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Bowens, Inc v. Valley Lanes Corporation, Glade H. Syme, Ruben Gallegos, Jeffrey G. Syme, and Duane Frederick Catte and Glade H. Syme, Ruben Ross Gallegos, Jeffrey Syme, Duane Frederick Catten and Valley Lanes Corporation v. Charles E. Bowen and Shirley Bowen, His Wife, and Bowens, Inc., A Utah Corporation : Brief of Defendants Charles E. Bowen and Shirley Bowen, His Wife, and Bowens, Inc., A Utah Corporation

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - - - - - - - - - -

BOWENS, INC.,

Plaintiff-Appellant,

vs

VALLEY LANES CORPORATION, GLADE H. SYME, RUBEN GALLEGOS, JEFFREY G. SYME, and DUANE FREDERICK CATTEN,

Defendants-Respondents.

Case No. 15615

GLADE H. SYME, RUBEN ROSS GALLEGOS, JEFFREY SYME, DUANE FREDERICK CATTEN and VALLEY LANES CORPORATION,

Plaintiffs-Respondents

vs

CHARLES E. BOWEN and SHIRLEY BOWEN, his wife, and BOWENS, INC., a Utah corporation,

Defendants-Appellants.

BRIEF OF DEFENDANTS CHARLES E. BOWEN AND SHIRLEY BOWEN, HIS WIFE, AND BOWENS, INC., A UTAH CORPORATION

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NATURE OF THE CASE

This case involves construction of a lease and whether or not it grants to the Appellant, Bowen's, Inc., the right to a new ten-year term after the expiration of the original lease. The case also involves the question of whether or not Charles and Shirley Bowen are to be held individually liable for the obligation of Bowen's, Inc.

DISPOSITION IN LOWER COURT

The Trial Court awarded judgment in favor of the Respondents and against Bowen's, Inc. and Charles and Shirley Bowen, as individuals, in the amount of $35,000.00, which amount was based upon the rental value of the subject premises at the rate of $3,500.00 per month, during the pendency of this action.

RELIEF SOUGHT ON APPEAL

That the Order awarding judgment against Charles and Shirley Bowen, as individuals, be reversed; and further, that the lease in this matter be construed as granting to Bowen's, Inc. the right to a new ten-year term at the expiration of that original lease.

STATEMENT OF FACTS

On or about August 31, 1966, Diamonds Development, Inc. leased a facility comprised of a bowling alley, lounge and cafe known as the Kearns Bowling Lanes, and located at 3951 West 5400 South, Kearns, Utah, to Howard C. Nelson and W. Roy Brown. Subsequently, Diamonds Development, Inc. sold and transferred the subject property to Manivest Corporation. On August 20, 1973,

Howard C. Nelson and W. Roy Brown sold and transferred their interest in the bowling business to Bowen's, Inc., Appellant herein. The interest of Howard C. Nelson and W. Roy Brown in the subject lease was transferred to Bowen's, Inc. on August 28, 1975. (Ex. 2-P) Subsequently, Manivest's interest was acquired by the Respondents.

The following depicts the chain of the various interests set forth above:

Lessor	Lessee
Diamonds Development, Inc.	Howard C. Nelson and W. Roy Brown
↓	↓
Manivest Corporation	Bowen's, Inc.
↓	
Respondents	

The original lease agreement (Ex. 32-D) provided for a term of ten years with rent payable at the rate of $1,700.00 per month during the heavy bowling season, from September through April; and $725.00 per month during each of the other months of the year. At the end of the ten-year term, the lease provided an option/first right of refusal to the Lessee which provided for an additional ten-year term. Pursuant to the provisions of the lease, Bowen's, Inc. gave notice of their intent to renew more than ninety days prior to the expiration of said lease. (Ex. 3-P)

Respondents gave notice to Appellants of the terms under which the premises would be re-leased, stating that the terms were non-negotiable. (Ex. 4-P) Shortly thereafter the Respondents

tendered an unexecuted lease to Appellants which purported to be a lease which was to be entered into between Respondents and a third party. (Ex. 7-P) The rental factor provided for in said lease was $780,000.00 as compared to $165,000.00 for the previous ten-year period.

