1978

Petty Motor Lease, Inc. v. Clarence L. Jolley : Brief of Plaintiff-Cross Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PETTY MOTOR LEASE, INC.,)

Plaintiff-Respondent,)

vs.) Case No. 15524

CLARENCE L. JOLLEY,)

Defendant-Appellant.)

BRIEF OF PLAINTIFF-CROSS APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE ERNEST F. BALDWIN, JUDGE

Wayne G. Petty, of
MOYLE & DRAPER
600 Deseret Plaza
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

Lorin N. Pace
Randall Bunnell
431 South Third East, B-1
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Cases Cited

Other Authorities Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

PETTY MOTOR LEASE, INC.,)
Plaintiff-Respondent,)
vs.) Case No. 15524
CLARENCE L. JOLLEY,)
Defendant-Appellant.)

BRIEF OF PLAINTIFF-CROSS APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Petty Motor Lease, Inc. ("plaintiff") brought an action against Clarence L. Jolley ("defendant"), claiming amounts, including attorney's fees, due under three lease agreements dated June 24, 1971. Plaintiff also asserted amounts due under another agreement dated June 24, 1971, for the purchase of the three leased vehicles and for defendant's failure to make certain restricted stock free trading as required by the agreement. Defendant counterclaimed, asserting entitlement to the three vehicles which are the subject of the three lease agreements.

DISPOSITION IN THE LOWER COURT

Judgment was awarded by the Third District Court to Petty Motor Lease, Inc. in the amount of $10,608.55, and defendant's counterclaim was dismissed, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent and cross appellant Petty Motor Lease, Inc. prays that the judgment be affirmed in all respects, except that plaintiff should be awarded its reasonable attorney's fees incurred in prosecuting its action against defendant.

STATEMENT OF FACTS

Plaintiff does not disagree with the statement of facts as set forth in appellant's brief, except for appellant's characterization, analysis or criticism of the evidence. However, there are additional facts which are not stated in appellant's brief, but are set forth below. In addition, this statement of facts includes a summary of the facts upon which plaintiff relies for its claim of attorney's fees.

At trial, the three lease agreements were introduced as Exhibits 1-P(A), 1-P(B) and 1-P(C). Paragraph 8 of the leases provides in material part as follows:

> User [defendant] agrees to pay all costs and expenses, including reasonable attorney's fees, incurred by Owner [plaintiff] in enforcement of its rights under this agreement . . . .

The agreement regarding the purchase of the three leased vehicles and the Telegift International stock was introduced as Exhibit 1-P. The agreement reflects that

Clarence Jolley sold, assigned and transferred to Petty Motor Lease, Inc. 100,000 shares of stock of Telegift International. The agreement provides:

> This stock is investment stock which Clarence L. Jolley guarantees to have made free-trading stock on or before the expiration date of the three leases referred to above, under the terms and conditions of the Securities Act of 1933-34, as amended.

The expiration date of the three leases was June 23, 1972.

The stock certificates (Exs. 2-P and 3-P) contain a restrictive legend which reads as follows:

> THESE SECURITIES MAY NOT BE SOLD, TRANSFERRED, PLEDGED OR HYPOTHECATED UNLESS THEY HAVE FIRST BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNLESS COMPANY COUNSEL HAS GIVEN AN OPINION THAT REGISTRATION UNDER SAID ACT IS NOT REQUIRED.

Neuman C. Petty, president of Petty Motor Lease, Inc., testified that in the fall of 1972, he called Clarence Jolley on the telephone at least twice. Specifically, Mr. Petty related his conversations with the defendant:

A Well, I told him that it was his responsibility to get the stock freed up under the terms of our agreement and nothing had been done and I wanted him to do it or to pay the money. He said he would work on it and then nothing happened and it was relatively the same with both conversations.

Q How long after the first was the second conversation?

A Oh, I don't know. Some months. Three or four months maybe five. I don't know exactly.

Q Did you have any subsequent conversation with Mr. Jolley?

A Well, yes. I had another conversation a couple of years later, but maybe one year later with Mr. Jolley much to the same effect.

Q Would you tell the court that conversation?

