

IN THE COURT OF APPEALS OF MARYLAND

No. 145

September Term, 1995

KEVIN J. SCOTT

v.

FORD MOTOR CREDIT COMPANY

*Murphy, C.J.,
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker, JJ.

Dissenting Opinion by Eldridge, J.,
in which Raker, J., joins.

Filed: April 8, 1997

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision

and the adoption of this opinion.

Eldridge, J., dissenting.

I disagree with the majority's decision that the four-year statute of limitations set forth in Maryland Code (1975, 1992 Repl. Vol.), § 2-725(1) of the Commercial Law Article, applies to the instant transaction.

The majority concedes that Title 9 of the Commercial Law Article, which is applicable to secured transactions, is applicable to the transaction at bar because the motor vehicle at issue was collateral for the security agreement. The majority, however, holds that the four-year statute of limitations in Title 2, which applies to transactions for the sale of goods, is applicable to the deficiency action brought by Ford Motor Credit Company (FMCC), the assignee of the agreement between the Scotts and Koon's Ford, upon the Scotts' default. In so holding, the majority rejects the logical conclusion that the time period for filing a deficiency action under these circumstances, along with all other aspects of such action, should be governed by Title 9 of the Commercial Law Article rather than by Title 2. The majority's decision today results from placing the form of a commercial transaction above its substance, and from a strained construction of Titles 2 and 9.

The majority opinion, while recognizing that the instant agreement between the Scotts and FMCC is a "hybrid" agreement possessing characteristics of both a sales contract and a security agreement, nevertheless concludes that the nature of the instant deficiency action is (slip opinion at 8):

"nothing but . . . an action to enforce the obligation of the buyer to pay the full sale price to the seller, an obligation which is an essential element of all sales and which exists whether . . . the sale is accompanied by a security arrangement [A] deficiency action must be considered more closely related to the sales aspect of a combination sales-security agreement rather than to its security aspect. . . ."

As support for this conclusion, the Court relies upon *Associates Discount Corporation v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966), and some subsequent cases which simply adopt the *Palmer* holding. In addition, the majority finds support for this "analytically correct" reasoning in paragraph F of the parties' agreement, addressing the creditor's rights upon default, repossession and resale, and providing that "[i]f the money from the sale is not enough to pay off this contract and costs, you [the debtor] will pay what is still owed to the Creditor"

The Court's reasoning, however, oversimplifies the nature of the instant transaction. The agreement between the parties was not a sale of a motor vehicle where the seller was immediately paid the entire contract price. Instead, the agreement provided for a small down-payment by the Scotts and for the balance of the purchase price to be financed through Koon's Ford, creating a security interest in the motor vehicle as collateral to ensure payment of the financed amount. This type of arrangement is the usual practice today because of the high cost of automobiles. Yet, the

majority appears to analyze the transaction and financing arrangement in this case as if it were a "cash sale" arrangement, producing a result in defiance of the realities of modern automobile financing.

I agree with Judge Hall, who concurred in *Associates Discount Corp. v. Palmer, supra*, 47 N.J. at 188-194, 219 A.2d at 861-865. The *Palmer* case and the case at bar are similar. Both concern agreements consisting of installment sale contracts simultaneously creating purchase money security interests -- "combination, all-inclusive instrument[s], constituting both a contract for sale and a security transaction." *Associates Discount Corp. v. Palmer, supra*, 47 N.J. at 190, 219 A.2d at 862. Judge Hall, concurring in *Palmer*, reasoned as follows (47 N.J. at 191-193, 219 A.2d at 863-864):

"All security transactions, on the other hand, whether created in connection with a sale or otherwise, are governed by Article 9 of the Code entitled "Secured Transactions * * *" and other special state statutes saved from repeal The rights, remedies and obligations of a purchase money security holder in the event of default, including repossession, resale and right of action for deficiency, are defined and controlled by Article 9 and the special saved statutes. It may be suggested that no Article 2 provision would apply since such matters are not 'general sales aspects' of the transaction."

* * *

"This over-all structure of the Code would indicate that the statute of limitations

provision in Article 2 was intended to apply only to actions particularly related to the sale itself, the primary transaction, such as claims for breach of warranty and the price of goods. The official comment to section 2-725 appears to bear out this thesis:

`Purposes:

To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nation-wide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.'

"I think there is considerable merit to the view that a suit for a deficiency, the amount of which is controlled by Article 9 and saved statutes, is not simply an action for the balance of the price of the goods."

The above-quoted reasoning is sound. Section 2-102 of the Commercial Law Article delineates the proper scope of Title 2, and provides:

"Unless the context otherwise requires, [Title 2] applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction . . ." (emphasis supplied).

The text of § 2-102 contemplates that the context of the transaction at issue be considered when assessing the applicability of Title 2, recognizing that, among other things, substance should prevail over form when determining the applicability of the appropriate statute of limitations. The Official Comment to § 2-102 states that the purpose of this section "leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions."

Despite the majority's conclusion that Title 2 applies to transactions creating both a contract of sale and a security agreement, Title 2 contains no information concerning either the requirements for an enforceable security interest or any discussion of the rights, remedies and obligations of the holder of a security interest upon default, including the right to repossess, the right to resell in a commercially reasonable manner, and the right of action for deficiency. These rights, remedies and obligations are all enumerated and discussed in Title 9, which by its terms governs secured transactions. *See First Nat'l Bank v. Chase*, 118 N.M. 783, 786, 887 P.2d 1250, 1253 (1994) (Franchini, J., dissenting):

"Significantly, the [creditor] had the right to take possession of the collateral upon default without judicial process under Article 9 [of the UCC] . . . and to sell it under [Article 9] -- not under Article 2. The deficiency arose out of the default under the security agreement and subsequent sale."

Under the majority's holding, § 2-725(1) of the Commercial Law Article applies to deficiency actions brought by a third-party financier who is the assignee of a sales contract, but the general three-year statute of limitations in Code (1974, 1995 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article, applies to deficiency actions when the sales contract and financing provisions are separate documents. Thus, most actions brought by banks or other lending institutions will be governed by the three-year period of limitations. The majority makes the result turn on whether the sales agreement and the financing agreement are combined in one document or are separate documents. The majority's view, therefore, disregards the substance of the transactions in favor of adherence to form.

Although the agreement between the parties in the present case was a single all-inclusive document governed by both Title 2 and Title 9 of the Commercial Law Article, the substance of FMCC's deficiency action related to the security aspects of the transaction, not the contract of sale. FMCC, as the assignee of Koon's Ford's security interest in the automobile, had the right to receive monthly payments provided for in the agreement between the Scotts and Koon's Ford. FMCC, however, is not a dealer or seller of automobiles; rather, it is a financing company in the business of making automobile loans. Thus, FMCC's function is identical to that of a bank when making automobile loans. In substance,

financing the purchase of an automobile through FMCC and financing the purchase of an automobile through a bank is the same. Because the majority values form over substance, however, different periods of limitations will be applicable.

The automobile in this case was repossessed by FMCC and sold at auction in 1989. FMCC notified the Scotts of the resulting deficiency on March 14, 1989. FMCC, however, did not file the instant deficiency action until April 16, 1992, more than three years later. I would hold that this action is barred by § 5-101 of the Courts and Judicial Proceedings Article because it was filed more than three years after the Scotts received notice of the deficiency.

Judge Raker has authorized me to state that she concurs with the views expressed herein.