1969

Security Leasing Company v. Flinco, Inc. v. Office Equipment Associates, A Corporation and John B. Johnson : Plaintiff and Appellant's Brief

In The Supreme Court of the State of Utah

CURITY LEASING COMPANY,
a corporation,
Plaintiff and Appellant,
vs.
INCO, INC., a corporation,
Defendant, Respondent and
Third Party Complainant,
vs.
ICE EQUIPMENT ASSOCIATES, a
orporation and JOHN B. JOHNSON,
Third Party Defendants.

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No.

Plaintiff and Appellant's B

Appeal From the Judgment of the D
of Salt Lake County, State of
Hon. D. Frank Will

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Clerk

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In The Supreme Court of the State of Utah

SECURITY LEASING COMPANY,
a corporation,
Plaintiff and Appellant,
vs.
FLINCO, INC., a corporation,
Defendant, Respondent and
Third Party Complainant,
vs.
OFFICE EQUIPMENT ASSOCIATES, a
corporation and JOHN B. JOHNSON,
Third Party Defendants.

Case No.
169886

STATEMENT OF KIND OF CASE

This is an action to recover damages for cancellation and breach of certain lease agreements entered into between plaintiff-appellant Security Leasing Company and defendant- respondent Flinco, Inc.

DISPOSITION IN THE DISTRICT COURT

The trial court rendered judgment on plaintiff-appellant's complaint in favor of defendant-respondent Flinco, Inc. and against plaintiff-respondent Security Leasing Company, no cause of action.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant Security Leasing Company seeks reversal of the judgment and requests that this court direct the District Court to enter judgment in favor of plaintiff-appellant Security Leasing Company and against defendant-respondent Flinco in accordance with the evidence properly presented.

STATEMENT OF FACTS

In early 1965, Flinco was in the market for a machine to handle its data processing (R. 213-214). At that time, Flinco was using Sentinel Life Insurance Company's computer to handle its work (R. 214). Because of Flinco's close ties with Sentinel, Bob Mastelotto, the manager at Flinco, relied upon Sentinel's employees and took them into his confidence in trying to decide how best to improve the data processing at Flinco (R. 215). In this regard, Sentinel sent Jim Montgomery, their data processing manager and programmer analyst, to Flinco to help evaluate their operation and see if any improvements could be made in data processing (R. 300). After having made his evaluation, he discussed his recommendations and the various possibilities that existed with Mr. Mastelotto (R. 301). During this same period of time, Mr. Mastelotto visited Friden, IBM, National Cash Register, and Ford Motor Company to learn about the different types of machines that were available to do data processing work (R. 193). After he had seen what was available and learned the capabilities of the various types of machines, he determined that a computyper, or something equivalent, was the way to go (R. 193-194). The decision, however, was contrary to the recommendation of Jim Montgomery of Sentinel (R. 302).

After having decided to go with the computyper, Mr. Mastelotto was mainly interested in the price (R. 218). In this regard, he contacted John Johnson of Office Equipment Associates, who was referred to him by Eddie Mecham of Sentinel (R. 217-218). A meeting between Mr. Mastelotto and Mr. Johnson ensued in which the availability of a computyper, the price, and the capabilities of the machine were discussed (R. 194, 309). Thereafter, other conversations took place between the two concerning the practical ways in which the machine would be set up so as to become operational and the manner in which the machine would be paid for (R. 197). Mr. Mastelotto decided to lease the computyper but it was understood, at that time, that the lease was not to start until after the computyper was installed and all work necessary to place the machine in proper working order was accomplished at which time additional instruments would be executed, including a release, and the lease payments would then begin (R. 197, 313-314).

