STATE OF MICHIGAN

COURT OF APPEALS

AUTOMOBILE LEASING, INC.,

Plaintiff-Appellant,

v

NATIONAL COACH ENGINEERING, INC.,
a Michigan Corporation,

Defendant-Appellee.

UNPUBLISHED
December 17, 1996

No. 189434
Sanilac County
LC No. 94-022870 CZ

Before: McDonald, P.J., and Murphy and J.D. Payant,* JJ.

PER CURIAM.

Plaintiff, Automobile Leasing, Inc., brought suit against defendant, National Coach Engineering, Inc., seeking a deficiency payment of $67,912.06, pursuant to two vehicle lease agreements between plaintiff and Terige Chiodo which defendant guaranteed. The trial court granted defendant's motion for dismissal of plaintiff's cause of action following the close of proofs, finding that article nine of the Uniform Commercial Code (UCC) applied to the leases in question and that plaintiff's failure to give notice of sale barred its deficiency claim. Plaintiff now appeals by right and we affirm.

Article nine of Michigan's UCC requires a secured creditor to give debtors reasonable notice of the sale of collateral. MCL 440.9504(3); MSA 19.9504(3). A guarantor is a debtor who is entitled to notice under MCL 440.9504(3); MSA 19.9504(3) of the UCC. *Honor State Bank v Timber Wolf Construction,* 151 Mich App 681, 684; 391 NW2d 442 (1986); *In Re Bluestone Estate,* 121 Mich App 659, 670; 329 NW2d 446 (1982). A creditor's failure to give the required notice operates as an absolute bar to a creditor's deficiency claim. *Bank of Standish v Keysor,* 166 Mich App 93, 99; 419 NW2d 752 (1988).

On appeal plaintiff contends that the trial court erred in applying article nine's notice requirement to the leases in question. In support of this contention, plaintiff argues that the trial court erred in refusing to apply MCL 440.1201(37); MSA 19.1201(37) as amended by 1992 PA 101, § 1 in

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

determining whether the leases in question were true leases to which article nine does not apply or were conditional sales to which article nine is applicable. *See* White & Summers, Uniform Commercial Code (3rd ed), § 21-3, pp 928-929. We disagree. The amendment to MCL 440.1201(37); MSA 19.201(37) resulting from 1992 PA 101 § 1, did not take effective until September 30, 1992. All the relevant events in this matter took place well before September 30, 1992. Therefore in order for the 1992 amendments to apply to this matter, this Court would have to do so retroactively.

1992 PA 101 does not expressly or implicitly provide for retroactive effect. "Generally a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicated its intention to give retroactive effect." *Macomb Deputies v Macomb County,* 182 Mich App 724, 730; 452 NW2d 902 (1990). However, this rule does not apply to statutes or amendments which are remedial or procedural in nature. *Id*. Plaintiff, however, argues that because the amendment merely made plain the Legislature's intent from the outset, it was procedural in nature and entitled to retroactive effect. We find no merit to plaintiff's argument.

The 1992 amendments to the UCC narrowed the factors to be considered in determining whether a lease was intended to be a security interest by excluding several of the factors recognized as indicating that a security interest was intended. *See* MCL 440.1201 (37)(a)-(e); MSA 19.1201(37)(a)-(e); *Michigan Carbonic Company v Anton's Lounge & Restaurant, Inc,* 40 BR 134, 136 (ED Mich, 1984); White & Summers, Uniform Commercial Code § 21-3, p 934. Moreover, the comments following MCL 440.1201(37); MSA 19.1201(37), expressly state that "Section 1-201(37) [was] being amended at the same time that the Article on Leases (Article 2A) [was] being promulgated." Thus, the definition of a security interest was being amended to conform with a newly promulgated statutory provision. As a result, 1992 PA 101 substantively changed the definition of a security interest and the amendment is not entitled retroactive effect.

Plaintiff, however, also argues that even if the court appropriately applied the pre-1992 version of MCL 440.1201(37); MSA 19.201(37), the trial court erred in finding that the leases in question were security interests because they did not contain any provisions granting the lessee the right to purchase. We disagree.

In assessing whether a lease is a true lease or a security interest, "the ultimate question is what the parties intended." *Michigan Carbonic Company, supra* at 136. Although in determining the parties' intent we consider whether the lessee was given an option to buy, "[e]ven if there is no purchase option or the purchase option is not for a nominal consideration, the lease may still be 'intended for security' under 1-201(37)." White & Summers, Uniform Commercial Code § 21-3, p 934. Thus, this Court takes into consideration numerous factors including:

1. Whether the lessee is required to insure the item on behalf of the lessor in an amount equal to the total rental payments.

2. If the risk of loss or damage is on the lessee.

3. If the lessee is required to pay for taxes, repairs, damage and maintenance.

4. When the goods are to be selected from a third party by the lessee.

5. Rental payments are a reasonable equivalent to the cost of the item plus interest.

6. Warranties generally found in a lease are excluded by the agreement.

See Michigan Carbonic Company, supra at 136; White & Summers, Uniform Commercial Code § 21-3, p 934.

Considering the facts of this case in light of the aforementioned factors, we find that there was substantial evidence to support the trial court's finding that the leases were intended as a security interest. The plaintiff purchased the vehicles that Chiodo wanted to lease from a third party. Pursuant to the terms of the lease, the lessee was obligated to acquire insurance at his own expense naming plaintiff as the insured. The lessee was responsible for all maintenance and repairs on the leased vehicles. The leases expressly stated that the lessor made no warranties regarding the use or condition of the vehicles leased. Therefore, the trial court did not clearly err in finding that the leases were intended to create a security interest and were subject to article nine.

Lastly, plaintiff argues that because title was not properly transferred to the lessee pursuant to MCL 257.233(4); MSA 9.1933(4), defendant can not seek to characterize the transaction as a secured purchase. We disagree. Defendant's position is that the leases in question were not true leases but security interests. In order for a lease to create a security interest, it must essentially be a conditional sale in which the lessor retains title to secure the lessee's obligation to pay for the goods. *See* White & Summers, Uniform Commercial Code § 21-3, p 929. Thus, the lessor's retention of title is essential to this type of claim. As a result, the fact that the titles to the vehicles in question were not transferred to the lessee should not be viewed as prohibiting defendant's from characterizing the leases as conditional sales or as security interests.

We affirm.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant