

TURMAN V. WARD'S HOME IMPROVEMENT, INC.

VIRGINIA CIRCUIT COURT, 1995
26 U.C.C. REP. SERV.2D 175

FACTS On February 23, 1993, Turman executed a deed of trust note for \$107,500 payable to Ward's Home Improvement, Inc. (Ward's). The note was in consideration of a contract for Ward's to build a house on Turman's property. On the same day, Ward's executed an assignment of the note to Robert Pomerantz for which Pomerantz paid Ward's \$95,000. Although the document uses the word "assignment," no notation or indorsement was made on the note itself. Subsequently, Ward's failed to complete the house, and to do so would require the expenditure of an additional \$42,000. The commissioner in this case found that Pomerantz was a holder in due course and awarded payment to Pomerantz. Turman appealed.

DECISION Judgment reversed and remanded.

OPINION Haley, J. This matter comes before the court upon Turman's exception to the finding of the Commissioner that Pomerantz was a holder in due course immune from defenses Turman might raise against Ward.

[Revised] Code § 3-201(b) states that "**** if an instrument is payable to an identified person, negotiation requires *** its indorsement by the holder." [Citation.] An assignment is not an indorsement. [Revised] Code § 3-204(a). Accordingly such a transfer is not a negotiation. [Citations.] And the transferee is not a holder. [Citations.]

An assignment does, however, vest "**** in the transferee any right of the transferor to enforce the instrument *** (under [Revised] Code § 3-301) ***" [Revised] Code

§ 3-203(b). The transferee's rights are derivative of the transferor's. Accordingly, and pursuant to [Revised] Code § 3-305(a)(2), a maker may assert a defense "**** that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract." In short, the assignee of a negotiable instrument is subject to defenses the maker can raise against the original payee/assignor. [Citation.] And such a defense is failure of consideration. [Citations.] [Revised] Code § 3-303(b). "**** If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed ***."

In light of the foregoing the above noted exception to the Commissioner's Report is sustained and the court holds Pomerantz is not a holder in due course and is subject to the defenses to payment of the \$107,500.00 note that Turman could raise against Ward.

This cause is remanded to the Commissioner for such proceedings as he or the parties deem appropriate in consequence of the court's ruling.

INTERPRETATION A holder is a person who has both possession of an instrument and all indorsements necessary to it.

CRITICAL THINKING QUESTION Does the UCC overemphasize formality in its requirements for transferring a negotiable instrument? Explain.