

1994

GUADALUPE LOPEZ, Plaintiff and Appellant, vs.
LARRY J. COET USED CAR DEPT. and FIRST
SECURITY BANK, Defendants and Appellees :
Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GUADALUPE LOPEZ,)	
)	
Plaintiff/Appellant,)	Case No. 940304-CA
)	
vs.)	
)	
LARRY J. COET USED CAR DEPT.)	Priority No. 15
and FIRST SECURITY BANK,)	
)	
Defendants/Appellees.)	

APPELLEE'S PETITION FOR REHEARING

On Appeal from the Judgment of
the Third Circuit Court for
Salt Lake County, State of Utah
Honorable Dennis Fuchs

UTAH COURT

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FILE NO.

940304

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COURT OF APPEALS

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PETITION

Appellee and Plaintiff Larry J. Coet Used Car Department petitions the Court of Appeals to "rehear" this appeal, pursuant to Rule 35(a), Utah Rules of Appellate Procedure. Under the circumstances, this petition functionally constitutes a request that the Court "hear" this matter, in that the Court did not afford Coet a hearing before ruling. See Utah R. App. P. 29(a)(3); Memorandum Decision, April 27, 1995.

Coet filed its Brief September 26, 1994. Appellant Lopez filed a Reply Brief March 17, 1995, almost five (5) months late. The Court, approximately one month later, reversed with only the following, cryptic comment:

"We reverse for the reasons stated in appellant's reply brief."

If the cursory statements in Lopez' Reply Brief truly reflect the law, then this Court has implicitly endorsed a significant modification of the law as it pertains to recourse provisions under third-party financing paper, and to assignments. The Decision also ignores the findings made by the Trial Court (Dennis Fuchs, Judge) and the testimony of First Security Bank's officer Shirl Nichols and Coet's Marsha Coet. The Decision effectively eviscerates the repurchase provisions of the Installment Sale Contract at

issue, and deprives Coet of all rights under the repurchased contract - without any cogent explanation of why Coet should be deprived of those rights. At the very least, if this Court is going to reverse based on the statements in Lopez' Reply Brief, then it should do so in a published decision. It should do so, because Lopez, in his Reply, does not accurately portray existing law; and an endorsement of Lopez' statements implicitly effects a significant change in the law.

This case involves the purchase by Lopez from Coet of a used Ford Bronco. Lopez made a significant down payment and financed the balance through execution of an Installment Sale Contract (the "Contract"), which was subsequently assigned by Coet to First Security Bank, for value. Lopez made three payments to First Security Bank, then stopped. He threatened to sue First Security Bank and Coet.¹ First Security requested that Coet repurchase the Contract, consistent with the Assignment/Recourse provisions of the Contract. Coet did so. Lopez subsequently sued Coet for fraud and other claims. Coet defended, and counterclaimed for a deficiency (which included reasonable attorneys fees, per the Contract). The Trial Court found against Lopez on

¹ Lopez, in fact, named First Security as a Defendant, but did not serve First Security.

all his causes of action and dismissed them with prejudice. It found for Coet on its counterclaim.

On appeal, Lopez challenges only the award of attorneys fees and the Contract based award of interest at the rate of 14.5 percent, as opposed to the non-contract statutory rate of 10 percent. Lopez theorizes that because First Security stamped the Contract "PAID 3-13-92" when it delivered the Contract back to Coet, that Lopez was therefore released from any further contractual obligation under the Contract. Lopez volunteers that he had only an "equitable" obligation to repay Coet the sum it had paid to First Security.

First Security Bank's officer Shirl Nichols testified that First Security Bank did not prepare a formal notice of assignment because industry standard did not require it. First Security's view was that inasmuch as Coet was the first-party creditor on the Contract, Coet could simply repurchase the Contract. The Contract specifically defines conditions under which "you [Coet] agree to repurchase the Agreement on demand by paying us the full unpaid balance together with accrued interest owing on the Agreement" (Emphasis added). Contrary to Lopez' representation in his Reply, Marsha Coet (R. 857, lines 21-25) and First Security's Shirl Nichols (R. 816, lines 18-20; R. 821, lines 20-25) both testified that they understood that Coet had

repurchased the Contract. Subsequent to its repurchase of the Contract, Coet notified Lopez that it had done so and that he should make subsequent payments, to Coet. This notice complied with Utah Code Ann. §70A-9-318.

