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Lavell A. Desbouillons and Henrietta R.
Desbouillons v. Kenneth O. Holt and Verdell T.
Holt : Brief of Defendant-Appellants

Utah Supreme Court

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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2

ARGUMENT

POINT I

NUMEROUS DEFECTS IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRE THE JUDGMENT OF THE LOWER COURT TO BE OVERTURNED BECAUSE THE EVIDENCE DOES NOT SUPPORT THE FINDINGS; NOR DO THE FINDINGS COMPLY WITH LAW IN THE STATE OF UTAH, AND SAID FINDINGS ARE BASED ON IN- ADMISSIBLE EVIDENCE	4
--	---

POINT II

A MISREPRESENTATION OF A MATERIAL FACT, IF ACTED UPON BY ONE PARTY TO HIS DETRIMENT, WILL CONSTITUTE SUFFICIENT GROUND FOR RECISSION AND CANCELLATION OF CONTRACT IN EQUITY BECAUSE THERE WAS NO MUTUAL ASSENT TO ALL THE TERMS OF THE CONTRACT--NO MEETING OF THE MINDS--HENCE, NO VALID CONTRACT CAN BE CREATED.	13
---	----

POINT III

THE COURT ERRED IN ALLOWING PLAINTIFF TO ESTABLISH A MISTAKE BY INADMISSIBLE PAROL EVIDENCE AND EXTRINSIVE EVIDENCE FOR THE PURPOSE OF REFORMING THE AGREEMENT, THEREBY EXCLUDING PROPERTY DESCRIBED IN THE LEASE AND REPRESENTED BY BOTH PARTIES TO BE PART OF THE PROPERTY BARGAINED FOR.. . . .	18
---	----

CONCLUSION	21-22
----------------------	-------

CASES CITED

<u>Bell v. Minor</u> 88 Cal. App. 2d 879, 195 Pacific 2d 718	21
<u>Farr v. Wasatch Chemical Company</u> 105 Utah 272, 143, Pacific 2d. 281, 151 ALR 274	20
<u>International Harvester Cr. Corp. v. East Coast Truck.</u> 387 F. Supp. 820 (Fla. 1974)	18

TABLE OF CONTENTS CONTINUED

CASES CITED

<u>Langley v. Irons Land & Development Co.</u>	114 So. 769	16, 17
(Fla. 1927)		
<u>Last Chance Ranch Co.</u>	25 P. 2d 952 (1953)	20
<u>Sandall v. Hoskins</u>	137P. 2d 819 (1943)	4, 8
<u>Sutton v. Cast-Crete Corporation of Florida</u>	17, 18
197 S. 2d 556 (1967)		

STATUTES CITED

Utah Rules of Civil Procedures 9B	7
17 Am. Jur. 2d Section 242 Page 627	14
Black on Recission and Cancellation P. 285 Section 140	17
9 Corpus Juris Contracts P 1167	18
Utah Code Annotated Section 18-25-16 (1953)	18
49 Am. Jur. 2d Section 145	20

IN THE SUPREME COURT OF THE
STATE OF UTAH

LAVELL A. DESBOUILLONS, and
HENRIETTA R. DESBOUILLONS

Plaintiff-Respondents

vs.

KENNETH O. HOLT and
VERDELL T. HOLT

Defendant-Appellants

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Case No. 15297

BRIEF OF DEFENDANT-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This case is the result of the consolidation of two actions: The first, initiated by the plaintiffs in this matter for the enforcement of rent payments pursuant with written leases; the second, being initiated by the defendants in this action complaining Breach of Contract against the plaintiffs.

DISPOSITION IN THE LOWER COURT

The Honorable Judge Ronald Hyde, in a trial without a jury, entered a Judgment of no cause of action on defendants claim for Breach of Contract and damages, and entered Judgment in favor of the plaintiffs and against the defendants for unpaid rent from July, 1974 through September 15, 1975.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks an Order of this Honorable Court reversing the Judgment of the lower Court, and for an Order entering Judgment in favor of the defendants for Breach of Contract; or in lieu thereof, for an Order of this Honorable Court reversing the Judgment of the lower Court and directing that the lower Court enter a Judgment and Findings and Conclusions that because there was never a meeting of the minds between the parties, the written agreements between them are invalid and unenforceable.

