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General Insurance Company v. Christiansen Furniture Co. : Brief of Appellant

Utah Supreme Court

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Case No. 7459

IN THE SUPREME COURT
of the
STATE OF UTAH

**GENERAL INSURANCE COM-
PANY,**

Plaintiff and Respondent,

VS.

**CHRISTIANSEN FURNITURE
CO., a corporation,**

Defendant and Appellant.

BRIEF OF APPELLANT

FILED

MAY - 3 1950

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*Attorneys for Defendant
and Appellant.*

Clerk Supreme Court, Utah

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(Cont'd.)

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GENERAL INSURANCE COM-
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7459

BRIEF OF APPELLANT

STATEMENT

This action was filed by the General Insurance Company of America, hereinafter referred to as "Insurance Company," against the Christiansen Furniture Company, hereinafter referred to as "Furniture Company," operating a retail furniture business at 66 South Main Street in Salt Lake City. The basis of the complaint is a claim for rent claimed to have accrued during two months immediately following destruction of the premises by a fire on May 2, 1946. The property is

owned by the Rental Investment Company, a Utah corporation, and was occupied by the defendant Furniture Company up to the date of the fire under an oral month-to-month rental agreement; all rent was paid up to the date of the fire.

The plaintiff Insurance Company paid the Rental Investment Company under a rental insurance policy, for loss of rent sustained by the Rental Investment Company, owner of the said real estate, by reason of the building being damaged by fire and the rental use by the appellant furniture company being terminated. The plaintiff Insurance Company sues under a subrogation agreement made in connection with the issuance of its rental income insurance policy.

The appellant Furniture Company answered, admitting first the occupancy of the premises prior to the fire; second, the occurrence of the fire on May 2, 1946, which fire rendered the place unfit for further use; and third, denying that defendant and appellant became obligated to pay any rent whatsoever after the date of the said fire.

For some time prior to the fire, the premises had been adapted to the use of the Furniture Company and used as a retail furniture store, under a month-to-month oral agreement to pay \$875.00 per month.

There was no lease, or obligation on the Furniture Company to occupy the premises for any specific time or period. The fire occurred in the early morning of May 2, and the owner of the premises, Rental Investment

Company, requested the Furniture Company to hold everything in the premises so as to help in protecting the property until fire adjustment insurance claims could be handled.

The premises were rendered wholly unfit for further use as a retail furniture store. Remodelling of the whole building was in contemplation. The appellant Furniture Company moved to another building all of its books and records, and kept only a desk in the store, with signs and an attendant directing people to another building where the office was established after the fire. On one occasion, for two days, the appellant Furniture Company conducted a fire sale in the premises.

The Rental Investment Company and the Furniture Company were two separate and distinct corporations. The officers of both companies were substantially the same. The damaged furniture and furnishings and property of the Furniture Company remained in the premises.

The plaintiff sued under the subrogation agreement for the full rent, as the rate being paid before the fire of \$875.00 per month, for two full months after the fire. The plaintiff offered no evidence whatever as to any specific rental agreement, or as to the reasonable rental value of the premises under the existing conditions, as a basis for an implied obligation to pay rent. The rental prior to the fire was \$875.00 per month. The Court entered judgment for the full amount of \$875.00 per month for two months, together with interest and costs.

STATEMENT OF POINTS

The defendant filed this appeal, and has designated and included the entire record, and all the proceedings and evidence in the action, and in its appeal relies upon the following points:

1. The Court erred in denying defendant's motion for non-suit and dismissal (Tr. 99) on the ground that the plaintiff had failed to prove an agreement to pay rent, or facts on which to base an implied agreement to pay rent, and the reasonable rental value of the damaged property.

2. There is no evidence in the record of any express agreement of the Furniture Company to pay any rent and there is no evidence of the rental value of the premises after the fire, or any evidence at all to support Finding of Fact No. 6 (Tr. 24). "That the agreed rental was \$875.00 per month," and Finding of Fact No. 9, (Tr. 25), reading: "The Court finds generally in favor of the plaintiff corporation and against the defendant corporation."

3. That there is no finding or evidence to support the Conclusion of Law No. 1, that plaintiff is entitled to a judgment against the defendant in the amount of \$1,750.00.

