IN THE COURT OF APPEALS OF IOWA

FILED
NOV 20 1984
CLERK SUPREME COURT

MERCANTILE FINANCIAL CORPORATION,

Plaintiff/Appellant-Cross-appellee,

vs.

R. W. RABEDEAUX, D.D.S., d/b/a THE RAMADA INN,

Defendant/Appellee-Cross-Appellant.

Filed November 20, 1984
4-301
83-1659

154

Appeal from the Iowa District Court for Jasper County, Luther T. Glanton, Jr., Judge.

Plaintiff appeals and defendant cross-appeals from a judgment for defendant in this suit to recover on a contract for a drink dispensing machine. On appeal, plaintiff asserts that: (1) the contract between the parties was a lease, rather than a security device, and therefore the plaintiff was not required to dispose of the drink machine in a "commercially reasonable" manner, (2) if the contract was not a lease and was thus governed by the U.C.C., this court should adopt the "remedial view" under which the creditor is allowed to recover a deficiency judgment for any amount in excess of what the collateral would have brought had it been sold in a commercially reasonable manner; and (3) the court should have found as a matter of law that the plaintiff acted in a commercially reasonable manner. AFFIRMED.

Mark A. Otto of Brierly, McCall, Girdner, Chalupa & McCall, for plaintiff-appellant.

Charles W. Larson and John Billingsley of Salisbury & Larson, for defendant-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

**OXBERGER, C.J.**

The plaintiff-petitioner appeals from a judgment in favor of defendant that the agreement between the parties was a secured transaction and petitioner was not entitled to a deficiency because its actions constituted a rescission of the agreement and because petitioner did not show it acted in a commercially reasonable manner. Respondent cross-appeals, saying he should have been given damages for petitioner's failure to act in a commercially reasonable manner. We affirm.

The defendant was formerly president of a corporation which ran a Ramada Inn in Newton, Iowa. In March of 1973 defendant entered into a lease of a drink dispensing machine with General Equipment Leasing Corporation. In late 1973 the business failed and creditors' claims, with the exception of the claim of the lessor of the drink machine, were resolved in receivership.

General Equipment Leasing Corporation, the original lessor of the bar equipment, assigned its lease to plaintiff, Mercantile Financial Corporation. Plaintiff filed a financing statement on the equipment May 25, 1973, naming itself as the secured creditor and defendant R. W. Rabedeaux as the debtor. In the same month the equipment was repossessed by Wolfe Equipment Company at the direction of plaintiff and stored at the facilities of the restaurant equipment company.

On September 5, 1974, approximately four months after repossession, plaintiff gave Rabedeaux notice of intent to sell and later sent another notice to Rabedeaux's attorney. Although several bids were received, including one for $2000, no sale was ever consummated. Seven years later, on July 31, 1981, another notice of intent to sell was sent and on February 17, 1982, notices of intent to sell were published in the Newton Daily News and the Des Moines Register. No bids apparently were received.

Eight years after repossession, in March of 1982, plaintiff filed what it termed its "Petition for Price." The petition is cast in terms of a U.C.C. security transaction, but the plaintiff relied at trial and on appeal on its contention the contract was a lease, and not subject to the U.C.C. requirement that repossessed collateral be disposed of in a commercially reasonable manner.

The trial court found in favor of defendant, apparently concluding that plaintiff had not acted in a commercially reasonable manner, and that the actions of plaintiff constituted a rescission.

Plaintiff asserts on appeal that there is insufficient evidence to show the lease was a secured transaction and therefore controlled by the Uniform Commercial Code, and that even if it is a secured transaction, plaintiff acted in a commercially reasonable manner. Finally, plaintiff argues, even if it did not act in a commercially reasonable manner, this court should follow the interpretation of certain courts that it is still entitled to a deficiency judgment.

Our review of this action is limited to assigned errors of law, and findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

There is adequate evidence to support the trial court's determination that the lease is a secured transaction, and we find no errors of law in the court's decision. Plaintiff contends weight should not be given to the fact that it termed its petition as a "Petition for Price" and not a breach of lease agreement, nor should undue emphasis be given to the fact the financial statement was filed with the secretary of state. Plaintiff is correct that these actions alone are not conclusive to show the U.C.C. applies. Iowa Code § 554.9408 (1983). This court will look beyond form and look to the intent of the parties along with the presence of an option to purchase at the end of the lease for a nominal sum. Iowa Code § 554.1201(37)(1983). While not determinative, petitioner's actions in couching the suit in terms of a petition for price, in filing the financing statement, sending

notices of intent to sell, referring to the equipment as collateral, and in referring in its pleadings and at other times to the applicability of the U.C.C. all go to the question of the intent of the parties. An option to purchase for a nominal sum of $1.00 at the end of the lease is included in the agreement. One factor the courts have considered significant in showing a secured transaction has occurred is when the lessor does not handle a volume of equipment and does not have facilities for storing and handling equipment. State v. Burleigh County Trust v. All American Sub, Inc., 289 N.W.2d 772, 777 (N.D. 1980). Plaintiff's business has no warehouse and plaintiff at trial could not give an opinion on the amount of leased equipment returned to it. In a true lease, the lessor is liable for personal property taxes, and here the debtor-defendant paid sales tax on the equipment. Id.; Szabo Food Services, Inc. v. Balentine's, Inc. 285 N.C. 452, 464, 206 S.E. 2d 242, 251 (N.C. 1974). There is sufficient evidence to support the conclusion that the lease was collateral and not a true lease.

The court decided that plaintiff had both acted in a commercially unreasonable manner and had rescinded the sale because of its actions in keeping the equipment for eight years after two attempts to sell it. We find that we must chose between these two possibilities, since, if plaintiff acted in a commercially unreasonable manner in attempts to sell the equipment, then damages may be awarded to defendant in his cross-petition pursuant to Iowa Code § 554.9507(1)(1983). We believe that in light of the inordinate amount of time plaintiff has retained possession of the equipment without selling it, and that no attempt to redeem has been made, that a rescission has occurred. See Bradford v. Lindsey Chevrolet Co., 117 Ga. App. 781, 782, 161 S.E. 2d 904, 906 (1968); Moody v. Nides Finance Co., 115 Ga. App. 859, 861, 156 S.E. 2d 310, 311 (1967); 79 C.J.S. Supplement Secured Transactions § 115 (1974). Therefore, defendant is not entitled to damages, and plaintiff is not entitled to a deficiency. Id.; Iowa Code § 554.9507(1)(1983).

We note parenthetically that under either interpretation, plaintiff would not be entitled to a deficiency judgment. Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 495-96 (Iowa 1977).

For these reasons we affirm the trial court ruling.

AFFIRMED.