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Lorraine Miller v. R.O.A. General Inc : Reply Brief

Utah Court of Appeals

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Suzanne Marelius; Littlefidl & Peterson; Attorney for Appellant.

Douglas T. Hall; Attorney for Respondent.

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SUZANNE MARELIUS - 2081
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

UTAH COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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ET NO.

880466

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LORRAINE MILLER,

Plaintiff/Appellant,

v.

R.O.A. GENERAL, INC., a Utah
Corporation, formerly known
as Reagan Outdoor Avertising,
Inc., a Utah Corporation,

Defendant/Respondent.

REPLY BRIEF

Docket No. 880466-CA
Civil No. C87-4928

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On Appeal from the Third Judicial District Court
in and for Salt Lake County, State of Utah
Honorable Raymond S. Uno, District Court Judge

Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah, 84102

Attorney for Plaintiff/
Appellant

DOUGLAS T. HALL
1775 North 900 West
Salt Lake City, Utah, 84116

Attorney for Defendant/
Respondent

FILED

JAN 30 1989

Mary T. Noon
Clerk of the Court

SUZANNE MARELIUS - 2081
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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LORRAINE MILLER,)	
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Plaintiff/Appellant,)	
)	
v.)	
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Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah, 84102

Attorney for Plaintiff/
Appellant

DOUGLAS T. HALL
1775 North 900 West
Salt Lake City, Utah, 84116

Attorney for Defendant/
Respondent

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NEW ISSUES PRESENTED IN RESPONDENTS' BRIEF

1. Does the Lower Court Ruling that the Lease Agreement was unambiguous require a finding for Defendant?

2. Does the application of "English Rules of Construction" require a finding for Defendant?

ARGUMENT

I. **DOES THE LOWER COURT'S FINDING THAT THE LEASE WAS NOT AMBIGUOUS REQUIRE A FINDING FOR DEFENDANT.**

One issue presented to this Court is simply to determine, as a matter of law, whether the lease contract is ambiguous. Respondent contends that the lower court's finding that the terms of the lease are "clear and unequivocal" requires a finding in Defendant's favor and the ambiguity issue which is not the case. If the contract is unambiguous, then its interpretation is a question of law reviewable by this Court. Kimball v. Campbell, 699 P.2d 714, (Utah 1985); Seashores, Inc. v. Hancey, 738 P.2d 645 (Utah App., 1987). If the lower court finds a contract to be ambiguous, then extrinsic evidence may be allowed on the question of the parties' intent to determine what the parties actually agreed to.

In the Kimball case cited above, the lower court found the contract at issue to be plainly ambiguous and then considered extrinsic evidence to clarify the parties' intent. These findings were affirmed by the Utah Supreme Court which stated:

"If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard." 699 P.2d at 716.

Thus, the threshold question of whether a contract is ambiguous is itself a question of law which must be reviewed by this Court before a determination can be made whether the lower court properly considered extrinsic evidence and the quality of that extrinsic evidence. Faulkner v. Farnsworth, 665 P.2d 1292 (Utah, 1983).

In this case Judge Uno found that the contract was unambiguous which Plaintiff asserts is error. This Court must review that error, in the first instance, without resort to any evidence which may be of record.

Indeed, the lease contract at issue in this case is similar to that construed by the Court in the case of Seashores, Inc. v. Hancey, supra. In that case the contract was held to be ambiguous when it referred to information on "other sheets" and "other contract documents". The court reasoned that without resort to the other documents referenced in the contract it was impossible to determine whether the main contract contained all material terms and was thus ambiguous. Similarly, in the case at bar, reviewing the renewal termination language in paragraph 4 is so unclear that it raises many questions about what the parties' intended and is therefore ambiguous. If the Lessor intends to terminate, as that paragraph provides, the question arises of

when can this termination be exercised - is it after one ten year term, after a "like successive period" (twenty years) or after "like successive period or periods." (thirty, forty, or infinity)? This ambiguity arises by failure to define the length of time meant by "period" as used in that paragraph or to provide a reference and definition for the phrase "said term" which can literally mean from ten years through perpetuity. As found by the court in the Seashores case a lack of clarity in such a situation requires a finding that the contract is ambiguous.

Lastly, once an ambiguity is found in a contract and extrinsic evidence is considered to resolve the ambiguity, if the contract is still unclear a court must apply the rule of construction to interpret the ambiguity against the drafter of the contract. This approach was recently clarified in the Court of Appeals case of Wilburn v. Interstate Electric, (Utah App. 1988) 748 P.2d 582, 583, and footnotes 1 and 2, and cases cited therein. It is for this purpose that the affidavits of the Plaintiffs should have been considered by Judge Uno to explicate for the court the expectations of the previous lessors on the lease term issue. After an appraisal of Plaintiff and Defendant's evidence on this point, Plaintiff submits the intent of the original contracting parties is still in conflict and cannot be determined with the result that the lease should be construed against the drafter, Reagan Outdoor Advertising.

