IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 10, 2001 Session

J. MACDONALD BURKHART, M.D. v. U.S. COMMERCE EQUIPMENT FINANCE, LLC

Appeal from the Chancery Court for Knox County
No. 144,226-3 Sharon J. Bell, Chancellor

FILED AUGUST 28, 2001

No. E2001-00069-COA-R3-CV

This is an action brought to recover monies allegedly overpaid under a finance lease that was coupled with an option to purchase. The plaintiff, J. MacDonald Burkhart, M.D., and the defendant, U.S. Commerce Equipment Finance, LLC, ("U.S. Commerce"), entered into an agreement, under the terms of which Burkhart would acquire certain equipment by way of a finance lease with an option to purchase.[1] Subsequent to the expiration of the initial term, Burkhart continued, according to him by mistake, to make installment payments and did not exercise his option to purchase. Nearly a year later, he did exercise the option. After U.S. Commerce refused Burkhart's request for a refund of installments allegedly paid by mistake, Burkhart filed this action. The trial court found in favor of U.S. Commerce except to the extent of one monthly "overpayment" by Burkhart. Burkhart now appeals, arguing that the trial court erred (1) in failing to award him the installment payments made by him after the expiration of the original term; (2) in failing to award him prejudgment interest; and (3) in failing to award him attorney's fees. U.S. Commerce argues that the trial court erred in awarding Burkhart the equivalent of one monthly payment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Timothy M. McLemore and Richard T. Scrugham, Jr., Knoxville, Tennessee, for the appellant, J. MacDonald Burkhart, M.D.

[1] The agreement was actually entered into by Burkhart and Burkhart Farms, LLC as co-lessees and Pro Lease Funding Group, Inc. as lessor. Burkhart is the successor to all of the rights of Burkhart Farms, LLC. The managing member of U.S. Commerce testified at trial that U.S. Commerce and Pro Lease Funding Group, Inc. are essentially the same entity. Neither party makes an issue as to the identity of the other.

Archie R. Carpenter, Knoxville, Tennessee, for the appellee, U.S. Commerce Equipment Finance, LLC.

OPINION

I.

On September 1, 1995, Burkhart and U.S. Commerce entered into an agreement relating to Burkhart's acquisition of certain equipment to be utilized at a Pigeon Forge theater in Sevier County. Paragraph 4 of the agreement provides that the parties intend that the agreement would qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code. The agreement further provides for a security deposit of $10,304.92 and 27 payments in the same amount over a 36 month term.[2]

Paragraphs 13 and 14 of the agreement provide as follows:

> 13. SURRENDER. By this Lease, Lessee acquires no ownership rights in the Equipment, and has no option to purchase same. Upon the expiration, or earlier termination or cancellation of this Lease, or in the event of a default under Paragraph 21, hereof, Lessee, at its expense, shall return the Equipment in good repair, ordinary wear and tear resulting from proper use thereof alone excepted, by delivering it, packed and ready for shipment, to such place or carrier as Lessor may specify.
>
> 14. RENEWAL. At the expiration of the Lease, Lessee shall return the Equipment in accordance with Paragraph 13, hereof. At Lessor's option, this Lease may be continued on a month-to-month basis until 30 days after Lessee returns the Equipment to Lessor. In the event the Lease is so continued, Lessee shall pay to Lessor rentals in the same periodic amounts indicated under "Amount of Each Payment," above.

These paragraphs are part of a preprinted form. Attached to the agreement as an addendum is a typewritten option to purchase, providing, in pertinent part, as follows:

> For and in consideration of said lease, Lessor does hereby agree that the following terms and conditions will be extended to lessee upon satisfactory completion of all the terms and conditions of said lease.
>
> 1. Lessee may return the equipment leased in accordance with provisions of the Lease Agreement.

[2] Payments were not due for the nine months in the three years when the theater would not be open for business.

> 2. Lessee may exercise his option to purchase the leased equipment for its Fair Market Value, estimated to be ten percent (10%).

Both the preprinted form and the typewritten addendum were prepared by U.S. Commerce.

Upon the expiration of the initial term in 1998, Burkhart continued to make monthly payments at the monthly rate specified for the original term. Although U.S. Commerce was aware that all 27 payments required for the initial term had been made, it continued to send invoices to Burkhart. It did not send notice to Burkhart that he had completed making the scheduled payments or that U.S. Commerce was treating him as a holdover tenant. However, a check from Burkhart to U.S. Commerce dated September 22, 1998, after the initial term had expired, had the words "Renewal Income" affixed to it, apparently placed there by U.S. Commerce.

