United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Michael E. Kepler, Trustee, Plaintiff v. Steve Rautman, Defendant
(In re David C. & Valerie A. Larson, Debtors)
Bankruptcy Case No. 96-32800-7, Adv. Case No. 97-3266-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

May 15, 1998

Timothy J. Peyton, Kepler & Peyton, Madison, WI, for the plaintiff.
Barrett J. Corneille, Corneille Law Group, LLC, Madison, WI, for the defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

This adversary proceeding was brought by the chapter 7 trustee, Michael E. Kepler ("Kepler") against Steve Rautman ("Rautman") who left a 1937 Ford automobile for sale on consignment at Capitol Corvette. Capitol Corvette was a sole proprietorship of David C. Larson ("Larson") who was engaged in the business of selling classic and collectible automobiles. The stipulation entered into by the parties and the exhibits on file provide the following relevant facts.

In mid-April, 1996, when the Ford was delivered to Capitol Corvette, Larson and Rautman executed a document entitled "Motor Vehicle Consignment Agreement" (the "Agreement"), which stated, inter alia: "3. DURATION. The duration of this Agreement shall be the date of consignment to _____." No date was entered in this blank on the Agreement. Rautman did, however, verbally tell Larson that he would retrieve the Ford if Larson had not sold it by June 1, 1996.

On June 4, 1996, Rautman retrieved the Ford from Larson. He subsequently sold it for

$26,000. Larson was insolvent on June 4, 1996. Less than 90 days later, on July 11, 1996, an involuntary chapter 7 petition was filed against Larson on which relief was granted. Kepler expects to distribute to unsecured creditors 5 to 10 percent of their claims. Part of the funds to be distributed will be those paid in by Rautman if the trustee is successful in this proceeding to have the retrieval of the Ford held to be a voidable preference.

In order to be voidable as a preference, all elements of §547(b) must be satisfied:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The parties have stipulated to each element of § 547(b) except whether Rautman was a creditor and whether the transfer was on account of an antecedent debt. If Rautman is held to have been a creditor, the transfer was made on account of an antecedent debt and all elements of a preferential transfer are present.

Rautman denies that he was a "creditor." Under § 101(10), "creditor" means:

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
> (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title[.]

Under § 101(5), "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

Rautman contends that he was not a creditor because the written consignment agreement he entered into with Larson was void. The agreement failed to comply with the requirements of Wis. Admin. Code Trans. § 138.04 and Rautman relies on the purported interplay of § 138.04 with Wis. Stat. Ann. § 409.203(5) and Wisconsin case law to claim it was void. In arguing this, Rautman makes two assumptions: (1) that Administrative Code regulations are included under the term "statute," and (2) that a consignment agreement that violates this regulation is void under its provisions. Both of these assumptions are incorrect.

Subsection (5) of Wis. Stat. Ann. § 409.203 provides:

> A transaction, although subject to this chapter, is also subject to chs. 138, 421 to 427, s. 182.025, or any other similar statute which may be applicable to the particular transaction, and in the case of conflict between this chapter and any such statute, such statute controls. Failure to comply with any applicable statute has only the effect which is specified therein.

Section 138.04 reads as follows (emphasis added):

> The minimum of books and records required to be kept and maintained at the licensed business premises by motor vehicle dealers and used

> motor vehicle wholesalers under ss. 218.01(3)(bf) and (d) and 342.16(2), Stats., shall include:
>
> > . . .
> > (b) Written consignment agreement between owner and dealer for each vehicle not owned by the dealer and offered for sale by the dealer. . . . *Each consignment agreement shall contain*:
> >
> > > . . .
> > > 4. *Terms of agreement including duration of agreement*, agreed upon minimum selling price . . . .

The language of § 409.203(5) specifies certain statutes dealing with consumer protection, Wis. Stat. Ch. 138, 421 to 427 and s. 182.025, and goes on to include: "any other similar statute which may be applicable to the particular transaction." Wis. Admin. Code Trans. § 138.04 is a regulation, it is not specified in subsection (5) and it is not a statute. Subsection (5) does not expressly include "regulations" in its language.

A proximate statute, § 409.201, specifically includes both statutes and regulations (emphasis added):

> Nothing in this chapter validates any charge or practice illegal under any statute *or regulation* thereunder governing usury, small loans, retail instalment sales, or the like, or under chs. 421 to 427, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

So, the Wisconsin Legislature is capable of specifically including regulations when desired. I must infer that the legislature desired not to do so when the term "regulation" was not included.

Even if § 409.203(5) were held to be limited or extended by regulations, Rautman would still not be entitled to void the contract. Section 409.203(5) provides: "Failure to comply with any applicable statute has only the effect which is specified therein." Comment 6 to § 409.203 provides: "The second sentence of the subsection is added to make clear that no doctrine of total voidness for

illegality is intended: failure to comply with the applicable regulatory statute has whatever effect may be specified in that statute, but no more." Wis. Admin. Code Trans. § 138.04 describes the level of detail required for records which must be kept pursuant to Wis. Stat. Ann. §§ 218.01(3)(bf) & (d). Violations of Wis. Stat. Ann. §§ 218.01(3)(bf) & (d), in turn, are subject to penalty under Wis. Stat. Ann. § 218.01(8)(c) which provides for a monetary forfeiture against the dealer. Thus the statute provides for a fine, not the voiding of the contract.

