

1972

## **FMA Financial Corporation v. Richard Mckean And Timothy F. Buehner : Brief of Respondent Fma Financial Corporation**

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# In The Supreme Court of the State of Utah

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FMA FINANCIAL CORPORA-  
TION,

*Plaintiff and Respondent*

vs.

RICHARD McKEAN and  
TIMOTHY F. BUEHNER

*Defendants and Appellants*

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## Brief of Respondent FMA

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Appeal from Judgment

District Court of Salt Lake

Honorable Stewart M. [unclear]

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FMA FINANCIAL CORPORA-  
TION,

*Plaintiff and Respondent,*

vs.

RICHARD McKEAN and  
TIMOTHY F. BUEHNER,

*Defendants and Appellants.*

Case No.  
12726

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## **Brief of Respondent FMA Financial Corporation**

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### STATEMENT OF THE CASE

This is an action for damages for breach of a lease agreement pertaining to an automatic car wash.

### DISPOSITION OF CASE IN LOWER COURT

The District Court granted Plaintiff's Motion for Summary Judgment.

### NATURE OF RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the District Court's Order and Judgment.

## STATEMENT OF FACTS

Richard F. McKean and Timothy F. Buehner, as lessees, executed on November 14, 1968 a lease agreement. (R-2, 3) The lease agreement was for an automatic car wash. Lessees promised to pay 60 consecutive monthly payments of \$296.01 each commencing November 15, 1968. (R-2) Periodic payments were made through January, 1970. (R-4) The unpaid balance of the lease at the end of January, 1970 was \$13,869.26. (R-4) No further payments were made. (R-4) In June of 1970, FMA Financial Corporation filed its Complaint seeking \$13,869.26 together with a reasonable attorney fee. (R-1)

The deposition of Richard McKean was taken September 23, 1971. His testimony relative to his allegation that FMA *released* him from the lease is as follows:

“By Mr. Marsden: (McKean deposition page 7, line 8)

Q Now, tell me about the Roderick transaction. What happened?

A Tim informed me that Bill Roderick, who had a gas station out in the Sandy area or South State area, was interested in it and would probably buy the machine. So again I say that I told him that this was personally all right with me, that I

was only interested in my original investment of \$300 and I would completely bow out of the picture which he agreed. So if the machine was moved of course, then that meant that he had accepted the situation. FMA was familiar with the Roderick situation, we had made as many as four or five appointments with Roderick. I never met the man. I never talked to him on the phone. He stood me up on every appointment that we had and we had one appointment in Judge Firmage's own office, and he failed to report. And Jack was aware of the situation that I was out of it and Roderick was going into the taking over the car wash, either by purchase or by lease from FMA.

Q All right. Now, how did FMA become familiar, as you characterize it, you are out and Roderick is in?

A What I mean was with Jack in his office—

Q Excuse me for interrupting. You probably mean John. John Firmage?

A I suppose. Yes. I only know him by Jack.

Q Never heard him called Jack, but go ahead.

A Excuse me. I really never became acquainted with the man personally until

this situation and I thought his name was Jack.

Q Now, it is your position that FMA released you from the lease?

A They knew of the transaction that if this was taken from the gas station, that Roderick would take the car wash over and they were going to renegotiate a lease with him, or it would be repurchased.

Q Now, are you familiar with an instrument that is entitled Consent to Sublet and Use Leased Property?

A I'd like to see it. All I know is that there was a negotiation in process for either the purchase or the releasing of this to Roderick. I haven't signed this document.

Q Was there ever any document signed wherein FMA released you from the lease agreement?

A Not to my knowledge.

Q This Consent to Sublet and Use Leased Property states in the pertinent part: "In consideration of FMA's consent hereto, Roderick agrees to be bound by and to perform all of the conditions and provisions of the lease. Consent of FMA given hereunder shall in no way dismiss McKean and Buehner or either of them of or from any responsibility or any liability under



the lease. By execution of this lease, FMA does not assume any responsibility for moving the equipment which is the subject of the lease or for its reinstallation and all risk of loss and damage during such operation shall be the responsibility of McKean and Buehner and Roderick." Now, have you ever seen this before?