Upon delivery of the computyper on April 26, 1965, Mr. Mastelotto, on behalf of Flinco, executed a document entitled Master Lease Agreement. (Exhibit P-1). During the next three months, installation and all other work necessary to place the computyper in proper working order was performed by Mr. Johnson (R. 199-200, 226, 314-315). On July 29, 1965, Mr. Mastelotto, on behalf of Flinco, executed a document entitled Schedule A of the Master Lease Agreement, (Exhibit P-2), whereby Flinco agreed to lease the computyper for a period of 60 months, and Flinco started making lease payments as of July 30, 1965. Also on July 29, 1965, a one-year Maintenance Agreement, (Exhibit D-6) was executed to cover the computyper. On August 2, 1965, Mr. Mastelotto, on behalf of Flinco, executed a document entitled Lesee's Statement and Completion Certificate, (Exhibit P-4), in which he acknowledged that "all

installation or other work necessary to the use thereof has been completed; that (the computyper) (has) been examined and/or tested and (is) in good operationg order and condition and (is) in all respects satisfactory to (Flinco) and as represented, and that the (computyper) has been accepted by (Flinco) for the purpose of said Equipment Lease."

Flinco used the computyper for a period of 16 months, from July 30, 1965 until December 2, 1966, at which time Mr. Mastelotto, on behalf of Flinco, notified the lessor, Security Leasing Company, that it was terminating the lease and requested that the lessor immediately remove the computyper from Flinco's place of business. (Exhibit P-5). No prior notification of any dissatisfaction with the computyper had been given the lessor by Flinco (R. 239).

On March 22, 1966, Mr. Mastelotto, on behalf of Flinco, executed a document entitled Schedule A of the Master Lease Agreement, (Exhibit P-3), whereby Flinco agreed to lease a TCPC unit (Tape Card Punch Control Unit) for a period of 60 months with payments to begin on May 30, 1966. It was upon the recommendation of Jim Montgomery of Sentinel that Flinco decided to obtain the TCPC unit (R. 306) although Mr. Johnson arranged for its procurement (R. 207). The lease covering the TCPC unit was also terminated by Mr. Mastelotto, on behalf of Flinco, in his letter of December 2, 1966 to Security Leasing Company. (Exhibit P-5).

ARGUMENT

POINT I.

THE COURT ERRED IN ADMITTING INTO EVIDENCE ORAL TESTIMONY TO VARY OR CONTRADICT MATTERS ALREADY COVERED BY THE WRITTEN INSTRUMENTS IN

VIOLATION OF THE PAROL EVIDENCE RULE.

In a very recent case, *Rainford v. Rytting,* .....Utah 2d....., 451 P.2d 769 (1969), the Utah Supreme Court acknowledged the parol evidence rule as follows:

> "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."

The parol evidence rule was acknowledged in *Youngren v. John W. Lloyd Construction Company,* 22 Utah 2d 207, 450 P.2d 985 (1969), another recent Utah Supreme Court case as follows:

> "When parties have negotiated on a subject and thereafter entered into a written contract, it should be assumed that their prior negotiations are fused into the contract so that it represents their full agreement with respect thereto; and that, consequently, after its due execution, extraneous evidence should ordinarily not be permitted to add to, subtract from, vary or contradict it."

In *Jones v. Acme Building Products, Inc.,* 22 Utah 2d 202, 450 P.2d 743 (1969), yet another recent Utah Supreme Court case concerning the parol evidence rule, the Court cited, as authority, *Emphraim Theatre Co. v. Hawk,* 7 Utah 2d 163, 321 P.2d 221 (1958), wherein the Court stated:

"The purpose of a contract is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto, and intent so expressed is to be found, if possible, within the four corners of instrument itself in accordance with the ordinary accepted meaning of words used.

"Unless there is ambiguity or uncertainty in language of contract so that the meaning is confused or is susceptible of more than one meaning, *there is no justification for interpretation or explanation from extraneous sources, since it would defeat the very purpose of formal contracts to permit a party to invoke use of words or conduct inconsistent with its terms to prove that parties did not mean what they said, or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist.*

"Generally, neither of the parties, nor the Court may ignore or modify conditions which are clearly expressed merely because they may subject one of the parties to hardship, but they must be enforced in accordance with the intention as manifested by language used by the parties to the contract." (emphasis added)

In the case at bar, there are four separate instruments which were executed by the parties, namely: Master Lease Agreement (Exhibit P-1), executed by Flinco on April 26, 1965; Schedule A, Amendment No. 1 to the Master Lease Agreement (Exhibit P-2), executed by Flinco on July 29, 1965; Lessee's Statement and Completion Certificate (Exhibit P-4), executed by Flinco on August 2, 1965; and Schedule A, Amendment No. 2, to the Master Lease Agreement, (Exhibit P-3), executed by Flinco on March 22, 1966.