In response, Bowen's, Inc. sent a letter to the Respondents stating that the terms were unreasonable and invoked the provisions of the original lease relative to the appointment of appraisers for the purposes of determining a fair rental factor. Subsequently, Appellants communicated an offer to pay $2,500.00 as a monthly rental or in the alternative to once again invoke the terms of the original lease with reference to the appointment of appraisers. (Ex. 5-P and Ex. 6-P)

On July 1, 1976, the Respondents withdrew the premises from consideration of a new lease (Ex. 8-P and Ex. 9-P), and upon the expiration of the original lease on August 31, 1976, Bowen's , Inc., pursuant to court order, held over and remained in possession of the premises during the pendency of this action.

During the hold-over period, Bowen's, Inc. continued to attempt to tender to Respondents rental payments, which said payments were continually refused by Respondents. (Ex. 10-P and Ex. 11-P)

The foregoing events were as a result of discussions held in 1975 between Appellant Bowen's, Inc. and Manivest Corporation, the predecessor of Respondent, relative to the re-lease or purchase of Manivest's interest in the subject property. Contemporaneously

thereto, Manivest Corporation and Bowen's, Inc. entered into an agreement to purchase new pin-setters, and jointly made a down payment to Brunswick. Subsequently, because of the ill health of one of the principals of Bowen's, Inc., and with the approval of Manivest Corporation, Bowen's, Inc. placed the bowling business, the cafe and lounge, for sale. Respondents Gallegos and Catten indicated interest in the lounge; and Respondents Symes were desirous of the bowling business, and pursuant to a verbal agreemen with Bowen's, Inc., took over the bowling business in March, 1976, and stayed in possession of said premises for approximately six wee During this six week period, the Symes together with Mr. Gallegos a Mr. Catten, purchased the building from Manivest Corporation, thus becoming Bowen's, Inc.'s landlord. Immediately after becoming Bowen's landlords, Respondents offered to purchase the businesses of Bowen's for $35,000.00, stating that that was all the business were worth since Bowen's had no option to release the premises and of course Bowen's, Inc. then gave notice of intent to release. Symes, Gallegos and Catten thereafter transferred their interest i the subject property to Valley Lanes, a corporation formed by them, and which is a Respondent herein.

The Court, after trial in this matter, found that the reasonable rental value of the premises for the hold-over period, $3,500.00 per month, and judgment was awarded for the Respondents and against Bowen's, Inc. and Charles and Shirley Bowen, as indiv in the sum of $35,000.00.

ARGUMENT

POINT I

THERE IS NO BASIS FOR AWARDING A JUDGMENT AGAINST CHARLES AND SHIRLEY BOWEN AS INDIVIDUALS.

The Trial Court awarded judgment for the Respondents and against Charles and Shirley Bowen, as individuals, without any grounds, basis, documents or evidence of any nature presented by Respondents that the Bowens were or should be held accountable as individuals. The only possible basis for which the Trial Court's determination for the individual liability of the Bowens might in any way be inferred is through Exhibit 1-P. Exhibit 1-P is a purchase agreement between Howard C. Nelson and W. Roy Brown as sellers of the Kearns Bowling Lanes business and Bowen's, Inc., a Utah corporation, as the buyer of Kearns Bowling Lanes business.

Paragraph 9 of Exhibit 1-P denotes that there is an existing lease entered into by and between Diamonds Development, Inc., a Utah corporation, as lessor (which lessor's interest was later transferred and assigned to Manivest Corporation), and Howard C. Nelson and W. Roy Brown, as lessees; which paragraph states:

> "Buyer agrees to faithfully perform all terms, covenants and conditions of the said lease [referring to the lease entered into between Diamonds Development, Inc. and Howard C. Nelson and W. Roy Brown] and any amendments, modifications and addendums to said Lease."