A Well, I was still wanting something done to either collect the money or free up the stock and get it sold and see how that would be at the time. When I first called him the stock was trading actively. I don't know how actively but, it was quoted and I wanted to get it turned into money each time I called and that was the purpose of my call. (Tr.13.)

Because of defendant's failure to free up the stock, Mr. Petty testified that he proceeded to make inquiry as to whether the stock could become free trading. Mr. Petty testified that he contacted counsel for Telegift International and Richard Bird with respect to the question of freeing up the stock. (Tr.14-15.) These efforts were in May or June of 1973, approximately one year after defendant was required under the terms of the agreement to make the stock free trading. Richard L. Bird, an attorney in Salt Lake City, testified that he was contacted by Neuman C. Petty in 1973 and that between June and September, he reviewed the question of freeing up the stock. No objection was made to Mr. Bird's testimony.

Thomas R. Blonquist, who was corporate counsel for Telegift International and its successors, testified regarding Mr. Jolley's relationship to the corporation (Tr.36-39

and described the investment certificate signed by Mr. Jolley:

Q Mr. Blonquist, were there any other documents in your files reflecting any restrictions on Mr. Jolley's stock?

A I think the documents that would indicate and describe the restrictions from a securities standpoint would be the proxy statement indicating his position by way of percentage stock ownership and the investment certificate that he signed wherein he agreed to take the stock for investment purposes and to not distribute them or resell them or dispose of them without first complying with the Securities Act of 1933.

Q Or getting an opinion from counsel of the company.

A That is correct and this investment certificate specifically outlines the legend that he agreed could be placed upon his shares.

Q And that is--

A On Page 2.

Q Is that the legend that appears on the certificates 850 and 851.

A In substance and effect that is the same thing. The only thing that the agreement specifically adds is that the parties to the transaction acknowledge that the shares being issued to Mr. Jolley were issued pursuant to Section 4(2) (sic) of the Securities Act of 1933 which of course identified this as a private transaction as opposed to a no-sale rule under 133 or under Section 4(1) (sic) or other applicable exemptions that could be claimed to make the shares free trading as opposed to investment. (Tr.40-41.)

Mr. Blonquist also testified regarding conversations in 1973 with Neuman C. Petty, and his opinion as to whether the stock could be made freely tradeable without

registration under the Securities Act of 1933. In response to the question of what he told Mr. Petty, Mr. Blonquist testified:

> A I told him that in my view as company counsel there were two basic objections to any disposition by Mr. Jolley of the shares and that was one, that he was a controlling person in the corporation, and two, that he had signed an investment agreement agreeing not to sell, hypothecate, distribute, pledge or do anything that would violate that investment letter and that for both of those reasons I felt that Mr. Jolley, unlike an uncontrolling stockholder, could not be in a position to institute proceedings either before the Commission or through any local court for relief.
>
> Q Now, was your opinion that, that is what you told him.
>
> A That is what I told him.
>
> Q Now, what is your opinion then and is it now what you told him at the time.
>
> A Yes, it is.
>
> Q And let me ask you this. What would be required to make those shares or what would be required before in your opinion those shares could be made freely trading shares.
>
> A Well, the only thing that I felt would do the job would be to register the shares with the Commission for the reasons I have mentioned those restrictions limiting Mr. Jolley's activities as they limit any officer, director or controlling stockholder of any publicly held company and the agreement specifically states that, you know, he can register the shares so that would be the best way of doing it. (Tr.43-44.)

To this point, counsel for Mr. Jolley had not interposed any objection to Mr. Blonquist's testimony. Counsel for Mr.

Jolley objected to subsequent questions asked of Mr. Blonquist.

Defendant Clarence Jolley was asked regarding any requests of an opinion by company counsel:

Q Did you ever request an opinion of company counsel regarding transferability or free-trading status of those shares?

A I didn't. (Tr.59-60.)