II. DOES APPLICATION OF "ENGLISH RULES OF CONSTRUCTION" REQUIRE A FINDING FOR DEFENDANTS

The Respondent argues that there is no ambiguity in paragraph 4 of the lease because of the presence of a semi-colon which in effect links two independent clauses. In this way Respondent asserts that the lease provides for an automatic renewal and then contains subsequent language providing for possible termination at the end of this renewal.

This complicated approach does not clarify the intent of the parties or eliminate ambiguity in this lease. Rather, it in fact adds additional ambiguity. Indeed, the need to discuss grammatical technicalities to interpret the lease is evidence of its misleading, ambiguous nature. The language in question at paragraph 4 is as follows:

"This lease shall continue on the same terms and conditions for a like successive period; thereafter, this lease shall continue in full force on the same terms and conditions for a like successive period or periods, unless lessor delivers to lessee notice of termination within ninety days of the end of said term".
Lease Agreement, para. 4.

If the semi-colon in the third line is indeed replaced by a period as Respondent asserts, the following sentence still contains an ambiguity. For example, if the lease term of ten years was extended automatically for a "successive period" then a total of twenty years will have elapsed. Looking at the language following the word "thereafter" there is again language calling for a continuation of the lease for "a like successive period or periods" unless a termination notice is delivered. A question

thus arises whether termination is permissible after twenty years, thirty years, forty years, or in effect, never as the interpretation of "successive period or periods" is entirely undefined in this contract. Thus, there is indeed no resolution to the patent ambiguity of this paragraph under Respondent's analysis.

It is well settled that any document must be construed from its four corners and all provisions construed together and not in isolation. Barnhart v. McKinney, 682 P.2d 112 (1982, KS.). Since there are still critical questions as to when the lessor can terminate this lease, which a court cannot answer within the four corners of this document, the lease must be held to be ambiguous. Fundamentally, the goal of contract interpretation is to give it the meaning intended by the parties and rules of grammar should not be permitted to control the construction of a contract when to do so would render language meaningless. Rubenstein v. Weil 408 P.2d 140, (New Mexico, 1965). Certainly, a reasonable interpretation of the term and termination provisions of this lease contract should begin with a reference to the explicit language stated in paragraph 2 which states that the contract is one for a "term of ten years" and referring then to paragraph 4 where the lessor may terminate "within ninety days at the end of said term". There is no other reference to the word "term" other than this ten year reference and a logical construction is that a lessor may thus terminate within "ninety days of the end of said

term". That is, at the end of ten years as Plaintiff attempted.

Such a construction does not resort to grammatical revision

or technicalities of punctuation but is a direct and reasonable interpretation of the contract language itself. This is supported by the well settled view that specific provisions where they exist in a contract, will supercede and qualify more general ones. Norman v. Recreation Centers of Sun City, Inc., 752 P.2d 514 (Ariz. App., 1988).

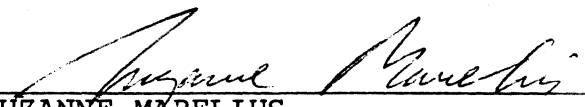
Respondent's brief cites Hampton v. Lum, 544 SW.2d (Civ. Ct. App.TX. 1976), and Faulkner v. Farnsworth, supra, to support its argument that the lease is not ambiguous. Both these cases are distinguishable as presenting fact situations very different than the one at issue. In Lum the lease had a renewal term that clearly contained the word "renewal" and the lease at issue here does not. Faulkner was held to be an ambiguous lease because too many questions were raised by written changes to a standard agreement. In the present lease the language is purporting to create a right of "renewal" is amenable to numerous interpretations, is hidden, and is phrased in a misleading manner. This lack of clarity makes the term ambiguous, and this Court should find so.

CONCLUSION

For the above-stated reasons this Court should find that the lease contract is ambiguous and should be construed against the drafter defendant Reagan Outdoor Advertising. Alternatively,

this Court should find the Lease lacking in mutuality, that it is illusory, or unconscionable and therefore void. For these reasons, the Court should find the lease term to be no more than ten years and thus no longer binding on Plaintiff.

DATED this 30 day of January, 1989.


SUZANNE MARELIUS
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing "Reply Brief" to Attorney for the Respondent, Mr. Douglas T. Hall, 1775 North 900 West, Salt Lake City, Utah, 84116, postage prepaid this 30th day of January, 1989.

