

1976

Young Electric Sign Co. v. Basil Vetas : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

YOUNG ELECTRIC SIGN COMPANY,

Plaintiff and
Respondent,

vs.

Case No. 14653

BASIL VETAS dba SIR BASIL'S,

Defendant and
Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Ernest F. Baldwin, Judge

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Case No. 14653

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Defendant and
Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF CASE

Plaintiff brought suit against defendant seeking money damages for breach of a written rental agreement relating to custom-made electrical signs manufactured by plaintiff for defendant.

DISPOSITION IN THE LOWER COURT

The Trial Court, sitting without a jury, rendered judgment for plaintiff against defendant in the sum of \$1,112.54, \$500.00 attorney's fees and plaintiff's costs of the action.

RELIEF SOUGHT ON APPEAL

Plaintiff asks the Court to affirm the judgment of the Trial Court and to award it its costs and attorney's fees incurred in this appeal.

STATEMENT OF FACTS

Plaintiff agrees in part with the Statement of Facts as set forth by defendant but feels several facts have been omitted which are material to the issues here raised. Plaintiff deems the important facts to be as follows:

On March 7, 1961, plaintiff and defendant entered into a written rental agreement under the terms of which plaintiff agreed to manufacture and install a custom-made neon sign for defendant's drive-in restaurant located at 999 Washington Blvd., Ogden, Utah. (Ex. 8-D). Said agreement required defendant to make monthly rental payments to plaintiff at the rate of \$110.00 per month. As part of the security for the performance by defendant of his obligations under the agreement, the sum of \$660.00 was deposited with plaintiff. Said sum was to be returned to defendant in the event he performed all of his obligations under the lease. Under the terms of the lease agreement, the title to the sign remained in the plaintiff and plaintiff was obligated, among other things, to maintain and keep the sign in good repair. The sign was duly built and installed by plaintiff in 1961. Subsequent thereto, defendant requested additional

signage from plaintiff. Plaintiff and defendant entered into a new rental agreement on the 20th day of January, 1963 (Ex. 9-D) under the terms of which defendant agreed to pay plaintiff the sum of \$135.00 per month for the rental of the combined sign package. The terms and conditions of that agreement were similar to the terms and conditions of the previous rental agreement. Defendant's security deposit was transferred to the new agreement. Pursuant to defendant's request and specifications, plaintiff thereafter manufactured certain overhanging plexiglas panels and installed the same on defendant's premises.

Subsequent to 1963 the subject signs were damaged in a windstorm. Under the maintenance provisions of the contract, plaintiff was required to expend the approximate sum of \$2,000.00 to repair and restore the damaged signs (R-90, 102).

By November of 1967, defendant's business was not doing well. Defendant thereupon contacted Mr. Robert Gilbert, manager of plaintiff's Ogden office and requested that something be done to reduce the monthly sign payments so as to increase the cash flow in defendant's business (R-72, 149, 151). At the time the request was made, defendant was delinquent in his payments to plaintiff under the previous rental agreement in the sum of \$558.92. (Ex. 1-P). Pursuant to the request of defendant, plaintiff and defendant entered into a third rental agreement relating to the subject signs, (Ex. 2-P), the terms and conditions of which were similar

to the two previous agreements. It is this third rental agreement which forms the basis of the law suit.

Under the terms of the subject rental agreement, defendant agreed to pay plaintiff the sum of \$99.17¹ per month for each and every calendar month for a period of 96 months with all rentals to be paid monthly in advance. Payment was to begin on December 1, 1967 (Finding No. 2, R-57). The lease agreement was not only for the use of the signs by defendant but also imposed upon plaintiff the burden of upkeep and maintenance of the signs (Finding No. 6, R-57). The contract provided that in the event of any failure of the defendant to pay any installment of the rental called for at the time provided, plaintiff had the right to terminate the agreement and, in addition thereto, to repossess the signs (Ex. 2-P). Defendant agreed to pay a reasonable attorney's fee in the event of suit after default (Finding No. 2, R-57). On disputed evidence the Court found that the defendant's security deposit was applicable to this agreement.