Burkhart continued to make payments until July 13, 1999. In August, 1999, he became aware that the original term had expired in 1998, and he contacted U.S. Commerce, which allowed him to exercise his option to purchase for $11,012.75; but U.S. Commerce refused Burkhart's request for a refund of the monies Burkhart paid in excess of the total payments required during the original term. Burkhart subsequently filed suit, seeking return of his "overpayments."[3]

After a bench trial, the chancellor stated the following from the bench:

> [A]t the end of the lease, pursuant to the lease and the addendum, I believe [Burkhart] had three options, and that was to return…the equipment; to keep it on a month-to-month tenancy at the same rate as under the lease; and then, under the addendum, [he] had the option to purchase the equipment for an estimated percentage of purchase price.
>
> I don't think there's any question the plaintiff, without meaning to and mistakenly and for probably reasons beyond – somewhat beyond his control, performed as if he were under option two, and that is to keep the equipment and pay a monthly rental.
>
> There's no evidence of a mutual mistake; there's no evidence of fraud or an allegation of fraud.
>
> When the plaintiff realized what had happened, he exercised his option, but in the meantime, had retained possession during the

[3]On appeal Burkhart contends that the amount of his "overpayments" is $82,439.36. Burkhart actually paid U.S. Commerce a total of $371,684.95, that figure being 34 installments of $10,304.92, a security deposit of $10,304.92, and the $11,012.75 purchase option price. He contends he was only required to pay $289,245.59, that figure being 27 installments of $10,304.92 plus the $11,012.75 purchase price.

> preceding months, and I think [he] is not entitled to a judgment, except, however, I believe that with his 27 installments, he bought the right at 36 months of possession. I believe he overpaid that by a month and should be rewarded [sic] that payment….

The trial court thus awarded Burkhart $10,304.92, the equivalent of one monthly payment. It did not award either party attorney's fees, nor did it award prejudgment interest to Burkhart.

Burkhart now appeals, arguing that the trial court erred (1) in failing to award him the amount of the installment payments he made after the expiration of the initial term; (2) in failing to award him prejudgment interest; and (3) in failing to award him attorney's fees as the prevailing party. U.S. Commerce argues on appeal that the trial court erred in making any award to Burkhart.

II.

In this non-jury case, our review is *de novo* upon the record, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

Our *de novo* review is also subject to the well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991).

III.

A.

Paragraph 7 of the agreement provides that it "shall be interpreted in accordance with the laws and regulations of the state of Lessor's principal place of business." St. Louis, Missouri is the defendant's principal place of business. Paragraph 7 of the agreement is valid under T.C.A. § 47-1-105(1).[4] Hence, Missouri law governs the resolution of this case.

[4] T.C.A. § 47-1-105(1) (Supp. 2000) provides as follows:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties….

B.

Many of the parties' arguments are based upon their respective characterizations – as either a financing arrangement or a true lease – of the agreement at issue. The parties stipulated at trial that "it" is a "finance lease" under Mo. Rev. Stat. § 400.2A-103(g) (1994).[5] Paragraph 2 of the preprinted portion of the agreement states that "it is the intent of both parties to this Lease that it qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code." Despite the stipulation and the language of the agreement, Burkhart argues that the agreement was more of a financing arrangement than a true lease. He asserts that the agreement was modified by the typewritten option to purchase prepared by U.S. Commerce, which, according to Burkhart, reveals that the true intention of the parties was that Burkhart would take title to the equipment after making the 27 payments by exercising his option to purchase. U.S. Commerce counters that the option to purchase did not convert the transaction into a security agreement. It contends that the agreement is a finance lease within the meaning of the Missouri Code. Hence, a primary point of contention is whether the

[5]Mo. Rev. Stat. § 400.2A-103(g) provides as follows:

