

1978

## Julian Barlow, Charles Clegg, and Dixie Clegg v. Charles Keener : Brief of Respondents

Utah Supreme Court

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### Recommended Citation

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IN THE SUPREME COURT

Of The

STATE OF UTAH

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JULIAN BARLOW, CHARLES  
CLEGG, and DIXIE CLEGG,

Plaintiffs-Respondents,

vs.

CHARLES KEENER,

Defendant-Appellant.

:

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:

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Case No. 15609

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BRIEF OF RESPONDENTS

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Appeal from the Judgment of the Third District Court for Salt Lake County, the Honorable Ernest F. Baldwin, Jr., Judge, and from the Order of the Same Court, the Honorable David B. Dee, Judge, Denying Relief from Judgment.

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## Cases Cited

- Chrysler v. Chrysler, 5 Utah 2d 415, 303 P.2d 995, (1956)
- King v. Firm, 3 Utah 2d 419, 285 P.2d 1114, (1955)
- Lincoln Financial Corp. v. Ferrier, \_\_\_ Utah 2d \_\_\_, 567 P.2d 1102, (1977)
- McRae v. Jackson, \_\_\_ Utah 2d \_\_\_, 526 P.2d 1190, (1974)
- Sta-Power Industries, Inc. v. Avant, 216 S.E.2d 897, 134 Ga.App. 952, (1975)
- Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, (1953)

## Statute Cited

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

JULIAN BARLOW, CHARLES	:	
CLEGG, and DIXIE CLEGG,	:	
Plaintiffs-Respondents,	:	Case No. 15609
vs.	:	
CHARLES KEENER,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an action by a landlord to evict his tenant and to collect back rent and other damages incident to cleaning and restoring the premises, together with costs and the statutory penalty of treble damages.

DISPOSITION IN THE LOWER COURT

Upon defendant's failure personally to appear at settlement conference as ordered by the court, judgment was entered for the plaintiffs for the sum of the rent due and

court costs. The motion of defendant's attorney for relief from judgment pursuant to Rules 59 and 60 was denied.

#### RELIEF SOUGHT ON APPEAL

Plaintiffs seek dismissal of this appeal or in the alternative an affirmance of the judgment below.

#### STATEMENT OF FACTS

Plaintiff Julian Barlow is the owner of improved real estate located at 758 Browning Avenue, Salt Lake City, Utah. Plaintiffs Charles Clegg and Dixie Clegg are the agents of Mr. Barlow for purposes of leasing said property. On or about December 1, 1975, plaintiffs leased the premises to the defendant, Charles Keener, on a month-to-month basis for an agreed rental of \$85.00 per month to be paid in advance, along with an initial \$25.00 cleaning deposit.

The defendant and his family resided in the premises from December 1, 1975 until at least January 14, 1976 when the complaint was filed in this action, but refused to pay the cleaning deposit and the rentals due in December, 1975 and in January, 1976. Plaintiffs duly noticed defendant on January 5, 1976 to pay the rent or to surrender the premises which defendant failed and refused to do. The plaintiffs then filed the complaint in this

action (Record, pp. 2, 3).

Defendant filed an answer dated January 22, 1976 prepared by his attorney Richard T. Black (Record, p. 5). On or before August 23, 1977 Jonathan H. King assumed the defense of the action and on said date moved to be allowed to amend the answer because "the above-entitled matter cannot be adequately defended in the absence of amending the answer." In the alternative, Mr. King moved to be allowed to withdraw as counsel should permission to amend be disallowed, again because "the above-entitled matter cannot be adequately defended by counsel unless leave to file an amended answer is granted." (Record, p. 16).

Leave to amend was granted and the defendant's attorney added, among other things, the fourth defense appearing in the amended answer (Record, pp. 14, 15). On November 8, 1977 Judge Ernest F. Baldwin, Jr. ordered that the parties and their counsel appear at a pretrial settlement conference to be held November 21, 1977 (Record, p. 20). The defendant failed to personally appear on that date and his counsel admitted that his client had not maintained contact with him and that there was no prospect that the defendant would appear for trial (Record, p. 23).

Plaintiff moved for judgment against defendant which was granted by the court for two month's rent and for costs of \$32.60 (Record, pp. 23, 24). Defendant's attorney subsequently moved for relief from judgment which was denied by Judge David B. Dee on December 30, 1977 (Record, p. 28).

Defendant's attorney then prosecuted this appeal primarily to determine the narrow issues raised by the fourth defense of his amended complaint: whether a warranty of habitability is implied in a leasehold and if so, whether the same excuses defendant from paying rent.