In view of the evidence, the trial court made the following findings of fact:

> 6. By the agreement, Exhibit 1, defendant agreed to make the shares reflected by the certificates in Telegift International, Inc. freely tradeable on or before June 23, 1972, whereupon plaintiff would be entitled to sell the stock and apply the proceeds of the sale to the rental due under the terms of the lease agreement, and the balance toward the purchase price of the vehicles as provided in the agreement. The agreement provides that plaintiff is entitled to the excess of the proceeds of such sale, or if the stock provided less than the amount required to pay the leases and the purchase price, defendant would pay the balance up to $10,000, plus sales tax and interest.
>
> 7. The stock certificates each contain the following legends in red type: "Investment stock" and "These securities may not be sold, transferred, pledged or hypothecated unless they have first been registered under the Securities Act of 1933 or unless Company counsel has given an opinion that registration under said Act is not required."
>
> 8. On March 25, 1971, defendant signed an investment certificate whereby he agreed not to sell any stock of Telegift International, Inc. unless such

> stock was registered under the Securities Act of 1933 or unless company counsel gave an opinion that registration under said Act is not required.
>
> 9. Defendant did not register the 100,000 shares of stock, did not receive an opinion from company counsel that registration was not required, and did not otherwise make the stock freely tradeable as required by the agreement, Exhibit 1. (Tr.38-39.)

ARGUMENT

POINT I. THE TRIAL COURT'S FINDINGS OF FACT TO WHICH APPELLANT OBJECTS ARE CORRECT AND PROPER AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

This Court has reiterated many times the various rules of appellate review. In an action at law the Supreme Court does not reverse on issues of fact where the trial court's findings are supported by the evidence or the lack thereof. Martin v. Martin, 29 U.2d 413, 510 P.2d 1102; Branch v. Western Factors, Inc., 28 U.2d 361, 502 P.2d 570 (1972). In Phillips Manufacturing Co. v. Putnam, 29 U.2d 69, 504 P.2d 1376 (1973), this Court stated the rules of appellate review as follows:

> [T]his court does not reverse and direct an essential affirmative finding unless the evidence so compels, that is, that it is such that all reasonable minds acting fairly thereon must necessarily so find. Conversely, if there is a reasonable basis in the evidence or from the lack of evidence from which the court acting fairly and reasonably thereon could remain unconvinced, its refusal to so find must be sustained. Moreover, in applying the tests just stated

> to the evidence, we are obliged to view the evidence and reasonable inferences that can be drawn therefrom in the light favorable to the findings and judgment. (Footnotes omitted.)

Where the evidence justifies the ruling of the trial court, the appellate court does not reverse the judgment unless there are errors involved which require reversal as a matter of law. Parker v. Telegift International, Inc., 29 U.2d 87, 505 P.2d 301 (1973).

In Nance v. City of Provo, 29 U.2d 340, 509 P.2d 365 (1973), this Court stated:

> Members of an appellate court do not have the opportunity to hear the witnesses and see their demeanor in court and on the witness stand and are not in as good a position to weigh the testimony as is the trial judge or jury. It is our duty on appeal to affirm the trial court in its findings of fact where there is competent evidence to support those findings. (Footnote omitted.)

There was substantial evidence to support the findings, conclusions and judgment of the trial court. It was the testimony of Neuman C. Petty that on several occasions he informed defendant that plaintiff was looking to defendant to perform his obligations under the contract. Defendant contradicted this testimony, but the trial court found in favor of plaintiff, giving the greater weight to the testimony of plaintiff's president. It cannot be said that this is not substantial evidence.

In his brief on appeal, appellant erroneously refers to "weight of the evidence" and "uncorroborated

testimony" as elements of the test. The test on appellate review is a substantial evidence test; the trier of fact considers the weight of the evidence and the credibility of the witnesses.

There is a further rule of appellate review stated in First Western Fidelity v. Gibbons & Reed Co., 27 U.2d 1, 492 P.2d 132 (1971), which is applicable in this case before the Court. In the First Western case, this Court stated:

> In addition to and supplementing the usual rule of review on appeal, that we survey the evidence in the light favorable to the trial court's findings, this further comment is applicable here. For the appellant's position is that the trial court erred in refusing to make certain findings essential to its right to recover, and insists that the evidence compel such findings, it is obliged to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find. Conversely, if there is any reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the finding should not be overturned. (Footnote omitted.)