As mentioned in the statement of facts, there was an additional instrument entitled Maintenance Agreement (Exhibit D-6), under which John Johnson of Office Equipment Associates agreed to render maintenance service on the equipment leased by Flinco from Security Leasing Company for a period of one year.

It is submitted that the execution of these instruments constituted an "integration", that is, the final and complete expression of the agreement of the parties concerning the leased equipment.

Restatement of Contracts, Section 228, defines "integration" as follows:

> "An agreement is integrated where the parties thereto adopt a writing or *writings* as the final and complete expression of the agreement. An integration is the writing *or writings* so adopted." (emphasis added)

Restatement of Contracts, Section 237, states:

> "The integration of an agreement makes inoperative to add to or vary the agreement all contemporaneous oral agreements relating to the same subject matter, and also, unless the integration is void, or voidable and avoided, *all prior oral or written agreements relating thereto.*" (emphasis added)

On April 26, 1965, contemporaneously with the delivery of a machine called a computyper which Flinco desired to lease, Flinco executed an instrument entitled Master Lease Agreement (Exhibit P-1) wherein Flinco agreed, among other things, to "lease the machines provided for in Schedule A attached hereto and made a part hereof . . . and to pay for the

leased property the monthly payments specified in Schedule A. Such payment and the leasehold term . . . shall commence at the time of the signing of the lease, or upon delivery of the item to the lessee(s), whichever is later." Because of the nature of the equipment to be leased, it was understood by Flinco, the party sought to be bound under the lease, that the lease payments would not start until after installation and all work necessary to place the machine in proper working order was accomplished, at which time, Schedule A, which was part of the lease, would be signed together with a release (R. 197, 313-314) thereby making the Lease Agreement complete.

On July 29, 1965, some three months after delivery of the computyper, Flinco executed an instrument entitled Schedule A of the Master Lease Agreement (Exhibit P-2) wherein Flinco agreed, among other things, to lease the computyper for "a period of 60 months, at $129.00 + 4.52 tax per month beginning July 30, 1965."

On August 2, 1965, some four days after the execution of Schedule A (Exhibit P-2), Flinco executed an instrument entitled Lessee's Statement and Completion Certificate (Exhibit P-4) wherein Flinco acknowledged among other things, "that the (computyper) (has been) delivered to and received by (Flinco); that all installation or other work necessary prior to the use thereof has been completed, that (the computyper) (has) been examined and/or tested and (is) in good operating order and condition and (is) in all respect(s) satisfactory to (Flinco) and as represented, and that the (computyper) has been accepted by (Flinco) for the purpose of (the Equipment Lease dated July 29, 1965)."

It is submitted that the Master Lease Agreement (Exhibit P-1), Schedule A (Exhibit P-2) and Lessee's Statement and

Completion Certificate (Exhibit P-4), all together, constitute the final and complete expression of the agreement of the parties concerning the lease of the computyper.

Based upon the Lessee's Statement and Completion Certificate (Exhibit P-4) executed by Flinco on August 2, 1965, it is submitted that all testimony of any witness concerning oral statements and representations or agreements and understanding allegedly made by the parties or their authorized representatives prior to August 2, 1965, should not have been admitted into evidence if such alleged oral statements, representations, agreements or understandings relate to matters already covered in the Lessee's Statement and Completion Certificate, absent any proof of fraud in the inducement. Therefore, any oral statements, representations, agreements or understandings allegedly made prior to August 2, 1965, which relate to the following matters should not have been admitted into evidence:

(1) the installation or other work necessary prior to the use of the computyper (this would include programming since the computyper would have to be programmed prior to the use thereof);

(2) the examination and/or testing of the computyper;

(3) the operating order and condition of the computyper;

(4) the satisfaction of Flinco with the computyper;

(5) the representations made by John Johnson as to what the computyper would or would not do;

(6) the acceptance of the computyper by Flinco for the purpose of the lease.

