1969

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

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. 11627

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
In and For Salt Lake County, Utah
Honorable D. Frank Wilkins, Judge

DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah
Attorney for Respondent

PUGSLEY, HAYES, WATKISS
CAMPBELL & COWLEY

STEPHEN G. MORGAN
400 El Paso Gas Building
Salt Lake City, Utah
Attorneys for Appellant

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RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff seeks to require defendant to pay rental on equipment after defendant had cancelled the lease on the equipment for lack of performance and plaintiff's failure to get it programmed to do the defendant's work.

DISPOSITION IN THE DISTRICT COURT

District Court entered judgment of no cause of action on plaintiff's complaint and no cause of action

on defendant's cross-complaint and counterclaim against plaintiff and third party defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff appeals from the judgment and seeks a determination that it is entitled to the balance of its lease payments. Neither third party defendant nor defendant appeals. Defendant seeks an affirmance of the trial court's decision.

STATEMENT OF FACTS

Defendant cannot agree to the Statement of Facts as set forth in the brief of the plaintiff.

This case was tried by Honorable Frank Wilkins, evidence was taken, a full and complete trial had, argument before the court made, and the judgment is based on the evidence received by the court.

Plaintiff's claim against defendant is based on a series of documents that are exhibits. The documents are Exhibit P-1 entitled Master Lease Agreement, Lease of Personal Property, dated April 26, 1965; Master Lease Agreement, Schedule A, Exhibit P-2, dated July 29, 1965; Master Lease Agreement, Schedule A, Exhibit P-3, dated March 22, 1966; Lessee's Statement and Completion Certificate, Exhibit P-4, dated August 2, 1965.

The documents covered two items of equipment. One item is a CTS-8 Friden Computyper, S5165865,

and the second item of equipment is a Tab Card Punch Control Unit, TCPC 30-873. The Computyper was a used item of equipment which Security Leasing Company owned prior to the 26th of April, 1965. This is the item of equipment that Exhibit P-1 and P-2 relate to.

John B. Johnson, third party defendant, delivered the equipment described in the exhibit and presented the documents that relate to the Computyper to the defendant for its signature. He signed both of the documents. In Exhibit P-1 he signed as manufacturer's representative witness, and in Exhibit P-2 he signed simply as witness. No one else signed for plaintiff.

On Exhibit P-4, which relates to the installation of the Computyper, Johnson again signed as witness and indicated on the Completion Certificate that Office Equipment Associates, the other third party defendant, was the vendor of the Computyper.

The three documents relating to the Computyper are forms which plaintiff, Security Leasing Company, uses and were furnished by said company. The forms do not accurately describe the transaction that was entered into between plaintiff and Flinco. It was defendant's position throughout the trial that these documents do not constitute an integration, having within their four corners the understanding of the parties.

The following discrepancies are undisputed:

(1) Exhibit P-1, Paragraph 10, recites:

> "Lessee has selected the property to be leased and it is ordered by Security Leasing Company for this lessee and at lessee's entire discretion and risk. Lessor will not be responsible for any repairs, worn out and/or replacement parts or defects in the equipment."

The undisputed fact is, (a) Security Leasing was the owner of the equipment prior to its installation at Flinco's place of business, (b) it agreed to maintain the equipment for one year, (c) it agreed to program the equipment, (d) Flinco never saw the equipment until delivery by Johnson, and (e) the equipment was never ordered by Security Leasing for Flinco.

Exhibit D-7 shows the agreement by Security Leasing and payment to Office Equipment Associates of $1,975.00 for the maintenance, programming and commission on the lease of its Computyper to Flinco.

It is undisputed that John B. Johnson undertook to do the programming for Security Leasing Company, and it is further undisputed that the programming was to be done in stages. John B. Johnson also undertook to do the maintenance work on the Computyper for the year shown in Exhibit D-7. It is also undisputed that John B. Johnson was not a manufacturer's representative, that Office Equipment Associates was not the vendor of the equipment, that at

all times he was arranging a lease of plaintiff's equipment with Flinco, Inc. and was paid for these services, including the programming and maintenance by Security Leasing Company.

