

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002952-MR

TERRY FOSTER AND KAREN FOSTER
D/B/A DADDIO'S PIZZA

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 00-CI-00060

FIRST FEDERAL LEASING

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, MCANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Terry Foster and his wife, Karen, appeal from an order of the Bullitt Circuit Court granting directed verdicts in favor of First Federal Leasing (First Federal or the bank) in a lawsuit over a finance lease. We affirm.

The factual situation underlying this appeal is rather complicated; therefore, we will set forth in some detail the circumstances surrounding the parties' transaction. Terry and Karen Foster are the owners and operators of Daddio's Pizza in Lebanon Junction, Kentucky. One day a salesman by the name of Sherman Alex Ollie approached them about adding barbeque to their

menu. He proposed to make arrangements for them to lease to own a brand new Kook-Rite-Kooker (Kooker), serial number 503328, which he would deliver and install. Believing that he was receiving a franchise without a name, Terry negotiated a purchase price for the Kooker and signed an application for a loan from Midwest Leasing in order to fund the equipment purchase. Midwest Leasing sent the application to First Federal for approval on September 17, 1999, and First Federal agreed to purchase the Kooker and lease it to Terry according to the terms of the loan agreement he had signed the previous day.

On September 21, 1999, Ollie brought Terry the lease contract with an attachment titled "Schedule A" which described the equipment which Terry was leasing from First Federal. Despite the fact that he had not received the Kooker, Terry also signed a delivery and acceptance receipt acknowledging that he had the equipment and was satisfied with it. In addition, Karen Foster signed an individual guaranty obligating herself to the lease payments of \$294.68 per month if Terry should default. Sometime during the day, Ollie did, in fact, deliver a Kooker although it was a used demonstration model which Ollie left uninstalled in an out-building behind the Fosters' restaurant. The next day, Terry received phone calls from both Midwest Leasing and First Federal, as is common practice in the finance lease business, seeking to verify the delivery of the Kooker. Without having looked at the equipment, Terry assured them both that it had been delivered in satisfactory condition. In a tape-

recorded statement, Terry gave First Federal permission to release payment for the Kooker to Ollie.

On November 3, 1999, Terry finally informed First Federal that Ollie had actually delivered a used and uninstalled piece of equipment, and that the serial number did not match the one in the lease agreement between himself and First Federal. Terry was told that, pursuant to the lease agreement, he was still obligated to pay First Federal because they had spent the money to purchase the Kooker. Furthermore, First Federal reminded Terry that he should bring his complaints about the equipment to the attention of Ollie who was not the bank's agent. Although under no obligation to do so, First Federal tried to locate the equipment which it had purchased by contacting the vendor. Ollie informed the bank that he would deliver the Kooker with the correct serial number and replace the demo model he had left behind with Foster. However, Ollie failed to do so, and First Federal was unable to locate him again.

Terry's lease payments became increasingly delinquent, and First Federal sent him a letter on December 13, 1999, informing him that his account was past due for the months of October and November, that the bank had been trying unsuccessfully to contact him regarding the delinquency, and that it would refer the matter to an attorney if Terry failed to send a payment. Terry responded by sending a letter to Midwest Leasing advising them that he wanted to cancel the lease. After December's payment was also past due, First Federal sent another letter on December 21, 1999, instructing Terry to contact the

vendor (Ollie) regarding his problems with the equipment. Finally, the bank sent a letter on December 22, 1999, notifying him that the lease was being referred to an attorney for legal action to collect because his account was three months past due.

It was the Fosters who filed suit, however, against First Federal and Ollie in January 1998 alleging breach of contract and fraud. They did not name Midwest Leasing as a defendant in their lawsuit. First Federal counterclaimed for breach of contract requesting as damages the total amount of \$18,337.04 due under the lease, plus costs and attorney's fees. The bank also filed a motion for summary judgment which the trial court denied. Prior to trial, the Fosters obtained a default judgment against Ollie; however, in the meantime Ollie died leaving the judgment unsatisfied. At trial, Karen's motion to dismiss the counterclaim against her as a guarantor was overruled. The trial court granted directed verdicts dismissing the Fosters' claims for breach of contract and fraud holding that these claims properly sounded against the vendor, Ollie. First Federal also moved for a directed verdict on its counterclaim for breach of contract arguing that the lease involved was a finance lease and that Terry's acceptance of the wrong equipment rendered the lease irrevocable. The trial court granted judgment against the Fosters holding them jointly and severally liable for the entire amount due under the lease, plus \$5,821.37 in costs and attorney's fees. This appeal followed.