4. That the judgment awarding plaintiff \$1,750.00, and \$262.50 interest, is unsupported by any evidence or Finding of Fact, and is contrary to the evidence, and there is no evidence on which to base any findings to support the judgment.

ARGUMENT

The pre-trial order (Tr. 15) specified that the only issue of fact is the amount of use of the buildings described, in the premises that were destroyed by fire, that was made by the defendant during the months of May and June, 1946, and the only question of law presented is as to whether a tenant of premises that are damaged by fire, who makes use, or some use of the premises, is liable for the full amount of the rent and the reasonable rental value of the premises, or owes no rent at all.

In support of point one, that the motion for non-suit should have been granted, the record affirmatively shows there was an agreement that there should be no rent obligation. (Tr. 50).

On the trial of the action before the Hon. John A. Hendricks, Judge, Howard Christiansen, President and Manager of the appellant Furniture Company, testified (Tr. 42) that he was President of both the Rental Investment Company, owner of the premises, and the Furniture Company, appellant tenant (Tr. 43); that the Furniture Company occupied the premises as a watchman, to keep track of what was left of the damaged merchandise, and that on June 24 and 25, a fire sale was held, pursuant to an advertisement in the Deseret News (Tr. 44); that the Rental Investment Company made claims for loss of rental against the Insurance Company in the amount of \$875.00 per month, and the Rental Investment Company received a settlement on that basis for the months of May and June (Tr. 45). On cross-examination, Mr. Christian-

sen testified (Tr. 46) that a fire occurred May 2 at 2:15 A.M.; that when he got to the store the doors were broken in and everything went up like a flash (Tr. 46); that the floor was covered with water; that the entire walls were completely wrecked, with the plaster falling (Tr. 47). The building was unsafe for customers to get in or the general public; that he immediately contacted the Insurance Company and then transferred the business over to a warehouse at 45 Richards Street, where they set up operating headquarters (Tr. 48); that the retail furniture business was not continued in the main building; that the damaged merchandise was taken out, and the Furniture Company merely kept someone at the store to receive payments and send others to the temporary office, and signs were posted to make payments at 45 Richards Street, the new location (Tr. 49). The front door was closed with canvas and boards, and the owner of the building instructed the Furniture Company to keep a watch at night, and there was an agreement that there would be no rent as long as the damaged premises were unoccupied. The premises were unoccupiable during the months of May and June (Tr. 50). The Rental Investment Company did remodel, as the owner of the building. There was no agreement made at any time to pay rent during May and June, and he was requested not to move or disturb anything (Tr. 52). The officers of both the Furniture Company and the Rental Investment Company, in a regular meeting, discussed the matter of rent, and there was no request or demand made upon the Furniture Company to pay, or meet any obliga-

tion for rent during the month of May or until full occupancy was resumed.

On re-direct examination, Mr. Christiansen testified, giving the names of the officers of the Rental Investment Company and of the Furniture Company, that the Furniture Company ceased doing business in the main store, but did hold a fire sale, but there was no agreement between the owner and the tenant to pay rent, the owner making claim under its insurance policy for loss of rent. The witness identified certain exhibits, E, F, G, H, I and J (Tr. 54) as photographs showing parts of the damaged building (Tr. 56). W. H. Shipler testified as to the exhibits, photographs taken by him (Tr. 58.) Howard A. Christiansen resumed the stand on further cross-examination (Tr. 58) and testified (Tr. 59) that after the fire, on May 2, negotiations were going on for settlement of a claim made by the Rental Investment Company for loss of rent, and that the Furniture Company paid rental to the Rental Investment Company on the new location in the warehouse, to which the business office was moved the day following the fire. Scott Wetzel testified (Tr. 60) as to the general condition of the building after the fire, and his negotiations for settlement, and finally that the \$4,000.00 paid under the insurance policy to the Rental Investment Company (Tr. 65) was paid as a compromise settlement of a claim for seven months' loss of rent. He further testified (Tr. 67) that he had seen merchandise in the damaged building, and at different times saw employees of the Furniture Company in the store. The witness further testified (Tr. 75) that

he was unable to make any agreement with respect to fixing any amount of rental to be paid by the Furniture Company during any period after May 2, which was the date of the fire.

