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Darrell Nielsen v. Carl Colby and Marie Colby, dba Super Savers Store : Reply Brief

Utah Court of Appeals

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DARRELL NIELSEN, Respondent and Plaintiff, -vs- CARL COLBY & MARIE COLBY, dba SUPER SAVERS STORE, Appellants and Defendants.	:	Appellate Court No. 960848 Priority No. 15

APPELLANTS' REPLY BRIEF

On Appeal from Final Orders Entered by the
Second Judicial District Court in and for Weber County
Honorable Stanton M. Taylor, Presiding

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ARGUMENT

I.

NIELSEN IS BOUND BY THE WRITTEN LEASE AGREEMENT HE SIGNED.

Nielsen's brief discusses some principles of basic contract law at length and attempts to stretch certain of these principles to fit the facts of this case. Significantly, though, Nielsen fails meaningfully to address a controlling legal argument set forth in the Colbys' brief -- that Utah law holds a lease enforceable against the party by whom it is made. Since there is no dispute that Nielsen owned the land and signed the written lease, this fact alone is determinative and requires that the district court be reversed as a matter of law.

Nielsen asserts that the case of *Commercial Union Associates v. Clayton*, 863 P.2d 29 (Utah App. 1993) is factually distinguishable, but his argument is unavailing. The holding in *Clayton*, based on Utah Code Ann. § 25-5-3, is that a lease signed by the lessor is enforceable as against the lessor:

> By its own ambiguous terms, section 25-5-3 requires only the signature of the lessor to take the document out of the statute of frauds.

Id. at 33 (emphasis added). That holding is clearly controlling here where Nielsen admits he signed the written lease. Furthermore, it is significant that both parties conducted themselves thereafter consistently with the terms of the written lease. This conduct would be sufficient to bind them, even if the lease had not been signed. *Id.* at 34.

Similarly, Nielsen makes no attempt to distinguish the case of *Edwards Pet Supply v. Bentley*, 652 P.2d 889 (Utah 1982), which also holds that the signature of the lessor is sufficient to render the lease enforceable as between the parties. Given the specific and controlling Utah precedent, Nielsen's reliance on general contract law is inapposite and unpersuasive.

II.

THE LEASE WAS ACCEPTED BY PERFORMANCE.

Nielsen alleges that the Colbys never accepted the lease. (Brief of Appellee at 5.) This argument is factually and legally erroneous. It is undisputed that the Colbys and Nielsen both performed in accordance with the terms of the written lease after it was signed: The Colbys immediately began paying substantially increased rent and Nielsen accepted the payments for an extended period of time.[1] The Colbys increased their stock in reliance on the lease and performed under the lease in all other particulars, as set forth in their opening brief. In accordance with Utah law as stated in *Clayton*, this performance also bound the parties to the terms of the written lease.

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[1] Nielsen tacitly acknowledges that the increased rent began with the written lease and does not argue with the Colbys' assertion that both parties altered and initialed the annual and monthly rent figures. The Colbys believe these initials also satisfy all required formalities.

III.

THE ALLEGED CONDITIONS PRECEDENT ARE NOT DETERMINATIVE.

Nielsen's principal argument is that the written lease was not enforceable because certain conditions precedent were not met, *i.e.* Marie Colby was to sign the copy of the lease left with Carl Colby, the Colbys' signatures were to be notarized, and then that copy was to be returned to Nielsen. It is apparent from the record that these alleged "conditions," if actually discussed by the parties, were no more than additional formalities of execution made by oral request at the same time Carl Colby and Nielsen signed the written lease.[2] As demonstrated, Nielsen's signature alone is sufficient to render the lease enforceable against him.

The lease itself demonstrates that the alleged "conditions" were not conditions precedent to the validity of the lease. Significantly, the written lease does not refer in any way to these so-called conditions. The silence of the lease on this point dooms Nielsen's argument because the question of whether requirements amount to conditions precedent is determined by the contract language and the intent of the parties. *Clayton*, 863 P.2d at 38.

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[2] Nielsen argues that certain statements by the Colbys' prior counsel somehow control. (Brief of Appellee, at 4.) As explained in the Colbys' opening brief, these incorrect statements were made when the Colbys were not present. More importantly, they were promptly corrected by sworn affidavits filed with the court in connection with the motions for reconsideration and for relief from judgment.

Second, the lease declares itself to have "binding effect" upon the parties as of October 1, 1995, without reference to other conditions (*See* Sections 1, 18.07 of the lease, R., pp. 73, 81). And third, the written lease contains an integration clause stating that it may only be modified in writing signed by the parties. (*See* Section 18.03, R., p. 80). Notably, Nielsen has never argued that the written lease was ever amended to set forth these additional "conditions."