STATEMENT OF THE FACTS

On October 6, 1973, plaintiffs and defendants entered into a written agreement of certain real property located in the City of Ogden. The testimony before the Second District Court indicates that the parties intended to enter into a Lease of a building and improvements, including a blacktop area designated by the plaintiff/lessor as a customer parking area. The real property discussed by the parties and identified as the parking area was included in the legal description of the Lease, but the building which defendants thought they were also leasing was not included in the legal description. Said Lease (See Exhibit 1) was prepared by plaintiff's attorney at the request of the plaintiff. After the execution of said Lease, the defendants went into possession of the property which they thought was leased to them; extensively remodeled the same; and thereafter, the defendants opened the building for business.

In the early part of November, 1973, plaintiffs informed the defendants that a certain advertising sign was not intended to be included in the original Lease (See Exhibit 1), and so plaintiffs prepared, and the parties executed a written Lease of said sign as part of an original transaction. The sign is not in fact situated on either portion of ground described in Exhibit 1, but is installed on the real property which was omitted from the Lease.

After executing all of the aforementioned Leases, and after extensive monies had been spent for moving, renovating, and repair, defendants began to encounter parking conflicts with the operator of a cafe situated on the area described as customer parking. Though some effort was made to work out an accord between the cafe operators and the defendants, the situation was never resolved. The defendants, after being informed by the cafe operator that he intended to install a fence adjacent to the building which defendants thought they had leased, discovered that the real property demised to them in the Lease was not owned or controlled by the plaintiffs, and shortly thereafter vacated the premises after an unsuccessful attempt to resolve the problem with the plaintiffs.

In spite of a request to resolve the problem, which was mailed to the plaintiffs by the defendants in September of 1975 (See Defendants Exhibit 2 and Defendants Exhibit 5), the plaintiffs ignored the parking problem and the ownership problem, and commenced an action against the defendants seeking only for the enforcement of rent. Plaintiffs' Complaint made no mention of the defect pointed out in defendant's letter. Defendants concurrently instituted an action for Breach of Contract against the plaintiffs and the two actions were consolidated in the case at hand.

ARGUMENT

POINT I

NUMEROUS DEFECTS IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRE THE JUDGMENT OF THE LOWER COURT TO BE OVERTURNED BECAUSE THE EVIDENCE DOES NOT SUPPORT THE FINDINGS; NOR DO THE FINDINGS COMPLY WITH LAW IN THE STATE OF UTAH, AND SAID FINDINGS ARE BASED IN PART ON INADMISSIBLE EVIDENCE.

In a trial before a Judge without a jury, it is the obligation of the ruling Judge to determine the facts; and on the basis of those facts, to arrive at legal conclusions which are consonant with the law of this state or as it may otherwise apply to the facts. In the case of Sandall v. Hoskins, et al., in the Supreme Court of Utah, 137 P 2d 819 (1943), this Court went into some considerable detail describing the nature of Findings and Conclusions. In particular, the Court stated, "(W)hat should really be contained in the Findings of Facts are those facts on each issue which are necessary to make flow from them a law conclusion or to make such law conclusions intelligible." In no event can the Court arrive at facts, regardless of their "ultimate factual nature" or "mixed nature" if the same is not found in the evidence or reasonably concluded or deducted from the evidence; and especially if the same controverts the actual evidence before the Court.

In this case, several findings of the lower Court in fact contradict the evidence submitted by both the plaintiffs and defendants. The statements of the plaintiffs, in whose favor a Judgment has been rendered herein, are consistant with the statements of the defendants, but inconsistent with the findings. To facilitate this Court's understanding of these inconsistencies, each of the defective findings are hereafter set forth. The specific evidence and testimony which controvert said

findings are set forth thereafter by page and line or exhibit number.

Finding of Fact Number 3 states, that said written lease contained a legal description which is not the correct legal description of the property in question. Said legal description was taken from an un-executed document entitled "Easement," which was drawn by plaintiff's counsel to settle the parking arrangement between plaintiff and his neighbor, Tony Dekazos. Said "Easement" document contained both descriptions, and in drawing the Lease, the scrivener, plaintiff's attorney, claimed that he had included the parking area by mistake. Nonetheless, the defendant believed he was leasing the parking area. In the Transcript, Page 21 Lines 9 through 15, plaintiff (Desbouillons) said,

Q: Was there ever a discussion concerning parking, Mr. Desbouillons?

A: Yes

Q: Do you recall when and where this conversation took place?

A: It was during the times that Ken was checking the property, and it was part of the overall decision.