Paragraph 8 of the subject agreement provided as follows:

"(8) It is agreed by the parties hereto that the SIGN is of special construction made for the uses and purposes of lessee and no other, and that except for use by lessee, the SIGN has no value. Lessee agrees that in the

¹The price was arrived at by combining the remaining balance due under contract #2 with plaintiff's standard renewal rate of 60% and extending the payments over 96 months. In making the calculations, however, Gilbert by error understated the rentals by some \$1,300.00 (R-72-73, 76, 80-81).

event he shall be in default in the payment of rental when due or shall fail to perform any other of his obligations hereunder, he shall be indebted to, and hereby agrees to pay to lessor forthwith, in addition to the full rental for such time as lessee retains possession of the SIGN, liquidated damages for his breach hereunder in an amount equal to three-fourths of the balance of the rental payable hereunder, whether the same may be due or not. The parties hereto agree that in such event, the said three-fourths of the balance of the rental payable hereunder is and will be fair and reasonable compensation for the damage to lessor arising from such breach by lessee. . ."

Defendant proceeded to make installment payments under the subject contract but experienced some difficulty in doing so. In order to help defendant, plaintiff commenced purchasing gasoline from him and allowed him a credit against his monthly payments for the gasoline purchases (R. 103). In spite of the efforts by plaintiff, defendant became delinquent in his payments to plaintiff in September of 1970 (Ex. 5-D). Thereafter, defendant made sporadic payments² and his delinquency gradually increased until, as of December 1, 1973, defendant owed plaintiff the sum of \$691.19 for delinquent rentals (Finding No. 4, R-57, Ex. 6-P). A demand letter was sent to defendant requesting that the account be brought current and that upon his failure to do so certain legal steps would be initiated by plaintiff. On December 26, 1973, defendant made one monthly payment of

²Paragraph 9 of the contract states, "Time is of the essence of this agreement. Acceptance by Lessor of a late payment shall not be construed as a waiver of Lessor's right to have each subsequent payment made on the due date thereof." (Ex. 2-P).

\$103.63 (Ex. 5-D, R-113), reducing the delinquent rental balance owed to plaintiff at that time to \$587.54. No payments were received by plaintiff from defendant after December 26, 1973 (Finding No. 4, R-57). On February 1, 1974, suit was commenced by plaintiff against defendant for breach of the December 1967 rental agreement. Plaintiff sought all sums in arrears plus liquidated damages on the remaining contract balance and attorney's fees. Defendant retained possession of the signs. On June 11, 1974, plaintiff attempted to reclaim the signs but defendant refused to allow it to do so (R-40). Defendant continued in business on the premises until October 15, 1974 (R-152). Since the signs were custom-made for defendant, plaintiff was unable to negotiate a new lease on the signs with subsequent occupants of the premises (R-74). In February of 1975 plaintiff removed the signs to its junk yard where they remained at the time of trial (R-78).

ARGUMENT

Point I

ON APPEAL, THE TRIAL COURT'S FINDINGS ARE PRESUMED CORRECT.

At the conclusion of the trial, the Trial Court took the matter under advisement; subsequently it entered its Findings of Fact and Conclusions of Law (R-56-58). The Findings of the Trial Court should be dispositive of this appeal. Among other things the Court found that:

1. The deposit of \$660.00 was to be returned to

defendant in the event that defendant performed all of his

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obligations under the rental agreement, but that defendant failed to so perform (Finding No. 3, R-57).

2. On December 1, 1973, defendant was in material default under the terms of the contract and there was due to plaintiff from defendant the sum of \$691.17. On December 26, 1973, plaintiff received from defendant the sum of \$103.63, which was applied toward the accrued delinquency, but no payments were received by plaintiff from defendant subsequent to that date (Finding No. 4, R-57).

