfavor. (12 Am Jur, Contracts, Sec 436) Before forfeiture can occur it must be clear that the parties understood and intended to provide for it in the contract under which it is attempting to be enforced. (Sec 436 supra) It should be noted that there is no condition of forfeiture expressed in the option to terminate. Its language is:

"This agreement may be terminated at any

time by either party upon notice to the other provided, however, that such termination shall not effect any contract discounted under this agreement."

The forfeiture attempted is derived from an inference from the opposite page of the termination option, which appears in direct conflict with the clear declaration that a termination shall not effect any prior contract. It is submitted that all of the rights of the Respondent accrue from prior contracts. I submit as a matter of law that the parties could not understand and intend, from the provisions of the said contract, that a termination, in fact, does adversely effect the rights of the Respondent upon a termination.

Where the preparer of an instrument is attempting to defeat the contract's operation, a very strict burden is imposed against said party. (17 Am Jur, 2d, Contracts, Sec 276) There is clearly no evidence that the preparer herein to-wit: Appellant, has met the burden of the law regarding their attempted forfeiture:

"....It was apparent...."

(deposition p. 2, line 10)

"....We knew by then it was all over...."

".... It was a series of events that led up to this conclusion...."  
(Deposition p. 18, line 30)

".... A series of circumstances which led up to the fact that his arrangement with us was being in effect terminated."  
(Deposition p. 13, line 28-30)

Certainly a self serving conclusion derived from conduct not inconsistent with the terms of the contract cannot effect a termination thereof and justify a forfeiture that arises merely by inference.

### ARGUMENT #3

THE GENERAL PLEDGE SET FORTH IN PARAGRAPH 4 OF THE RESERVE AGREEMENT DOES NOT GIVE RISE TO ARBITRARY CONTROL OF ANY RESERVES OVER THE 5%.

Where we have a general provision followed by a specific modification which can be implemented without destroying the general, the specific modifies the general and is given effect  
(17 Am Jur 2d, Contracts § 270)

There is nothing in the words "shall release" that gives the right of arbitrary



discretion. The general pledge must of necessity apply only to the 5% reserve. Any other interpretation would destroy the express release provision for the excess.

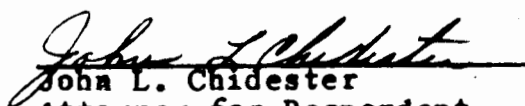
There certainly is no issue as to adequate security. Even a separate reserve was established to cover contracts wherein the security value was less than the discounted price. (Deposition p. 19-20)

### CONCLUSION

There is no issue of fact that would alter the decision of the Trial Court.

The fundamental fact is that Appellant is attempting to construe and enforce a forfeiture while in default. The contract fails to meet the requirements for a forfeiture as a matter of law. The evidence relied upon, if believed, still would not as a matter of law, effect a termination because it is in no way inconsistent with the terms of the contract.

It is respectfully submitted that the decision of the lower Court is correct and should be sustained.

  
John L. Chidester  
Attorney for Respondent