The fallacy of Lopez' argument, which this Court endorses by reversing, is that there must necessarily be a writing entitled "Assignment" and that, if there is not, then Lopez was released of all contractual-based obligations. This is simply not the law. An assignment need not be in writing. 6 Am.Jur.2d Assignments §84 (1963). No particular form is required to effectuate an assignment of rights under a contract. All that is required is that the assignor express an intention to transfer his right to the assignee. 4 Corbin on Contracts §879 at 528 (1951 ed.); see also Restatement (Second) of Contracts §324 Comment a; and authorities cited in Appellee's Brief. Parol evidence may be relied on to determine intention. 4 Corbin on Contracts §879. Contrary to Lopez' representation in his Reply, testimony was elicited that confirms First Security's intention that Coet succeed to its rights under the Contract.

It is absurd to think that Coet gratuitously undertook to pay off the Contract for Lopez' benefit. Its intention, as established by Marsha Coet's testimony and the Notice it

gave to Lopez, was that it had repurchased the Contract and that Lopez' obligations under the Contract remained intact.

Lopez, without relying on any authority, suggests that because First Security stamped the Contract "PAID 3-13-92" when it delivered the same to Coet,² then Lopez has only an "equitable" obligation to repay Coet the sum Coet paid First Security Bank. This unique theory, while appearing to benefit Lopez, has insidious implications for debtors in Lopez' position. According to Lopez, any first-party creditor (on third-party paper) who re-acquires the paper from the third party assignee by paying off the balance owed acquires an "equitable" right to be reimbursed; but all contractual-based obligations are extinguished. That would necessarily include contractual provisions that benefit the debtor. Thus, and for instance, the creditor would have the right to immediately collect its "equitable" claim, even if the debtor had been current on the contract-based installment, repayment schedule. Interest, for example, would default to the legal 10 percent rate, even if the contract provided for a lower rate of interest.

² It should be noted that a copy of the Contract, stamped "PAID", was not delivered to Lopez. This copy of the Contract, contrary to Lopez' statement in his Reply, was in Coet's file, and was faxed by First Security to Coet. Coet produced the same to Lopez during the course of discovery.

The Court's Decision also leads to the conclusion that First Security acted negligently in stamping the Contract "PAID," and in not executing a formal document entitled "Assignment," based on what it understood to be industry practice.

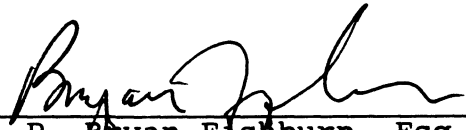
CONCLUSION

The Court should revisit its Memorandum Decision. The law, as embraced by Lopez' Reply Brief, represents a quantum departure from existing law, with potentially adverse and unexpected implications to debtors and creditors, including financial institutions, who undertake financing by use of third-party paper. If the Court intends to endorse such significant departures from existing law, it ought to do so only after the opportunity for hearing and publication of its decision.

DATED this 11th day of May, 1995.

As counsel for the Appellee, I certify that this Petition is presented in good faith, and not for delay.

CALLISTER NEBEKER & McCULLOUGH

By 
P. Bryan Fishburn, Esq.
Attorneys for
Defendant/Appellee, Larry J.
Coet Used Car Department

CERTIFICATE OF MAILING

I hereby certify that **two** true and correct copies of the foregoing **APPELLEE'S PETITION FOR REHEARING** were mailed, postage prepaid, on this 11th day of May, 1995 to the following:

Brian W. Steffensen, P.C.
675 East 2100 South, Suite #350
Salt Lake City, Utah 84106

A handwritten signature in cursive script, appearing to read "Brian W. Steffensen", is written over a horizontal line.