1969

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

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 Complaintant,

vs.

OFFICE EQUIPMENT ASSOCIATES, a corporation and JOHN B. JOHNSON,

Third Party Defendant.

Case No. 11627

Reply Brief of Plaintiff-Appellant

Appeal from the Judgment of the District Court
of Salt Lake County, State of Utah
Hon. D. Frank Wilkins

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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-respon-

dent 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

Plaintiff-appellant submits that the facts are best set forth in the Statement of Facts in plaintiff-appellant's brief.

ARGUMENT

POINT I.

THE COURT ERRED IN FINDING THAT THE WRITTEN INSTRUMENTS EXECUTED BY THE PARTIES DID NOT CONSTITUTE AN INTEGRATION, I.E. THE FINAL AND COMPLETE EXPRESSION OF THE AGREEMENT OF THE PARTIES CONCERNING THE LEASED EQUIPMENT.

In support of defendant-respondent's position that the written instruments do not represent the total agreement between the parties and thus do not constitute an integration, Flinco bases its argument for the admission of parol evidence primarily on two propositions; namely (1) the agreements do not des-

cribe the actual transaction of the parties and (2) the written instruments contained a "latent ambiguity."

As to (1), Flinco argues that "on three material matters, the written documents do not describe the true and correct understanding. They are (a) relationship of the parties, (b) ownership of the leased equipment, and (c) duty of plaintiff to program and maintain the computyper.

In support of (a) and (b), Flinco, in its Statement of Facts, points out that the Master Lease Agreement (Exhibit P-1), paragraph 10, provides:

> **"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."**

Then, Flinco argues that "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."

As to (a), (d), and (e), plaintiff-appellant acknowledges these facts to be true but submits that such facts were never misrepresented to Flinco and the same were known by Flinco when the lease agreement was executed. (R.227-229) Standard lease docu-

ments, used by Security Leasing in the operation of its leasing business, were submitted to Flinco, whose manager, after reading the documents and acknowledging his understanding thereof (R.227), executed the same on behalf of Flinco. If Flinco's manager had considered the wording of paragraph 10, as set forth above, material, he should have requested that it be modified to reflect the actual facts. Flinco would have entered into the lease agreement regardless of who owned the computyper and whether Security Leasing had ordered the machine or not. This is obvious from the testimony of Mr. Mastelotto, Flinco's manager, who stated that he knew Johnson did not own the computyper; he knew Friden was the manufacturer of the computyper but he knew they did not own it; he knew it was a used computyper; and he testified that he did not care who owned the machine, he would have leased it anyway. (R.220) Thus, it is respectfully submitted that such facts are immaterial.

> **"A fact is material when it influences a person to enter into a contract, when it deceives him and induces him to act or when without it the contract (or lease) would not have been entered into or the transaction not have occurred." 37 Am. Jur. 2d §178.**

Counsel for Flinco pointed out in its brief that John Johnson in witnessing the four documents which constitute the final and complete expression of the agreement, Exhibits P-1, P-2, P-3, and P-4, signed two as "witness (manufacturer's representative)" and two as "witness." It is submitted that this is im-

material since Flinco knew that Johnson was simply witnessing the execution of the documents and was not the "manufacturer's representative" nor was this fact ever misrepresented to Flinco. (R.229)

Counsel for Flinco also pointed out that on Exhibit P-4, Lessee's Statement and Completion Certificate, Office Equipment Associates is listed as the vendor. Once again, Flinco knew that Office Equipment Associates was not the vendor and even if it had been Flinco would still have executed the document and entered into the lease. (R.229) This fact was never misrepresented to them nor were they induced by it to enter into the lease and thus it is submitted that it is immaterial.

Counsel for Flinco also pointed out in its brief that no one signed the lease documents for Security Leasing Company, thus attempting to infer that the parties had no binding lease agreement or contract.

> **"Parties may become bound by the terms of a contract even though they do not sign it, where their assent is otherwise indicated, such as by the acceptance of benefits under the contract . . . The fact that one of the parties has signed the contract does not necessarily require that the other party should do likewise." 17 Am. Jur. 2d §70.**

It cannot be said that this Lease Agreement entered into between Security Leasing Company, as lessor, and Flinco, as lessee, was not intended to create any legal relations between the parties. Security Leasing agreed to lease its equipment to Flinco and in consideration therefor, Flinco agreed to pay a

certain amount per month for 60 months for the use of the equipment. The conduct of the parties subsequently in carrying out the terms of the lease for 16 months directly contradicts any argument that the parties did not accept the benefits of the agreement or did not intend the lease agreement to be binding.