The matter went into litigation (Tr. 77), and (Tr. 78) liability under the policy was calculated on the basis of the time required to repair the building. The \$4,000.00 paid was on a basis of \$875.00 a month for nearly five months, on a basis of compromise settlement (Tr. 78, There was a substantial amount of water through the building, and sawdust was placed on the floor to absorb the water. The witness saw various different employees of the Furniture Company in the building (Tr. 80). He could not calculate how the agreed rental was divided between the store and the warehouse property.

Mrs. Merrill testified (Tr. 82, 83) that she visited the store on June 24 and saw people there, and purchased some furniture at the sale.

Mrs. Hopkins testified that she was employed by the Furniture Company (Tr. 88) and worked on the accounts of the company with Mr. Greenwood, that she was there at the time of the fire sale, and saw the accounts of the company at the store during the day, but they were taken away at night, and that she saw (Tr. 90, 91) customers make purchases. She simply stayed there to keep up contacts with customers.

Mrs. Ainsworth testified as to visiting the store after the fire, and the location of the office desk and typewriter (Tr. 97).

The plaintiff rested, and the defendant (Tr. 99) moved for a non-suit, which was denied. Mr. Christian-sen, a witness for the defendant testified (Tr. 101) as follows:

The Furniture Company, at the time of the fire, was occupying the building at No. 66 South Main Street, Salt Lake City, and was also leasing from the Rental Investment Company warehouse space in the rear of the furniture building, in no way connected with the retail store on Richards Street, and paying therefore \$125.00 per month. The whole operation of the Furniture Company retail business was located in the Main Street store. The Furniture Company had branch stores at Richfield and at Ephraim. After the fire, it became necessary to move the operations of the retail business to the warehouse at 45 Richards Street (Tr. 102), and a day or two after the fire, the office equipment was moved to the warehouse location at 45 Richards Street. Customers were calling for their furniture bought and left for repair, and other furniture in for repair, and to make payments. From the date of the fire on, the Furniture Company acted as a watchman for the premises. The matter of the Furniture Company continuing in the premises was discussed with the officers of the Rental Investment Company, and there was no requirement or agreement that any rent would be charged or paid for the further use or occupation of the premises by the Furniture Company (Tr. 50 and 106). The witness further testified that he had been in the furniture business for many years and had rented similar property in Salt Lake City, and was

familiar with the fair rental value of similar property, and that under the conditions existing during the months of May and June, 1946, the reasonable rental value of the premises involved was \$50.00 to \$75.00 per month. The windows and doors of the building were not closed, and it would have been necessary to keep a watchman there at all times if the Furniture Company had not stayed in the premises and acted as a watchman (Tr. 108). The damage was extensive. Plaster was falling and walls were cracked, so that everything had to be torn down and rebuilt. The Furniture Company got everything out, and the contractor then started right out with the work, without any delay on its account whatever (Tr. 109). On cross-examination, the witness testified that at the fire sale in June, about \$2,000.00 to \$2,500.00 in merchandise was sold (Tr. 110). The Furniture Company had a policy of insurance for use and occupation (Tr. 116), and was paid for loss under this policy, and the Rental Investment Company was paid for loss of rental under its policy. The Rental Investment Company determined what repairs and rebuilding would be done, and the Furniture Company was paid under its business insurance policy for a loss of income. (Tr. 118).

B. R. Greenwood, a witness called for the defendant, (Tr. 120) testified that he was an employee of the Furniture Company, was familiar with the business and the occupancy after the fire, that he was familiar with rental values, and that in his judgment the reasonable rental value of the premises during the months of May and June was \$50.00 to \$75.00 a month.

Earl B. Bennett (Tr. 129) testified that he was employed as a shipping clerk and that he was called to locate the electrical shut-off immediately, and that the walls were damaged to the extent that it was not suitable for continued use. The store was not used for anything at the time, and all the business of the Furniture Company was carried on from the warehouse, except a fire sale for a day and a half.

