FILED
AUG 27 '86
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RATIGAN-RHODEN MOTOR CO., INC., (An Iowa Corporation),	)	
Plaintiff-Appellee,	)	Filed August 27, 1986
	)	256
vs.	)	6-165
ROGER L. WINTERS,	)	84-1486
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Harrison County (24102) - E. F. Hanson, Judge.

Defendant buyer appeals from a judgment for the plaintiff based upon a deficiency judgment following the sale of a repossessed automobile. **REVERSED AND REMANDED FOR NEW TRIAL.**

Lloyd R. Bergantzel, Council Bluffs, Iowa, for defendant-appellant.

John W. Kellogg and Jack J. White of Kellogg & Kellogg, Missouri Valley, Iowa, for plaintiff-appellee.

Considered by Donielson, P.J., Snell, and Hayden, JJ.

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HAYDEN, J.

Defendant buyer appeals from a judgment for the plaintiff based upon a deficiency judgment following the sale of a repossessed automobile.

Defendant, a paraplegic, is able to operate only motor vehicles equipped with special hand controls. One of plaintiff's salesmen sold him a car representing that it could be adapted to meet his need for hand controls and wheelchair storage. On the day of sale problems developed adapting, to the car, the hand controls removed from the truck that defendant had traded in. It also became apparent that defendant's wheelchair would fit only in the back seat from which defendant could not remove without substantial assistance.

On the evening of the sale, after a full day of waiting, defendant told plaintiff's agents that he wanted to cancel the contract and take the pickup back. Plaintiff's agent told defendant to drive the car home and come back the next day to get things "worked out." The following morning defendant drove the car back to Missouri Valley from Council Bluffs. Upon arriving at plaintiff's, defendant was told that he signed a contract and the car was his. At that time defendant called his attorney and was advised to leave the car with plaintiff. Defendant requested a ride to Council Bluffs, but was refused. Because of his financial condition defendant was unable to take a cab, so he drove home. Later that day defendant drove back to plaintiff's business, again defendant's request to exchange the car for his truck was denied. Defendant was told that he had signed a contract and the car was his. After attempting to return the car twice, defendant drove away and continued to use the car for approximately six months without making any payments before it was repossessed and sold.

Plaintiff brought an action seeking a deficiency judgment. Defendant counterclaimed on theories of breach of warranty, rescission and revocation, and negligent misrepresentation and fraud. Punitive damages were also sought.

The trial court directed a verdict for plaintiff on both the main claim and defendant's counterclaims.

Defendant contends that the trial court erred by: directing a verdict for plaintiff, failing to submit to the jury the defendant's claims, and in overruling defendant's motion for a new trial.

I.

Initially, we consider the proper scope of review. The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. Moseback v. Blythe, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). Where the primary right of the plaintiff arises from nonperformance of a contract, where the remedy is money, and where damages are full and certain, remedies are usually provided at law. Id. The present deficiency action was the result of a repossession based upon a written contract, the action below was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovants claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa Ct. App. 1984).

II.

The defendant contends that it was error for the trial court not to submit the breach of warranty and rescission theories to the jury. The trial court concluded that defendant had properly notified defendant of his rescission but the court saddled defendant with the burden of returning the car or seeking damages. Regarding the latter option, the court concluded that defendant had presented insufficient evidence of damages. We disagree.

A party may rescind a contract where the other parties breach is so substantial as to defeat the object of the contract. Beckman v. Carson, 372 N.W.2d 203, 208 (Iowa 1985); Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744, 749 (Iowa 1976). The supreme court has provided:

> "Recission," as used in connection with the cancellation or termination of contracts has two connotations. A contract may be recinded by the acts of one of the parties and does not require court action except such action at law may be necessary to restore the status quo.

Smith v. Peterson, 282 N.W.2d 761, 764 (Iowa Ct. App. 1979) (citing Binkholder v. Carpenter, 260 Iowa 1297, 1302, 152 N.W.2d 593, 596 (1967)). In the present case defendant had recinded the contract, the action here should have been concerned with a restoration of the status quo.

Under Iowa Code section 554.2608(3) (1985), a buyer who revokes acceptance has the same rights and duties with respect to the goods as a buyer who has never accepted them and has rejected them under Iowa Code section 554.2602(2)(b) (1985). See Cardwell v. International Housing, Inc., 282 Pa. Super. 498, 510, 423 A.2d 355, 363 (1980). The buyer's duty upon revocation under Iowa Code section 554.2602(2)(b) (1985) requires only that the buyer hold the goods with reasonable care to permit the seller to remove them, there is no obligation to formally tender the goods back to seller. See Art Hill, Inc. v. Heckler, 457 N.E.2d 242, 245 (Ind. Ct. App. 1983). Furthermore, under Iowa Code section 554.2711(3)

(1985), a buyer who has revoked acceptance has a security interest in the goods in his possession to the extent of any payment made, and may retain the goods and even sell them to recover the value of his security interest. See Lawrence v. Modern Mobile Homes, Inc., 562 S.W.2d 729, 731 (Mo. Ct. App. 1978). See also Jorgensen v. Pressnall, 545 P.2d 1382 (Or. 1976), and Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980). But see Wendt v. Beardmore Suburban Chevrolet, Inc., 219 Neb. 731, 366 N.W.2d 424 (1985).

In construing the U.C.C. the Supreme Court has never addressed this issue, other state courts have held that whether a continued use of goods after notification of revocation of their acceptance destroys the revocation is solely dependent upon whether such use was reasonable. See Mobile Homes Sales Management, Inc. v. Brown, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977); McCullough v. Bill Snad Chrysler-Plymouth, 5 Ohio St.3d 181, 449 N.E.2d 1289 (1983); Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654 (Minn. 1981); O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982). Whether such use is reasonable is a question for the trier of fact. McCullough, 5 Ohio St.3d at 183, 449 N.E.2d at 1292.

The trial court concluded, in the order for directed verdict, that defendant properly notified plaintiff of his rescission and defendant was "entitled to be made whole." In its order, the court erred by giving defendant the obligation of either tendering the vehicle or selling the car and bringing suit.

Any "obligation" that defendant might have had regarding the tendering of the vehicle was waived. Defendant attempted to return the car twice, each time he was told that he had signed the contract, therefore the car was his. By refusing to accept the tender, defendants waived any such right. Also, we agree with those jurisdictions that construe the Uniform Commercial Code so as not to require the tender of an object to create a valid rescission. Under

Iowa Code section 554.2711(3) (1985), the buyer may retain the goods and then sell them. There is no obligation on the buyer to sell. Defendant may also hold the car without sale and thereby be liable for the fair and reasonable value of that use.

The trial court erred in its consideration of the motion for directed verdict. In reviewing the elements of defendant's claim the court added unnecessary obligations. Substantial evidence was presented to create a jury question regarding whether defendant's use of the car was reasonable. It was error for the trial court not to submit defendant's counterclaims to the jury.

REVERSED AND REMANDED FOR NEW TRIAL.