The lease that was entered into between Diamonds Development, Inc. and Howard C. Nelson and W. Roy Brown was not, however, assigned to Bowen's, Inc. until August 28, 1975. (Ex. 2-P)

Thereafter, at the end of the entire purchase agreement between Howard C. Nelson and W. Roy Brown as sellers of the Kearns Bowling Lanes business, and Bowen's, Inc., as buyer, Charles Bowen and Shirley Bowen guaranteed the performance of the terms and conditions of the purchase agreement. Charles and Shirley Bowen were guaranteeing the performance of Bowen's, Inc. to Howard D. Nelson and W. Roy Brown on a purchase agreement, but not guaranteeing the performance of Bowen's, Inc. to Diamonds Development, Inc. or Manivest Corporation or the Respondents herein on a lease which had not even been assigned to Bowen's, Inc. at the time that Exhibit 1-P was entered into.

At no time during the proceedings of the trial herein were any documents ever shown or known to be exhibited by Respondents that Charles and Shirley Bowen ever agreed to be held personally liable for the obligations of Bowens', Inc. to the lessors. The guarantee in the purchase agreement did not in any way run to the lessors or their assigns. The lessors were not a party to the contract between Howard C. Nelson and W. Roy Brown and Bowen's, Inc., and there was no intention shown or exhibited by any of the provisions of Exhibit 1-P that it was the intent of the parties to have Charles and Shirley Bowen guarantee the performance of Bowen's, Inc. to the lessors.

> "Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third party would be incidentally benefited does not give

him a right to sue for its breach. An incidental beneficiary has no enforceable rights or interest under, and hence he cannot recover on, the contract." 17 Am Jur 2nd, §307.

In Schwinghammer v. Alexander, 21 U. 2d 418, 446 P.2d 414, (1968) this Court defined what an incidental beneficiary is, which is what the Respondents are in this matter.

The Court used an illustration from Corbin to define an incidental beneficiary and stated at P.2d 416:

> "Where A owes money to a creditor C, or to several creditors, and B promises A to supply him with money necessary to pay such debts, no creditor can maintain suit against B on this promise. . . In such cases the performance promised by B does not itself discharge A's duty to C or in any other way affect the legal relations of C. It may, indeed, tend towards C's getting what A owes him, since it supplies A with the money or material that will enable A to perform, but such a result requires the intervening voluntary action of A. B's performance may take place in full without C's ever getting any performance by A or receiving any benefit whatever. In such cases, therefore, C is called an 'incidental' beneficiary and is held to have no right."

Respondents herein are merely an incidental beneficiary to the contract between Nelson and Brown as sellers and Bowen's, Inc. as buyer of the Kearns Bowling Lanes business. Charles and Shirley Bowen were merely guaranteeing the performance of Bowen's, Inc. in its agreement with Howard C. Nelson and W. Roy Brown. They were not guaranteeing the performance of Bowen's, Inc. with the lessors.

To be a third-party beneficiary, as the Respondents would have this Court believe that it is, the obligation incurred by the contracting party must run for and be intended for the benefit of a

party who is not a party to the contract; and further, that it must be shown by the intent of the parties, as manifested in the contract itself, that it was the specific intention of the contracting party that the benefit is to run to a third party.

See Chatlik v. Allstate Insurance Company, 34 Ohio App. 2nd 193, 299 N.E. 2nd 295 (1973). A third party may benefit from a contract even if he is not named in the contract, as long as he is contemplated by the parties to the contract and sufficiently identified thereto, but it must be shown that the contract was made and entered into with the intent of benefitting that third party; and a mere incidental or indirect benefit is not sufficient to give him a right of action.

Also, Snyder v. Townhill Motors, Inc., 193 Pa. Super. 578, 165 At. 2nd 293 (1960). A third-party beneficiary to a contract comes into existence when it appears in the contract itself that both parties to the contract intend that a third party benefit thereby.

Also see Spires v. Hanover Fire Insurance Company, 364 Pa. 52, 70 At. 2nd 828 (1950). To be a third-party beneficiary entitled to recover on a contract both parties to a contract must intend and must indicate that intention in the contract; and further, that a primisor cannot be held liable to an alleged beneficiary of the contract unless the alleged beneficiary was within the promisor's contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking and

the obligation of the third party must be created and must affirmatively appear in the contract itself.

