

1950

Soren J. Jespersen, Roy H. East, Howard J. Hassell
and Roy W. Brown, dba Power Engineering
Company v. Deseret News Publishing Co. : Brief of
Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

SOREN J. JESPERSEN, ROY H.
EAST, HOWARD J. HASSELL
and ROY W. BROWN, doing busi-
ness as POWER ENGINEERING
COMPANY, a partnership,

Plaintiffs and Respondents,

vs.

DESERET NEWS PUBLISHING
COMPANY, a corporation,

Defendant and Appellant.

FILED
JUN 1 - 1950

Clerk, Supreme Court, Utah

RESPONDENTS' BRIEF

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7443

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The plaintiffs agree with the defendant's statement of facts as contained in the defendant's brief and designated as "Statement of the Case" and "Admitted Facts" with the additions and corrections next hereinafter noted.

The defendant examined the premises and particularly the support of the flooring (R. 113, 115, 116, 117 and 205) prior to the leasing.

The following is the description of the demised premises as contained in the said lease:

“The west one hundred forty-five feet (145') of that certain building known as building numbered one eighty one (181) located at 1710 South Redwood Road.” (R. 4.)

The lease by and between the parties to this action contained the following language with regard to attorney's fees:

“Also that the said lessee will pay * * * together with all costs and attorney's fees and expenses that shall arise from enforcing the covenants of this lease. * * *” (R. 5.)

It is not expressly stated whether the leased premises includes the land under the building leased (R. 4) and plaintiff discusses in point III the construction of the lease in that regard.

The plaintiff at no time during the continuance of the lease accepted nor agreed to any surrender of the leased premises (R. 105).

STATEMENT OF POINTS

POINT I.

The evidence is sufficient to support finding No. 3 to the effect that the defendant stored certain materials in such a manner as to break the floor and cause damage and to support finding No. 4 to the effect that such

damage did not result from reasonable use and wear or from damage by the elements.

POINT II.

The evidence is sufficient to support finding No. 5 to the effect that the reasonable cost of repairing the damage is \$3,000.00.

POINT III.

The evidence is sufficient to support the finding that the defendant is liable for rent.

POINT IV.

Plaintiffs should be awarded additional attorney's fees.

ARGUMENT APPLICABLE TO POINTS

I, II AND III

Since defendant's sole ground of appeal is an alleged insufficiency of the evidence, plaintiffs deem it well to emphasize at the beginning of the argument that this is a case at law. This is an action to enforce the provisions of a written lease of real property wherein no equitable issues are involved. In such a case under the provisions of Art. VIII, Sec. 9, Constitution of Utah, to-wit:

“* * * in cases at law the appeal shall be on questions of law alone,”

it is too well settled to require citation of authority that it is the function of this court not to pass upon the weight of the evidence nor to determine conflicts therein, but to examine it solely for the purpose of determining whether or not the judgment finds substantial support in the evidence.

Defendant does not seem to contend, at least in some respects, that the plaintiffs' evidence was not substantial within the meaning of the rule. At page 10 of the brief, it speaks of the question of overload, saying "the evidence is in direct conflict." At the same page it speaks of its own expert as "better qualified than any other expert at the trial." At page 8 the brief admits that "plaintiffs' experts testified that the sole cause of the collapse was overload."

Plaintiffs will proceed to state briefly the evidence which supports each of the court's findings attacked in the order such findings are mentioned in the defendant's brief.

POINT I.

The following evidence supports the trial court's Findings of Fact No. 3 to the effect that defendant "stored certain materials therein in such amounts and in such a manner that defendant broke said floor and sub-flooring or caused said floor and said sub-flooring to be broken and smashed, said pilings to be driven downward and out of line, and the walls of said building to be broken and pushed out of line, and the whole

of said structure to be damaged'', and the trial court's Finding of Fact No. 4 that "defendant has abandoned said premises and has refused and failed to restore said premises to as good order and condition as when the same were entered by defendant, reasonable use and wear thereof and damages by the elements excepted, although plaintiffs have demanded that defendant so restore the premises; that said damages are in excess of reasonable wear of said premises."