Defendant has not and cannot make the showing required by the First Western case. The best defendant can assert is that the evidence is controverted, which is not an adequate showing for reversal of the trial court's judgment. See Super Tire Market, Inc. v. Rollins, 18 U.2d 122, 417

P.2d 132 (1966). The cases cited above refer to uncontradicted testimony and evidence so strong that all reasonable minds would so find as necessary to compel a court to make certain findings essential to a party's right to recover; the evidence is not uncontradicted and is not of the weight, in defendant's favor, that the trial court should be compelled to find other than it did.

It is not inconsistent with the trial court's findings, conclusions and judgment that plaintiff, when defendant had failed to perform, attempted to have the restrictions upon the stock removed and made several inquiries with respect to making the stock free trading. Certainly defendant should not have a basis to object to efforts on the part of plaintiff to remove the restriction on the stock when defendant had failed to do so. Efforts by a damaged party to end or mitigate his damages cannot be construed, without more, as inconsistent with the damaged party's right to require performance of the other party as required by the contract, and for damages for such other party's failure to perform. See Bjork v. April Industries, Inc., infra.

Defendant is attempting to have this Court substitute its findings for those of the trial court, or perhaps even more accurately, defendant attempts to have this Court

substitute the facts as defendant would have them for the trial court's determination of the facts. Defendant has not and cannot show that there was not substantial evidence to support the findings of the trial court and his attempt to substitute someone else's findings for the trial court's findings must fail.

POINT II. THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE AGAINST DEFENDANT'S CLAIMS OF ESTOPPEL AND WAIVER, AND SUCH FINDINGS AND CONCLUSIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Neuman C. Petty testified that he told defendant at least twice that plaintiff was looking to defendant to perform his obligations under the contract to make the stock free trading. Defendant's testimony was contradictory, but the trial court accepted testimony favorable to plaintiff, and that testimony constitutes substantial evidence and supports the trial court's findings and conclusions.

For this Court to reverse the trial court's findings, defendant must show "that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find." First Western Fidelity v. Gibbons & Reed Co., supra. Defendant cannot show uncontradicted evidence supporting his claim of waiver and estoppel.

Defendant asserts that plaintiff waived defendant's requirement to free up the stock within the period required

by the contract and that plaintiff took upon itself the responsibility to do so. The trial court found otherwise and the evidence is such that the trial court's findings, conclusions and judgment should be affirmed. Appellant cites plaintiff's attempts to free up the stock itself as evidence of plaintiff's waiver of defendant's obligation to free the stock. The evidence suggests otherwise. First, there is no evidence in the record that Clarence L. Jolley knew of the efforts of plaintiff to free up the stock. Without such knowledge, relied upon by defendant, there could be no estoppel, and waiver requires the relinquishment of a known right. Second, plaintiff's inquiries into freeing up the stock were made after the date defendant's performance was due. That is, plaintiff made inquiry regarding freeing up the stock only after the date had passed when the defendant had guaranteed in the agreement that the stock would be free trading.

These facts are similar to those in Bjork v. April Industries, Inc., 547 P.2d 219 (Utah, 1976), particularly with reference to waiver and plaintiff's responsibilities under the contract. This Court's opinion is quoted at length:

> The trial court found that the plaintiffs were the owners of shares validly and legally issued to them as compensation for services rendered, and that plaintiffs' shares

were the subject of the "piggyback" registration agreement which entitled plaintiffs' shares to registration when April made a public offering of its shares. April later made a public offering but declined to register plaintiffs' shares. The agreement was not honored by April in spite of numerous inquiries and suggestions that it be honored. During the period that plaintiffs were endeavoring to have April honor the registration agreement, the stock offered in the public offering rose in price substantially.

Upon these facts, the trial court held that plaintiffs did not effectively convey to April their desire to sell their shares and should have taken steps to enforce the agreement and denied recovery of damages but ordered April to deliver shares without the restriction theretofore placed on the shares.