On page 42, and beginning with Line 4, Mr. Desbouillons stated that the parking behind, and around the Cedars Lounge was an integral part of Mr. Holt's decision to lease the building, and more specifically stated as follows, beginning at Line 18.

Mr. Rothey: And isn't it a fact that that parking area that you pointed out physically to Mr. Holt is described in the first legal description of Paragraph 1 of the Lease?

Mr. Desbouillons: Yes.

Further, on Pages 67 and 68, in the testimony of Mr. Holt under direct examination, Mr. Holt states that he agreed or understood that he was going to lease the building, its fixtures, and the parking lot, and that parking was absolutely necessary to the operation of his business.

Q: As a result of all of these discussions what did you agree or what did you understand that you were going to do?

A: I agreed, or I understood, that I was going to lease the building and all its fixtures, the property, including the parking lot.

Q: And as a result of all of those discussions did you sign the lease which is marked Exhibit 1?

A: Yes, I did.

Mr. Desbouillons, as previously quoted from Transcript Page 42, Lines 18 through 21, confirmed that the first legal description in Exhibit 1 was the area described by him to Mr. Holt as the parking area for the building situated at 20th and Washington Blvd. The first legal description in Exhibit 1 is identical to the first legal description in Exhibit 15, and was admitted as evidence over the objection of counsel for defendants on the basis of parol evidence (Transcript Page 24, Lines 15 through 20; and Page 23 Lines 21 through 28). It is clear from these facts that the legal description contained in Exhibit 1 was, in fact, a correct legal description of the property called the "parking property" in question in this lawsuit. The Courts' finding controverts that testimony of plaintiff and the defendant with respect to the parking area; and further controverts Exhibit 1, which was offered and admitted without objection; and Exhibit 15, which was offered by the plaintiffs over the defendants objection, and is therefore binding upon the plaintiffs.

The Court further found as part of Finding Number 3, that the real property description in the Lease was the result of a "scribbler" (sic) error. Such a conclusion dehors the record (Finding of Facts Paragraph 9. Conclusions of Law Paragraph 2 and 9). The only place

62 and 63, and is merely argument of counsel for plaintiff; and not admissible evidence. It states as follows:

Mr. Vlahos: Yes, It's a scrivener's error, and I take full responsibility for the error, and I ask the court to amend the pleadings to conform with the fact that the correct description should be as indicated in the deed where Mr. Desbouillons sold the property, because that was the property that he in fact did lease, and our position is he has had peaceful possession of it the entire time until he moved out.

There is no question in this respect that the plaintiffs prepared the written Lease, (Exhibit 1; Transcript Page 67, Lines 11 through 18).

In addition to preparing the Lease, plaintiffs requested their counsel, in an unrelated matter, to prepare an agreement between the plaintiffs and persons not party to this lawsuit. That agreement was objected to by defendant's counsel on the basis of materiality, (Transcript Page 3, Line 22 through 27), and on the basis of Parol (Transcript Page 24, Line 15 through 19), but the Court, nevertheless, allowed said document into evidence and has based material findings and conclusions on said document.

The plaintiff's Complaint raises no claim that the regular description contained in the Lease was an error, and the law of this state requires that any error in a written document be specifically pleaded before evidence of such error can be introduced at trial. Utah Rules of Civil Procedure 9B.

This rule, of course, is limited to those factual circumstances where the document contains ambiguity. In this case, the court has made no finding that the Lease was ambiguous and the defendants respectfully submit that the court therefore erred in two respects, with respect to allowing Exhibit 15 into evidence, and its "Finding Number 4."

At no place in the transcript is there any evidence to show that the intention of the parties was to lease only the property on the corner (emphasis supplied). The record reflects the fact that it was the intention of the parties to lease the property on the corner of 20th and Washington Blvd. as well as the parking lot. (See Transcript Page 42, Line 14 through 21, testimony of the plaintiff; Transcript Page 67 Line 21 through 24, testimony of the defendant). In light of the testimony of both the plaintiff and defendant in this case, it is clear error on the part of the Court to find, as a matter of fact, that the intention of the parties was to do something other than what the parties informed the Court. The rule of law allows the trial Court considerable discretion in believing or disbelieving the testimony of any witnesses; but it does not allow the trial Court the discretion to disregard totally the testimony of both plaintiff and defendant with respect to their intention in forming the written agreement. Finding of Fact Number 4, if it is to meet the criteria of Sandall v. Hoskins, et al, (op. cit.), should, therefore, be amended to reflect the actual intention of the parties.