Flinco did not allege any fraud in its Amended Answer (R. 26-31), nor did it offer any proof of fraud in the execution of the three instruments above referred to.

At trial, Mr. Mastelotto testified that the only reason he signed the Lessee's Statement and Completion Certificate (Exhibit P-4) was because of the alleged threat of Mr. Johnson that if Mr. Mastelotto did not sign it Mr. Johnson would abandon them and since they had already spent so much money and time on the project Mr. Mastelotto signed the instrument (R. 200-201). Mr. Johnson denied these allegations and alleged that no such threats were made and, further, that the Lessee's Statement and Completion Certificate (Exhibit P-4) was signed by Mr. Mastelotto at Sentinel in Eddie Mecham's office in the presence of and with the apparent approval of Eddie Mecham and Jim Montgomery (R. 318-319).

There is no evidence in the record as to any fraud, duress or undue influence in the execution of Lessee's Statement and Completion Certificate (Exhibit P-4) nor is there any evidence in the record as to any expense or damages incurred by Flinco prior to or after the execution of said instrument. As a matter of fact, Flinco had paid nothing to Security Leasing Company, John Johnson, or Office Equipment Associates prior to its execution on August 2, 1965, other than the first lease payment due under the lease dated July 29, 1965.

Notwithstanding the parol evidence rule, however, the trial court admitted into evidence testimony as to certain statements and representations allegedly made by John Johnson to Bob Mastelotto and Estella Anderson of Flinco as to what the computyper was capable of doing, as well as testimony concerning the dissatisfaction of Flinco with the computyper because the machine allegedly never did do what John Johnson said it

would do, all of which were allegedly made prior to August 2, 1965, the date the Completion Certificate was executed. This testimony was admitted over appellant's strenuous and continuing objections (R. 85, 86, 96, 100-105, 113, 149-150, 193).

We respectfully submit that the self serving testimony of Bob Mastelotto and Estella Anderson of Flinco which concerned alleged oral statements and representations as well as alleged oral agreements and understandings between the parties should not have been admitted into evidence since they varied with or contradicted matters already covered in the written instruments and were therefore admitted in violation of the parol evidence rule.

POINT II

IN ADDITION TO THE FACT THAT THE COURT ERRED IN ADMITTING ORAL TESTIMONY TO ALTER OR CONTRADICT THE TERMS OF THE WRITTEN INSTRUMENTS, THE COURT ERRED IN FINDING THE WEIGHT OF SUCH PAROL EVIDENCE IN FAVOR OF THE DEFENDANT-RESPONDENT FLINCO.

The Master Lease Agreement (Exhibit P-1), executed by Flinco on April 26, 1965, provided that "no representations, no express or implied warranties, regarding the equipment herein leased, has been made by Security Leasing Company". In the Lessee's Statement and Completion Certificate (Exhibit P-4), executed by Flinco on August 2, 1965, Flinco acknowledged that the computyper was "in all respects satisfactory and as represented."

Notwithstanding these written instruments, and in violation of the parol evidence rule, the trial court allowed into evidence oral testimony concerning (1) the alleged representation of John Johnson as to the capabilities of the computyper in handling Flinco's data processing work and (2) the alleged dissatisfaction of Flinco with the computyper because the machine allegedly never did do what John Johnson said it would do.

We submit that Flinco did not rely solely upon the representations of Mr. Johnson as to the computyper's capabilities since Bob Mastelotto, Flinco's manager, had already decided to obtain a computyper, by purchase or lease, before he even contacted Mr. Johnson, who merely confirmed what Mr. Mastelotto had already learned about the computyper's capabilities on his visits to Friden, the manufacturer of the computyper, IBM, National Cash Register and Ford Motor Company (R. 193-194, 216).