We have detailed the evidence to make clear the basis of this appeal. The whole theory of the complaint was damages for breach of contract of the Furniture Company to pay rent. Paragraph 3 of the complaint alleges that the Furniture Company "occupied said premises as a tenant under an oral month-to-month rental agreement* * * *." The complaint then alleges the fire, and that the Furniture Company "continued to occupy said premises as tenant," and further, that on or about July 2, 1946, the Furniture Company "vacated said premises, and ever since has failed and refused to pay the agreed rental of \$875.00 per month * * *."

We take the position that the evidence wholly failed to establish any agreement, after the changed conditions due to the fire on May 2, of the Furniture Company to pay rent. The uncontradicted evidence of the witness, Christiansen, as above pointed out, is that there was no agreement to pay rent after the fire, and that no demand for the payment of rent was ever made by the landlord. The plaintiff therefore wholly failed in his proof, and the Court should have sustained the defendant's motion for non-suit and dismissal at the close of the plaintiff's evi-

dence. The plaintiff sued on the express agreement to pay rent, and did not seek to amend his pleading to seek a judgment on an implied agreement, and even if this application to amend had been made, plaintiff had produced no evidence to justify or support such amendment or recovery on the theory of implied agreement and quantum meruit.

Passing on to points 2, 3 and 4, which we will consider and discuss together, that there was no evidence to support the finding of an express agreement or an implied agreement to pay rent, and no evidence and no finding to support the judgment for \$1750 rent for two months, we again urge that the theory of the action is breach of an express agreement, and that there is no evidence to support this theory, all of the evidence of the defendant on this point being to the contrary. Again we assert that plaintiff did not seek to change his theory and recover on a quantum meruit, and again assert that even had he done so, there still was no evidence in the record on which the Court could find the reasonable rental value of the premises to be \$875.00 per month. Further, the Court did not attempt to make any such finding. Surely, the bald Finding No. 9, "The Court finds generally in favor of the plaintiff corporation, and against the defendant corporation," could not be so construed. The Court did close Finding No. 6 with the words "that the agreed rental was \$875.00 per month." We refer back to our previous statement, and re-assert that this is wholly without support in the evidence.

We have been unable to find any case or principle of law, applied, which could be pointed to as supporting this judgment, and we seriously doubt that counsel for respondent, applying even greater diligence, can do so. We find one analogy in the bankruptcy cases where, upon bankruptcy, a lease is terminated and the Trustee holds over during the course of liquidation, as the Bankruptcy Act contemplates. The Courts there say that under the changed conditions, the Trustee or Receiver is obligated to pay only reasonable rent, and the agreed rental in the lease is only some evidence of what is reasonable rent. We call the Court's attention to the case of *Crook v. Zorn*, 100 F. (2d) 792, where the Court says:

“There being no express contract of rental, and no claim that the relationship of landlord and tenant existed, the rights of the parties are fixed by law. Section 62 of the Bankruptcy Act, 11 U S C A, Section 102, provides for payment from the estate of the actual and necessary expenses incurred. * * * Necessary expense in this connection is the cost of preserving the property. The full rental value of the entire building would have very little weight in determining the amount of this necessary expense, and there was no evidence before the court below upon which to base a finding as to a reasonable storage charge. There being no claim for storage and no evidence tending to prove what amount would be fair and reasonable in the circumstances, the Court did not err in denying the rental claim entirely.”

We refer the Court also to *In re Millards, Inc.*, 41 F. (2d) 498. In this case, similar circumstances existed.

The Receiver and Trustee occupied the premises after bankruptcy, mainly for storage purposes, and the landlord presented a claim for rent on a basis of a lease. The Court, in denying this claim and fixing a lesser amount, stated, at Page 499:

“The fair rental value of such property cannot be tested by its value for such a use or for storage purposes. If storage was the only purpose of retaining it, the stock might have been taken to distinctly storage premises at very much lower rate. Nor is it material that some time would be required to prepare the property for another tenant, or that another tenant was not immediately on hand to take the premises. There was no basis in the facts, nor under the law, for applying the first year’s rent rate under the lease to the period in question.”

We respectfully submit that each of the points of error is well taken, and should be sustained, and the judgment of the trial court reversed, with direction to enter judgment in favor of the defendant with costs.

Respectfully submitted,

SKEEN, THURMAN & WORSLEY,

*Attorneys for Defendant
and Appellant.*