In addition, Finding Number 4 is inconsistent with Finding Number 6, which states that the defendants were well aware of the parking belonging to said property and should be amended in any event to conform with Finding Number 6. If the defendants were aware of the parking, and if the plaintiff included it in the lease, how can the Court find that the parties did not intend to do that which they in fact did. The classic sense of intent is manifested in conduct of affirmative action.

Finding Number 7 is not a Finding of Fact within the meaning of the Sandall case. First of all, it is not credible to the defendant that the

court could find in Number 6 that the defendant was well aware of the parking as part of the lease, and then cavalierly proceed in Finding Number 7 to reform the agreement specifically excluding the parking. It is not the defendant's contention that the Court could not reasonably conclude from the evidence that the real property situated on the corner of 20th and Washington Blvd. was the "part" of the property bargained for, and reform the agreement to include said description (emphasis supplied). It is a clear error in light of the testimony, for the Court to allow reformation totally excluding that portion of the property which plaintiff and defendant admitted was to have been included as the parking area (See Transcript Pages 42, 71, 79, 88, 91, 112, 113, 117); and in light of the testimony of both plaintiff and defendant, it is an error to conclude as a Finding of Fact that a reformed agreement excluding the property bargained for would not interfere with defendants peaceable possession. Ken Holt said at Page 87 Line 26, "he would have never signed the lease if he had known he had no blacktopped parking."

Finding of Fact Number 8 totally dehors the record. Plaintiffs and defendants causes of action are clearly set forth in their Complaint, Answer, and Counterclaim, and at no place in the pleadings do the defendants request the Court to assist them in exercising an option for the property bargained. The balance of the Finding is immaterial.

Finding of Fact Number 9 is quoted in its entirety for the purpose of the defendant's argument as follows:

"The court find (sic) that the scribblers error does not release the defendants from the Lease."

Is this a fact to be derived from the testimony? Who is the scribbler (sic)? To conclude as a fact that a scribblers error does not release the defendants, per se presumes that there was, in fact, an error

(emphasis supplied). If the error was an error in the legal description, is the Court allowed the prerogative of reforming the lease and writing a new agreement which excludes a right bargained for by the defendants. Reasonable minds can only come to one conclusion in that respect: No. (See Transcript Pages 42, 67, 71, 79, 88, 91, 112, 113, 117).

In Finding of Fact Number 12, the Court found from the testimony of the defendant that the defendant never mentioned any parking problem to the plaintiff prior to a written letter in September, 1975; and further, found that the defendants never had any problems with the parking.

This simply is not true. Even the plaintiff admitted he was informed about the parking problem by the defendant during the time the continued payment of rent came into question. The testimony of the plaintiff in this respect is quoted to show the clear error of this finding, Transcript Page 54 and 55, beginning with Line 26 through 30; and Page 55 Lines 1 through 5.

Q: Mr. Desbouillons, in direct examination Mr. Vlahos asked you whether or not in these conversations you have had with Ken Holt on the telephone, whether anything was discussed concerning his parking problems with Mr. Tony Dekazos? Isn't it a fact that he indicated to you that he was having numerous problems with Mr. Dekazos?

A: He indicated to me that he had had some problems with Tony and that, or I believe that he--I think he said that Hal had been having some words with Tony, not him. I think that's what he said.

The unrefuted testimony of the defendant, Ken Holt, on the other hand, shows that the plaintiff was informed of the parking problem long before the plaintiff sued for past due rent (See Transcript Page 79, Lines 19 through 28; and Pages 88, 91, 112, 113, 117). The mere act of informing the plaintiff of the parking problem is not material to a decision in this matter by this Honorable Court, but it has material

affected the Judgment of the lower Court. It is true that the defendant's really had no parking problem and that defendant's real problem was economical rather than physical. In Exhibit 6, Page 2, the defendant informed the plaintiffs that one reason he desired to renegotiate the Lease/Purchase Agreement was because of the parking problem which was "plaguing them." Said Exhibit was offered without objection and states in considerable detail numerous factors which the defendants were concerned with, including the parking problem and cannot be ignored by the lower Court.