In Wigmore on Evidence, the author states:

> **"Where a jural act is executed by signing a specific and complete document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of resonable consequences plainly requires this result. That the signer did not intend to execute such terms is immaterial; and whether the lack of intent was due to a failure to read it over, or some other cause is immaterial." Wigmore on Evidence §2415, p. 44.**

As to (b) and (c), plaintiff-appellant submits that it did not agree to maintain the equipment for one year or to program the equipment but it only agreed to pay for the first year's maintenance and to pay for the programming of the equipment which was a part of the installation. Exhibit D-6, the Maintenance Contract, clearly shows that Office Equipment Associates and John Johnson agreed to maintain the equipment for the first year, not Security Leasing Company, and Exhibits P-7 and P-8 clearly show that Security Leasing Company paid Office Equipment Associates and John Johnson for such maintenance and installation, which included programming.

Exhibit P-1, the Master Lease Agreement, paragraph 9, provides that the "lessee, at its own cost and

expense, shall order and shall furnish all parts, mechanisms and devices required to keep the equipment in good mechanical and working order." Paragraph 10 provides that the "lessor will not be responsible for any repairs, worn out and/or replacement parts, or defects in the equipment." The term of the lease was for 5 years. The fact that the lessor paid for the first year's maintenance on behalf of Flinco does not change the responsibilities of the parties in this regard as set forth in the lease agreement.

Insofar as programming is concerned, Flinco argues that "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 . . . . as far as the programming of the computyper is concerned, the written documents were incomplete. This creates a latent ambiguity." Since a latent ambiguity exists, Flinco argues that parol or extrinsic evidence is admissible as an exception to the parol evidence rule.

The written instruments which comprise the final and complete expression of the parties on the lease agreement, that is, Exhibits P-1, P-2, P-3, and P-4, do, in fact, refer to the programming of the computyper. The Lessee's Statement and Completion Certificate, Exhibit P-4, is a document which relates specifically to the "installation and all other work necessary" to place the computyper in proper working order. Flinco acknowledged in its brief that programming was an "essential part of the installation.",

and thus it is submitted that there is, in fact, a written instrument, executed by Flinco, which concerns programming.

Even if we assume for the sake of argument that there existed a latent ambiguity insofar as programming is concerned, and therefore allowed parol testimony as to what the understanding of the parties was in this regard, we still have a written instrument (Exhibit P-4) which was part of the lease agreement wherein Flinco asknowledged on August 2, 1965, that, regardless of what the understanding was between the parties concerning programming "all installation and other work necessary prior to the use thereof (that is, programming) had been completed, that the computyper had been examined and/or tested and was in good operating order and condition and was in all respects satisfactory to Flinco and as represented and has been accepted by Flinco for the purpose of the equipment Lease, dated July 29, 1965." Therefore, whatever Flinco understood was to be accomplished or done insofar as programming was concerned, it acknowledged some four days after the effective date of the lease that the programming had, in fact, been completed and that it was satisfied with it in all respects.

Therefore, it is respectfully submitted that the written instruments executed by the parties, the Lease Agreement on the computyper, Exhibit P-1 and P-2; the Lease Agreement on the TCPC Unit, Exhibit P-1 and P-3; and the Lessee's Statement and Completion Certificate, Exhibit P-4, constituted an

integration, that is, the final and complete expression of the agreement between the parties, as evidenced by the written instruments themselves and the subsequent conduct of the parties in carrying out the terms of said written instruments for some 16 months.

POINT II

THE COURT ERRED IN FINDING THAT THE AGREEMENT BETWEEN THE PARTIES WAS NOT PERFORMED.

Flinco argues that plaintiff did not supply any evidence "which could be a basis of a finding that the programming of defendant's business into the computyper was completed."

By the execution of the Lessee's Statement and Completion Certificate, Exhibit P-4, Flinco acknowledged that the leased equipment, the computyper, had been fully programmed to its satisfaction and that it had been accepted for the purpose of the lease. Therefore, it is submitted that plaintiff did, in fact, complete the programming and fully performed its responsibilities under the terms of the lease.

The only evidence, which Flinco alleges is in support of its proposition that plaintiff did not perform its responsibilities under the lease, is that evidence which was improperly admitted and in violation of the parol evidence rule.

Flinco attempted throughout the trial to raise some doubt as to Mr. Johnson's competence as a

programmer. Two employees of Friden, a competitor of Office Equipment Associates and John Johnson (R.100), testified about his competency as a programmer. Neither one was a programmer; one was a salesman and the other was a service manager (R.-152, 185) No programmer from Friden was called by Flinco.