In this particular matter, the guarantee was made with the intent of benefitting Howard C. Nelson and W. Roy Brown in the event that Bowen's, Inc. ever failed in its obligations in performing under the purchase agreement entered into by and between Howard C. Nelson and W. Roy Brown and Bowen's, Inc. There was no intent shown in that purchase agreement of any nature or any type that Charles and Shirley Bowen were to guarantee the performance of Bowen's, Inc. to the lessors of the premises, especially when the lease agreement was not even assigned to Bowen's, Inc. until August of 1975.

Bowen's, Inc. was the obligatory party and as such should be the only party accountable herein. Charles and Shirley Bowen have no duty owing to the Respondents and no duty was shown owing by them to the Respondents in any evidence or documents presented at trial. The Respondents in this matter are at best incidental beneficiaries to the contract between Howard C. Nelson and W. Roy Brown and Bowen's Inc., when Charles and Shirley Bowen agreed to guarantee the performance of Bowen's, Inc. in that purchase agreement. As such incidental beneficiaries, Respondents have no right of action or cause of action against Charles and Shirley Bowen as individuals. The judgment awarded to the Respondents against the Bowens as individuals should be reversed.

POINT II

THE LEASE AGREEMENT ENTERED INTO BETWEEN DIAMONDS DEVELOPMENT, INC. AND HOWARD C. NELSON AND W. ROY BROWN SHOULD BE CONSTRUED AS GRANTING TO THE LESSEE THE OPTION TO RENEW THE LEASE FOR A TEN-YEAR PERIOD.

Paragraph 7 of the lease (Ex. 32-D) states as follows:

> "Lessors hereby give and grant to the Lessees the first right of refusal to renew this lease. Lessees shall notify the tessors in writing by registered mail at least ninety (90) days prior to expiration of this lease of lessees intention to release said premises herein contained, otherwise Lessors shall assume that the Lessees does not desire to release and this lease shall terminate on August 31, 1976. Should Lessees desire to release, Lessors shall submit to Lessees a proposed new lease for a ten (10) year term or a bonified offer to lease by a third party within thirty (30) days of date that request for release has been received by Lessor. Should the Lessee feel the lease terms unreasonable then Lessee will hire a competent appraiser to place a fair market lease value on said property. Should Lessor then feel this market value not reasonable, they will obtain a competent appraiser to place a fair market value on said property and equipment. Should the two appraisers and Lessee and Lessor fail to arrive at a meeting of the minds, then the two appraisers will appoint a third appraiser by mutual agreement, to act as a referee and all parties concerned will be bound by the finding of appraisers as to fair market value."

This lease, which was assigned to Bowen's, Inc. on August 28, 1975, (Ex. 2-P) is unclear as to whether or not an option or first right of refusal is granted to the lessee. However, there can be no question that the langauge in that provision grants to the lessee a right to renew, and as such should be construed in favor of the lessee.

> "As a general rule, when construing provisions of a lease relative to renewal, the tenant is favored".

32 Am Jur 809, and
Russell V. Valentine, 14 U.2d
376 P.2d 548 (1960)

There is uncertainty in the lease agreement, but that uncertainty should be construed in favor of the tenant. Such a holding was dictated in Continental Bank & Trust v. Stewart, 4 U.2d 228, 291 P.2d 890 (1955), when this Court stated that interpretation of the contract where ambiguity exists:

> "The Court will endeavor to give the contract a rational and just construction. This rule is echoed in apt langauge by Mr. Page in his treatise on contracts: as between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred". (P.2d 893)

From the langauge of the lease agreement itself and from the intent and actions of the parties, Manivest Corporation, there is no doubt that a renewal of the lease agreement after the expiration of the primary term was intended by all parties. Manivest Corporation showed its intent on renewal of the lease when it entered into an agreement with Bowen's, Inc. in 1975, for a down payment on pin-setters for the bowling alley. The down payment which was made on the pin-setters amounted to a very substantial investment on equipment which could not have been installed until the Summer of 1976, which is within a few months of the termination of the primary term of the lease. It was the intention of Manivest Corporation that it would renew the lease at the expiration of the primary ten-year term.