3. The signs were unique chattels constructed and designed especially for use on the lessee's premises (Finding No. 5, R-57).

4. Plaintiff was not in breach of the terms of the agreement with defendant and properly maintained the signs and did such other things as it was required to do under the rental agreement (Finding No. 8, R-57).

5. The actual damages caused by the breach of the agreement by defendant were difficult to accurately estimate at the time the subject lease was executed by the parties and the amount stipulated in the lease agreement for liquidated damages bears a reasonable relation to the damages actually sustained by plaintiff (Finding No. 9, R-58).

Upon appeal the evidence must be viewed in a light most favorable to sustain the Trial Court. The Findings come to this Court endowed with a presumption of validity and correctness and will not be disturbed unless they are clearly contrary to the evidence; the appellant must sustain

the burden of showing error. Hardy v. Hendrickson, 27 Ut.2d 251, 495 P.2d 28 (1972); Lynch v. McDonald, 12 Ut.2d 427, 367 P.2d 464 (1962); Carlton v. Hackett, 11 Ut.2d 389, 360 P.2d 176 (1961).

Plaintiff submits that the Findings of the Trial Court are adequately supported by the evidence as set forth hereafter and must be sustained by this Court on appeal.

POINT II

DEFENDANT WAS IN MATERIAL DEFAULT UNDER THE TERMS OF THE CONTRACT AND THE FINDING OF THE TRIAL COURT RELATING THERETO MUST BE SUSTAINED.

The evidence is undisputed that on December 1, 1973, defendant was delinquent in his payments to plaintiff in the sum of \$691.17 (Finding No. 4, R-57, 125, Ex. 1-P), a sum in excess of his security deposit. Defendant himself acknowledges this fact (R-148).³ Defendant argues, however, that he was not in default because a subsequent payment by him made his accrued rental delinquency less than the security deposit held by plaintiff.

The rental agreement provided that as part security for the performance by lessee of his obligations the sum of \$660.00 was to be deposited with lessor. The document further provided that "in the event lessee shall have performed all of his obligations hereunder, such deposit is to be

³Defendant in his brief states it is not disputed that at the end of December he was in arrears five payments (Brief of Appellant, page 4).

returned." (Ex. 2-P). The Trial Court found, and properly so, that defendant had failed to perform all of his obligations under the agreement (Finding No. 3, R-57), and, therefore, was not entitled to a return of the security deposit.

The mere fact that the defendant gave plaintiff a security deposit does not relieve defendant of his obligation to make the monthly payments on the lease as they accrue. Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938). Under the terms of the subject agreement, defendant, upon his breach, became obligated to plaintiff for the full rentals for such time as he retained possession of the sign and, in addition thereto, three-fourths of the remaining contract balance (Ex. 2-P, Finding No. 2, R-57); therefore, on December 1, 1973, defendant's obligation to plaintiff amounted to \$2,401.85,⁴ a sum greatly in excess of the amount of his security deposit. Even if the sums owed by defendant were less than his deposit defendant would still be in breach of the agreement.

Where, as in this case, money is deposited as security for the performance of a lease, the lessor is entitled to retain the deposit until the lessee has completely discharged all of his obligations. Garfinkle v. Montgomery, 248 P.2d 52 (Cal. App. 1952). As was stated therein:

⁴\$99.17 x 23 months x 75% = \$1,710.68 + \$691.17 = \$2,401.85. If defendant was obligated for the full rentals for such time as he retained possession of the sign, as the contract provides, defendant's indebtedness would have been greater. In calculating the above figure, however, defendant was only "charged" for 75% of the remaining contract balance.

"The lessor is entitled to retain the deposited fund until complete discharge by the lessee of the obligations the performance of which the deposit is shown to have been intended to secure." (Id. at 57).