In Finding of Fact Number 13, the lower Court ambiguously found that the plaintiffs had never misrepresented anything to the defendants and that the defendant was aware of the property he was leasing, and the parking arrangement. The defendant submits to this Court that at no time did he represent on cross-examination or direct-examination that the plaintiff had never misrepresented anything to him. The only testimony upon which the Court could rely for such a finding, is found beginning at Line 29 on Page 94 through Line 11 on Page 95. Mr. Holt, in response to a rather meaningless and ambiguous question, merely stated that Mr. Desbouillons had been fair with him and he inspected the property prior to the time the Lease was signed. This testimony (Transcript Page 95 and 96) cannot possibly support the finding that the plaintiffs had never misrepresented anything to the defendant, in light of Exhibit 1, which included the representation by the plaintiff that he owned the property described in the Lease, and which he had pointed out to Ken Holt as the joint parking area (Transcript Page 42, Line 14 through 21). In addition, in light of the numerous witnesses who testified that the lessee of the adjoining property was

going to install a fence so that Mr. Holt could no longer use the parking area; and in light of the testimony of Mr. Desbouillons on Page 21, Lines 25 through 27, stating that the parking around the building at 20th and Washington was very minimal, the finding of the Court that the defendant was aware of the parking arrangement becomes meaningless.

In summary, it becomes patently obvious that the judicial reformation of the agreement between the plaintiff and the defendant to lease real property in Ogden is based upon such erroneous and unfounded Findings of Fact as to make the Judgment appear to be the product of chance. There is no question that each and every material witness for the plaintiffs and the defendants testified that the lease agreement was entered into by both parties after negotiations and reliance upon representations that the parking, which was vital to defendant's business, was available to the northwest of the main building (Transcript Page 116 Line 9 through 13). The plaintiff admitted that he informed the defendant that he had given consideration for the parking area, and that he had in fact described the parking area to the defendant as the same later included by plaintiff's attorney in Exhibit 1, as part of the leased premises. Without pleading for reformation, and without establishing that the lease was ambiguous on its face, the court allowed objectionable evidence to be admitted, and it relied upon the unsworn statement of plaintiff's attorney respecting a "scribblers" error.

There is no question from the testimony that the defendant leased property from the plaintiff which was to have included the parking area. There is no question that said area did not only not belong to the plaintiffs, but the plaintiff's had absolutely no right with respect to said property upon which the defendants could rely in the enforcement of their

agreement. The result of the Courts Finding and Judgment is unconscionable since there was apparently never a meeting of the minds between the plaintiff and the defendant with respect to the parking area; and if there was a mistake as to the parking area, the mistake was unilateral and made by the plaintiff and his counsel.

The defendant knew the area to be used for parking, and knew that the same was part of that which he had bargained for, for the plaintiff described it in the Lease. The plaintiff knew the area which was to be used for parking and represented that it was part of the property bargained for. For the plaintiff to be allowed to reform the Lease and totally exclude the area reserved for parking, negates the entire agreement and renders it voidable.

POINT II

A MISREPRESENTATION OF A MATERIAL FACT, IF ACTED UPON BY ONE PARTY TO HIS DETRIMENT, WILL CONSTITUTE SUFFICIENT GROUND FOR RECISSION AND CANCELLATION OF CONTRACT IN EQUITY BECAUSE THERE WAS NO MUTUAL ASSENT TO ALL THE TERMS OF THE CONTRACT--NO MEETING OF THE MINDS--HENCE, NO VALID CONTRACT CAN BE CREATED.

The record shows that the plaintiff represented ownership of what he did not own and could not deliver, thereby breaching Lessor's implied covenant of quiet enjoyment (See Exhibit 1). This representation was material because parking was vital to the conduct of the defendant's business, and the defendants relied upon the misrepresentation. See Transcript Page 42, Lines 9 through 21.

The holder of the paramount legal title subsequently asserted control, thereby depriving defendants of the use of the parking. The exercise of this control constituted constructive eviction of defendants from the premises demised. (See Transcript Page 1).

This mistake, being unilateral in nature, is ground for rescission, not reformation, as the lower Court has done, the reason being that there was never a mutual assent to all the terms of the contract--no meeting of the minds--and the Court cannot negotiate a contract for the parties different than they themselves bargained for. 17 Am Jur 2d Section 242, Pg. 627. Contracts.

Furthermore, the mistake has been established by the testimony of Plaintiff, which fact also requires rescission.

In this case, the Lease was clear and unambiguous. Lessor/Plaintiff claimed to be the owner of the property as set forth in the Lease executed by all parties. It was represented by the plaintiffs that part of the leased premises behind the Cedars Lounge was to used by the defendants to operate their business. Transcript Page 42, Lines 14 through 21, cross-examination by Mr. Rothey:

Q: Mr. Desbouillons, did you in fact, represent to Mr. Holt that parking was available for the building situated at 20th and Washington behind the Cedars?

