

1977

# Woodland Theatres, Inc., a corporation v. ABC Intermountain Theatres, Inc., a corporation, and Plitt Intermountain Theaters, Inc., a corporation : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

WOODLAND THEATRES, INC.,  
a corporation,

Plaintiff-Appellant,

vs.

ABC INTERMOUNTAIN THEATRES,  
INC., a corporation, and  
PLITT INTERMOUNTAIN THEATRES,  
INC., a corporation,

Defendant-Respondent.

Case No. 14440

Case No. 14441

APPEAL FROM JUDGMENT OF THE  
DISTRICT COURT OF SALT LAKE COUNTY  
HONORABLE MARCELLUS K. SNOW, DISTRICT JUDGE

BRIEF IN ANSWER TO PETITION FOR REHEARING

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BRIEF IN ANSWER TO PETITION FOR REHEARING

Plaintiff-Appellant does not seek rehearing with respect to this Court's determination that by acceptance of rent plaintiff has waived the forfeiture of the lease and its determination that there is no covenant, express or implied, to maximize rentals or to operate the theatre in "a prudent and businesslike manner." In its attempt to reargue this case plaintiff now contends that it has the right to collect damages it claims to now suffer for alleged breaches of the covenants to maintain and repair the theatre. It seeks other damages

separate and apart from any resulting diminution of percentage rental. Its petition for rehearing concedes the correctness of the decision in all respects except the "single issue . . . of its claim for actual damages" for this alleged breach.

Plaintiff Should Not Be Permitted  
to Reargue the Case by Now Shifting  
the Theory of its Case

The reference now to "actual damages" is an attempt to sidestep the position taken by plaintiff earlier before this Court and the trial court and to avoid the clearly correct ruling (now finally conceded by plaintiff) that there is no implied covenant to operate the theatre in a "prudent and businesslike manner" so as to maximize percentage rentals.

Plaintiff clearly spelled out its damage theory both in oral argument and in its briefs. Plaintiff's reply brief, for example, explains its position:

". . . it is Woodland's complaint that through improper maintenance and neglect of the physical plant of the theatre, Plitt allowed the business of the theatre to deteriorate so that Woodland's receipts under the percentage rental provisions of the lease were artificially limited . . . .

The derelictions of the defendants-respondents Plitt and ABC responsible for limiting Woodland's receipts under the percentage rental provisions of the lease agreement have been previously outlined in appellant Woodland's initial brief to this Court. What Woodland is asking for is damages resulting from Plitt's and ABC's failure to operate the Drive-In Theatre in a prudent and businesslike fashion." Appellant's Reply Brief, pages 8-9 (Emphasis added).

Also this is clearly the thrust of plaintiff's complaint (See paragraph 13 and 14 of complaint quoted at page 37 of Respondent's Brief in this court). Plaintiff's entire claim for damage was premised on its argument that the alleged failure to maintain the theatre according to the standard demanded by plaintiff injured plaintiff by a diminution of percentage rental and that there was an implied obligation to operate so as to maximize the percentage rental. Being told again now that this just is not the law, plaintiff wants to shift its theory and take another bite at the apple.

The Court correctly perceived plaintiff's argument and correctly ruled upon it, and plaintiff should not now be permitted to further prolong the agony in this case (filed in the summer of 1974) with reargument.

The Court's Ruling Was  
Correct; Even Plaintiff's  
New Theory is Erroneous

Although respondent does not accede to plaintiff's contention that even though the acceptance of rent waives the forfeiture it does not waive the underlying breach, it is conceded that the cases on this issue are few (perhaps because if the waiver is such as to waive the forfeiture it has been assumed that it waived the breach and landlords have not

attempted to gain damages when they have not been permitted to forfeit.) For several reasons, however, even accepting the correctness of the Court's ruling on that point, the Court was correct in affirming the summary judgment.

It must be noted that even plaintiff makes no effort to claim damages for, and concedes that it has waived, one of the main breaches it asserted, that is the alleged sublease or assignment. Obviously there can be no damage here because all that plaintiff is entitled to is the rent and it is receiving and accepting rent from the alleged subtenant.

The Court correctly noted that it makes a difference what damages one seeks. As noted above plaintiff's case rests upon the claim for percentage rent, the contention being that defendant is required to operate in a manner to maximize the rent and if all the things were done which plaintiff alleges in the complaint were not done, plaintiff would get more percentage rent. The Court has correctly ruled, and in its Petition for Rehearing plaintiff so concedes, that there is no implied covenant as plaintiff previously contended.

In its Petition for Rehearing and the supporting brief plaintiff states its new position to include the contention that it should recover "actual damages resulting from a failure



to repair and maintain the theatre" (page 5) and points to the portions of the complaint alleging that defendant breached the lease by failing "to improve, properly care for, and maintain the theatre in a good state of repair and by allowing the theatre to deteriorate and remain in a position of disrepair."

The case relied upon by plaintiff involved a substantial physical alteration of the premises made by the tenant contrary to an express prohibition in the lease prohibiting structural change. It did not involve the usual covenant concerning maintenance and surrender of the premises in good repair. Moreover, as pointed out in defendant's opening brief (page 6) the record shows substantial expenditures by the defendant to make certain that it had cured within the grace period given in the lease even the tenuous claims of this landlord. In addition, as pointed out in footnote 2 at page 5 of our opening brief, some of the matters with respect to repair raised in plaintiff's brief involve worn out parts of the premises that cannot be repaired and need to be replaced. As there pointed out, under case law it is the landlords's and not the tenant's responsibility to replace worn out parts of the premises.

The paragraph of the lease necessarily relied on by the plaintiff for its newly asserted claim for damages

(paragraph 8) concludes with the requirement that "at the expiration of the lease, lessee agrees to surrender possession to lessor of the said premises and the improvements and equipment upon said premises in a good state of repair, ordinary wear and tear, acts of God and damage by fire or other insured casualty excepted." This covenant necessarily applies to all other covenants in the lease pertaining to repair and maintenance because all such covenants in a lease must be construed together. A breach of these covenants can occur only at the end of the lease when surrender is to be made. Thus, even accepting plaintiff's allegation that the fence has not been painted, or the roadway repaired, etc., plaintiff has no claim for damage unless and until the lease is terminated and the premises are surrendered in condition less than required by the lease.

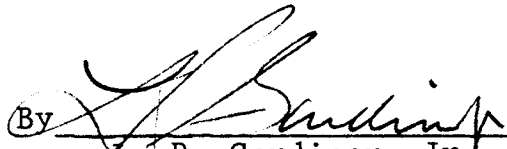
The landlord does not have a present interest in the leasehold -- his is only a reversionary interest and that interest can be damaged only when the reversion occurs and the premises are not then, as the lease requires, "in a good state of repair, ordinary wear and tear, acts of God and damage by fire or other insured casualty excepted."

Under the circumstances of this case, all that plaintiff is entitled to now is the rents which the tenant covenants to pay. Plaintiff continues to receive those rents (including the fixed rental and a very substantial amount in percentage rental) and has no claim for damages.

The petition for rehearing should be denied.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & EVANS

By   
L. R. Gardiner, Jr.  
Attorneys for Defendant-Respondent

DATED this 23 day of February, 1977

CERTIFICATE OF SERVICE

The foregoing Brief In Answer to Petition For Rehearing was served upon the plaintiff-respondent by delivering true copies thereof to its attorney Richard D. Burbidge, 500 Kearns Building, Salt Lake City, Utah 84101

