STATE OF MICHIGAN

COURT OF APPEALS

PATSY L. WILLIAMSON,

Plaintiff-Appellant,

v

MASSE LINCOLN-MERCURY, JEEP-EAGLE, INC. d/b/a MASSE, INC., MASSE NISSAN, INC. and TERRYL E. MASSE,

Defendant-Appellee.

UNPUBLISHED
June 17, 1997

No. 189869
Genesee County
LC No. 94-027654

Before: Reilly, P.J., and Wahls and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order dismissing her complaint which sought specific performance of two asset purchase agreements. We affirm.

This case arose out of an agreement between plaintiff and defendants whereby plaintiff would purchase defendants' automobile dealerships. Plaintiff agreed to purchase all of the personal property and intangibles belonging to defendants Masse Lincoln-Mercury, Jeep-Eagle, Inc., and Masse Nissan, Inc., free and clear of all security interests, liens, material restrictions, claims, escrow balances, or changes of any kind, and that plaintiff would assume certain of defendants' outstanding leases. A dispute arose between the parties, and plaintiff filed a claim in circuit court seeking specific performance of the agreement, claiming that defendants failed to perform their contractual obligations. On May 22, 1994, the parties entered into a settlement agreement which resolved all disputed issues in the case except for one. The remaining issue involved a Reynolds and Reynolds computer that defendant Masse Lincoln-Mercury Jeep-Eagle leased from Reyna Financial Corporation, a subsidiary of the Reynolds and Reynolds Company. Plaintiff claimed that the transaction was not a true lease, but was an installment sale with a security interest, and, therefore, she was not required to assume this lease. Defendants argued that the lease agreement was in fact a true lease, and thus plaintiff assumed the obligations of the lease agreement by the terms of the asset purchase agreement.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal, plaintiff argues that the circuit court erred in relying on the intent of the contracting parties and the terminology of the agreement to determine that the agreement was a true lease rather than an installment sale. We disagree.

Whether a transaction creates a lease or security interest is determined by the facts of each case. MCL 440.1201(37); MSA 19.1201(37). This Court reviews the trial court's findings of fact for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous when the reviewing court is left with a firm conviction that a mistake has been made. *Id.*

MCL 440.1201(37); MSA 19.1201(37), which is based on Uniform Commercial Code § 1-201(37), defines a security agreement. The statutory provision distinguishes between a true lease and an installment sale with a security agreement as follows:

> Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and any of the following;
>
> (a) The original term of the lease is equal to or greater than the remaining economic life of the goods.
>
> (b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.
>
> (c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal consideration upon compliance with the lease agreement.
>
> (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.
>
> A transaction does not create a security interest merely because it provides any of the following:
>
> (a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into.
>
> (b) The lessee assumes the risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods.

(c) The lessee has an option to renew the lease or to become the owner of the goods.

(d) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed.

(e) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed. [MCL 440.1201(37); MSA 19.1201(37).]

The statute was amended in 1992 to delete all references to the parties' intent, focusing instead on economic factors. UNIFORM COMMERCIAL CODE § 1-201 comment 37.

"Where a contract provides that a person receiving certain goods is the lessee of those goods, has an obligation to pay a stipulated rental without obtaining title, and has an option to purchase the property at the end of the lease, the contract may not be deemed one of sale." *Hill v GMAC*, 207 Mich App 504, 512; 525 NW2d 905 (1994). In the present case, the circuit court first noted that the agreement was characterized by the contracting parties as a lease, but then the court went beyond the label and looked to the substance of the agreement to determine the issue. In particular, the court stressed the provisions that the lessor retained ownership at all time, that the lessee could not assign, sublet, or mortgage the equipment, that the lessee could not remove the equipment from the specified location, and that the lessee's risk of loss was limited to one percent or $1,000. The court also stressed the fact that the agreement gave the lessee the option to purchase the equipment for the fair market value up to 15% of the cost of the equipment. Finally, the agreement expressly provided that "nothing herein contains shall give or convey to the lessee any right, title or interest in or to the equipment leased hereunder." On the facts of this case, the trial court did not err in concluding that the agreement in question was a true lease and not a sale with a security agreement.

Plaintiff argues that the contractual language the court relied on is equally consistent with a security agreement. This argument has no merit. The statute expressly provides that the question is one of fact. The trial court analyzed the agreement in light of the statutory factors and concluded that it was a true lease. This conclusion was not clearly erroneous.

Plaintiff relies primarily on case law from other jurisdictions which hold that an option to purchase for less than twenty or twenty-five percent of the original cost is an option to purchase for nominal consideration as a matter of law. *In re Excello Press, Inc*, 83 BR 539, 542 (ND Ill, 1988), aff'd 90 BR 335 (ND Ill 1988), rev'd on other grounds 890 F 2d 896 (CA 7, 1989); *In re Royal Food Markets, Inc*, 121 BR 913 (SD Fla, 1990); *In re Alpha Creamery Co, Inc*, 4 UCC Rep Serv 794, 795 (Bankr WD Mich, 1967). However, upon close examination of these cases, we do not believe that they stand for the proposition asserted by plaintiff.

Instead, we find the statutory provision more helpful. MCL 440.1201(37); MSA 19.1201(37) provides:

> As used in this subsection:
>
> (a) Additional consideration is not nominal if when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predicable cost of performing under the lease agreement if the option is not exercised.

In the present case, the lessee was given the option to purchase the equipment at the end of the lease term for "fair market value not to exceed fifteen percent of the original equipment cost." The trial court found this was not nominal consideration. This finding is consistent with the authority cited by plaintiff, which indicates that the relationship of the option price to the original purchase price is an important factor to consider, but not the only factor. It is also consistent with MCL 440.1201(37); MSA 19.1201(37) because the option price is tied to the fair market value of the equipment, even though the agreement places a cap on the price. The trial court could reasonably have found, given the nature of the equipment involved, that fifteen percent of the original purchase price was not nominal consideration.

Affirmed.

/s/ Myron H. Wahls
/s/ Nick O. Holowka

Judge Reilly concurs in result only