Programming as used in this case involves the wiring of the Computyper and adjusting the electronic panel in the Computyper so that it would produce the records which Flinco, Inc. needed to conduct its business. The Computyper is a machine with the ability to produce an invoice, to retain certain information off the invoice and give totals at the end of a period of time of the mathematical information which the machine has retained. It also prints, at the time it prints the invoice, a tape. This tape is later translated by other electronic equipment which produces a card for IBM computers.

Defendant's evidence supports the court's findings that the programming was never completed by Johnson and that Johnson was not a trained programmer. Programming a Computyper is a very intricate, difficult, complex operation (R. 161-167). There is no one in the state of Utah who is qualified by the Friden Company to program its Computypers (R. 159). When Friden itself seeks such services, it must import from Denver a trained programmer to wire the electronic panel and control so that the machine will produce the information that is programmed into it (R. 159).

The evidence is undisputed that Johnson had worked for Friden prior to his setting up his own operation as Office Equipment Associates, but had never been classified as a programmer. His testimony was that on some occasions he has assisted in programming.

The Exhibits P-1, P-2 and P-4, which relate to the Computyper, contain no mention of the duty of plaintiff to program or maintain the Computyper. Exhibit D-7, which shows that such a duty was undertaken by Security Leasing, is not a part of the documents which plaintiff claims contain the integrated agreement between the parties.

Flinco was never satisfied with the programming which was accomplished (R. 263-266-291). Third party defendant undertook to maintain and keep repaired the equipment during the year after it was installed at Flinco's place of business. Flinco was not satisfied with the maintenance either (R. 264-265).

In the spring of 1966 the second piece of equipment was installed at Flinco's place of business. This is the Tab Card Punch Control unit represented by Exhibit P-3. This item of equipment was actually purchased from the Friden Company and then leased to Flinco. It is Flinco's evidence on which the court relied that the TCPC equipment was required because the Computyper would not function efficiently for

Flinco. Erroneous data was punched by the Computyper onto the tape. This information was different from the information which appeared on the typed invoice prepared at the same time (R. 289). These erorrs were not discoverable until after the tape had been translated by other electronic equipment either at Sentinel Security Life Insurance Company's place of business or one of the other service bureaus used by Flinco. The TCPC unit, it was thought, would produce the information placed on the tape immediately and then it could be checked to see whether or not that information was the same as the information on the invoice. The TCPC was used for about six months, but even with it, Flinco could not get its work accomplished satisfactorily (R. 287-288-278-279).

Defendant's primary complaint about the inadequacy of the program which third party defendant placed in the machine was that it never did produce any totals on which the defendant could rely (R. 257-260). It would not retain the cash sales separate from the charge sales and permit the company to know what had been sold on credit and what had been sold for cash. The cash register never could be balanced at the close of the day's business. The machine also was never programmed to record on the invoice all the information which Flinco needed in the operation of its business (R. 263). It was defendant's position that the rental of the TCPC unit was only the result

of its continuing effort to get the Computyper to produce the records it needed. The notice of termination is dated December 2, 1966 (Exhibit P-5). Rent was paid in full to the date of termination.

Plaintiff refused to consent to the termination and brought the present action for the balance of the payments under the lease.

Each issue was fully litigated. The court found in favor of the plaintiff on the cross-complaint and counterclaims of defendant and in favor of defendant on the complaint of plaintiff, entering a judgment on each of no cause of action. The evidence presented supports the court's findings in every respect.

SUMMARY OF ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE WRITTEN INSTRUMENTS ARE NOT ALL OF THE AGREEMENT BETWEEN PARTIES.

POINT II

SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDINGS THAT THE AGREEMENT BETWEEN THE PARTIES WAS NOT PERFORMED BY PLAINTIFF.

POINT III

DEFENDANT PAID IN FULL ALL RENT DUE PRIOR TO CANCELLATION OF THE LEASE.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE WRITTEN INSTRUMENTS ARE NOT ALL OF THE AGREEMENT BETWEEN PARTIES.

