British Columbia Court of Appeal
Seaboard Accept. Corp. v. Moen
Date: 1986-01-31

F. Potts, for appellant.

D.D. Hough, for respondent.

(Vancouver No. CA004460)

January 31, 1986. Excerpt from the transcript.

[1] CARROTHERS J.A.: Mr. Justice Lambert will give the first judgment.

[2] LAMBERT J.A.: This is an appeal from the judgment of the Honourable Judge Campbell [[1985] B.C.W.L.D. 2605] in which he awarded summary judgment under R. 18A in favour of the plaintiff against the defendant.

[3] On 16th April 1982 Seaboard Acceptance Corporation Ltd. (whom 1 will call “Seaboard”) entered into a standard form of written contract with the defendant under which the defendant agreed to lease a motor vehicle for three years.

[4] Clause 3(e) of the contract required the defendant to pay Seaboard a rental for the use of the vehicle, a sum called a fixed rental charge to be paid monthly. The contract also required that at the conclusion of the three-year rental period a calculation would be made, based on the value of the vehicle at the start of the contract, which was agreed to by all parties, and based also on the value set at the conclusion of the contract, based on the highest wholesale bid for the purchase of the vehicle. There were other factors in the calculation and in the end an amount was to be determined at the conclusion of the contract which might be an amount payable by the defendant to Seaboard, or it might be an amount payable by Seaboard to the defendant.

[5] There was also a clause in the contract which provided that if the defendant became insolvent or if any proceedings were taken in bankruptcy in relation to the defendant, whether voluntary or otherwise, the defendant then agreed that Seaboard should have the right to immediately retake and repossess the vehicle.

[6] The terms of cl. 8 were that the defendant would remain liable for all rentals payable, for all payments under the contract and for costs.

[7] The contract provided that in the event of premature termination the defendant would pay Seaboard all moneys due under the agreement.

[8] The defendant took possession of the vehicle in April 1982 when the contract was signed. On 7th December 1983 the defendant made a voluntary assignment into bankruptcy. She did not inform the trustee in bankruptcy of the lease contract with Seaboard or the terms by which she had possession of the automobile. That bankruptcy went through the procedures under the Bankruptcy Act and an absolute order of discharge was made on 22nd May 1984.

[9] The defendant made the required payments until 14th September 1984, that is, from before the bankruptcy right through the bankruptcy, past the time of her discharge, and several payments after the discharge had been granted. But, in September 1984, default occurred and in the end the vehicle was returned to Seaboard in November 1984. At that time Seaboard calculated the amount owing under the contract in accordance with the terms of the contract just as if no bankruptcy had occurred and Seaboard made a demand for the balance owing.

[10] At that time Seaboard had no knowledge of the bankruptcy. Seaboard learned of the bankruptcy in December 1984.

[11] No funds were realized by the trustee in bankruptcy for the benefit of creditors; nor were any dividends paid out to the unsecured creditors from the bankrupt's estate.

[12] In February 1985 Seaboard began this action against the defendant claiming $2, 934.48, which was the balance said to be due on the lease. Both Seaboard and the defendant brought applications for judgment under RR. 18 and 18A.

[13] Judgment was given by the Honourable Judge Campbell dismissing the defendant's application and giving judgment in favour of Seaboard for the amount claimed of $2, 934.48. The reasons discussed whether this was a claim provable in bankruptcy and turn on the fact that, in the opinion of Judge Campbell, this was not a claim provable in bankruptcy but a claim for individual monthly payments and that when each payment was made, as it was up to the date of bankruptcy, that payment discharged the debt and there was no further debt until a further payment became due.

[14] A question called “novation” was also mentioned by Judge Campbell, but was specifically not dealt with by him. By the term “novation” I understand Judge Campbell to mean those arguments in relation to the conduct of the parties throughout the bankruptcy, and particularly after the bankruptcy, in relation to whether there was an existing contractual relationship between the parties after the bankruptcy.

[15] We were referred by counsel for the appellant to s. 95, and particularly subss. (1), (2) and (3) of that section in the Bankruptcy Act. We were referred also to s. 148, and particularly to subs. (1)(f) and to subs. (2). On the basis of those provisions counsel for the appellant argued that at the time of the bankruptcy there was a claim provable by Seaboard in the bankruptcy for the full amount then calculable as owing under the contract, either because of breach or because of the termination provisions of cl. 8. The argument continues with the submission that if there were a claim payable in bankruptcy that claim could not survive the discharge except as a claim to a dividend equal to the dividend in the bankruptcy.

[16] It is not necessary for me to deal with that argument in this case. I do not wish to make any decision as to whether there was or was not a claim provable in bankruptcy. But, on the assumption that there was a claim provable in bankruptcy, I pass on to consider what occurred between these parties.

[17] The contractual payments were made throughout the period of the bankruptcy and the defendant retained possession of the vehicle throughout that period. After she had obtained her discharge from the bankruptcy she continued to retain pos-session of. the vehicle and she continued to make the contractual payments. Under what basis was that possession retained and on what basis were those payments made? In my opinion, the proper view is that the contract continued throughout the bankruptcy and continued after the discharge from bankruptcy; it was never terminated in accordance with its provisions for termination, and the fact that there might have been a claim provable in bankruptcy, or that a claim provable in bankruptcy might have been made, does not affect the fact that the contract itself continued and continued to regulate the relationship of the parties after the discharge from bankruptcy.

[18] In my opinion, what occurred in this case was not, strictly speaking, a novation, as that term is properly understood, but was merely a continuation of the contract, and a continued abiding by the terms of the contract that had been made between the parties. In effect, the contract was endorsed by the defendant after the discharge. In those circumstances no other order is possible in relation to damages than that the contractual provisions apply and they must set the quantum of damages in the amount for which judgment was given by the Honourable Judge Campbell.

[19] We were referred in the course of argument in relation to the question of endorsement of the contract to the decision of the Superior Court of Quebec in Bankruptcy

in the case of *Godin v. Nobert* (1926), 7 C.B.R. 725. That case deals with whether the partial payment to a debtor after the discharge from bankruptcy would restore the full amount of the debtor's claim. That case is distinguishable from this case because in this case there was a continuing contract with continuing benefits flowing both ways through the continued possession of the vehicle and the continuation of making payments. So I do not disagree with that decision, but say it has no application to the facts of this case.

[20] For those reasons I think that this appeal ought to be dismissed.

[21] CARROTHERS J.A.: I agree.

[22] MACFARLANE J.A.: I agree.

[23] CARROTHERS J.A.: The appeal is dismissed.

Appeal dismissed.