Two expert witnesses, structural engineers, were called by the plaintiff and their testimony supports the foregoing findings. The witness Koch testified that in his opinion overloading was the cause of the floor's collapse (R. 54). The witness Gardner testified that in his opinion overloading was the cause of the collapse and that water-weakening was not the cause. (R. 80, 82)

There would seem to be no question that there is sufficient evidence to support the court's findings that physical damage was caused by the use which defendant made of the building. The lease provided:

"And the said lessee further agrees to deliver up said premises to said lessors at the expiration of said term in as good order and condition as when the same were entered upon by said lessee, reasonable use and wear thereof and damage by the elements excepted * * *"

In order to be absolved of liability for the damage, the defendant must show that one of the two express exceptions applies. In this connection, the cases hold

that the *burden* of *establishing* that the damage falls within one of the exceptions in "surrender-up" clauses absolving a lessee for damage rests upon the lessee. See *Vaughan vs. Mayo Milling Co.*, 102 S. E. 597 (Virginia); *Rusted vs. Lamport*, 183 N. W. 483 (Minnesota) and *Oakland Motor Company vs. Meyer*, 174 N. E. 154 (Ohio).

The trial court has found that the damage was not caused by the elements. The trial court further found that the damage was caused by the use to which defendant subjected the premises. Defendant contends that this use was nevertheless reasonable. It argues in effect that it is not liable if it has complied with a tort standard of reasonable conduct. It is debatable as to whether defendant acted prudently in this case, but the authorities hereafter cited reject such a defense in any event.

Plaintiffs submit that this exception, "reasonable use and wear", contains two elements: (a) The *use* must be reasonable. (b) The *wear* must be reasonable. The words mean different things. To consider only the conduct of the defendant and to ignore the physical result of its tenancy is to deny any force or function on the part of the word "wear". This is contrary to fundamental rules of constructions. "Use" is defined at 43 Words and Phrases 463, as "to employ for any purpose". Certainly, "wear" means something else than that. Plaintiffs submit that it means physical change.

It is difficult to see how the damage which was visited upon plaintiff's building in this case can be characterized as reasonable wear. Defendant has described that damage as destruction. We submit that the only sound policy for the courts to take in a situation of this sort is to require of a lessee, that if he wishes to be exempt from the consequences of such substantial damage or destruction, he must provide by the terms of his lease that the premises shall be put to a specific use and that if that use results in damage or destruction, the lessee shall not be liable therefor.

To accept the contention of the defendant is grotesquely to distort the contract of the parties. It is to say that the parties agreed that plaintiffs would rent the building to defendant and that if defendant merely stored newsprint, it mattered not to plaintiffs if the building should thereby be destroyed or damaged.

This defendant was confronted with an emergency. It had to secure warehouse space speedily or pay demurrage on freight cars. The defendant appealed to plaintiffs for warehouse space. The defendant was experienced in the storing of these materials. The plaintiffs were not. The written lease contains no warranty that the building would sustain the materials. It contains no reference to the use to be made of the building. Unless, by contract it expressly provided otherwise, defendant assumed the risk of damaging plaintiffs' building. It is to be noted also that defendant's agents were apprehensive as to the ability of the building to

hold up under the proposed load. They expressed concern about this. Nevertheless, they proceeded with the leasing of the building and took the gamble. Now in retrospect they seek to excuse the damage. In the light of the factors of defendant's superior experience with this particular type of warehousing, and of the absence on the part of plaintiffs of any warranty in the lease that the building would sustain the weights, does the law now deny plaintiffs' redress? To do so is to disregard entirely the body of *substantive* law which holds that where there is a writing it is the writing, and the *writing* alone which creates and defines the parties' rights and liabilities.

Defendant seeks to escape liability for the damage caused plaintiffs' building during defendant's tenancy, upon the plea that the use made of the building was reasonable. The court's attention is invited to the language of the lease—the lessee is to return the premises in the same condition as they were in when rented—"reasonable *use and wear* excepted". Even if the "use" made of the building by defendant be considered "reasonable"—(to which postulate the plaintiffs dissent)—that alone does not absolve defendant. The covenant of the defendant is not a covenant merely to make reasonable use of the building—it is an absolute covenant to do a specific thing—to-wit: to return the premises to plaintiff in the same condition as when rented, reasonable use and wear excepted. In addition to inquiring into the use made of the building by tenant, the test of "what *wear* has the building sustained?" must be ap-

plied. The wear in this instance certainly is abnormal.

The proposition here urged by the plaintiffs is simply the common-law rule which was recognized by the court in *Powell vs. Hughes Orphanage* (138 S. E. 637, Virginia), in which case there was a lease of a building in which the lessee covenanted "to leave said premises in good repair, ordinary wear and tear excepted". The tenant used the building as a warehouse and sections of the building in which tobacco was stored, collapsed. The theory of the plaintiff was that the collapse was caused by overloading. Defendant contended it was caused by breaking down of piers in the basement which supported columns on all the floors, and that there was a structural defect undiscoverable to tenant and that if piers had had the strength they appeared to have no collapse would have occurred.