> "Finance lease" means a lease with respect to which:
>
> (i) the lessor does not select, manufacture, or supply the goods;
>
> (ii) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
>
> (iii) one of the following occurs:
>
> (A) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
>
> (B) the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
>
> (C) the lessor (aa) informs the lessee in writing of the identity of the supplier, unless the lessee has selected the supplier and directed the lessor to purchase the goods from the supplier, (bb) informs the lessee in writing that the lessee may have rights under the contract evidencing the lessor's purchase of the goods, and (cc) advised the lessee in writing to contact the supplier for a description of any such rights, or
>
> (D) the lease contract discloses all warranties and other rights provided to the lessee by the lessor and supplier in connection with the lease contract and informs the lessee that there are no warranties or other rights provided to the lessee by the lessor and supplier other than those disclosed in the lease contract.

agreement, *as a whole*, constitutes a finance lease or is, in fact, a secured transaction in disguise.[6] The trial court, by finding that Burkhart retained the equipment after the expiration of the term as a month-to-month tenant, implicitly found that the agreement was a true lease.

The official comments warn that the term, finance lease, "*in other contexts,*" may sometimes encompass disguised secured transactions. *See* Mo. Rev. Stat. § 400.2A-103(g) (1994), comment (g) ("to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions."). However, in the context of the Missouri Commercial Code, a transaction constituting a "finance lease" is entirely different from a transaction creating a security interest. The definition of a "security interest" is found in Mo. Rev. Stat. § 400.1-201(37) (1994), which provides, in pertinent part, as follows:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation.

That subsection elaborates on the distinction between a lease and a security interest:

> 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,[7] and
>
> * * *
>
> (d) *the lessee has an option to become the owner of the goods for…nominal additional consideration upon compliance with the lease agreement.*

(Emphasis added).

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[6] The official comment to Mo. Rev. Stat. § 400.1-201(37) makes clear the importance of the characterization of the transaction as a lease or the creation of a security interest:

> The answer is important because the definition of lease determines not only the rights and remedies of the parties to the lease but also those of third parties. If a transaction creates a lease and not a security interest, the lessee's interest in the goods is limited to its leasehold estate; the residual interest in the goods belongs to the lessor.

Mo. Rev. Stat. § 400.1-201(37), official comment. Thus, as it pertains to the instant case, if the transaction is a lease, the residual interest in the equipment belongs to U.S. Commerce.

[7] This requirement is not at issue in the instant case.

Burkhart argues that the transaction created a security interest because the typewritten agreement gave him an option to purchase the equipment for nominal consideration. The concept of "nominal additional consideration" is elaborated upon in subsection (x) of Mo. Rev. Stat. § 400.1-201(37), which provides, in pertinent part, as follows:

> Additional consideration is not nominal if…(ii) 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 predictable cost of performing under the lease agreement if the option is not exercised.

The pertinent language of the option at issue is as follows:

> Lessee may exercise his option to purchase the leased equipment *for its Fair Market Value*, estimated to be ten percent (10%).

(Emphasis added). As can be seen, the language grants to Burkhart the option to purchase the equipment for its fair market value. Thus, under Mo. Rev. Stat. § 400.1-201(37)(x), the additional consideration required to exercise the option is not nominal in the sense that it is stated to be the fair market value. However, the option to purchase also estimates the fair market value of the equipment to be "ten percent." The final sentence of Mo. Rev. Stat. § 400.1-201(37)(x), provides that "[a]dditional consideration *is* nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." (Emphasis added). Burkhart urges us to consider the "economic realities" of the transaction and to come to the conclusion that "no business person or professional would rent equipment for an additional month for $10,304.92 when the 'purchase price' was $11,012.75, a difference of only $707.83," and that "[e]ven more obvious is that you would not 'lease' equipment for eight (8) additional months on those absurd terms." In essence, Burkhart's argument is that the additional consideration – either $20,400 (10% of the cost of the equipment) or $11,012.75 – is nominal because it was less than Burkhart's cost of continuing to perform under the contract – paying $10,304.92 per month for an additional eight months after expiration of the original lease term.

We are not persuaded by Burkhart's argument. There is no proof in the record of what the precise "additional consideration" to exercise the option would have been at the expiration of the original term of the lease. Burkhart's argument assumes that the additional consideration would have been equal to the ten percent estimate, $20,400, or equal to the figure of $11,012.75, the option price agreed upon by the parties almost a year after the expiration of the original term. Because there is no proof as to what the additional consideration would have been at the relevant time, *i.e.*, at the end of the initial term, we cannot determine whether the additional consideration is less than Burkhart's reasonably predictable cost of performing under the lease agreement if the option was not exercised.