Mr. Mastelotto stated that Mr. Johnson represented that the computyper was capable of handling invoicing and accounts receivable, accounts payable and payroll (R. 194, 309). That a computyper is capable of performing these functions was confirmed by Mr. James P. Rice of Friden, the manufacturer of the computyper (R. 170).

The computyper itself is merely a supplier of information and must therefore be used in conjunction with a computer in order to handle invoicing and accounts receivable, accounts payable, payroll or any other accounting function (R. 304). Flinco had been using the computer at Sentinel to handle their data processing before they became interested in a computyper (R. 215). The information which the computer needed to handle these various accounting functions was done by hand

prior to obtaining the computyper. The computyper would simply supply certain information that the computer needed and eliminate some work which was previously done by hand. Once it was determined what information the computer would need, the computyper would be programmed to supply this information.

Therefore, in order for John Johnson to program the computyper so that it would supply the necessary information, he needed to find out what information the computer would need (R. 304-305). In this regard, Bob Mastelotto arranged a meeting between Mr. Johnson and the data processing men at Sentinel, namely Eddie Mecham and Jim Montgomery (R. 220). It was decided at this time that the computyper would be programmed to supply the information that Sentinel's computer would need to handle invoicing and accounts receivable (R. 304-305). In this regard, Jim Montgomery instructed Mr. Johnson as to what information Sentinel's computer would need to provide the reportage which Flinco wanted, that is, invoicing and accounts receivable (R. 303-305).

Mr. Montgomery testified that in order to handle invoicing and accounts receivable for Flinco, which was the reportage that Mr. Mastelotto had communicated to Mr. Montgomery that he wanted (R. 303), Sentinel's computer would need the following information: invoice number, customer number, station number, inventory number, salesman's number, quantity and price (R. 304). Mr. Montgomery further testified that as of July 29, 1965, the effective date of the Lease Agreement (Exhibits P-1 and P-2), the computyper checked out okay and was supplying all the information set forth above that was necessary for the computer to handle invoicing and accounts receivable (R. 305).

A few days later, on August 2 ,1965, in Eddie Mecham's office of Sentinel in the presence of and with the apparent approval of Eddie Mecham and Jim Montgomery, Bob Mastelotto, on behalf of Flinco, executed the Lessee's Statement and Completion Certificate (Exhibit P-4) in which it was acknowledged that the computyper "was in good operating order and condition and in all respects satisfactory and as represented" (R. 318-319).

It is submitted that the testimony of Jim Montgomery was the most reliable and unbiased of any witness who testified throughout the entire trial. He worked for Sentinel which was closely associated with Flinco and had no personal or financial interest in this matter whatsoever.

Instead of relying upon the written instruments and the testimony of Jim Montgomery which supported said instruments, the trial court apparently chose to rely upon the testimony of Bob Mastelotto. Mr. Mastelotto knew the capabilities of a computyper and had already made the decision to obtain one, either by purchase or lease, before he contacted John Johnson (R. 216), and yet he inferred in his testimony that he did not have available to him the advice of experts in the area of data processing to whom he could turn concerning the advisability of obtaining a computyper (R. 211, 215). Both Eddie Mecham and Jim Montgomery had many discussions with Bob Mastelotto about the various possibilities that existed to improve Flinco's data processing (R. 301). In January, February and March of 1965, Jim Montgomery was sent to Flinco by Sentinel to study and evaluate their data processing operation and make suggestions and recommendations as to how the system could be improved and the different possibilities that existed (R. 300). Jim Montgomery discussed these recommendations

and possibilities with Bob Mastelotto before John Johnson ever came into the picture (R. 217-218). After Bob Mastelotto decided to obtain a computyper but prior to, or shortly after, its installation, Jim Montgomery expressed his opinion to Bob Mastelotto that he did not think the computyper was the way to go (R. 302). Notwithstanding this advice, Bob Mastelotto went ahead.