This intent was also noted by Mr. Symes during the trial when he noted that Manivest was going to give an option on the property to whoever the lessee was at the time of the expiration of

the primary term of the lease. (TR-179) It wasn't until Valley Lanes, Respondents herein, became lessors of the property that it was apparent that the lease would not be renewed under any circumstances. Valley Lanes and its immediate predecessors, who were the other Respondents herein, sent notice to Bowen's, Inc. that they would not re-lease the premises under any conditions. (TR-154 and Ex. 8-P)

All of the Respondents herein knew that the intent of Manivest Corporation was to renew and/or negotiate a new ten year lease on the subject property. (TR-179, 182, 217 and 218)

It became apparent to the Respondents that they might have a chance to eliminate any interest that Bowen's, Inc. might have had in the property by purchasing Manivest Corporation's interest in the property and then not renewing the lease. By not renewing the lease, the Symes could obtain the bowling business which they had wanted, and Canton and Gallegos could obtain the lounge and cafe business that they wanted, without either party paying for any of the good-will, customers, fixtures and improvements that Bowen's, Inc. had placed into the businesses over the past few years. The Respondents were not acting in good faith in their meager attempt to renew the lease after they had obtained the property from Manivest Corporation. The Respondents demanded $6,500.00 monthly rental from Bowen's, Inc. which is 3.8 times the monthly rent of $1,700.00 under the old lease. (Ex. 4-P).

The Trial Court found a monthly rent of the property to

$3,500.00, and the appraiser for Bowen's, Inc. determined the amount to be even less than the amount determined by the Trial Court. (TR-297 The Respondents had no real intention of renewing the lease with Bowen's, Inc.

The proposed lease as set out in Exhibit 4-P stated that:

> "There will be no negotiations from the specific terms amended and added into the proposed lease,"

which terms as set forth by the Respondents were totally unconscionable and unreasonable.

Bowen's, Inc. invoked the provision relating to the appointment of appraisers (Ex. 32-D, Par. 7) for determining a reasonable rental value on the premises. (Ex 5-P) However, Bowen's, Inc. was forced off the property before it could obtain an appraiser. (TR-123 thru 125)

Even if Bowen's, Inc. had obtained an appraiser for the property, such an appraisal would have been meaningless because there was never any real intent on the part of the Respondents to re-lease the premises for any amount less than a monthly rental of $6,500.00.

Sixty days prior to the expiration of the primary term of the lease, the Respondents gave notice that there would be no re-leasing of the subject property. (Ex. 9-P) The Respondents had obtained what they had desired, namely the bowling, cafe, and lounge businesses, and had effectively paid nothing for these businesses. Such an inequity should not be allowed, especially under the circumstances presented herein. Bowen's, Inc. should be granted the right to re-lease the subject property at a reasonable rental value

and not lose that right because of the unconscionable rent demanded by the Respondents, which rent could not have been met from the operations of the bowling business.

POINT III

THE APPOINTMENT OF APPRAISERS AS PROVIDED BY PARAGRAPH VII OF THE LEASE MERELY CONSTITUTES A METHOD OF ARRIVING AT A REASONABLE RENTAL VALUE.

The provision in paragraph VII of Exhibit 32-D which relates to the appointment of appraisers to determine fair rental value is merely a method to determine a fair rental value and not arbitration of dispute.

In Barnhart v. Civil Service Employees Company, 16 U.2d 223, 398 P.2d 873, the Supreme Court struck down private arbitration as a method of settling future disputes as being against public policy since in the court's opinion, basic liberties are impaired and further stated that such arbitration may prevent access to the courts, which is counter to the purpose as set forth in Const. Art. 1 §10 and §11; Art. 8 and 9; UCA (1953), 78-21-1. In Barnhart an uninsured motorist clause in an insurance policy called for arbitration of any controversies or future disputes. The case at hand is clearly distinguishable for the reason that notice of Appellant's intent to re-lease was given, and Respondents responded. Thus, if the court finds that the provisions call for arbitration, a position in which we do not agree, the agreement to arbitrate, occurred by virtue of the notice of intent to re-lease, and Respondent's response thereto. Additionally, if in fact a dispute arose, it di

not arise until after the aforesaid agreement came into existence and thus the agreement, if there be one to arbitrate was to arbitrate the dispute or grievance presently in existence, which is not outlawed by Barnhart.