A I have never seen this document nor did I sign it.

(Whereupon Plaintiff's Exhibit C was marked for identification.)

Q Were you ever notified by FMA that the lease payments were delinquent?

A Yes.

Q And when was that?

A March 1970.

Q Had you received an earlier letter as early as September 1969? Did you ever receive a copy of this letter?

A No.

Q Did you ever receive a copy of this letter dated October 2, 1969 or received the original?

A No.

- Q Again, the first letter that you received was dated when?
- A March 1970.
- Q Is that March 13th?
- A Yes.
- Q May I see a copy of that letter?
- A Yes.
- Q Now, this letter of March 13, 1970 clearly sets forth that FMA is still looking to you for payment; isn't that an accurate summary of that letter?
- A Yes.
- Q Now, did you contact FMA at that time about that?
- A I think this was discussed with John Firmage.
- Q Who was present, if you know. Where did this take place?
- A As I recall, it was a telephone conversation and I reassured John again of our situation with my release of the car wash with Tim and he was aware of this even though he may not have commented much concerning it.
- Q What, if anything, was said about the letter and FMA looking to you for payment.

A State that again.

Q What, if anything, was said about this letter wherein FMA was looking to you for payment?

A Well, it was the same hassle again as to whether I was involved or released and Tim had the program.

Q What was said, the best you can recall that conversation?

A Well, I told John that my agreement with Tim was that if the car wash was moved or sublet or sold, that I was out of it and he was assuming the responsibility; if he made a profit or loss, it was his program.

Q And what about your relationship to FMA?

A *Well, I'm still on the agreement as far as that goes. Nothing has been cancelled or rewritten.* (Emphasis added)

\* \* \*

By Mr. Conder: (McKean deposition page 12,  
line 1)

Q Mr. McKean, you said, as I understand, in your deposition, that you talked to John Firmage about the fact that if Tim Buehner made a deal with Roderick, you were going to be out of it; is that correct?

A That is correct.

Q What did Mr. Firmage say in response to that?

A I don't have any recollection of what he said. It was just an informative situation.

Q He didn't object then to the fact that you were being released, if you were being released?

A Well, I can't read his mind.

Q He didn't voice any objection?

A Well, there was discussions about it. I can't exactly remember his reaction toward it.

Q Was his reaction such that: Okay, Mr. Roderick now has it. I am not going to worry about you or Mr. Buehner?

A I can't say that either.

Q Did Mr. Firmage at any time ever say: We are not going to look to you, in sum and substance? Or any words to that effect?

A *No. I don't recall him saying that. (Emphasis added)*

On or about September 1, 1970, FMA notified Defendant McKean by letter of its attempt to mitigate damages and that FMA "intends to sell the car wash unit". The sale was not consummated.

The deposition of Timothy F. Buehner was taken September 23, 1971. Although Mr. Buehner's counsel was asked prior to the Lower Court hearing to file the original deposition signed by Mr. Buehner, it has not been filed. Mr. Buehner's counsel, however, cites the Buehner deposition in his brief. Therefore, I also would like to indulge in that liberty although it is not a document of record. Buehner in his deposition states relative to FMA's accounting as follows:

“By Mr. Marsden: (Buehner deposition page 4, line 2)

Q Now, have you had a chance to look at this accounting before?

A Yes. Just this morning.

Q Do you have any records that are contrary to the credit that you have been given by FMA on this lease agreement?

A I would have to dig out my records and look.

MR. CONDER: For the purpose of this, I have gone over this this morning. We will check the records and give you the records. I think they differ from this.

Q (By Mr. Marsden) By what approximate amount do you claim the difference?