One of the basic issues presented by the parties in their pleadings and statements to the court was whether or not there was an integration containing all of the agreements between the plaintiff and defendant. The court found that there was not an integrated written agreement and that part of the agreement was in writing, but a substantial amount of the understanding between the parties was not in writing.

The agreements signed by both parties were on forms which the plaintiff used in routine rental agreements. These forms applied to situations where a renter selected the item of personal property and Security Leasing would then purchase that property and lease it back to the customer. The rental arrangement being one which would provide a method of financing the purchase or rental of personal property. This was not the situation with Flinco. The undisputed evidence revealed that Security Leasing always owned the Computyper and that Office Equipment Associates and John B. Johnson were actually acting as agents for Security Leasing in placing the Computyper with Flinco. Flinco never did select

the Computyper and have Security Leasing purchase it for them, but actually rented a used item of equipment from Security Leasing.

The agreements do not describe such a transaction. The evidence undisputedly shows the ownership of the equipment and the manner in which it was supplied to Flinco. On three material matters, the written documents do not describe the true and correct understanding. They are, (a) relationship of parties, (b) ownership of the leased equipment, (c) duty of plaintiff to program and maintain the Computyper.

The written document, (Exhibit D-7), shows that Security Leasing was to program the Computyper into Flinco's business and maintain it for a year.

It might be argued that Flinco is responsible for the fact that these documents do not accurately described the understanding between the parties. If Flinco is in some way at fault in this respect, how much greater is the responsibility of the plaintiff, Security Leasing, since the forms furnished and the agreements that were prepared were its forms and prepared by its agents and employees. If the principle to apply is that construction should resolve doubt against preparer of instruments, Security must suffer.

It seems clear that it is a factual question as to whether or not the understanding between the parties

is contained in the written document or is partially oral. On this question the undisputed evidence supports the court's finding that there was no integration. The agreement between the parties was partly in writing and partly oral. (See Findings of Fact, No. 2, Page 57).

The general rule seems to be that:

> "Where suit is brought to compel a defendant specifically to perform a written contract, parol evidence may be given by him to show that the alleged agreement is not the true agreement." (Jones on Evidence (5 Ed), Vol. 2, Sec. 469, P. 897.)

The law relating to parol evidence has been recently examined in this court in *Rainford* vs. *Rytting*, ... Utah 2d ....., 451 P2d 769. The guarantors of a purchase contract sought to avoid its provisions by showing conditions or oral agreements which were at odds with the terms of the written contract. Such evidence was inadmissible. This court also has recently decided *Jones* vs. *Acme Building Products, Inc.*, 22 Utah 2d 202, 450 P2d 743, in which it permitted parol evidence from one of the parties to explain what was intended by the words "net worth" in a written instrument since such words are susceptible to more than one meaning. It is an exception to parol evidence that where there is a latent ambiguity in the language of a written instrument, parol evidence may be received to explain what the parties had in mind.

In the present case the written instruments do not refer to the programming of the Computyper. This necessary and essential part of the installation of the Computyper is nowhere mentioned. Exhibit P-1, the lease, is entirely silent. Plaintiff accepted the responsibility for programming the Computyper (See Exhibit D-7). It paid Office Equipment Associates to program and maintain the Computyper.

As far as the programming of the Computyper is concerned, the written documents were incomplete. This creates a latent ambiguity. The written documents are not integrated and are actually incomplete. Parol evidence would have to be received then to discover what the agreement relating to the programming of the Computyper was. This kind of latent ambiguity and incompleteness of written instruments has always been recognized as an exception to the parol evidence rule. In *Fox Film Corp.* vs. *Ogden Theatre Company, Inc.*, 82 Utah 279, 17 P2d 294, the court discussed at some length the parol evidence rule and the exceptions thereto and stated, after reciting the rule, at Page 282:

> "There are numerous exceptions to this rule, however, most of which pertain to informal writings, incomplete memoranda, unilateral documents and other writings that do not purport to set forth the entire contract" * * *

The court then continued and stated, Page 283:

> "One well-recognized exception to the above rule is that extrinsic evidence, parol or otherwise, is admissible to explain a latent ambiguity in a writing. This does not mean that terms or conditions may be inserted into or taken out of the writing by direct oral assertions, but it does mean that the court may receive evidence of such surrounding facts as will enable it to look upon the transaction through the eyes of the parties thereto and thereby know what they understood or intended the ambiguous word or provision to mean. 4 Jones Commentary on Evidence #1544, etc."