If the lessee fails to perform his obligations, lessor is entitled to recover his damages and if actual damages exceed the deposit, the entire deposit may be retained and the additional damages recovered. If the actual damages are less than the deposit, the remaining portion may be reclaimed by lessee. 5 Williston, Contracts (3d) §790, p. 768. See also Boral v. Caldwell, 35 Cal. Rptr. 689 (1964). Thus, in the instant case, defendant was entitled to a full return of the deposit only if he fully performed his obligations; otherwise, as the Trial Court found, plaintiff was entitled to apply the deposit against its damages.

Since a security deposit must be returned to the extent that it exceeds the actual damages incurred, it follows inescapably that one can be in default under a contract although the amount of the default is less than the deposit. See Garfinkle v. Montgomery, *supra*.

In the instant case defendant had few obligations other than to make his monthly payments. This defendant failed to do. Defendant's failure to pay the accruing installments when due placed him in breach of his contractual obligations with plaintiff. 17 Am Jur 2d, Contracts, §429. The subsequent payment of one month's accrued delinquency cannot excuse defendant's breach.

Although defendant had no right to require plaintiff to utilize the deposit to off-set his accrued delinquency, it is interesting to note that he made no request of plaintiff that the deposit be so applied (R-152), even though he had received repeated demands that he bring his account current (R-152). Defendant should not now be heard to complain that plaintiff's failure to do that which it was not required to do and that which defendant had not even requested it do should absolve defendant from the consequences of his own actions.

As of December of 1963 there remained 23 months of the contract at the monthly payment of \$99.17 plus sales tax for a remaining balance due under the contract of \$2,280.91 (R-113). By February 1, 1974, the date suit was instituted, the minimum accrued rental delinquency was \$736.30 ($\$691.17 + [99.17 \times 2 \times 75\%] - 103.63$). Subsequent to December 26, 1973, defendant made no further payments on the sign although he retained its use and possession until October of 1974, at which time he ceased doing business (R-152). In spite of the fact that defendant continued to use the sign and paid no further rentals on it, he would now like this Court to give him the option, at his sole discretion, of applying his security deposit at any stage of the agreement as he, in retrospect sees fit, to off-set the accrued rental obligations. This he asks, in spite of the fact that he never requested it of plaintiff, and has no legal right to do so.

In the instant case there was a dispute in the testimony concerning the disposition of the security deposit. The Trial Court found in favor of the defendant on that point and allowed defendant to credit the security deposit against the judgment. The plaintiff testified that a journal entry was made regarding the deposit in order to partially correct the mistake that had been made in the calculation of the subject contract (R-122-123). Mr. Gilbert, testified that the transfer was made after consultation with defendant (R-86). The defendant denied that he had ever been so informed by plaintiff. Plaintiff's records were in a state of disarray due to the transfer of its bookkeeping functions from Ogden to Salt Lake City. The Court held there was insufficient evidence for it to determine precisely what had happened to the deposit.

Defendant now attempts to have its cake and eat it too with regards to the security deposit. Defendant was more than agreeable to off-set the deposit against the judgment awarded to plaintiff and yet now argues that the deposit had, in fact, been previously appropriated by plaintiff. The only manner in which it could have been utilized was to partially off-set the contract miscalculation (R-82, 121, 136). Plaintiff submits that if the deposit had, in fact, been utilized by it as its witnesses indicated, no off-set should be credited against the judgment since the "deposit" would be non-existent. If, however, as the Court found, a credit against the judgment is proper, there can be no claim

that the security deposit had been appropriated by plaintiff. The Court found on disputed testimony that it could not determine the disposition of the deposit, therefore defendant was entitled to have the deposit applied towards the obligation owed to plaintiff. Although plaintiff contends that there is evidence to support a contrary conclusion, it must abide by the findings of the Court.

POINT III

PLAINTIFF WAS NOT IN BREACH OF ITS OBLIGATIONS UNDER THE LEASE AGREEMENT.