The court at p. 644 (9, 10) says:

"The covenant to leave the premises in good repair, unaffected by statute, was not a covenant to use due care to leave them in good repair, but an absolute covenant to do a specific thing, to-wit: to leave the premises in good repair * * * This was the common law rule * * *"

(The court then refers to a Virginia statute modifying the rule.)

Plaintiffs submit that the reasoning of the court above set forth is applicable to the case at bar; that the defendant breached its covenant to return the premises in the same condition as when rented.

Plaintiffs respectfully ask the court to consider the logic attending the use in the "surrender-up" covenants of leases of such phrases as "reasonable wear and tear excepted" or "reasonable use and wear excepted". Were it not for the fact that some wear of a building is inevitable, a lessor would wish his building returned in the identical state in which it is leased. The exception clauses are used to excuse the lessee from liability for usual wear—such deterioration or wearing as always are expected to occur. If the use made of the building results in unusual damage it would seem that the lessee should bear the damage, unless by the contract the lessor has warranted that the building is suitable for the specific use or has absolved the lessee of liability for any damage resulting from the specific use. Such a principle seems to have been recognized in the Powell case (*supra*) where a requested instruction that the landlord could not recover for damage to the building if the tenant used ordinary care in using the building as a storage warehouse and acted on the advice of a competent building contractor, was held to have been *properly refused in the absence of evidence that landlord undertook to put building in condition to use for storage purposes*. In other words, there was no warranty or undertaking by the landlord respecting the suitability of the building for the use to which it was to be put.

POINT II.

The following evidence supports the trial court's finding No. 5 to the effect that the reasonable cost of

restoring said premises to as good order and condition as when the same were entered by the defendant, reasonable use and wear thereof and damage by the elements excepted, is \$3,000.00.

The witness Gardner, called by plaintiffs, testified to the items necessary to make repairs (R. 82, 83, 84, 85) and testified that in his opinion the reasonable cost of the repairs would be \$5,051.21 (R. 86). The defendant's own witness, Ullrich, testified that in his opinion the cost of repairs, not taking into account the floor covering and the gas and electrical systems, would be \$2,450 (R. 175).

POINT III.

The evidence is sufficient to support the finding that the defendant is liable for rent.

In its argument upon this point, defendant presupposes lack of fault on its own part. As has been previously pointed out, there is substantial evidence from which the court did find that the defendant through its own act caused the damage. After that finding there can be no reasonable argument that the liability for rent ceases. There would seem to be no reason to consider the rules applicable where damage comes to the leased premises without fault of the lessee. But since the defendant contends for certain propositions which assume the damage by an unavoidable casualty unrelated to the acts of the lessee, plaintiffs will consider those contentions.

Defendant's brief at page 12 cites the minority views and particularly the views of Brewer, J. in an early Kansas case and later quoted in a later case. That view, we think, is properly analyzed in footnote 1010, page 1193, I Tiffany on Landlord and Tenant as follows:

“The opinion of Brewer, J., in *Whitaker v. Hawly*, 25 Kan. 674, 37 Am. Rep. 277, argues strongly in favor of relieving the tenant in case of destruction of the building. It is submitted, however, that the learned writer of the opinion, in saying that a lease ‘is an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term or estate in lands,’ takes a view of a lease which is contrary to the common-law authorities, though in accordance with that of the civil law.”

Plaintiffs do not feel it necessary to pursue further the defendant's theory that such rule of law is not adapted to present-day conditions in our state in view of the decision of our highest court in the case of *Wilson v. Woodruff*, 65 Utah 118, 235 P. 368. The plaintiff in that case suffered personal injuries, his wife was killed and his property was damaged all in the collapse of part of a building leased. The court affirmed a judgment of dismissal, the opinion ending with the following statement:

“We think the evidence in this case clearly shows that the injuries sustained resulted from defects in the premises demised to the plaintiff,

which risk he assumed when he entered under his lease.”

If a lessee can and does, absent stipulation to the contrary, legally assume such risks of death, injury and damage to his property and such has been confirmed as a valid and subsisting part of the law of this state, can it be seriously argued that social considerations require this court to hold that such lessee cannot legally assume liability for payment of rent (certainly a much lesser risk) regardless of certain contingencies because in the event of the happening of such contingency such payment may be harsh as to him? Plaintiffs believe the cited case disposes of defendant's contentions in this regard and that the same case is a valuable precedent in the other phase of the present action as will be hereafter noted.