#### POINT I

THIS APPEAL IS MOOT AND SHOULD BE DISMISSED WHERE THERE IS NO BASIS IN UTAH LAW THAT AN IMPLIED WARRANTY OF HABITABILITY IS A DEFENSE TO NON-PAYMENT OF RENT

In McRae v. Jackson, \_\_\_ Utah 2d \_\_\_, 526 P.2d 1190, (1974), minors sued by their guardians to be allowed to obtain drivers licenses. The trial court held for the minors. Defendant appealed, but in the interim the plaintiffs obtained their licenses. This court, in holding the case to be moot and in dismissing the appeal, said:

Although no Utah case precisely in point has been found, the general principle, to which we adhere, is stated in 5 Am.Jur. 2d, Appeal and Error, §761: "The function of appellate courts like that of courts generally,

is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or cases which have become moot or academic are not a proper subject to review." Id. at 1191.

As will be seen below, there is absolutely no controversy remaining in this appeal prosecuted by the attorney for defendant. The defendant long ago abandoned the defense of the case and his counsel has had no contact with him for more than a year. Furthermore, there is absolutely no basis in the law of Utah or the facts of this case to protract these matters further. Two judges below have already passed upon the question of warranty and found it totally without merit.

Here, there is no actual controversy between the litigants at this time. The plaintiffs have no practical interest in any disposition that could now be made by this court. This appeal presents simply an abstract question of law which does not rest upon existing facts or rights. Therefore, this court must, in the exercise of its discretion, dismiss the appeal on the simple ground that the case has become moot and is not of sufficient public interest, regardless of whether the trial court erred or not. Id. at 1192

The court in McRae restricted "public interest" issues to those involving "extraordinary circumstances" coupled with a class action, a constitutional interpretation question, the validity or construction of a statute



and the propriety of administrative rulings. This case deals with patently ordinary circumstances and does not involve any of those questions.

Appellant's brief is almost totally devoted to arguing that a warranty of habitability should be part of a lease and that a breach of that warranty should be a defense to non-payment of rent by the tenant. The authorities cited by appellant's attorney, however, are not the law of Utah. This court has not authorized such a warranty or defense, nor has the legislature of this state. The Appellant recognizes at page 4 of his brief that the common law does not imply a warranty of habitability. By statutory mandate, the courts of Utah are to apply the common law:

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adopted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all the courts of this state. 68-3-1, U.C.A.

At least one case decided by this court has implied that the common law rule not recognizing a warranty of habitability is perfectly consistent with the physical conditions of the state and necessities of the people.

In Lincoln Financial Corp. v. Ferrier, \_\_\_ Utah 21\_\_

367 P.2d 1102, (1977), a lessor sued to evict a month-to-month lessee after she was duly served with notice. The tenant resisted by claiming the landlord was only evicting her for retaliatory purposes because she had attempted "to obtain better conditions for herself and other tenants." This court, however, decided the case on the basis of the rights guaranteed to property holders by the Utah Constitution:

We are also concerned with the constitutional rights of the landlord. Our Utah Constitution, Article 1, Section 1 states: "All men have the inherent and inalienable right . . . to acquire, possess, and protect property . . . " . . . The question that must be confronted and answered is: If the landlord cannot enforce the terms of his lease and proceed under the express provisions of our statutory law to reclaim his property, what has happened to his property rights? Id. at 1104, 1105

This court affirmed an award of treble damages to the landlord. By implication, a recognition of an implied warranty of habitability would deprive a landlord of his property rights since he could not evict a tenant who asserted that defense even if duly noticed.

Another Utah case has rejected the attendant proposition posed by defendant's attorney that covenants in a leasehold are mutually dependent. In King v. Firm, 3 Utah 2d 419, 285 P.2d 1114, (1955) a tenant claimed to

be able to offset a debt owed to him by his landlord against the rent. In rejecting that argument, the court cited with approval the following passage from Williston on Contracts:

\*\*\*Where rent is due under a lease, the tenant must pay the rent even though he has been obligated to spend money on repairs which the landlord covenanted to make . . . it cannot be said that the tenant has paid or tendered the rent due if he had deducted even a valid cross-claim. Id. at 1117

The clear implication of this language is that a tenant may not unilaterally decide to decrease his rent in order to improve the premises or because of some other claim between the parties.

Thus, as a matter of law, plaintiffs are entitled to judgment in this case. The only possible dispute--the condition of the premises--is irrelevant given the law of Utah which does not recognize the implied warranty of habitability as a defense to an action for rent. Defendant has not contested the fact that the rent is due and owing and in numerous places in his pleadings and brief has recognized that his case is indefensible without the implied warranty of habitability. The default judgment entered below should thus be affirmed or this appeal dismissed where no question remains to be resolved. The appeal is moot.

## POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, AND JUDGMENT FOR PLAINTIFFS WAS PROPERLY ENTERED WHERE DEFENDANT HAS FAILED TO MAINTAIN CONTACT WITH HIS COUNSEL AND HAS ABANDONED HIS DEFENSE

Defendant's counsel has admitted to having no contact with his client since at least May, 1977 (Appellant's brief, p. 2), and that no prospect exists that defendant would personally appear at trial. As a result of his willful absence, the defendant has failed to obey the trial court's order to appear for settlement conference. The defendant was warned by that order that sanctions for non-appearance were a distinct possibility:

IF COUNSEL FAIL TO APPEAR OR IF SETTLEMENT EFFORTS ARE THWARTED BY THE NON-APPEARANCE OF A PARTY, ATTORNEYS FEES MAY BE ALLOWED TO OPPOSING PARTIES AND THE COURT MAY IMPOSE OTHER SANCTIONS AS MAY SEE[M] JUST IN THE CASE.

Defendant's non-appearance, in the trial court's discretion, thwarted settlement efforts and the judgment was granted for plaintiff for the rents due and owing.

Not only did defendant thwart settlement by disobeying a court order, but his failure to keep in contact with his attorney is further willful misconduct justifying the judgment entered. Without knowing the location of defendant, plaintiffs will be prejudiced in their efforts both in discovery and at trial. It is now impossible that any

discovery be had directly from the defendant. Likewise, defendant could not be called as an adverse witness by plaintiffs. Such discovery or testimony could be crucial to plaintiff's case. Rule 37(b)(2)(C) authorizes various sanctions against disobedient parties including judgment by default; defendant's disappearance and consequent disobedience to the settlement order is analogous to the situation under that rule.

Speaking of a client's failure to maintain contact with his attorney, a recent case said:

A defendant is under a duty to keep in touch with his attorney so that he can answer interrogatories or take any other action his attorney might find necessary pending litigation ... His failure to maintain such contact amounts to "conscious indifference to consequence," which our courts equate with "willful misconduct." Sta-Power Industries, Inc. v. Avant, 134 Ga.App. 952, 216 S.E. 2d 897, 902, 1975.

That court entered default judgment where the party failed to comply with discovery requests due to loss of contact with his attorney. By analogy, where defendant has failed to obey a court order requiring his appearance at settlement conference and where his abandonment of his defense may prejudice future discovery efforts by plaintiffs, then the trial court did not abuse its discretion in entering

judgment for plaintiffs.

In Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, (1953) the court affirmed a judgment by default and commented on the propriety of reversing the same as follows:

The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. Rule 60(b) of the Utah Rules of Civil Procedure outlines the situations wherein a party may be relieved from a final judgment . . . Equity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action, the hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown. Id. at 742.

In the case now before the court, two judges have approved the entry of default judgment against the defendant. Defendant has personally abandoned his defense, and while plaintiffs have no direct evidence to the effect that defendant's attorney is merely proceeding with this case as a substitute for legislative action, the primary inference to be drawn from the unwarranted protraction of this simple

action by a landlord for two months rent could be no other. The lower courts have twice held, in essence, that in fairness to the plaintiffs and in the interest of public convenience, that is, relieving the schedules of the courts of this state from further consideration of a case so patently without merit, that default judgment was a proper remedy.

The rule that the courts will incline towards granting relief to a party who has not had opportunity to present his case is ordinarily applied at the trial court level, and this court will not reverse the trial court where it appears . . . that all elements were considered, merely because the motion could have been granted. Warren, at 744.

The law of Utah does not recognize the defense advanced by defendant's attorney and the defendant has himself abandoned all contact with his attorney. In the words of the court in Chrysler v. Chrysler, 5 Utah 2d 415, 303 P.2d 995, (1956):

Manifestly the court should not follow the rule of indulgence toward the party in default when the effect would be to work an injustice or inequity upon the opposing party. A prime requisite precedent to the granting of such relief is that the movant demonstrate that he comes to the court with clean hands and in good faith. Id. at 996, 997

In this case the defendant has engaged in "willful misconduct" by abandoning his defense and further proceedings

in this case would only work additional injustice and inequity upon the plaintiffs.

CONCLUSION

Defendant's willful misconduct in not staying in contact with his attorney, his consequent disobedience to an order to appear for pretrial settlement, and the implicit admission in defendant's brief that the rent is owing coupled with the law of Utah which recognizes no implied warranty of habitability as a defense to an action for rent compel the conclusion that this appeal is moot and should be dismissed or in the alternative that the discretion of the trial court should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & EVANS

  
Jay E. Jensen

Scott R. Jenkins



CERTIFICATE OF SERVICE

I hereby certify that the foregoing respondents' brief was served on counsel for the appellant, Jonathan H. King, 352 South Denver, Salt Lake City, Utah 84111, by mailing a copy thereof, postage prepaid, on the 15 day of May, 1978.

Robert R. Jensen