Defendant claims that plaintiff actually breached the terms of the contract since it failed to maintain the subject sign after December 1, 1973 (Appellant's Brief, page 6). Although there was some dispute in the testimony concerning the maintenance of the signs,⁵ the Trial Court found that plaintiff had not breached the terms of its agreement, and further found that plaintiff had properly maintained the signs and did such other things as it was required to do under the terms of the rental agreement (Finding No. 8, R-57).

Mr. Garth Hess, the service manager for plaintiff, testified that defendant's signs were included upon a nightly sign patrol (R-100), and that the signs were properly maintained (R-101, 104-105). Mr. Hess further stated that he didn't remember receiving any complaints from the defendant

⁵ It is the duty of the Trial Court to resolve any conflicts in the testimony. McKaren v. Merrill, 15 Ut.2d 179, 389 P.2d 732 (1964).
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regarding the maintenance on the signs (R-102, 103), although he saw the defendant frequently (R-103-104). When the signs were removed he had occasion to review their condition and found that there was nothing wrong with them (R-104). In support of his contention that plaintiff had not maintained the signs, the defendant testified that subsequent to the time that suit was initiated by plaintiff, the signs "didn't light up." Defendant estimated that this occurred possibly in March or April of 1974 (R-147). Defendant further indicated that there was some paint peeling on the bottom of the panel. All of defendant's complaints regarding the condition of the signs, however, relate to conditions that occurred subsequent to the time defendant breached the rental agreement and at a time when defendant's accrued monthly delinquency was, at a minimum, in excess of \$800.00. The lessee's material breach in failing to pay his rental obligations excused plaintiff from further performance under the contract. See Young Electric Sign Co. v. Fohrman, 466 P.2d 846 (Nev. 1970); Restatement of Contracts, §397 (1932).

Under the terms of the agreement, plaintiff, upon defendant's default, had the right to immediately repossess the signs and, in addition, to collect liquidated damages for the remainder of the contract term. The subsequent failure of the signs to properly function cannot be considered a breach of the contract since, by its terms, plaintiff could have completely removed the signs from defendant's premises prior to the time they ceased to function properly.

Cf. Young Electric Sign Co. v Fohrman, supra. In the instant case, defendant at least had the use of the signs during the day, whereas, had plaintiff exercised its rights under the contract and repossessed the signs, defendant would not have had any use of the signs.

It is interesting to note that plaintiff attempted to repossess the signs on June 11, 1974, but that defendant refused to allow plaintiff to do so (R-40). Defendant, at that time, maintained that the signs were still of some value to him since he was still operating his business at that location (R-43). Defendant refused to pay plaintiff the sums due under the rental agreement, refused to allow plaintiff to repossess the signs, and continued to have the use of the signs at his business. Although defendant would not pay the rentals on them, he felt that the signs still had some value to him, but now asks this Court to find that in spite of these failures to pay the rent when due, plaintiff nevertheless had a duty to continue to maintain the signs and to incur additional expenses relating to them without a corresponding obligation on the part of defendant to make the monthly payments. Such a contention is contrary to the decided law on this point. Young Electric Sign Co. v. Fohrman, supra.

The evidence is clear; plaintiff performed its duty and defendant breached his. The findings of the Trial Court are amply supported by the evidence.

Point IV

THE TRIAL COURT'S AWARD OF LIQUIDATED DAMAGES IS REASONABLE AND MUST BE SUSTAINED BY THIS COURT.

As previously set forth, the rental agreement provided for liquidated damages upon defendant's breach equal to three-fourths of the remaining contract balance. The law of this state is to the effect that where the parties to a contract stipulate to the amount of liquidated damages that will be paid in case of a breach, such a stipulation is generally enforceable. Perkins v. Spencer, 121 Ut. 468, 243 P.2d 446 (1952). In the instant case defendant had entered into three agreements with plaintiff relating to the signs each of which contained an identical provision calling for liquidated damages in the event of defendant's breach (Ex. 2-P, 8-D, 9-D). Since the Trial Court adopted the measure of damages defendant had agreed to, defendant should not now be heard to complain. See Ray v. Electrical Products Consolidated, 390 P.2d 607 (Wyo. 1964).