A I am not sure, but I think we are probably three months different on it. I don't

think it shows approximately three months that I feel have been paid. But I will have to confirm that with my records and going back to Roderick also because he has made part and I have made part.

**Q** Can you enlighten me as to how you have arrived at this approximately three months deficiency?

**A** Not at this time, I can't."

At the hearing for Summary Judgment, Buehner's counsel stated that FMA had not given Buehner credit for three payments. Plaintiff's counsel agreed to give credit for the allegedly missing payments. It should be noted that the Judgment reflects the credit. The monthly payments were \$296.01. Three payments is \$888.03. The prayer of the Complaint and FMA's ledger card indicate \$13,869.29 owing. The Judgment is for \$12,981.23.

## ARGUMENT

### POINT I.

**BUEHNER'S ONLY POINT ON APPEAL IS THAT HE DID NOT AGREE WITH FMA'S ACCOUNTING OF PAYMENTS MADE ON THE LEASE. THE JUDGMENT CREDITS BUEHNER WITH THE THREE ADDITION-**

**AL PAYMENTS CLAIMED; THEREFORE,  
THERE IS NO ISSUE TO BE TRIED.**

Mr. Buehner and Mr. McKean have been delinquent on the lease agreement since February, 1970. Mr. Buehner has said there was some problem with the accounting. He has stated that he would review his records. In his deposition, he "felt" that it was about three payments. At the hearing on Motion for Summary Judgment, Mr. Buehner's counsel said that there were three payments made for which no credit had been given. FMA's legal counsel stated that the Judgment would be reduced accordingly. The prayer of the Complaint and FMA's ledger sheet indicate a balance owing of \$13,869.26. Because plaintiff wanted to put the matter to rest, they voluntarily agreed to credit the three payments claimed by defendant Buehner. Therefore, the Order and Judgment was for \$12,981.23.

**POINT II.**

**McKEAN MAKES TWO POINTS ON APPEAL:  
(1) HE WAS RELEASED BY FMA; AND  
(2) HE WAS NOTIFIED BY FMA OF FMA'S  
INTENT TO MITIGATE DAMAGES BY  
SELLING THE CAR WASH. THE SALE WAS  
NOT CONSUMMATED. THERE IS NO GEN-  
UINE ISSUE OF FACT CONCERNING  
THESE POINTS AND ON THE RECORD  
FMA IS ENTITLED TO JUDGMENT.**

Mr. McKean claims that FMA released him from the lease agreement. At page 11 commencing at line 6, Mr. McKean testified under oath that "I'm still on the agreement as far as that goes. Nothing has been cancelled or rewritten." This is a true statement. FMA when presented with a document to consent to the subletting of the car wash added the following language: "Consent of FMA given hereunder shall in no way dismiss McKean and Buehner, or either of them, or from any responsibility or any liability under the lease." Mr. McKean was never released from the original lease agreement.

On or about September 1, 1970, FMA notified defendant McKean by letter that it was attempting to mitigate damages and that FMA intended to sell the car wash unit. The sale was not consummated. FMA had no duty to give Mr. McKean notice of its attempt to mitigate damages. Perhaps it is unfortunate that the proposed seller did not choose to close the transaction, but FMA was not at fault. McKean cannot hold FMA liable for a good faith, unsuccessful attempt to mitigate damages.

This case presents a situation where the lessees have fought with each other and McKean has brought a cross-claim against Buehner. It appears that Buehner and McKean want FMA to wait until Buehner and McKean resolve their differences before FMA is paid.



FMA has waited too long already and the "issues" raised by the lessees are sham-type issues designed to cause further delay.

## CONCLUSION

Buehner has received his credit for three payments and McKean was not released by FMA nor was McKean damaged by FMA being unable to mitigate damages. There are no material facts in dispute and FMA is entitled to judgment as a matter of law. The Lower Court's Judgment and Order should be affirmed and costs awarded to Respondent.

Respectfully submitted,

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