We know of no rule of law that either requires or permits this result. Demand is not necessary where both parties have equal knowledge of the contract provision, or where the defaulting party denies the obligation. See 17 Am.Jur.2d 794, Contracts Sec. 356. Either April performed its contract (which it did not) or April breached its contract (which it did) by failing to register the shares. Plaintiffs were entitled to damages flowing from that breach, subject only to the plaintiffs' obligation to mitigate those damages, if possible. The only possible manner in which damages could have been reduced would have been a sale of the shares through the use of S.E.C. Rule 144. The application of this rule depended upon a favorable opinion by April's legal counsel which was never offered. It is not the responsibility of a party damaged by another's breach to plead with the breaching party to help the damaged party mitigate damages.

The defendant's claim of waiver is adequately controlled by our decision in Phoenix Ins. Co. v. Heath, 90 Utah 187, 61 P.2d 308.

> Waiver must be an intentional relinquishment of a known right. The facts here do not support a claim or finding of "intentional relinquishment" of the rights of the plaintiffs to have their shares registered at the time of the public offering by the defendant. (Emphasis the Court's.)

In the present case, defendant either performed his contract or breached the contract. The trial court found defendant breached the contract. The efforts of plaintiff to resolve the problem, to mitigate its own damages, is not a waiver of its rights under the agreement. See April Industries, supra. The law does not require plaintiff to make more demands of defendant than it did in this case; as stated in April Industries, supra: "Demand is not necessary where both parties have equal knowledge of the contract provision . . . ." The obligation of performance was on defendant.

The evidence is substantial in supporting the trial court's findings and against defendant's claim of waiver. Defendant has not and cannot meet the requirement of First Western Fidelity v. Gibbons & Reed Co., supra.

POINT III. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE PROPER AND ANY OBJECTION THERETO WAS WAIVED BY DEFENDANT.

Defendant made no objection to the testimony of Richard Bird. Further, defendant made no objection to the testimony of Thomas Blonquist regarding Mr. Blonquist's conversations with Neuman C. Petty, including the opinion

given to Mr. Petty that Telegift International, Inc., or its successor, would object to any attempt to free up the Jolley stock. Defendant's failure to object timely constitutes a waiver of any objection he might have had. In Child v. Child, 8 U.2d 261, 332 P.2d 981 (1958), appellant cited receipt of hearsay testimony as error. This Court stated:

> Whatever merit there may have been to this objection, the defendant is now precluded from voicing it. The testimony was elicited without objection. This constituted a waiver of the right to question its competency. And the evidence being so received could be relied upon as proof of the fact to which it related. (Citations omitted.)

Similarly, in State in the Interest of Christensen v. Christensen, 227 P.2d 760 (1951), this Court stated:

> As a further ground for reversal, the appellant contends that the court erred in admitting in evidence testimony as to matters which were not embraced within the allegations of the petition for re-hearing of the case and for modification of the court's order. Assuming that the admission of such testimony was erroneous because it was outside the allegations of the petition charging Lynn with violating the order of probation, the appellant cannot complain of that error on appeal because he had to object to the admission of such testimony at the hearing.

See Scott v. Scott, 19 U.2d 267, 430 P.2d 580 (1967). In Porcupine Reservoir Co. v. Lloyd W. Keller Corp., 15 U.2d 318, 392 P.2d 620 (1964), appellant alleged error for the trial court's refusal to separate trials for each of the three defendants. The record did not disclose any request

for separate trials nor any objection to the court's decision to try the matters in one trial. This Court held that it would not review a ground of objection not urged in the trial court.

Defendant, not objecting to the evidence at the time of trial, waived any objections which he had, and those objections cannot be raised on appeal for the first time. Rule 4 of the Rules of Evidence is consistent with the foregoing in that it requires (1) a timely objection "so stated as to make clear the specific ground of objection," and (2) that "the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding." Defendant does not meet either test since (1) there was no objection, and (2) the evidence was admissible.

The restrictive legend on the stock required either an opinion of company counsel or registration of stock under the Securities Act of 1933. Graham Dodd, not being company counsel, was not qualified to testify regarding freeing up of the stock. Counsel for plaintiff made timely objection to Mr. Dodd's testimony and the trial court properly refused to receive the testimony. Mr. Dodd's testimony was irrelevant as to freeing up the stock since he was not company counsel. The best he could do for defendant

would be to testify that the stock could be freed up; that would still leave defendant with the obligation of actually freeing up the stock by registration, opinion of company counsel, or a legal action. Mr. Dodd's testimony, and the proffer made by defendant's counsel, was irrelevant since it did not show, and was not intended to show, that defendant had performed his obligation under the contract. The issue is not the legal question of whether the stock could have been made unrestricted, but whether defendant met the requirement of making the stock free trading. The testimony was properly refused by the trial court.