A large portion of the electrical signs in the industry are custom-made and maintenance is often included in the lease thereof, thereby making an accurate forecast of actual damages difficult. As a consequence, a provision for liquidated damages is common in rental agreements in the sign industry. These provisions have generally been upheld by the courts. See Young Electric Sign Co. v. Capps, 94 Id. 518, 492 P.2d 57 (1971) and Young Electric Sign Co. v. Fohrman, supra, upholding identical provisions to the one

here in question, Ray v. Electrical Products Consolidated, supra, 75% clause upheld; Mosier v. Woodell, 189 Wash. 583, 66 P.2d 353 (1937), 80% clause upheld; Bassett v. Claude Neon Federal Co., 65 F. 2d 526 (10th Cir. 1933), 75% clause upheld; Lamson Co. v. Elliott-Taylor-Woolfenden Co., 25 F.2d 4 (6th Cir. 1928), 80% clause upheld.

Defendant states, and plaintiff agrees, that an award of liquidated damages must fit within the requirements of Section 339, Restatement of Law of Contracts. That section provides:

"[A]n agreement made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach unless

(a) the amount so fixed is a reasonable forecast of the harm that is caused by the breach and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." Restatement of Contracts, §339 (1932).

In the instant case, the Court specifically found that the actual damages caused by a breach of the agreement by defendant were difficult to actually estimate at the time the subject lease was executed by the parties (Finding No. 9, R-58). Plaintiff submits that there is ample evidence to support this conclusion. The evidence showed that the signs were custom-made neon signs constructed and designed especially for use on the lessee's premises (Finding No. 5, R-57). The rental agreement provided that "it is agreed by the parties hereto that the sign is of special construction made for the uses and purposes of Lessee and no other, and

that except for use by Lessee the sign has no value." (Paragraph 8 of Ex. 2-P). Mr. Robert Gilbert testified that plaintiff attempted to mitigate its damages by dealing with several other parties relating to the signs, but that the signs could not be used by subsequent tenants of the premises because they were custom-built for defendant (R-141). Plaintiff ultimately removed the signs to its junkyard (R-78). When removal of the signs was sought by plaintiff, defendant took the position that the signs were of "some value" to him, but that they had no value to plaintiff (R-43). When dealing with this precise issue and the precise contract presented here, the Supreme Court of Idaho, in resolving the question in favor of plaintiff, stated:

"Since the value of signs themselves is questionable, it follows that computation of the actual damages to Young Electric is 'in capable or very difficult of accurate estimation'." Young Electric Sign Co. v. Capps, supra.

There is, however, additional evidence to support the Trial Court's Finding. The subject rental agreement was not only for the use of the signs by defendant but also imposed upon plaintiff the burden of upkeep and maintenance (Finding No. 6, R-57). A portion of the compensation plaintiff was to receive from defendant under the rental agreement was for services as well as for the use of the signs. Testimony indicated that prior to the execution of the subject contract the signs had been severely damaged in a windstorm and that Young Electric, under its duty to maintain the signs,

had, on that occasion, expended the approximate sum of \$2,000.00 in repairing a portion of the subject signs (R-90, 102). Other than the windstorm, however, the signs, through their life, had required only standard maintenance (R-107). Robert Krantz, the credit manager for plaintiff, testified that during the year 1973 plaintiff had only been required to expend the sum of \$175.00 for the maintenance of the signs (R-128, Ex. 7-P). It is obvious that plaintiff could not look into the future and could not determine in advance whether the signs would be damaged by wind, vandalism or any other cause, or whether the signs would weather properly or require a large amount of painting or other maintenance. Thus, it is clear that the actual damages caused by breach of the agreement were sufficiently difficult to ascertain at the time the contract was signed. The testimony is uncontroverted in this respect and the Trial Court specifically so found (Finding No. 9, R-58).