In addition, we are wary of Burkhart's method of calculating his "reasonably predictable cost of performing under the lease agreement if the option is not exercised." It is not necessarily true that any reasonable person would elect to purchase equipment for $20,400 or even $11,012.75 rather than paying $10,304.92 per month to continue renting that same equipment. There could be any number of reasons one might choose not to exercise his or her option to purchase. For example, one might not want to own property for accounting, tax, or other business reasons. Even assuming that we knew the precise amount of the "additional consideration," *i.e.*, the fair market value of the leased equipment at the end of the initial term, we are still faced with the illusive concept of Burkhart's "reasonably predictable cost of performing under the lease agreement if the option is not exercised." This is because, as of the date of the expiration of the initial term, there is no way to know how many months under the month-to-month holdover lease that Burkhart intended to continue to lease the subject equipment. If he had decided to lease the equipment for just one more month – as he was certainly entitled to do under the month-to-month holdover – the monthly rental, *i.e.*, $10,304.92, would have been less than the purchase price, be it $20,400 (10% of the cost of the equipment) or $11,012.75, the price at which Burkhart was permitted to purchase the property one year later. Burkhart would have us compare the over $80,000 paid by him after the initial term with the $20,400 figure or $11,012.75, and conclude from this that the additional compensation is nominal. The problem with this approach is that Burkhart was not obligated to keep the equipment for more than one month after he retained it following the expiration of the initial term. Therefore, the eight months cannot logically be equated with the period of time "of performing under the lease agreement if the option is not exercised." If Burkhart's approach is correct, just about any lease that defaults to a month-to-month tenancy at the end of the original term could be classified as a secured transaction because the cost of continuing as a month-to-month tenant will at some point add up to more than a static purchase option price.

We find that the trial court correctly characterized the transaction as a finance lease as that term is defined in Mo. Rev. Stat. § 400.2A-103(g).

C.

Burkhart argues that, even if we find the parties' agreement to be a finance lease, still the trial court erred in finding that he was not entitled to recover all monies paid to U.S. Commerce in excess of the 27 scheduled payments plus the option purchase price of $11,012.75. His arguments takes two forms: (1) that we should view the extra payments as an exercise of the option to purchase the equipment; and (2) that because Burkhart's extra payments were made to U.S. Commerce "by mistake," U.S. Commerce must, in equity and good conscience, return those funds to Burkhart under the equitable doctrine of money had and received. We will address these contentions in turn.

With respect to the first of these arguments, Burkhart posits two steps. First, he asserts that the typewritten option to purchase superceded paragraphs 13 and 14 of the preprinted form and thereby extinguished the possibility of defaulting to a month-to-month tenancy. The argument concludes that Burkhart's extra payments should be viewed as an overpayment of his exercise of the

option to purchase, especially in light of the fact that U.S. Commerce misled him, albeit unintentionally, by continuing to send invoices to Burkhart after expiration of the term.

If a contract is open to two interpretations, it is ambiguous. ***Linnenbrink v. First Nat'l Bank*** 839 S.W.2d 618, 622 (Mo. Ct. App. 1992). Ambiguities are to be construed against the party who drafted the document. ***Graue v. Missouri Property Ins. Placement Facility***, 847 S.W.2d 779, 785 (Mo. 1993) (en banc). "[W]here preprinted portions of a contract conflict with typewritten portions of the same contract, the typewritten portions will prevail." ***Mews v. Charlie Chan Publishing Co.***, 884 S.W.2d 109, 111 (Mo. Ct. App. 1994).

Paragraph 13 states unequivocally that the lease gives Burkhart no ownership rights in the equipment and that he has no option to purchase the equipment. It also states that Burkhart must return the equipment upon expiration of the term. Paragraph 14 provides that Burkhart must return the equipment at the expiration of the term, but also provides that U.S. Commerce has the option of continuing the lease on a month-to-month basis after expiration of the original term. The typewritten option to purchase provides that Burkhart may purchase the equipment upon satisfactory completion of the lease.

We are of the opinion that the option to purchase supercedes only that portion of paragraph 13 stating to the contrary, *i.e.*, that Burkhart has no option to purchase the equipment. Thus, at the expiration of the term, Burkhart could have returned the equipment, U.S. Commerce could have exercised its option to continue the lease on a month-to-month basis, or Burkhart could have exercised his option to purchase. Accordingly, we reject Burkhart's first line of reasoning.