Instead of relying upon the written instruments and the testimony of Jim Montgomery, the trial court apparently chose to rely upon the testimony of Estella Anderson who testified she could remember in detail her first conversation with John Johnson, which occurred some four years before the trial, wherein he allegedly made certain representations and statements as to the capabilities of the computyper, but she could not even remember if Jim Montgomery ever came to Flinco in January, February and March of 1965 to study and evaluate their data processing operation (R. 271). Jim Montgomery testified he talked to Estella Anderson some ten or twelve times during that three month period. He asked her questions about Flinco's system as a part of his study and evaluation which was being made for the purpose of determining the possibilities that existed to improve their data processing operations (R. 300-301).

It is submitted that the trial court erred in allowing into evidence the self-serving testimony of Bob Mastelotto and Estella Anderson to the effect that the computyper was not programmed to their satisfaction. This testimony is contrary to the written instrument which Bob Mastelotto executed on behalf of Flinco on August 2, 1965, and contrary to the testimony of Jim Montgomery, the only really unbiased, uninterested witness in the entire trial. The inquiry into whether the computyper was ever programmed to the satisfaction of Flinco should have ended with the Lessee's Statement and Com-

pletion Certificate (Exhibit P-4) wherein the answer to that inquiry is a resounding and unequivocal "yes"!

POINT III

THE COURT ERRED IN NOT FINDING THAT DEFENDANT-RESPONDENT FLINCO SHOULD HAVE BEEN BARRED FROM CANCELLING THE LEASE AGREEMENT BECAUSE OF ESTOPPEL AND WAIVER AND LACHES.

A person such as defendant-respondent Flinco, claiming a right to cancel a contract because of alleged misrepresentations, must, after discovery of the misrepresentations, announce his purpose and adhere to it. *Frailey v. McGarry,* 116 Utah 504, 211 P.2d 840 (1949) and *Taylor v. Moore,* 87 Utah 493, 51 P.2d 222.

The purchaser or lessee must evidence his intent to cancel by some unequivocal act either by notice or some act amounting to notice of intent to cancel. *Frailey v. McGarry, supra,* and *McKellar Real Estate & Investment Co. v. Paxton,* 62 Utah 97, 218 P. 128.

A party to whom alleged misrepresentations have been made, after learning the truth or being charged with a knowledge thereof, will not be permitted to go on deriving benefits from the transaction and later elect to cancel. *Frailey v. McGarry, supra,* and *LeVine v. Whitehouse,* 37 Utah 260, 109 P. 2.

A mere expression of dissatisfaction with a contract or lease is not sufficient notice of election to cancel. *Frailey v. McGarry, supra.*

In *Eitel v. Alford*, 127 Colo. 341, 257 P.2d 955 (1953) the court stated:

> "Where one for many months has taken the fruits of his contract, he may not plead, in defense against liability thereunder, circumstances created through his own imprudence, nor claim ignorance of facts which it was his duty to know, and especially where, as here, the information was readily available. . . . If, under any theory of this cause, rescission was at any time justifiable, the remedy was lost by reason of unreasonable delay in bringing action when the facts were known, or readily ascertainable, and defendants were upon notice and under duty to inquire. *Young v. Leech*, 78 Colo. 208, 212 P. 692. These principles apply even though, as was not the case here, the contract may have been the result of mutual mistake, or actual misrepresentation, fraud or deceit. Dozens of cases might be cited, of which we list only a few (cases cited)."

In *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539 the court held:

> "Any transaction between the plaintiff and defendant relating to the subject matter of the contract, inconsistent with an intention to rescind, amounts to a ratification and bars an action for cancellation."

In *Dennis v. Jones*, 44 N.J.Eq. 513, 14 A. 913 the court held:

> "A party, upon discovering facts that entitle him to have the contract or conveyance cancelled, must proceed with reasonable diligence to disaffirm the contract and give the other party an opportunity of rescinding it; the party deceived may not go on

> deriving all possible benefit from the transaction, and then claim to be relieved from his own obligations by seeking its rescission."

