STATE OF MICHIGAN

COURT OF APPEALS

LEXUS FINANCIAL SERVICES,

Plaintiff/Counter-defendant/Appellee,

v

TROMBLY TINDALL, P.C.,

Defendant/Counter-plaintiff,

MICHAEL E. TINDALL,

Defendant/Counter-plaintiff/Appellant,

v

CITY OF HARPER WOODS and
HARPER WOODS POLICE DEPARTMENT,

Defendants.

FOR PUBLICATION
March 30, 2004
9:05 a.m.

No. 243472
Wayne Circuit Court
LC No. 02-218597-PD

Updated Copy
June 18, 2004

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

COOPER, P.J. *(dissenting).*

I respectfully dissent from the majority opinion in this case.

A careful review of the record indicates that Tindall & Co. purports to be the successor in interest to the lease. This is an impossibility. Defendant Trombly Tindall filed for bankruptcy. Pursuant to federal law, all property in which defendant Trombly Tindall had a legal or equitable

interest, including the current lease, became property of the bankruptcy estate.[1] The only party with a right to assign the lease after the commencement of the bankruptcy case was the trustee of the bankruptcy estate.[2] To assign a lease, the bankruptcy estate must first assume the lease.[3] It is clear that neither Tindall & Co. nor Michael Tindall was assigned the lease after the commencement of the bankruptcy case. The estate expressly rejected, and therefore, breached the lease.[4] A rejection does not return the lease to the debtor, or a principal of the debtor.[5] Furthermore, nothing in the record suggests that defendant Trombly Tindall assigned the lease prior to filing for bankruptcy.

A careful review of the record also reveals the perplexing fact that it was appellant who requested arbitration and even requested sanctions against plaintiff for bringing the case in circuit court as opposed to arbitration. As the bankruptcy estate is the only entity with an interest in the lease, the bankruptcy trustee is the only party with standing to assert a claim or defense regarding the lease.[6] Accordingly, if Tindall & Co. and/or Michael Tindall individually are not successors in interest to the lease, they have no standing to assert a defense to an action for repossession, replevin or judicial foreclosure or to request arbitration. They also have no standing to assert a counterclaim and such a claim would, indeed, be spurious.

Once an executory contract or unexpired lease is rejected by the estate, the aggrieved party's claim is treated as if it arose just prior to the commencement of the bankruptcy case.[7] The claim is handled in the bankruptcy court and is paid through the normal administration of the estate.[8] In this case, the bankruptcy court terminated the automatic stay with respect to the current lease, allowing plaintiff to assert its rights under the lease.

It is clear from paragraph 44 of the lease agreement that nothing in the agreement may be construed to prevent plaintiff from seeking repossession, replevin or judicial foreclosure.

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[1] 11 USC 541(a)(1).

[2] The trustee is the representative of the estate. 11 USC 323 (a). Therefore, the trustee is the only party with power to control the estate's assets.

[3] 11 USC 365(f)(2).

[4] 11 USC 365(g).

[5] Estate property only reverts to the debtor upon the estate's express abandonment of the property subsequent to court approval. See 11 USC 554.

[6] 11 USC 323(b); 11 USC 558 (the estate has "the benefit of any defense available to the debtor as against any entity other than the estate").

[7] 11 USC 502(g).

[8] *Barnett v Blachura*, 242 Mich App 395, 401-402; 618 NW2d 777 (2000).

Plaintiff was not required to arbitrate under the circumstances and no party with standing requested arbitration. Therefore, plaintiff 's claims were properly brought in the circuit court.

I would reverse the decision of the trial court. Plaintiff was entitled to seek repossession of the leased vehicle in the circuit court. As the bankruptcy estate failed to request arbitration, and Tindall & Co. and Michael Tindall individually had no standing to make such a request, plaintiff was required to try the case in the circuit court. Michael Tindall kept and used the vehicle throughout this action; therefore, plaintiff was also entitled to the escrow account. I would note from oral arguments that, according to plaintiff, Michael Tindall has now returned the vehicle to Lexus.

Accordingly, since Mr. Tindall was not a party in interest at any time during these proceedings, his counter-claim in circuit court should also be dismissed.

/s/ Jessica R. Cooper