Defendant further argues that the present case is a lease of “merely a portion of a building”. In this connection plaintiffs believe that the defendants have reached a conclusion which is at least questionable, and have apparently done so without an examination of the authorities. Plaintiffs believe that a determination of this point is not essential to a proper disposition of this phase of the action before the court for the reasons hereafter more fully set forth, but propose to examine the point briefly since a determination favorable to the defendant would be a necessary step in further examination of its said contention. Defendant states in its statement of “admitted facts” that there

was "no leasing of the land". No authority or reason is given for this interpretation of the written lease. It is, of course, patent that the question of whether any particular lease includes an interest in land as distinguished from an interest in an improvement only is a question of interpretation in the particular transaction involved, unless the parties state an intention in express language. There are the following rules as stated in the cases and the authorities to aid in such interpretation:

"In regard to when an interest in the land passes, the general rule is well settled that the grant of a house, store, mill, or other building carries with it the land under the building".
4 Thompson on Real Property 255, Section 1726.

Tiffany states that conclusion as a presumption only:

"It is a question of construction in each particular case whether a lease of a building includes the earth or soil, and, as above stated, there is a presumption in favor of such construction." I Tiffany, Landlord and Tenant 269, Section 26.

The authority last cited further states, "if a lease is in terms of a room or apartment merely, it *prima facie* includes no part of the earth or soil." The other text mentioned contains similar statements at the cited page.

It is submitted that the two rules of interpretation stated are logical rules to apply in the fact situa-

tions mentioned. If a person is given a leasehold interest in a structure, it is logical to assume, absent a showing to the contrary, that his leasehold interest includes the earth or soil to which the improvement attaches, and of which the improvement is a part according to settled rules of law. On the other hand where the leasehold interest is described as a room or an apartment, there are, in many cases, other parts of the same building above and below which are in the possession of other tenants or the landlord. It would seem that the fundamental concept of the common law which views ownership of the surface as extending downward to the center of the earth and upward to the heavens would require that such a lease be construed as separating the right of occupancy of the surface from rights to occupy a specific room or apartment.

But it is also submitted that there are, as in the present case, fact situations which do not fit into the category of a lease of an entire building and which give more rights than merely the ordinary letting of a room or apartment. Another example of such a lease not fitting into either category is the case of a lease of a modern duplex house where one-half is leased to each of two different tenants.

Tiffany states at the page and section last cited:

“And in the case of one building, divided into two residences by a vertical partition, it would be a question of construction whether a lease of one of such residences included the ground thereunder or adjoining.”

Applying the rules to the facts of the present case, it is further submitted that the following considerations weigh in favor of a construction that the lease in question included the land: The premises were divided by a vertical partition. There were no rooms or other parts of the building above or below the leased portion. The ingress and egress was by docks directly into the leased premises, and not through parts of the building retained by the landlord.

One test would be to assume that the ground below the floor was valuable for storage purposes and that this lessor had brought an action against this lessee to prevent him from using such space to store materials of the lessee. In view of the nature of the building and the terms of the lease and the circumstances attending its execution it is felt that this court would decide in favor of the lessee and hold there was a right to so use the land.

If the proper construction of the lease is as indicated and the same included the land under the building, the defendant virtually admits liability for rent unless this court wishes to reject the majority rule hereinbefore indicated, even if we assume, contrary to the findings of the trial court that the damage was not caused by the lessee.

POINT IV.

The lease upon which this suit is based provides
 "that the said lessee will pay * * * all costs and

attorney's fees and expenses that shall arise from enforcing the covenants of this lease." Plaintiffs submit that this court should award plaintiffs attorney's fees in addition to the award of the trial court, or should remand the case to the district court for the purpose of making a finding and award of additional attorney's fees, said additional fees to be for the services of plaintiffs' counsel subsequent to trial of this action.

CONCLUSION

Respondent submits:

1. That there is sufficient evidence to support the findings and judgment of the trial court and that the judgment appealed from should be affirmed.
2. That this court, pursuant to the lease of the parties, should award plaintiff additional attorney's fees or remand the case to the district court for that purpose.

Respectfully submitted,

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and

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Received two copies of foregoing brief this 1st day of June, 1950.

Attorneys for Appellant