In *Rosenbaum v. Texas Bldg. & Mortgage Co.*, 140 Tex. 325, 167 S.W.2d 506, the court held:

> "An express ratification is not necessary; any act based on a recognition of the contract or any conduct inconsistent with an intention of avoiding it has the effect of a waiver of the right of cancellation."

In the case at bar, Flinco was aware of the alleged oral statements and misrepresentations of John Johnson concerning the capabilities of the computyper shortly after the computyper became operational in July, 1965. Flinco knew then what alleged problems existed insofar as the computyper was concerned.

Nevertheless, Flinco retained possession of the computyper, used the same to handle their data processing work, and made monthly lease payments thereon for a period of 16 months from July 30, 1965 until December 2, 1966 at which time they gave notice, for the first time, to Security Leasing Company, the lessor, that they had never been satisfied with the computyper and they were cancelling the lease which still had 46 months to go. The lease was cancelled notwithstanding the fact that printed in large black letters on each of the lease documents were the words: "THIS LEASE CANNOT BE CANCELLED".

We submit that by having the computyper in its possession for 19 months and using it for some 16 months, thereby reaping the benefits derived from the use thereof and, further, by treating the lease agreement as existing and binding by

making regular monthly lease payments to Security Leasing Company, the lessor, for 16 months, Flinco waived its right, if any ever evisted, to cancellation and it should be estopped from now denying the existence and binding effect of the lease and from cancelling the same.

On March 22, 1966, Mr. Mastelotto, on behalf of Flinco, executed an amendment to the original lease agreement wherein Flinco agreed to lease a Tab Card Punch Control Unit (TCPC Unit) "for a period of 60 months at $26.62 + .93 tax per month beginning May 30, 1966" (Exhibit P-3). The decision to obtain a TCPC Unit was made by Bob Mastelotto of Flinco, upon the recommendation of Jim Montgomery of Sentinel (R. 306) and its procurement from Friden was accomplished, at Mr. Mastelotto's request, by John Johnson (R. 207) who also arranged for its lease thereof with Security Leasing Company. This lease was also cancelled by Flinco on December 2, 1966, notwithstanding the fact that printed in large black letters on the instrument itself were the words: "THIS LEASE CANNOT BE CANCELLED".

We submit that on March 22, 1966, by executing the amendment wherein Flinco agreed to lease the TCPC Unit, Flinco acknowledged and ratified the existence, validity and binding effect of the original lease agreement, the effective date of which was July 29, 1965, wherein Flinco agreed to lease the computyper (Exhibits P-1 and P-2).

We also submit that lessee, defendant-respondent Flinco, is guilty of laches in that it did not timely make known its

dissatisfaction with the leased equipment to the lessor, plaintiff-appellant Security Leasing Company, until after 16 months usage of the computyper and 6 months usage of the TCPC Unit and by using the leased equipment and deriving the benefits from such usage for such period of time without making known its complaints, it has deprived the lessor, plaintiff-appellant Security Leasing Company, from obtaining full value from resale or re-lease of the equipment and in view of such long use thereof, lessee, defendant-respondent Flinco, cannot now be heard to complain.

CONCLUSION

We submit that lessee, defendant-respondent Flinco, breached a legally enforceable and binding lease agreement threby causing damage to the lessor, plaintiff-appellant Security Leasing Company.

The trial court erred in not relying upon the written instruments and in admitting in evidence and relying instead upon prior and contemporaneous oral statements, representations and agreements which altered and contradicted the written instruments. This evidence was admitted in violation of the parol evidence rule.

The trial court also erred in finding the weight of the evidence in favor of lessee, defendant-respondent Flinco and in not estopping said lessee from cancelling the written lease agreement after it had used the leased equipment, derived the benefits therefrom and made the lease payments thereon for 16 months after the effective date of the lease agreement.

We respectfully request that this court reverse the judgment of the trial court and direct said court to enter judgment

in favor of plaintiff-appellant, Security Leasing Company and against defendant-respondent Flinco in accordance with the evidence properly presented.

Respectfully submitted,

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