A: Yes.

Q: And isn't it a fact that the parking area you pointed out physically to Mr. Holt is described in the first legal description of paragraph 1 of the lease?

A: Yes

Plaintiff was also aware that parking was a material factor in the negotiations. Transcript Page 42, Line 4 through 13, cross-examination of plaintiff by Mr. Rothey:

Q: As I understand your testimony you state on the basis of the representations you made to Mr. Holt and his associates concerning this parking that that was an integral part of Mr. Holt's decision with respect to this building; is this correct?

A: I don't know whether it was an integral part. It was a part of his perusal of the property.

Q: Was he concerned about the parking?

A: I don't know whether concern is the word. He ~~considered~~

Transcript Page 21, Line 9 through 15, Direct by Mr. Vlahos.

Q: Was there ever a discussion concerning parking, Mr. Desbouillons?

A: Yes

Q: Do you recall when and where this conversation took place?

A: It was during the times that Ken was checking the property and it was part of his overall decision.

In addition to plaintiff's mistaken representation of parking, his attorney has clearly stated to the court in the Transcript Page 62, Lines 25 and 26 that,

"...It's a scrivener's error, and I take full responsibility for the error, ..."

It is established from the record that both plaintiff and his attorney were mistaken in representations made to defendant regarding the parking.

It is also established from testimony that parking was absolutely necessary to defendant and that he intended to lease the parking. Transcript Page 71, Lines 2 through 28.

A: Well, Mr. Desbouillons, and I, and Hal Stonebaker, and I think Dave was present. We discussed the parking lot. He mentioned that he had blacktopped the whole parking lot.

Q: Did he mention that you had those privileges in connection with anyone else?

A: Yes, he did. He said, "Now is this a joint parking lot," and he says, "Tony uses those parking lots right adjacent and close to his building, and you have the rest of the back of the parking lot."

Q: And I take it you were present this morning; were you not, during the testimony of Mr. Desbouillons?

A: Yes

Q: Do you recall the question directed to him by his counsel where his counsel asked him whether there was sufficient parking around the building on 20th and Washington without the parking spaces you're describing? Do you remember that question?

A: (nods head up and down)

Q: Do you remember Mr. Desbouillons' answer?

A: He mentioned that there wasn't.

Q: And do you agree or disagree?

A: I agree.

Q: Was parking necessary for the operation of your business there Mr. Holt?

A: It's vitally important, and it's an absolute necessity.

Q: Was it necessary for you to have the parking described by Mr. Desbouillons in order to operate the Ogden store property.

A: I had to have that parking. It was absolutely necessary. And then when I run into that parking problem, that really upset me. I just didn't know which way to go or which way to turn. I lost many sleepless nights, and each time that I contacted Des, or Mr. Desbouillons, on the telephone I explained to him about the parking problem, and he was aware of it.

The parking was an "absolute necessity" according to defendant's testimony. Plaintiff, Mr. Desbouillons, testifies that parking was part of defendant's "overall decision," (Transcript Page 21, Lines 9 through 15; and Transcript Page 42, Lines 4 through 13), and that parking was considered. Both have been previously cited.

The record clearly indicates that plaintiff and his attorney misrepresented a material fact to defendant regarding availability of parking that plaintiff did not own and did not control. It is of no importance whether the misrepresentation was deliberate or innocent, since defendant relied upon it and executed the lease.

The majority opinion in the United States regarding contractual mistake is reflected in the case of Langley v. Irons Land and Development Co. 114 So 769 (Fla. 1927) and is to the effect that innocent mis-

ground for rescission and cancellation in equity because the
minds ever occurred. The Langley Court said: Quoting from 9 Cal.
Contracts P 1167 §18

"Where a contract in writing is executed by only one of the parties, under a mistake as to a fact which is of the essence of the contract, the mistake constitutes a ground for a court of equity to rescind and cancel the apparent contract as written and to place the parties in statu quo, but it does not constitute a ground for reformation, the reason being that by the mistake of one of the parties, there was no mutual assent to all the terms of the contract--no meeting of the minds--and hence there is no prior contract to which the writing may be made to conform. As stated by an eminent text-writer: A mistake on one side may be ground for rescinding a contract, or for refusing to enforce its specific performance; but it can not be a ground for altering its terms. Where such a state of facts exists, and the mistaken party is seeking reformation of a written instrument, the court at the instance of the other party, will treat the case as though no writing has ever existed and will restore the parties to their original positions."

