1965

New Hampshire Insurance Co. v. Ballard-Wade, Inc. et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEW HAMPSHIRE INSURANCE COMPANY,

Plaintiff-Respondent,

v.

BALLARD-WADE, INC., ET AL.

Defendants-Appellants

No. 10245

APPELLANTS' BRIEF

Appeal from Judgment of the
3rd District Court for Salt Lake County
Hon. A. H. Ellett, Judge

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STATEMENT OF THE KIND OF CASE

This is a civil suit brought by an insurance company on a theory of absolute liability to recover from the lessees amounts expended by the insurance company in repairing fire damage to the leased premises.

DISPOSITION IN THE LOWER COURT

The lower court ruled that as a matter of law the lease imposed absolute liability on the lessees and, accordingly, limited the non-jury trial solely to the question of amount of damages. Judgment was awarded the insurance company in the amount of $4,200.

RELIEF SOUGHT ON APPEAL

The appellants seek a reversal of the judgment below and a remand with instructions to enter judgment in their favor against the insurance company, or in the alternative, a new trial.

STATEMENT OF FACTS

The Patricia Graff Trust (called lessor), not a party to this action, leased certain premises in Salt Lake City, Utah, to the defendants-appellants (called lessee). (R. 13) There was a substitution of parties to the lease, not material to this controversy. (R. 13)

During the term of the lease, a fire occurred on the premises. (R. 13) The lessor assured the lessee that insurance would take care of the repair. (R. 120) No demand or request was made upon the lessee to repair the damage, the lessor making all arrangements for the repair. (R. 119) Plaintiff-respondent, New Hampshire Insurance Company, (called insurance company) caused repairs to be effected. (R. 13)

Over a year and a half later, the insurance company initiated this action against the lessee by a two count complaint. The first count sounded in negligence. (R. 1, 13) The alternative second count was based on the theory that one paragraph in the lease (paragraph 8, entitled Indemnity) (R. 18) imposed absolute liability as a matter of law on the lessee for damage to the premises. (R. 2, 14, 57)

Although the pretrial order would have required a

finding of negligence against the lessee in order that liability be imposed under the second count of the complaint (R. 14), on motion of the insurance company and before the taking of any evidence, the trial court ruled that the indemnity provision of the lease imposed absolute liability on the lessee. (R. 22, minute entry; R. 58, lines 19-21) The trial court determined, at the request of the insurance company, that negligence on the part of the lessee need not be shown and that the only issue which the court would hear was the question of the amount of damages. (R. 58, line 21)

The trial court sustained the insurance company's objections to the lessee's offer of proof that the lease was drafted by the lessor's attorney, and an offer of proof as to the intent of the parties with reference to the effect of the maintenance provision (paragraph 4) and the indemnity provision (paragraph 8) of the lease. (R. 63)

On motion of the insurance company, its negligence count was dismissed without prejudice. (R. 22, minute entry; (R. 58)

After hearing evidence the trial court, sitting without a jury, rendered judgment against the lessee in the amount of $4,200.

The parts of the lease, which is set forth in full in the record (R. 17-19), relevant to the issues on appeal are:

> 4. MAINTENANCE: . . . Lessee agrees at its own expense to maintain all the said premises, including roof, exterior, interior, plumbing, heating, electrical fixtures and glass in the build-

ing on said premises in a good and useable condition, and to maintain the hard surfacing of the premises in a good and useable condition, and at the expiration of this lease or sooner termination thereof to surrender said premises in as good condition as when received, ordinary wear and tear, unavoidable damage by fire, the elements or other casualties excepted. . . .

and

8. INDEMNITY: The Lessee will exonerate, save harmless, protect and indemnify Lessor from and against any and all losses, damages, claims, suits or actions, judgments and costs which shall arise or grow out of any injury to or death of persons and/or damage to property, caused by, arising from, or in any manner connected with the exercise of any right granted or conferred hereby, or the use, maintenance, operation and/or repair of the said premises, buildings, equipment, machinery, and appliances thereon, whether sustained by Lessee or Lessor, their respective agents or employees or by any other persons or corporations which seek to hold the Lessor liable.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN RULING ON THE MOTION OF THE INSURANCE COMPANY THAT, AS A MATER OF LAW, THE LEASE IMPOSED ABSOLUTE LIABILITY ON THE LESSEE:

A. BECAUSE PROPER CONSTRUCTION OF THE LEASE SHOWS THAT ABSOLUTE LIABILITY WAS NOT INTENDED BY THE PARTIES.

It was at the insistence of the insurance company

that the trial court ruled that the lease imposed absolute liability on the lessee and refused to hear any evidence but that bearing solely on the issue of the amount of damages. Although the lessee was prepared to litigate fully all issues fairly raised by the complaint, the insurance company chose to rest its case entirely upon the theory that the indemnity provision of the lease imposed absolute liability on the lessee. It is the lessee's contention that the trial court erred in ruling as a matter of law that the lease imposed absolute liability on the lessee.

