FILED
JUN 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RONALD LOONTJER and JABRE ENTERPRISES, INC.,

Plaintiffs-Appellants,

vs.

JAMES L. METHE and BLUFFS AIRCRAFT, INC.,

Defendants-Appellees.

Filed June 26, 1984

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83-468

Appeal from the Iowa District Court for Pottawattamie County - Glen M. McGee, Judge.

Plaintiffs appeal from a judgment for defendants in a replevin action. AFFIRMED.

David J. Stein, Milford, Iowa, for plaintiffs-appellants.

Michael A. Sciortino of Sciortino & Vannier, Council Bluffs, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

Plaintiffs appeal from a judgment for defendants in a replevin action. We affirm.

Plaintiffs, owners of a Beechcraft twin engine airplane, entered into a lease with defendants in October of 1980 under which defendants could use the airplane in a charter business in Council Bluffs, Iowa. The lease, after an initial six-month period, was terminable at will by either party upon thirty-days notice. Defendants were authorized to make repairs to the airplane but plaintiffs' approval was required for all repairs costing in excess of two hundred dollars. Although the lease of the Beechcraft did not prove to be financially profitable for plaintiffs, they subsequently purchased a second airplane, a Piper Arrow, and leased it to defendants.

Plaintiff-Loontjer used both airplanes when they were not being rented by customers. Loontjer gave notice to defendants of his intention to use the airplanes and he was billed for the time he spent flying them. In the spring of 1982 a dispute arose over the amount of defendants' bill for repairs and maintenance. Defendants told plaintiffs not to use the airplanes until the bill was paid. Plaintiffs, however, moved the Arrow to Nebraska. Defendants located the airplane and removed the log books and radios from it in Nebraska. The Beechcraft remained at Council Bluffs. Defendants filed an artisan's lien covering the Beechcraft, log books, and radios in their possession. Shortly after plaintiffs filed the present action for replevin, the Beechcraft disappeared from defendants' possession and was severely damaged in a crash.

The trial court held that defendants were entitled to retain possession of the Beechcraft, log books, and two radios for as long as their artisan's lien exists for repairs and maintenance. The court accordingly dismissed plaintiffs' petition.

Replevin is a law action triable by ordinary proceedings, and is reviewed upon assigned errors. Iowa Code § 643.2 (1981); Ritchie v. Helmer, 251 Iowa 1002,

1004, 103 N.W.2d 858, 859 (1960). This action, however, was filed and tried in equity without objection. Our review of equity proceedings is de novo. Iowa R. App. P. 4.

An action for replevin is based on the immediate right to possession of personal property; if the plaintiff is not entitled to present possession, the action must fail. Marx Truck Line, Inc. v. Fredricksen, 260 Iowa 540, 546, 150 N.W.2d 102, 105 (1967). Defendants have asserted as a defense an artisan's lien on the property. A valid artisan's lien entitles the lienholder to possession of the property and would defeat an action for replevin.

Iowa Code section 577.1 provides in part:

> Any person who renders any service or furnishes any material in the making, repairing, improving, or enhancing the value of any inanimate personal property, with the assent of the owner, express or implied, shall have a lien thereon for the agreed or reasonable compensation for his service and material while such property is lawfully in his possession, which possession he may retain until such compensation is paid, ...

It is essential to the validity of the lien that the lien claimant retain possession of the property. Nevan v. Roup, 8 Iowa 209, 212 (1859). If the claimant voluntarily and unconditionally surrenders possession, the lien is lost. 53 C.J.S. Liens § 17(d)(3) (1948). However, removal of the property by the owner without the lienholder's consent does not destroy the lien. Iowa Truck Center, Inc. v. Davis, 204 N.W.2d 630, 632 (Iowa 1973). Furthermore, Restatement of Security section 80 (1941) provides:

> (3) Where a lienor surrenders possession of a chattel to the bailor under circumstances which impose upon the bailor an obligation to return it, the lienor can recover the chattel from the bailor and others except a bona fide purchaser for value and an officer of the law who has levied on or attached the chattel at the instance of one who has become a creditor without notice of the lienor's interest.
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> (4) In the circumstances described in Subsection (3) where the chattel is recovered by or returned to the lienor, the lien is revived, subject to superior interests of those third persons referred to in that Subsection.

In the present case plaintiffs argue that defendants lost the lien on the Beechcraft by allowing plaintiff-Loontjer to periodically fly the airplane. We do not agree. The lease between the parties specifically provides that the airplane is to be based at the Council Bluffs airport in defendants' possession. Loontjer testified that when he used the airplane he rented it and was billed for the time just as any other customer. Therefore, while defendants did part with possession of the airplane, such surrender was not unconditional. As long as the lease was in effect, plaintiffs were obligated by the lease to return the property to defendants. Although the initial six-month period had run, it is undisputed that the lease had not been terminated by written notice prior to the last time defendants voluntarily rented the airplane to Loontjer. Therefore, defendants' artisan's lien was not waived or lost. See North End Auto Park, Inc. v. Petringa Trucking Co., 337 Mass. 618, 150 N.E.2d 735, 738 (1958) (possessory lien of garagekeeper for storage of trucks not defeated by the owner taking trucks out daily and returning them to the garage each night).

We also reject plaintiffs' contention that defendants were joint venturers with plaintiffs and, therefore, are precluded from asserting an artisan's lien. This argument appears not to have been raised below and will not be considered for the first time on appeal. Furthermore, the lease clearly obligates plaintiffs to pay for the fuel, oil, insurance, maintenance, storage, or tiedown of the airplane. Even if the parties were joint venturers, there is nothing in the record which would allow this court to rewrite the agreement between them.

Since defendants' lien is valid, they are entitled to possession of the airplane, log books, and radios until the debt is satisfied. The only issue before the trial court and before this court on appeal was the validity of the artisan's lien and plaintiffs' right to replevin. We give no opinion as to who should be responsible for the damage to the twin engine airplane.

AFFIRMED.