Further on, the Court went on to cite Black on Rescission and Cancellation, p. 385 § 140 says:

"Equity will grant relief, by way of rescission or cancellation, from a contract or conveyance based upon a substantial misunderstanding of the parties as to the subject matter of the contract, though the mistake was entirely innocent on both sides and there was no fraud or misrepresentation."

And further,

"So, in a sale of real estate, if one party believes he is buying a particular piece of property while the other thinks he is selling another piece, there is no meeting of minds so as to constitute a valid contract."

In Sutton v Cast-Crete Corporation of Florida 197 So. 2d 556 (1967) it was clearly set forth that a mistake or misrepresentation of material facts, if acted upon by the other party to his detriment, constitutes a sufficient ground for rescission and cancellation in equity.

Citing Langley v. Irons Land & Development Co., (supra) the Sutton Court stated:

"The leading case in Florida on rescission of contracts because of misrepresentation of fact, whether innocent or otherwise, is Langley v. Irons Land & Development Co., 1927, 94 Fla. 1010 114 So. 769, wherein Justice Buford made an exhaustive exposition of the law, quoting from Ruling Case Law, C. J., Black on Rescission and Cancellation, and other authorities. The holding in said opinion, most closely applicable to the facts here, is as follows (text 114 So. 771):

"Innocent Misrepresentation of Facts: According to the weight of authority, misrepresentation of material facts, although innocently made, if acted on by the other party to his detriment, will constitute a sufficient ground for rescission and cancellation in equity. The real inquiry is not whether the party making the representations knew it to be false, but whether the other party believed it to be true and was misled by it in making the contract; and, whether the misrepresentation is made innocently or knowingly, the effect is the same. It is as conclusive a ground of relief in equity as a willful and false assertion, for it operates as a surprise and imposition on the other party; and in such case the party must be held to his representations."

Another case in point is International Harvester Cr. Corp. v East Coast Truck 387 F. Supp. 820 (Fla. 1974) citing Langley v. Sutton. The weight of authority clearly directs a Judgment of rescission for an award of damages to the defendant for expenses incurred in moving in and out of the premises because of the unilateral mistake of the plaintiff representing that he owned or had an interest which he could demise.

POINT III

THE COURT ERRED IN ALLOWING PLAINTIFF TO ESTABLISH A MISTAKE BY INADMISSIBLE PAROL EVIDENCE AND EXTRINSIVE EVIDENCE FOR THE PURPOSE OF REFORMING THE AGREEMENT, THEREBY EXCLUDING PROPERTY DESCRIBED IN THE LEASE AND REPRESENTED BY BOTH PARTIES TO BE PART OF THE PROPERTY BARGAINED FOR.

Utah Code Annotated Section 78-25-16 (1953) provides that

no evidence will be admitted except by instrument other than the writing itself, except cases.

In this case, both plaintiff and defendant testified that they negotiated for the lease of certain real property and improvements described variously for the purpose of this Brief, as Parcels A, B, and C: Parcel A was the real property situated on the corner of 20th and Washington Blvd., and was not included in the final Lease prepared by the plaintiff's attorney; Parcel B was an unimproved lot to the west of Parcel A, which at the time, was burdened by a condemned house, covered with weeds, and separated from Parcel A by a fence; Parcel C was an improved parking lot to the north of Parcel A, but situated to the rear of a business known as the Cedars Lounge.

When the plaintiff's attorney prepared the written lease, he included a legal description of Parcels B and C, along with the representation that the plaintiff was the owner of said property. There is no ambiguity in the legal description of Parcel B or C, but the court allowed the plaintiff to testify, over the defendants objection, that the legal description of Parcel C was in error and that the only descriptions he intended to include were the descriptions of Parcels A and B. Further, at page 62 of the reporter's Transcript, plaintiffs' counsel attempted to establish, by his own unsworn testimony, that the inclusion of Parcel C in the lease was his own error; and in doing so, counsel for plaintiff relied upon Exhibit 16, which plaintiffs' counsel had prepared in an unrelated matter, to establish the error. This Exhibit was admitted by the lower court over defendants' objection, both as materiality and parol evidence.