It should be noted that paragraph 4, entitled Maintenance, deals with maintenance of the premises and the duty of the lessee to the lessor with reference to repair and maintenance of the premises by the lessee and the conditions, qualifications and exceptions of such requirement. It surely does not impose absolute liability or any semblance of it.

On the other hand, paragraph 8, entitled Indemnity, is a broadly drawn provision purporting to provide that the lessee will save the lessor harmless from losses arising out of the use of the premises. While its language is not a model of clarity, it is clearly primarily intended to protect the lessor from claims of third parties which might arise out of the lessee's activity on the leased premises.

A lease is a contract and as such is properly interpreted by the long and well established rules of contract interpretation. In the interpretation of any contract, the

cardinal principle is that the intent of the parties should be ascertained. *Anderson v. Great Eastern Casualty Co.*, 51 Utah 78, 168 Pac. 966 (1917).

The most important rule used in determining the intent of the parties to a written instrument is that the instrument should be read as a whole and effect given to all of its provisions if possible. *Minkoff v. McLean*, 295 Pa. 396, 145 Atl. 534 (1929). In *Neal D. Ivey Co. v. Franklin Associates, Inc.*, 370 Pa. 225, 87 A.2d 236 (1952) the court said, at page 239:

> It is a rule of universal application that in construing a contract each and every part of it must be taken into consideration and given effect if possible, and that the intention of the parties must be ascertained from the entire instrument. An interpretation will not be given to one part of a contract which will annul another part of it.

It is but logical, sensible and just that a contract be construed so that all of its provisions be given effect, if possible. *Hull v. Magnolia Petroleum Co.*, 119 F.2d 123 (1941); Restatement of Contracts, § 236(c).

Corbin states the rule in the following language:

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former. 3 Corbin on Contracts, § 547, p. 176 (1960).

The reason for the rule is that the specific provision

more exactly states the intention of the parties than the broad or general clause. *Denver Joint Stock Land Bank v. Markham,* 106 Colo. 509, 107 P.2d 313 (1940); *Smith v. Russ,* 184 Kan. 773, 339 P.2d 286 (1959); *Wilder v. Wilder,* 138 Cal. App.2d 152, 291 P.2d 79 (1955).

In *Smith, supra,* one provision of a lease provided that the lessee ". . . shall not release or sublease said premises, or any portion thereof or assign this lease nor shall there be any renewal or extension of the same without written consent. . . ." of the lessor. Another provision more specifically provided that the lessee ". . . has the option of extending this lease for an additional five (5) years. . . ." The court ruled that the specific provision would control over the general one to the extent necessary to give effect to the specific provision.

In *Wilder, supra,* where one provision purported to cover all claims and another purported to cover specific, enumerated claims, the court held that the general provision must give way to the extent needed to accommodate the specific provision.

In the instant controversy, the indemnity provision is sweepingly broad and general in its terms, seemingly unlimited as to persons, property or damages involved, while the maintenance provision, on the other hand, is very specific, setting forth in detail the duty of the lessee to the lessor with reference to the leased premises. The specific maintenance provision sets forth with exactitude the property with which it is concerned, the degree

and extent of duty involved, and the exceptions to this duty.

Under the view which the insurance company induced the trial court to adopt, paragraph 4 is an absolute nullity. It is as though it were never agreed upon and included in the lease by the parties at all. Under the insurance company's interpretation of the lease (to which it was not a party) the lessor could insure against any and all loss, damage or injury of any kind to the premises and upon payment of the claim by the insurance company, it could hold the lessee absolutely liable, even for the causes specifically enumerated in the maintenance provision.

This is an absurd result which flies in the face of common sense and reason and does violence to the primary and fundamental rule that all parts of an instrument will be given effect if possible. All that can be said for the rule espoused by the insurance company is that it would provide an unearned financial windfall for the insurance carrier which has already been paid the premium it specified for the risk involved. We respectfully submit that this is insufficent justification for such a radical change in basic contract law.

Although it is not essential to the proper disposition of the case, another rule of contract interpretation used to reconcile conflicting provisions without going outside the instrument itself would also require a reversal. This is the frequently stated rule that where two provisions conflict, the first one is given effect and the second

one gives way. *Klever v. Klever,* 333 Mich. 179, 52 N.W.2d 653 (1952); *Burns v. Peters,* 5 Cal. 2d 619, 55 P.2d 1182 (1936).

In summary, it is the lessee's contention that a proper construction of the lease, without recourse to outside evidence, precludes the conclusion that the lease imposes absolute liability on the lessee.

POINT I.

THE TRIAL COURT ERRED IN RULING ON THE MOTION OF THE INSURANCE COMPANY THAT, AS A MATER OF LAW, THE LEASE IMPOSED ABSOLUTE LIABILITY ON THE LESSEE:

B. BECAUSE GRANTING THE RULING REQUESTED BY THE INSURANCE COMPANY THAT THE LEASE IMPOSED ABSOLUTE LIABILITY ON THE LESSEE AND THE CONSEQUENT LIMITING OF THE TRIAL SOLELY TO THE QUESTION OF DAMAGES PREJUDICIALLY PRECLUDED THE LESSEE FROM AN OPPORTUNITY TO SHOW THE ACTUAL INTENT OF THE PARTIES TO THE LEASE.