Burkhart next argues that making additional payments following the expiration of the term of the agreement constituted an exercise of the option to purchase, especially in light of the fact that U.S. Commerce's act of continuing to send monthly invoices after expiration of the term was misleading and contributed to Burkhart's mistake. He relies upon the following:

> As a general rule, in absence of equities, an optionee is held to strict compliance with the terms of an option agreement….An optionee will be excused from strict compliance where his conduct in failing to comply was not due to willful or gross negligence on the part of the optionee but was rather the result of an honest and justifiable mistake. In addition, equity will also excuse strict compliance where the strict compliance was prevented by some act of the optionor such as waiver or misleading representations or conduct.

Cattle Feeders, Inc. v. Jordan, 549 S.W.2d 29, 32-33 (Tex. App. 1977) (citations omitted).

We cannot view Burkhart's "extra" payments as an exercise of his option to purchase the equipment. The evidence does not preponderate in favor of a finding that U.S. Commerce's act of sending invoices after the expiration of the term was misleading. It is a plausible explanation that

sending the invoices was U.S. Commerce's way of exercising its option to continue the lease on a month-to-month basis. One of the first checks U.S. Commerce deposited after the term expired was processed and returned to Burkhart by his bank with the notation "Renewal Income." Burkhart signed the original agreement and retained a copy of it; if he did not wish to continue the lease after the original term ended, he could have either returned the equipment or exercised his option to purchase. He did neither until almost a year later when he exercised the option to purchase.

Moreover, by the terms of the option it was to be exercised by payment of the fair market value of the equipment. As we stated earlier, there is absolutely no proof in the record as to the fair market value of the equipment *as of the date of the expiration of the original term.* It would be impossible to find that a portion of Burkhart's payments after the term constituted payment of the fair market value of the equipment when there is no proof as to that amount. We can make no assumptions about the unproven value of this equipment. This is because many factors impact the fair market value of equipment, such as the condition of the equipment. That value is also impacted by technological advances that can substantially reduce the value of older equipment rendered obsolete or near obsolete by such advances. Hence, we find and hold that the evidence does not preponderate against the trial court's finding that Burkhart performed as a month-to-month tenant upon expiration of the original term of the lease until he exercised his option to purchase the equipment in August, 1999.

D.

Burkhart also argues that because he made the extra payments by mistake, U.S. Commerce must return those funds under the equitable doctrine of money had and received.

A plaintiff may bring an action "for money had and received" against a defendant who has received money from the plaintiff "under circumstances that in equity and good conscience" require the defendant to return the money to the plaintiff. ***Ryan v. Tinker***, 744 S.W.2d 502, 504 (Mo. Ct. App. 1988); *see also* ***Third Nat'l Bank v. St. Charles Savings Bank***, 149 S.W. 495, 502 (Mo. 1912); ***Alarcon v. Dickerson***, 719 S.W.2d 458, 461 (Mo. Ct. App. 1986); ***Newco Land Co. v. Martin***, 213 S.W.2d 504 (Mo. Ct. App. 1948). The action, which is equitable in nature, is "very broad and flexible." ***Alarcon,*** 719 S.W.2d at 461. "The tendency of the courts is to widen rather than restrict its scope." ***Id***.

The doctrine is sometimes discussed in terms of restitution or unjust enrichment. *See* ***Petrie v. LeVan***, 799 S.W.2d 632, 635 (Mo. Ct. App. 1990) ("A person who confers a benefit upon another because of a mistake is entitled to restitution if the mistake caused the conferring of the benefit. The right to restitution for unjust enrichment presupposes: (1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; (3) that it would be unjust to allow the defendant to retain the benefit.") (citation omitted).

One circumstance that "in equity and good conscience" might require a defendant to return money to a plaintiff is where the defendant received the money due to a mistake. *See* ***Blue Cross***

Health Servs., Inc. v. Sauer, 800 S.W.2d 72, 76 (Mo. Ct. App. 1990) ("The appropriate action when one party has been unjustly enriched through the mistaken payment of money by the other party is an action at law for money had and received."); ***Ticor Title Ins. Co. v. Mundelius***, 887 S.W.2d 726, 727 (Mo. Ct. App. 1994) ("One who confers a benefit upon another due to a mistake is entitled to restitution if the conferring of the benefit was caused by the mistake."); ***Petrie,*** 799 S.W.2d at 635 ("Thus, a person who has received money from another by mistake, money that in equity and good conscience the person ought not to keep, may be compelled to make restitution – even though the mistake was an honest one.").