None of the cases cited by Nielsen is persuasive. In *Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199 (Utah 1983), cited by Nielsen for the principle that the district court could interpret the contract as a matter of law to "contain conditions precedent," the case before the court involved a written contract found to be unambiguous with no conditions precedent. It is not authority for the proposition advanced by Nielsen, *i.e.* that a court may imply oral conditions into a written contract as a matter of law without first finding ambiguity. A finding of ambiguity, of course, is required before extraneous evidence is considered. *Id.* at 1200. No such finding was made here. Similarly, the case of *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187 (Utah App. 1993) involved a course of written offers and counteroffers, and is thus again factually distinguishable.

Other cases state only basic tenants of contract law in factually dissimilar contexts, such as *Wadsworth Const. v. City of St. George*, 865 P.2d 1373 (Utah App. 1993), which involved a construction dispute in which there was no formal agreement and the issue was whether a contract was ever formed. The case of *Medica Serv.*

Group v. Boise Lodge, 878 P.2d 789 (Idaho App. 1994) involved a written condition precedent, but the dispute was whether it had been waived by the parties' conduct -- not whether the condition precedent existed. In sum, Nielsen cites to no cases (and the Colbys are aware of none) where an orally requested formality of execution is thereafter held as a matter of law to be a condition precedent to an integrated written lease.

The issue of the so-called conditions precedent is really a red herring. Nielsen's claims in this regard might be relevant if he were trying to enforce the lease and the Colbys had raised the issue of non-execution in defense. That is not the case at bar. Nielsen in fact signed the lease and the Colbys performed under it. This is as far as the inquiry need go. The Colbys are entitled to the protection of the written lease Nielsen signed and they performed.

IV.

NIELSEN IS ESTOPPED FROM DENYING THE VALIDITY OF THE WRITTEN LEASE.

Nielsen does not make any attempt to refute the Colbys' argument of estoppel, except generally to allege that he gave the Colbys no basis to rely on the terms of the written lease. In fact, Nielsen did give the Colbys a basis to rely by accepting the substantially increased rent, in accordance with the written lease, for a period of months. The Colbys believed the signed written lease was valid and demonstrated that belief by paying the increased rent, by promoting their business at the location of the

leased premises, and by not pursuing relocation. It was error for the trial court to hold to the contrary, at least as a matter of law.

V.

SUMMARY EVICTION WAS IMPROPER.

Whether a year-to-year or a month-to-month tenancy was created by the parties' actions is also an issue preserved below. Contrary to the assertions in Nielsen's brief, more has been shown than mere payment of rent on a monthly basis. The written lease expressly states that rent is based on an annual sum. This term was obviously agreed, altered and initialed by the parties. It thus gives the Colbys at least a one-year leasehold. *Evershed v. Berry*, 436 P.2d 438 (Utah 1968).[3] Accordingly, the district court's summary eviction, assuming that a month-to-month tenancy existed, was erroneous.

Nielsen mischaracterizes contested facts as legal conclusions when he states that the Colbys understood that Nielsen's request that a copy of the lease be signed by Marie Colby, notarized and returned to him was somehow an express condition precedent to the formation of the lease. Obviously, the parties' intent with respect to this formality of execution is vigorously disputed, and it was simply not established as a

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[3] Nielsen cites this case for the proposition that evidence of payment and receipt of rent, and "nothing more," results in a tenancy of "at most" year-to-year. (Brief of Appellee, at 10.) Absent the written lease, a yearly tenancy is clearly established here, rendering the trial court's judgment incorrect. As noted, the Colbys demonstrated much more than mere rent payments as a basis for their tenancy -- they had a lease signed by their landlord.

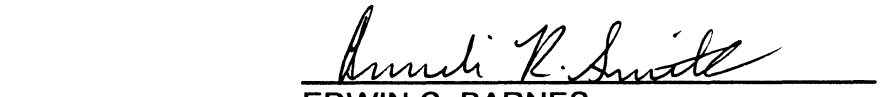
matter of law that the parties intended these formalities of execution to be conditions precedent to the validity of their lease. If that was the basis of the trial court's order, it was error.

CONCLUSION

The written lease is enforceable against Nielsen. He signed it, the parties performed in accordance with its terms, and he is estopped from now denying its validity. The formalities alleged by Nielsen to be conditions precedent were not understood as such by the Colbys, who believed they were in possession under a two-year lease. For the reasons set forth herein and in the Colbys' opening brief, the trial court's ruling was erroneous. It should be reversed and the Colbys should be awarded their costs and attorney's fees, as provided in Section 18.08 of the lease (R., p. 81).

Dated this 1st day of May, 1997.

CLYDE, SNOW & SWENSON



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CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the foregoing Appellants' Reply Brief to be mailed, postage prepaid, to the following this 1st day of May, 1997:

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