Restricting the issues at trial, at the request of the insurance company, solely to the question of the amount of damages deprived the lessee of any opportunity to utilize two additional rules of contract interpretation which would have assisted in avoiding the error of holding that the lease imposed absolute liability on the lessee.

This court has ruled that where there is an ambiguity in a document, it is to be construed against the one who wrote it. *Gregerson v. Equitable Life & Cas. Ins. Co.,* 123 Utah 152, 256 P.2d 566 (1953); *Jordan v. Madsen,* 69

Utah 112, 252 Pac. 570 (1926). This is also the restatement rule. Restatement of Contracts, § 236(d).

The insurance company thus led the trial court further into error by insisting that it exclude, which it did, evidence as to who drafted the lease. (R. 63)

Another most important and fundamental rule in contract interpretation is that the parties own interpretation of the instrument should be given great, if not conclusive, weight. *Jenkins v. Jensen*, 24 Utah 108, 66 Pac. 773 (1901). The course of conduct of the insurance company led the trial court into the further error of excluding evidence of the interpretation of the parties to the instrument. (R. 63)

Not only is the interpretation which the parties place on the instrument important, but also, as pointed out by this court, preliminary negotiations may show such intention. Thus in *Fayter v. North,* 30 Utah 156, 83 Pac. 742 (1906) this court allowed extrinsic evidence as to what the parties meant by "appurtenances" in a deed. In *Bartels v. Brain,* 13 Utah 162, 44 Pac. 715 (1896) evidence outside the lease was allowed to show what was meant by "reasonable use."

The evidence and the offer of proof as to the intention of the parties was erroneously precluded to the prejudicial detriment of the lessee by the theory upon which the insurance company chose to try its case. (R. 63) Had this evidence as to the intention of the parties been admitted, it would have given the trial court a basis

upon which to determine whether the parties to the lease really intended that there be absolute liability, something less than absolute liability, or whether it was not the intention of the lessor and lessee that the fire insurance purchased by the lessor with the proceeds from the rent inure to the benefit of both lessor and lessee, as is the generally accepted custom in the business for any other course of conduct allows the insurance company to collect twice for the same risk, or as here, collect once for the risk and then shift the burden it was fully paid to shoulder to one whose use of the premises provided the premiums paid to the insurance carrier.

It is with considerable trepidation that counsel for the lessee assert that research has failed to disclose competent authority supporting the position of the insurance company; however, research has failed to reveal a case where the lessor, let alone an insurance company fully paid to take the risk, has asserted, let alone prevailed, on the theory inflicted by the insurance company upon the trial court below.

We respectfully submit that the exclusion of the evidence as to who drafted the lease and the evidence as to the intention of the parties with reference to damage to the premises was prejudicial error.

POINT II.

THE APPROPRIATE RELIEF IN THIS CASE IS A REVERSAL WITH INSTRUCTIONS TO ENTER JUDGMENT FOR THE LESSEE; HOWEVER, SHOULD THE COURT NOT

GRANT THIS RELIEF, A NEW TRIAL SHOULD BE ORDERED.

The insurance company, plaintiff below, could have tried its case on more than one theory and on more than one issue. It chose not to do so. Over the objection of the lessee it chose to rest its entire case on the theory that the indemnity provision of the lease imposed absolute liability on the lessee and restricted the issues to be litigated solely to the question of the amount of damages.

We must assume that the insurance company stands upon the theory of absolute liability as the law of the case for it has not filed a statement of points as is required by rules 74(b) and 75(d) Utah Rules of Civil Procedure for a cross appeal. Nor could it with propriety claim that the trial court erred in sustaining its wishes for as this court recently stated in *Pettingill v. Perkins,* 2 Utah 2d 266, 272 P.2d 185 (1954) at page 186, "He cannot lead the court into error and then be heard to complain thereof. To permit such action would needlessly prolong litigation, so there might never be an end thereto." Having elected voluntarily his position below "He cannot now on appeal shift his theory and position."

The theory on which this case was tried below, and its consequent posture on appeal, were determined by the insurance company. Under the rule enunciated in *Pettingill v. Perkins, supra,* that one "cannot lead the court into error and then be heard to complain thereof" the appropriate relief in this case is a reversal of the judgment below and a remand with instruction to enter judg-

ment for the lessee. To do otherwse would unjustly penalize the lessee who was prepared to litigate all issues raised by the insurance company's complaint. It would allow the insurance company to try one theory, then another, and then yet another, ad infinitum, so that "there might never be an end thereto."

Should the court, however, not grant the reversal and remand with instructions to enter judgment for the lessee, a new trial should be ordered.

CONCLUSION

For simplicity of language the defendants-appellants have been called by the singular "lessee." As shown, however, by the Notice of Appeal, this appeal is prosecuted for the benefit of Ballard-Wade, Inc., M. R. Ballard, Jr. and Loral R. Peterson.

The appellants respectfully pray that this court reverse the judgment of the trial court and remand with instructions to enter judgment for the appellants, or in the alternative to remand the case for a new trial.

Respectfully submitted,

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