Both plaintiff and defendant testified, (op. cit. pp 5 and 6) that Parcel C was intended by the plaintiff to become the parking area be used by the defendant and that said parking was vital to the business of the defendant.

In light of these circumstances, the Court not only erred in allowing the testimony of the plaintiff to vary the terms agreed upon by both the plaintiff and defendant, but totally misapprehended the agreement of the parties when it proceeded to reform the agreement to include only Parcel A and B to the total exclusion of Parcel C.

It is not Defendant/Appellants' contention that Parcel A, which was clearly intended by the parties to be included as part of the lease, could not otherwise be included by the court in a reformed agreement without regard to parol evidence. Plaintiff accepted Lease payments on monthly basis. It is the defendants contention, however, that to allow extrinsic evidence such as Exhibit 16 to totally exclude a parcel of ground, which both parties admit was part of the thing bargained for, does in fact violate the parol evidence rule. The general rule is found in 49 Am Jur. 2d, Section 145, to the effect that parol evidence is admissible to vary or contradict the terms of a written lease except as it is shown that because of fraud, accident, or mistake in writing, it fails to express the actual agreement of the parties citing various cases including Farr v. Wasatch Chemical Company, 105 Utah 272, 143, Pacific 2d.281, 151, ALR 275. In the case of Last Chance Ranch Co. in the Supreme Court of Utah, 25 P. 2d 952 (1953), the Supreme Court of the State of Utah, in circumstances analogous to the present case, stated as follows:

"The application of such doctrine does not help the respondent, for on page 1169 the author further says that, where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete upon its face, the evidence is not admissible; for in such case, says the author, it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat the terms of a written instrument. Many cases are cited in support thereof. The proposition is well put in 4 Jones' Commentaries on Evidence (2d Ed.) 2854, that, "if the consideration stated appears as a clear and unambiguous statement of part of the agreement, representing an actual contractual term and something more than a mere formal requisite, such a term of the contract must be regarded in the same light as any other material term of the contract and extrinsic evidence to vary or contradict it is inadmissible: and that "a party cannot, under the guise of varying the consideration, ingraft new terms and covenants upon the writing by extrinsic evidence." To that effect is also Page on the Law of Contracts, vol. 4 § 2164."

In addition to the support of the cases cited above, it should be recalled that the Lease in this case was prepared entirely by plaintiff/respondent. The rule is that uncertainties in the construction of a Lease will be resolved strictly against the one who prepared the document. See Bell v. Minor 88 Cal. App. 2d 879, 199 Pacific 2d 718. Under this rule, taken in connection with the parol evidence rule, the only reasonable explanation for the presence in the Lease of the grant of the exclusive rights to Parcel C, is that such parcel was bargained for between the plaintiff and the defendant as a necessary part of their transaction. Plaintiff/Respondent cannot now be allowed to resolve the problem through parol evidence which totally excluded the parcel bargained for.

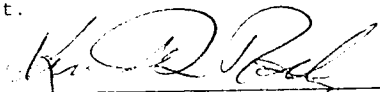
CONCLUSION

In this case, the plaintiff is bound by law to know what property he controlled and what property he had a right to lease. He should have

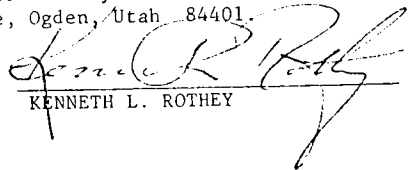
known that he did not have parking facilities behind the Cedars as he represented, and he should not have shown the defendant a parcel of ground and then said "that is your parking," unless he had the unqualified right to the quiet enjoyment of the ground he professed to control.

Plaintiff misled defendant into doing something defendant would not otherwise have done, and that is purely and simply grounds for rescission not reformation. The net effect of the trial Court's Judgment allowing reformation is to permit the plaintiff to misrepresent a material fact concerning the availability of parking which plaintiff bargained for; and then to deny the defendant the benefit of that bargain, and ignore plaintiff's misrepresentation.

This Honorable Court, in light of these facts, should reverse the Judgment of the lower Court and enter a Judgment rescinding the agreement between plaintiff and defendant; and for damages in favor of the defendant for such amount as was proven at trial to have been incurred in reliance upon the misrepresented fact.


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Mailed one copy of the Brief of Appellant to Mr. Pete N. Vlahos Attorney for Plaintiff/Respondents, this 8th day of November, 1977, at Legal Forum Building 2447 Kiesel Avenue, Ogden, Utah 84401.


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