Since the damages were sufficiently difficult to estimate at the time the contract was entered into, the only remaining impediment to plaintiff's award of liquidated damages is the question of whether they bear a reasonable relation to the damages actually sustained. In this regard, the Trial Court made a specific finding that the amount stipulated in the lease for liquidated damages did bear a reasonable relation to the damages actually sustained by the plaintiff (Finding No. 9, R-58).

In attempting to attack the Court's specific finding, defendant has misconstrued the evidence that was presented. Defendant here contends that the maintenance cost of the sign amounted to \$50.00 per month and that taxes and insurance each amounted to an additional \$15.00 per month. Such a contention is clearly erroneous. The testimony is undisputed that the figures relied upon by defendant were rule-of-thumb estimates used by plaintiff to allocate the charges made to defendant and were not the actual expenses incurred by Young Electric (R-96, 129).⁶ The figures were, in fact, arrived at subsequent to the date the contract was executed (R-96, 139) and were not the basis upon which the parties contracted.⁷

The actual expenses incurred by Young Electric with relation to the subject sign amounted to \$175.00 for maintenance for the year 1973 (R-114) and \$3.75 per month for property taxes (R-135). The testimony indicated that plaintiff was self-insured in relation to property damage (R-116) and had a blanket policy of liability coverage on all of its signs. Defendant states, and plaintiff agrees, that the cost of the liability insurance as it related to the subject signs could not be great (Defendant's brief, page 7).

⁶Mr. Gilbert testified that the actual expense might have been much greater or much less than the \$50.00 budgeted amount (R-96).

⁷In Ray v. Electrical Products Consolidated, supra, lessee also attempted to utilize cost allowances rather than the actual expenses.

The uncontroverted evidence indicates that plaintiff's actual out-of-pocket expenses for the signs, as opposed to its budgeted or estimated expenses, amounted to \$14.58 per month for maintenance (\$175.00 ÷ 12) and \$3.75 per month for taxes, making the total monthly expense \$18.33.

In determining the reasonableness of the 75% provision it is important to remember that the purpose and function of this Court is to place the injured party so far as is possible in a position no better or no worse than he would have occupied had the contract been performed. Young Electric Sign Co. v. Capps, supra; Ray v. Electrical Products Consolidated, supra.

The evidence indicated that Young Electric made a reasonable effort to mitigate its damages by re-letting the signs; further, the Trial Court awarded damages to plaintiff only for such time as the plaintiff had not entered into a subsequent rental agreement with the subsequent occupant of the premises.⁸

Plaintiff agrees that it is obligated to give defendant credit for the saved expenses which it did not incur because the breach by lessee relieved it from further performance. Young Electric Sign Company v. Capps, supra. In applying this principle, plaintiff's damages would be computed by establishing the total unpaid rentals (\$99.17 per month) less the saved monthly expenses (\$14.58 maintenance

⁸Although the defendant's signs were required to be removed, plaintiff was able to use a portion of the sign structure and entered into a new contract with a subsequent lessee. The first payment thereunder was due in May, 1975. Sponsored by the J. L. Quinby Law Library, Funding for this program provided by the Utah State Library, Library Services and Technology Act, administered by the Utah State Library.
(R-142). Machine-generated OCR, may contain errors.

+ \$3.75 taxes = \$18.33), which results in net damages to plaintiff of \$80.84 per month (\$99.17 - \$18.33). Since the Trial Court awarded liquidated damages to plaintiff in the sum of \$74.25 per month (Finding No. 11, R-58), the liquidated damages as awarded are actually less than plaintiff's actual damages and hence must be reasonable and proper.