Mr. Johnson's background and experience in programming consisted of the following: In 1957, he attended the first two Friden programming schools on the Model CTC computyper. Later he went to the programming school on the Model CTC computyper as well as programming schools on two other Friden units, the flexowriter and the calculator, both of which form part of the computyper. From 1961 until 1965, he was the service manager of the San Francisco office and had 35 service men under his jurisdiction. Included among his duties were modifying programs for his salesmen for customer demonstration. It was his responsibility to do his own programming of the machines he sold. In 1965 he left Friden and started his own company, Office Equipment Associates, and became a competitor of Friden. Prior to programming the computyper at Flinco, he programmed computypers for Eimco Corporation, Hill Air Force Base, Miller Warehousing Corporation, and J. G. McDonald Chocolate Company. In addition to the above, Mr. Johnson has made special in-depth studies in the field of programming for Thiokol Chemical Corporation and for Boeing Company. (R.323-328) Based upon this background and exper-

ience, it appears conclusive that Mr. Johnson was a qualified programmer.

Counsel for defendant-respondent refers to Friden's employees, Mr. Rice, a salesman, and Mr. Burnett, a service manager, as his "expert witnesses." These men had far less experience than Mr. Johnson and yet both testified that they had modified existing programs and were aware that Mr. Johnson had done the same. (R. 168, 171, 176, 177, 188, and 189) Mr. Burnett at one time was under the supervision of Mr. Johnson and would go to him for advice on certain matters including advice on existing programs. (R.185) Mr. Johnson testified that all he did in programming the computyper at Flinco was to modify an existing program (R.316).

It should also be pointed out that Mr. Montgomery, a programmer analyst for Sentinel Life Insurance Company, testified that he informed Mr. Johnson as to what information Sentinel's computer would need from the computyper in order to produce the business information Mr. Mastelotto of Flinco had communicated to Mr. Montgomery that Flinco wanted and further that Mr. Johnson programmed the computyper in such a manner that the computyper did, in fact, produce all of this information. (R.304-305).

It is submitted that Mr. Johnson did have the requisite background, experience, and qualifications to modify an existing program on the computyper for Flinco; that Mr. Johnson did, in fact, perform this function prior to the effective date of the lease, July

29, 1965; and that Flinco was satisfied with said programming of the computyper and accepted the machine for the purpose of the lease by its execution of the Completion Certificate on August 2, 1965. (Exhibit P-4).

POINT III

THE FACT THAT DEFENDANT PAID IN FULL ALL RENT DUE PRIOR TO CANCELLATION OF THE LEASE IS IMMATERIAL.

The Lease Agreement on the computyper, Exhibits P-1 and P-2, and the Lease Agreement on the TCPC Unit, Exhibits P-1 and P-2, both provided in large, bold, black type at the botton of each page "THIS LEASE CANNOT BE CANCELLED."

In Exhibit 1, paragraph 7, defendant-respondent Flinsco agreed, among other things, as follows:

> **"If lessee shall fail to pay any rental as herein provided when the same is due and payable . . . the remaining unpaid lease payments shall be at once due and payable . . . "**

The lease agreement provided for a lease of the equipment for a period of 60 months. Flinco had made payments for about 16 months before giving Security Leasing Company notice of cancellation on December 2, 1966. Therefore, in accordance with the terms of the lease agreement, Flinco became liable to Security Leasing Company for the remaining unpaid rentals, less, of course, the salvage value of the leased equipment.

The fact that Flinco had made its rental payments to Security Leasing Company for 16 months prior to cancellation supports Security Leasing Company's position that a binding and enforceable lease agreement did, in fact, exist between the parties and that Flinco accepted the benefits of said lease agreement by using the leased equipment for 16 months and making monthly rental payments therefor.

Thus, it is submitted that Flinco's cancellation of the lease agreement was in violation of the terms thereof and Security Leasing Company is entitled to recover damages for such breach.

CONCLUSION

It is respectfully submitted that the written instruments executed by the parties constitute the final and complete expression of the lease agreement and should be enforced in accordance with the terms provided therein. By execution of the Lessee's Statement and Completion Certificate, Exhibit P-4, Flinco, the lessee, acknowledged that Security Leasing Company, the lessor, had fully performed its responsibilities and obligations under the terms of the lease agreement and that Flinco was fully satisfied with the leased equipment and accepted the same for the purpose of the lease agreement. Flinco breached that lease agreement some 16 months after its effect-

ive date, thereby causing damage to Security Leasing Company for which judgment should be granted.

Respectfully submitted,

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