Barnhart can further be distinguished based on the court's ruling in the 1968 case of Young v. Bridwell, 20 U.2d 686, wherein the court held that where a lease contains a clause granting an option subject to arbitration so far as rent is concerned, the lessee has given notice of its intent to exercise the right, that this is binding on the lessor insofar as term of lease is concerned. The Supreme Court itself, seems to distinguish Barnhart wherein arbitration is used as a method to determine fair rental value. This merely recognizes the practical necessity of providing a method of determining rental value since if the method is not stated in the lease, the provision may fail for lack of certainty. Courts in other jurisdictions also recognize arbitration as a method to determine fair rental value. Beel et al v. Dill, 173 Kan 897, 252 P.2d 931 (1953), and Chaney et al, v. Schneider, 206 P.2d 669 (Cal. 1949). Here defendants proposed amendments to the old lease which related only to rent and a bond. There was no dispute as to the other provisions of the lease, and the method outlined to determine fair rental value would thus be the logical next step.

The appraisal method of determining fair rental value is also accepted as a method to determine fair rental value and it is Appellant's position that such is the method provided in the lease

in question. The Court need not even concern itself with problems of arbitration.

POINT IV

THERE IS NO BASIS FOR THE TRIAL COURT'S DETERMINATION OF THE MONTHLY RENTAL IN THIS MATTER.

The Trial Court awarded the Respondents $3,500.00 monthly rental for each month that Bowen's, Inc. held the property during the pendency of this action. However, neither appraiser from either of the parties ever testified that $3,500.00 was a reasonable monthly rental for the premises herein. The appraiser for the Respondents determined the value of the monthly rental to be $3,800.00 per month if the property was in its present condition, and $5,700.00 per month when the property was improved with new pin-setters and other improvements. (TR-272) These figures were based on what other businesses in the bowling business were doing, and had nothing to do with the business of Bowen's, Inc. The appraiser for the Respondents had guessed at the amount of business and revenue that Bowen's, Inc. was making to arrive at its figure. (TR-274)

Since the appraiser for the Respondents had no basis for his determination as to the monthly rental, his testimony was of little to no value in helping to determine a fair monthly rental for the premises herein.

The appraiser for Bowen's, Inc. used a cost approach to determine a fair monthly rental of the property. (TR-298 thru 301) Using a cost approach method, the appraiser for Bowen's, Inc.

determined the value of the property to be $21,500.00 per year in its present condition (which is approximately $1,800.00 per month) and $41,800.00 per year if new pin-setters were installed (or approximately $3,500.00 per month). (TR-297)

The $3,500.00 per month figure arrived at by the Court is approximately the same amount as determined by Bowen's, Inc.'s appraisers' valuations of the premises for when it had the pin-setters installed. The Trial Court had thus misapplied the figures in this amount as to the reasoanble rental value of the property, and the property should therefore be decreased to $1,800.00 per month in relation to the figures as determined by the appraisers for Bowen's,Inc

CONCLUSION

The Trial Court's finding that Charles and Shirley Bowen were individually liable along with Bowen's, Inc. to the Respondents is incorrect and without any basis of support. The judgment obtained against Charles and Shirley Bowen should be reversed and they should be dismissed from this action.

Bowen's, Inc. should be given the right to renew the lease in this matter. The Respondents acted in bad faith throughout their course of dealings with Bowen's, Inc. Equity would demand that Bowen's, Inc. be given the right to obtain some sort of remuneration for the businesses which it had developed which the Respondents obtained when they refused to renew the lease with Bowen's, Inc.

The Trial Court had misapplied the figures as to the monthly rental value of the property. The judgment awarded to the Respondents should be decreased to the appropriate figure of

$1,800.00 per month for the monthly rental of the property during the period of time that the property was held by Bowen's, Inc. during the pendency of this action, or in the alternative that this matter be remanded to determine the appropriate monthly rental of the premises.

Respectfully submitted,

JOHN C. GREEN
Attorney for Appellants

Served two (2) copies of the foregoing Brief of Appellants on Respondents by delivering to Philip C. Pugsley, at 310 South Main Street, Salt Lake City, Utah.