The evidence is undisputed, however, that plaintiff's obligation to pay taxes and insurance on the signs continued through 1974 to the end of that year (R-92) and, indeed, that the taxes were paid additionally through 1975 (R-134).⁹ Thus it appears that the only "saved expense" occasioned by defendant's breach of contract was the maintenance expense which had averaged \$14.58 per month. Thus the actual damages caused to plaintiff by defendant's breach were really \$84.59 per month (\$99.17 - \$14.58), some \$10.00 more than was actually awarded to plaintiff under the liquidated damages provision. Plaintiff submits there is ample evidence to support the Trial Court's finding that the liquidated damages as awarded by the Trial Court bore a reasonable relationship to the actual damages incurred by plaintiff. In construing this precise contract two other courts have similarly concurred. Young Electric Sign Co. v. Capps, supra; Young Electric Sign Company v. Fohrman, supra. Plaintiff submits that the requirements of Section 339 were met and that the award of liquidated

⁹Since defendant refused to allow plaintiff to repossess the signs plaintiff was forced to maintain insurance and pay property taxes on those signs subsequent thereto. Therefore, defendant cannot now complain that he does not get credit for these expenses which normally would be saved but which in this instance he forced plaintiff to incur.

damages must be sustained by this Court.

Point V

PLAINTIFF IS ENTITLED TO RECOVER A REASONABLE ATTORNEY'S FEE ON THIS APPEAL.

The lease agreement upon which plaintiff relies provides as follows:

"In the event this agreement is placed by Lessor in the hands of an attorney after default for enforcement or collection, Lessee will pay a reasonable attorney's fee." (Paragraph 8, Ex. 2-P).

Since the agreement provides for the award of attorney's fees such an award is proper under the laws of this state. Holland v. Brown, 15 Ut.2d 422, 394 P.2d 77 (1964); Hawkins v. Perry, 123 Ut.16, 253 P.2d 312 (1953). The Trial Court found that \$500.00 was a reasonable sum to be awarded plaintiff for its legal costs to date (Finding No. 12, R-58).

Plaintiff submits that since it prevailed in the Trial Court that if that judgment is affirmed herein, as plaintiff insists it must be, it should be allowed to recover from appellant its attorney's fees on this appeal pursuant to the terms of the contract. Such an award is not only proper, Young Electric Sign Co. v. Capps, supra, but is necessary to allow plaintiff to recover the full benefit of its bargain.

CONCLUSION

The Findings of Fact are clearly supported by ample evidence. Appellant cannot meet his burden of showing clear

error on the part of the Trial Court. Defendant refused to make his monthly payments under the lease agreement and became in material default thereunder. Upon defendant's breach, plaintiff had the right to immediately repossess the signs, and defendant became indebted not only for the delinquent rentals but for 75% of the remaining contract balance. Defendant's breach relieved plaintiff of its duty to further maintain the signs. The Trial Court specifically found that the liquidated damages provision of the contract was reasonable and met the requirements of the Restatement of Contracts, Section 339. This precise contract has been upheld by the Supreme Courts of Idaho and Nevada and similar liquidated damages clauses are recognized throughout the sign industry. The mere existence of a security deposit does not relieve defendant of his obligations under the contract. Such a deposit is given to secure performance, not in lieu thereof. Defendant was entitled to the full return of his deposit only if he completely performed all of his contractual obligations. This defendant failed to do, therefore the deposit could properly be applied by plaintiff to partially off-set the damages caused to it by defendant's breach.

The Findings of the Trial Court are amply supported by the evidence. Plaintiff contends, therefore, that the judgment of the Trial Court must be affirmed and that plaintiff should be awarded reasonable attorney's fees on this appeal pursuant to the terms of the subject contract.

Respectfully submitted,

EARL D. TANNER & ASSOCIATES

By _____
J. Thomas Bowen
Attorney for Plaintiff and
Respondent

Mailed two copies of the foregoing Brief of Respondent to Richard W. Campbell, Attorney for Appellant, this ____ day of December, 1976.

J. Thomas Bowen