The converse of the rule is that one cannot recover a payment made to another, even if made by mistake, if the one to whom the payment is made may in good conscience retain the money. *See* ***Foster v. Kirby***, 31 Mo. 496, 497 (1862); ***Leach v. Cowan***, 125 Tenn. 182, 140 S.W. 1070, 1077 (1911); *see also Restatement of Restitution* § 60 (1937) ("A person who has performed a duty owed to another, enforceable at law or in equity, is not entitled to restitution from the other for such performance, although the performance was induced by mistake or by the fraud of the other."); 66 Am. Jur. 2d *Restitution and Implied Contracts* § 137 (1973) ("To allow recovery of a payment justly due although made by mistake would inequitable, and hence would fall within the principle that a payment induced by mistake cannot be recovered if the payee is entitled in equity and good conscience to retain it."). Moreover, "[i]n order to sustain an action for money had and received there must be no consideration for the money or the consideration must have failed." ***Ryan***, 744 S.W.2d at 505.

Burkhart argues that all payments made to U.S. Commerce in excess of the 27 scheduled payments and the purchase price were made by mistake, and that considering the economic reality of the transaction, U.S. Commerce must, in equity and good conscience, return those payments to Burkhart.

As we have already found, the agreement at issue is a true finance lease and the evidence does not preponderate against the trial court's conclusion that Burkhart performed as a month-to-month tenant under the lease after the expiration of the initial term. Thus, any payments made by him after expiration of the term were made as a month-to-month tenant and equity and good conscience do not require U.S. Commerce, as a month-to-month lessor, to return those payments.

E.

Burkhart next argues that the trial court should have awarded him prejudgment interest either from the time U.S. Commerce knew all scheduled payments had been made or from the date Burkhart requested a refund.

T.C.A. § 47-14-123 (1995) provides that

> [p]rejudment interest, i.e., interest as an element of, or in the nature of, damages,…may be awarded by courts or juries in accordance with

> the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum....

In making an award of prejudgment interest, trial courts are to follow several principles. Most importantly, the award must be equitable under the circumstances. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998); T.C.A. § 47-14-123. The decision of whether to award prejudgment interest is within the sound discretion of the trial court and will not be disturbed by an appellate court absent a "manifest and palpable abuse of discretion." ***Myint***, 970 S.W.2d at 927.

We find that the trial court did not abuse its discretion in declining to award Burkhart prejudgment interest in this case.

F.

Burkhart next argues that the trial court erred in not awarding him his reasonable attorney's fees because, so the argument goes, he should have prevailed at trial. Because we have found that the evidence does not preponderate against the trial court's judgment, we find and hold that Burkhart is not entitled to attorney's fees.

G.

Finally, U.S. Commerce argues on appeal that the trial court erred in awarding Burkhart a judgment for $10,304.92. This amount reflects what the trial court considered to be an extra payment made during the original 36-month term. A trial exhibit reflects that, although only 27 payments were required, Burkhart made 28 payments. U.S. Commerce's managing member testified that he was "pretty sure" that the 28th payment replaced an earlier payment that had been abated at Burkhart's request. He stated that even though Burkhart never made the abated payment, it appeared on the payment history as a regular payment because U.S. Commerce paid the bank on behalf of Burkhart. Burkhart's counsel, in responding to the trial court's question as to whether it was correct in believing that 28 payments had been made, stated that that he thought the trial court was correct, but that he had not focused on it.

On appeal, U.S. Commerce argues that the trial court erred in awarding this extra payment to Burkhart. It notes that the assertion an extra payment had been made during the original term was not raised in the pleadings and argues that the finding is not supported by a preponderance of the evidence. Burkhart concedes that he made only 27 installment payments during the 36-month term, but argues that he is entitled to the trial court's award because he paid a security deposit in the same amount that should have been, but was not, returned to him.

The evidence does not preponderate against the trial court's award.

IV.

The judgment of the trial court is affirmed. The case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant.

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CHARLES D. SUSANO, JR., JUDGE