As an example of what the court had in mind as far as latent ambiguity is concerned, the court in *Fox Film Corp.* vs. *Ogden Theatre Company, Inc.*, supra, cited the early case of *Boley vs. Butterfield*, 57 Utah 262, 194 P. 128. In this case there was a lease of summer grazing for sheep and in it no mention was made of whether or not the lessee was to have the exclusive use of the range for his sheep. As a matter of fact, the lessor had also leased to another sheep grazer. The first lessee refused to pay any rent on the grazing right. Trial court, noting the failure of the lease to state whether or not it was exclusive, permitted the lessor to state that he had advised the lessee prior to the lease that it was not an exclusive lease.

The *Boley* vs. *Butterfield* principle applies exactly to the present situation. There is no mention in any

of the documents as to who is to program the Computyper and place in its electronic control panel the various circuits that will make the machine produce the records that Flinco needed. This omitted item, on which the written contracts are incomplete, had to be supplied to the court by parol evidence. The parol evidence is without conflict. All of the evidence demonstrated that this was a responsibility of plaintiff and it actually paid third party defendant to do the work of programming.

It is respectfully submitted that the court's finding that there was no written integrated agreement is supported by evidence. The written part was incomplete and contained a latent ambiguity. Under such circumstances the court may ascertain what the agreement between the parties was and then determine their rights.

POINT II

SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDINGS THAT THE AGREEMENT BETWEEN THE PARTIES WAS NOT PERFORMED BY PLAINTIFF.

The court found that part of the agreement between the parties was that the Computyper would be programmed, maintained and serviced for one year at the expense of the plaintiff. (See Findings of Fact, No. 3 Page 57). Court further found that the plaintiff attempted to program the defendant's business. The

programming was to be conducted in stages, and only a part of defendant's business was ever programmed into the Computyper. (See Findings of Fact, No. 4, Page 57). Court further found that the plaintiff and third party defendants, who were plaintiff's agents, never were able to program fully the business of defendant into the Computyper machine so that it would supply the business records needed by the defendant. (Findings of Fact, No. 5, Page 57).

The three foregoing findings of the court were supported by evidence supplied by the plaintiff and the defendant. (See Statement of Facts for specific reference to testimony).

Defendant's evidence, in the form of testimony from Mr. Mastelotto, Mrs. Anderson and Miss Khant, was uncontradicted. Plaintiff made an attempt to program the business over the period of time that the Computyper was present. Finally, in an attempt to obtain the records needed by defendant, the TCPC was ordered. It was thought that with this machine converting the taped information immediately to the IBM card, that the errors which were turning up in the material produced by the Computyper would be quickly apparent. After six months of this system, Flinco came to the conclusion that it could not make the Computyper work. After sixteen months, the programming had never been completed. All that the Computyper was ever programmed for was the accounts receivable and the invoicing of sales at

Flinco's place of business. It still had not produced the cash and credit sales as separate, total items, and neither the inventory nor the payroll had been placed on the Computyper (R. 266).

It is the defendant's position that no evidence was ever supplied by plaintiff or by third party defendant which could be the basis of a finding that the programming of defendant's business into the Computyper was completed. This was a material matter. The very essence of the lease agrrement. The breach was the basis on which the termination of the lease was claimed by Flinco in its letter of December 2, 1966.

Defendant submits the termination was justified.

POINT III

DEFENDANT PAID IN FULL ALL RENT DUE PRIOR TO CANCELLATION OF THE LEASE.

Defendant paid the rent on the machines supplied by the Security Leasing up through the date of notice of termination December 2, 1966. Defendant tried in every way to get satisfactory performance from the Computyper. (See Statement of Facts for record references). It ordered an additional piece of equipment which would assist in translating the Computyper information into the IBM card. It suffered for sixteen months with incomplete and inaccurate records.