Nevertheless, Rautman argues that Wisconsin case law supports his argument that § 138.04 voids the contract. The Wisconsin Supreme Court has held that certain breaches of the Administrative Code cause contracts "in question to be void as a matter of law." Perma-Stone Corp. v. Merkel, 255 Wis. 565, 570 (1949). However, "Not all contracts made in violation of the provision of a statute are void." Vic Hansen & Sons, Inc. v. Crowley, 57 Wis.2d 106, 116 (1973). "In determining whether such a contract is void, this court has observed that the intent and purposes of the legislature must be ascertained." Id. at 117. In Crowley, the Wisconsin Supreme Court held that Wis. Stat. Ann. § 218.01(6), regarding the requirements for contracts involving installment sales, was designed to protect consumers due to the presence of a penalty provision for its violation in Wis. Stat. Ann. § 218.01(8)(c). Id. at 117. The Court went on to hold that the protection was provided by making the nonconforming contract void.

That level of consumer protection is not indicated here. Wis. Admin. Code Trans. § 138.04 describes the level of detail required for records which must be kept pursuant to Wis. Stat. Ann. §§ 218.01(3)(bf) & (d). Violations of Wis. Stat. Ann. §§ 218.01(3)(bf) & (d), in turn, are subject to penalty under Wis. Stat. Ann. § 218.01(8)(c), the same penalty provision in question in Crowley. However, the turning point in Crowley was that the court considered the statute in question to be

designed for "the protection of the purchasers of automobiles, individually, and as a class." Id. at 117. This seems logical as the statute required that a signed contract "be furnished by the seller to the buyer at the time the buyer signs the contract." Id. at 116 (quoting Wis. Stat. Ann. § 218.01(6)(c)). The implication is that a car purchaser needs the protection of a contract in writing. It is far from clear that a consignor must be protected by an end date on the consignment agreement or that voiding other terms of the agreement, such as the consignee's obligation to return the vehicle if not sold, would provide that protection.

Under the Uniform Commercial Code, Wis. Stat. Ann. §§ 402.326(2) & (3) provide (emphasis added):

> (2) Except as provided in sub. (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; *goods held on sale or return are subject to such claims* while in the buyer's possession.
> (3) *Where goods are delivered to a person for sale* and such person maintains a place of business at which the person deals in goods of the kind involved, under a name other than the name of the person making delivery, *then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return*.

This section of the U.C.C. provides no statute of frauds beyond that contained in Wis. Stat. Ann. § 402.201. The statute of frauds contains an exception "With respect to goods for which payment has been made and accepted or which have been received and accepted." Wis. Stat. Ann. § 402.201(3)(c). Judge Ginsberg has held that under the Illinois version of this section, acceptance of goods on consignment fits within this exception to the statue of frauds. See Steege v. Affiliated Bank/North Shore National (In re Alper-Richman Furs, Ltd.), 147 B.R. 140, 148 n.9 (Bankr. N.D. Ill. 1992) ("No writing was required to evidence the consignment arrangement between the Debtor and

Just Furs.").[1]

In this case, there is no doubt that Larson both received and accepted the consigned car. Thus, there was no requirement under the Uniform Commercial Code that the consignment agreement be in writing. Moreover, the consignment agreement was put in writing and only one term was omitted. The U.C.C. provides explicitly that "A writing is not insufficient because it omits or incorrectly states a term agreed upon." Wis. Stat. Ann. § 402.201(1). The parties have stipulated that a duration (until June 1) was agreed to by the parties, but was simply not included in the written agreement.

Moreover, the statute of frauds is not applicable to this case even if the exception in § 402.201(3)(c) is not met. Section 402.201(3)(b) provides that an unwritten contract does not fall within the statute of frauds:

> (b) If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this paragraph beyond the quantity of goods admitted[.]

Rautman has admitted not only that an agreement was formed, but also that a duration was agreed upon but omitted from the writing. The consignment agreement is not invalid under the statute of frauds.

Even if the consignment contract were deemed void due to the improper writing, the transaction would not be a "mere bailment" as Rautman contends. The Wisconsin Supreme Court has stated that "A 'bailment' arises when the possession of a chattel is temporarily transferred but the general title

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[1]Judge Ginsberg's conclusion, however, is somewhat questionable because he relied extensively on the definition of "purchaser" in order to reach his conclusion. Judge Ginsberg stated that a consignee fits within the definition of "purchaser" under §§ 1-201(32) & (33). The term "purchaser" is not mentioned in § 2-201(3)(c). Only the terms "received" and "accepted" are used. While it may be implicit that receipt and acceptance would be by a purchaser, the term is not actually used in the statute.

remains in the hands of the original owner." Moore v. Relish, 53 Wis.2d 634, 639 (1972). The Wisconsin Supreme Court has stated that "in order to constitute a bailment, there must be an agreement, expressed or implied, to redeliver the property bailed when the purpose of the bailment has been fulfilled." American Nat'l Red Cross v. Banks, 265 Wis. 66, 69 (1953) (quoting Bradley v. Harper, 173 Wis. 103). This case is still good law in Wisconsin. No bailment could have existed, for as trustee Kepler points out in his brief regarding the earlier motion to dismiss, "Had this 'bailment' been fulfilled the vehicle would have been sold and the defendant paid."

Upon delivery, the car is deemed to be "on sale or return" and thus subject to the claims of Larson's creditors. See Wis. Stat. Ann. § 402.236. The car was then covered by the Benjamins' security interest. See Wis. Stat. Ann. § 409.114(2) ("In the case of a consignment which is not a security interest and in which the requirements of sub. (1) have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor."). Rautman became a creditor of Larson as soon as he delivered the Ford to Capital Corvette. The transfer back to Rautman over two months later was on account of that antecedent debt.

Upon the foregoing the plaintiff may have judgment according to the demand of the complaint.