Further, in light of what the proffered evidence could show, there is no basis for reversal of the trial court's findings and judgment. Rule 5 of the Rules of Evidence precludes setting aside a finding or reversing a judgment because of erroneous exclusion of evidence unless "the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding." Again, since the issue was not whether the stock could have been made free trading, but whether defendant performed his obligation to make it free trading, the proffered evidence would not have brought about a different finding.

The trial court's findings, conclusions and judgment should be affirmed.

POINT IV. PLAINTIFF WAS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES.

The three lease agreements (Exs. 1-P(A), 1-P(B) and 1-P(C)) provide in paragraph 8, in material part:

> "User [defendant] agrees to pay all costs and expenses, including reasonable attorney's fees, incurred by Owner [plaintiff] in enforcement of its rights under this agreement . . . ."

This is the type of contractual provision between parties which this Court has required, in absence of statute, for the award of attorney's fees. B & R Supply Co. v. Bringhurst, 28 U.2d 442, 503 P.2d 1216 (1972); Slim Olson, Inc. v. Winegar, 122 Utah 80, 246 P.2d 608 (1952).

The amount and reasonableness of the attorney's fees are not disputed. Defendant's answer admitted the allegations of paragraph 7 of plaintiff's complaint:

> 7. The lease agreements provide for the payment of costs and reasonable attorney's fees incurred by plaintiff in the enforcement of its rights under the lease agreements. Plaintiff has been forced to hire counsel by defendant's actions, and a reasonable fee to be awarded to plaintiff for the use and benefit of its attorney herein is the sum of $2,000.

When a party by his pleading concedes a fact, no proof is thereafter required for a finding upon the matter so confessed. Butler v. Stratton, 212 P.2d 43 (Cal.App. 1949). No further proof was necessary, and plaintiff, by

virtue of the provisions of the lease agreements, was entitled to the attorney's fee of $2,000.

The merger of the leases into a sales agreement does not preclude plaintiff's claim for attorney's fees. On the contrary, it requires the award of attorney's fees. As stated in National Surety Corp. v. Christiansen Brothers, Inc., 29 U.2d 460, 511 P.2d 731 (1973):

> [W]here parties engage in negotiations concerning a transaction, pursuant to which they enter into a written contract, it is presumed that all matters relating to the subject are merged in and constitute a complete integration of their agreement. (Footnote omitted.)

The agreement between the parties included the three lease agreements and the agreement for sale of the leased vehicles, which specifically referred to the three leases. The three leases provide for attorney's fees, and the doctrine of merger requires that the entire agreement be given effect. This requires that plaintiff be awarded its attorney's fees in this action.

CONCLUSION

The trial court's findings of fact related to defendant's performance or breach of the contract are supported by substantial evidence and should be affirmed. Similarly, the trial court's findings against defendant's claims of estoppel or waiver are supported by substantial evidence and should be affirmed.

The trial court's evidentiary rulings were proper, or any objection to such rulings were waived by defendant. Further, there is no showing that the admitted or excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Finally, the lease agreements provide for attorney's fees and the amount and reasonableness thereof were admitted by defendant. Plaintiff should be awarded its attorney's fees in the amount of $2,000, and the trial court's findings, conclusions and judgment revised accordingly.

DATED this _____ day of February, 1978.

Respectfully submitted,

MOYLE & DRAPER

By_____
Wayne G. Petty
Attorney for Plaintiff-Respondent
600 Deseret Plaza
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1978, two true and correct copies of the foregoing Brief of Plaintiff-Cross Appellant were mailed, postage prepaid, to Lorin N. Pace and Randall Bunnell, Attorneys for Appellant, 431 South Third East, B-1, Salt Lake City, Utah.

_____