Plaintiff claims that the failure to cancel earlier than December 2, 1966 is laches on the defendant's part. It is defendant's position that during this period of time it was attempting to make such adjustments and accommodations as would give the Computyper, the plaintiff, and Mr. John B. Johnson of Office Equipment Associates, a reasonable chance to perform under the lease agreement. In *Hanson Silo Company* vs. *Bennett*, 254 Iowa 928, 119 NW 2d 764, the court quoted 12 *Am Jur, Contracts*, #447, P. 1029 as the rule: (P.767)

> "The general rule is that the right to rescind must be exercised within a reasonable time, although there is authority to the effect that the mere question of how much time a party to a contract has permitted to lapse is not necessarily determinative of the right to rescind, the important consideration being whether the period has been long enough to result in prejudice to the other party."

It is undisputed that the machine could produce the records if it were properly programmed and operating in the manner that it was designed to operate (R. 166).

Plaintiff could not be damaged by the defendant's extended efforts to get the machine to operate properly. It received its rent for the full period. It did not stay its hand in reliance on defendant's conduct. Its agent Johnson knew at all times that the programming was not complete. *Corpus Juris Secun-*

dum, Vol. 17A, Section 531 Contracts, Page 1026, states as the general rule in re laches:

> "As a general rule, where there are no contractual limitations, a party to an agreement may bring an action at any time until the action is barred by the statute of limitations, and mere delay or laches, short of the statutory period of limitations and not connected with such facts as may amount to an estoppel, is not a bar to an action at law on the contract. However, where one seeking to enforce a contract has by his conduct and unreasonable delay brought about an undue hardship which by his diligence could have been avoided, relief will be denied."

The evidence supplied by defendant from the witnesses James P. Rice and George S. Burnett, who are local employees of the Friden Company, convinced the court that John B. Johnson, the agent of plaintiff who was charged with the duty of programming the Computyper, did not have the necessary training and experience to wire into the electronic control panels the program which Flinco needed.

As explained by these expert witnesses, the programming of a business into the Computyper requires the removal from the Computyper of the program it originally had operated on (R. 162). A secondhand machine, such as the equipment supplied by Security Leasing, has already been programmed (R. 161). The problem of removal of the old program, that is

disconnecting the electronic panel circuits and inserting a new program, is more complicated than the inserting of a program into a new machine that has not already been wired with a program (R. 171).

Mr. Johnson had been an employee of Friden prior to setting up his own business in the name of Office Equipment Associates and had worked as a sales representative with the Friden Company. However, he had never been trained or designated as a programmer of the Friden equipment (R. 153). His job while at Friden, even when his testimony is taken in the light most favorable to the plaintiff, was that of a sales representative who on occasion had assisted in the programming of machines (R. 171-172). A programmer is someone who has the highest degree of technical skill, ability and training in the handling of the Friden Computyper. It was undisputed by any testimony that there is not in the state of Utah or in the area serviced by the local Friden office, a person trained to program the Computyper that was supplied to Flinco. The closest trained, designated programmer for this kind of equipment is at Denver (R. 159).

Security Leasing obligated itself to program the Computyper rented to Flinco. This is standard practice in the rental or sale of the equipment (R. 172). The only person who attempted to accomplish the programming is John B. Johnson, plaintiff's agent. Plaintiff furnished no evidence whatsoever that it

ever attempted to get from the Friden Company a designated, qualified programmer to insert into the Computyper the program necessary to produce for Flinco its business information.

The court finding that the programming was never fully accomplished is undisputed. That the Computyper was never able to supply the business records which defendant needed is also supported by all the evidence.

It is respectfully submitted that findings of the court as set forth in this point were supported not only by a preponderance of the evidence, but by undisputed and uncontradicted evidence and were the only findings which would reasonably have been made under the state of the evidence as shown by this record.

CONCLUSION

It is respectfully submitted that the decision of the trial court should be affirmed, that the defendant should have its costs incurred.

Respectfully submitted this.....day of ....., 1969.

.....

DWIGHT L. KING

Attorney for Defendant Flinco, Inc.