The Fosters argue that the trial court erred in denying their claims for breach of contract and fraud against First

Federal. In order to sustain a claim for fraud in Kentucky, the Fosters must prove that First Federal made "(a) a material representation, (b) which is false, (c) known to be false or made recklessly, (d) made with inducement to be acted upon, (e) acted in reliance thereon, and (f) causing injury." Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 359 (1978). The only representation which First Federal made regarding the equipment delivered to the Fosters was the serial number, listed in the lease, which did not match that of the used Kooker they actually received. However, First Federal did not knowingly or recklessly misrepresent the serial number; rather the bank relied on Terry who signed the delivery and acceptance receipt for a new Kooker with the correct serial number and confirmed by telephone the following day that he had received the equipment described in the lease. Terry admits that he did not read the lease agreement prior to signing it; therefore, he cannot claim now that he was induced to enter into the agreement by any statements in the lease prepared by First Federal. The deceit perpetrated on the Fosters was the result of the vendor's action in leaving a used and uninstalled piece of equipment instead of the new Kooker which was the subject of the lease agreement between First Federal and Terry.

According to the Fosters, Ollie was acting as an agent for First Federal and, consequently, the bank is liable for his fraudulent behavior. Ollie originally contacted Midwest Leasing to finance the piece of equipment he wished to lease to Terry. At the time the lease was signed, First Federal had not been in

contact with Terry and had no business dealings with Ollie. Simply put, the Fosters have failed to prove any fraud on the part of First Federal or any relationship between the bank and Ollie which would allow his conduct to be imputed to First Federal. Regarding the bank's liability for Ollie's fraudulent conduct, there were no "disputed issues of material fact on which reasonable minds could differ" and, therefore, the trial court properly granted a directed verdict denying the Fosters' claims against First Federal. Bierman v. Klapheke, Ky., 967 S.W.2d 16 (1998).

The Fosters next argue that the trial court erred in granting a directed verdict holding them liable for the entire amount due under the lease plus costs and attorney's fees. The dispositive issue here is whether the lease agreement between Terry and First Federal qualifies as a finance lease under the Uniform Commercial Code as codified by Kentucky Revised Statute (KRS) 355.2A-103(1)(g):

1. The lessor does not select, manufacture, or supply the goods;
2. The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
3. One of the following occurs:
 - . . .
 - d. If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods

from that person, (b) that the lessee is entitled under this article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and review an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

The lease between First Federal and Terry clearly meets the statutory requirements for a finance lease. First Federal did not select, manufacture, or supply the goods, but rather they were selected by Terry, supplied by Ollie, and manufactured by an entity which is not a party to this action. Furthermore, the bank acquired title to the goods under the lease as described in KRS 355.2A-103(1)(g)(2). Finally in accordance with (1)(g)(3)(d), after Terry selected the goods, Ollie arranged for the bank's financing, and the lease informed Terry of all of the warranties and directed him to contact the supplier if he had any problems with the goods.

A further provision of the Uniform Commercial Code, known as a "hell or high water clause," mandates that a finance lease becomes irrevocable once the lessee accepts the goods. We have codified this provision in KRS 355.2A-407 as follows:

1. In the case of a finance lease that is not a consumer lease, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

2. A promise that has become irrevocable and independent under subsection (1):

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs. . . .

Acceptance of goods is defined by KRS 355.2A-515 as follows:

Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods; and

(a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity . . .

Terry argues that he did not have an adequate opportunity to inspect the goods prior to signing the delivery and acceptance receipt and, therefore, he is not bound to the terms of the lease under KRS 355.2A-407. However, at the same time he concedes that there was no reason why he had to sign the lease and the delivery and acceptance receipt without reading the documents and prior to the delivery of the equipment. Critically, when Ollie actually delivered a Kooker to Terry and left it in his out-building, Terry made no move to inspect it. Instead, he relayed to Midwest Leasing and First Federal on the telephone that the correct equipment had been installed. By doing so, he conveyed his acceptance of the defective equipment to First Federal and irrevocably bound himself under the terms of the lease which

included First Federal's right to recover upon Terry's default for costs and attorney's fees.

Finally, the Fosters claim that the trial court erred in granting a directed verdict holding Karen liable under her individual guaranty. They argue that the guaranty did not refer directly to the lease and, therefore, was not valid under KRS 371.065. Although the guaranty is not dated, it refers to a lease of equipment between FFL (First Federal) and Terry Foster doing business as (d/b/a) Daddio's Pizza and it is the only such lease that was signed between these parties. The guaranty is further imprinted in the top right hand corner with the number 25102 which is the same number on the lease between Terry and First Federal and noted as "Lease No." The Fosters have failed to demonstrate that Karen's guaranty does not comply with the statutory requirements of KRS 371.065. Their claim that Karen's guaranty was conditioned on Ollie's performance of the sales contract is similarly unfounded due to the fact that the document plainly states that "the undersigned unconditionally guarantees to Lessor the prompt payments when due of all of Lessee's obligations to Lessor under the Lease." Moreover, their claim that the guaranty should be invalidated because Ollie fraudulently induced Karen to sign it also fails, because Karen's signature guaranteed Terry's obligation to First Federal which committed no fraud.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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