

1950

## General Insurance Company v. Christiansen Furniture Co. : Brief of Respondent

Utah Supreme Court

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F. Robert Bayle; Attorneys for Plaintiff and Respondent;

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# In the Supreme Court of the State of Utah

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GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,

*Plaintiff and Respondent,*

vs.

CHRISTIANSEN FURNITURE COM-  
PANY, a corporation,

*Defendant and Appellant.*

Case No. 7459

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## RESPONDENT'S BRIEF

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# FILED

JUN 7 1950

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Clerk, Supreme Court, Utah

F. ROBERT BAYLE,  
*Attorney for Plaintiff  
and Respondent.*

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# In the Supreme Court of the State of Utah

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*Defendant and Appellant.*

Case No. 7459

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## RESPONDENT'S BRIEF

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### STATEMENT

Respondent, the General Insurance Company of America, hereinafter referred to as "Insurance Company," sued Appellant, the Christiansen Furniture Company, a Utah Corporation, hereinafter referred to as "Furniture Company," for rent which accrued during the two months period immediately following a fire on May 2, 1946, which partially damaged the property it was occupying as tenant.

The respondent cannot agree with the statement of facts contained in appellant's brief insofar as the same states that

after the fire occurred, the owner of the premises 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; nor that the building was destroyed by the fire; nor that the appellant vacated the premises and only instructed the Furniture Company to keep a watch at night, and that there was an agreement that there would be no rent during the period in question.

The Furniture Company occupied the premises at 66 South Main Street in Salt Lake City, under an oral month-to-month agreement prior to the fire, which occurred in the early morning hours on May 2, 1946 (Tr. 42, 43 and 44). The building was owned by the Rental Investment Company, a Utah Corporation, and rental paid by the Furniture Company was \$875.00 per month (Tr. 43, 65, 66, 73, 75, 76 and 82—Plaintiff's Exhibit A).

The Rental Investment Company and the Furniture Company were separate Corporations but were kindred in nature as the officers of both companies were virtually the same. Howard A. Christiansen was President of both corporations, Mabel C. Larsen was Secretary-Treasurer of both companies, while Ralph H. Christiansen was Vice President of the Rental Investment Company and Golden M. Christiansen was Vice President of the Furniture Company. Thus the control of the two corporations was in the Christiansen family (Tr. 43, 53 and 74).

The premises were not rendered wholly unfit for occupancy as is claimed by the Furniture Company. The actual

fire was confined to the area of the store where the business office had been previously situated, and there was not very extensive damage to the interior, except for smoke (Tr. 61, 62, 70 and 98, Plaintiff's Exhibits D, F, G, J and I).

The Furniture Company continued to occupy the premises during the months of May and June. The office was maintained therein and customers were invited in to make payments on accounts and contracts (Tr. 66, 68, 80, 81, 89, 96 and 97—Plaintiff's Exhibits D and E). A two-day fire sale was conducted on June 24 and 25, some seven weeks after the fire (Tr. 44, 69, 82, 83, 84, 86, 89, 90, 91 and 93—Plaintiff's Exhibits B and K). The Furniture Company finally vacated the premises on July 2nd or 3rd (Tr. 69).

The Insurance Company paid the Rental Investment Company for the loss of rent sustained, as a result of the fire damage to the building, under the provisions of an insurance policy which insured the rental income from the premises resulting from fire (Plaintiff's Exhibits A and C).

Had the Furniture Company promptly vacated the premises directly following the fire, repairs could have been completed within sixty to seventy days (Tr. 75 and 76). The Insurance Company was only obligated to pay for the time it would require to repair the building (Tr. 78). However, the Furniture Company did nothing to facilitate vacating the premises (Tr. 74).

At the time of settlement, the Insurance Company took a subrogation agreement from the Rental Investment Company (Tr. 74—Plaintiff's Exhibit A).

The Insurance Company then brought suit under this subrogation agreement for the rent covering the months of May and June, during which time the Furniture Company was in possession of, and using the premises.

## STATEMENT OF POINTS

1. The Trial Court properly denied Defendant's motion for non-suit and dismissal at the conclusion of Plaintiff's evidence.

2. The Trial Court did not err in its findings that the rental was \$875.00 per month and in awarding Plaintiff judgment against the Defendant for two months rent plus interest.

3. The findings of fact of the Trial Court upon conflicting evidence should not be disturbed on review.

## ARGUMENT

### I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR NON-SUIT AND DISMISSAL AT THE CONCLUSION OF PLAINTIFF'S EVIDENCE.

In support of the motion for non-suit, the appellant contends that there was an agreement that there should be no rent paid by the Furniture Company to the landlord, The Rental Investment Company, for the two months' occupancy of the premises following the fire. Howard Christiansen, President

and Manager of the Furniture Company, testified that the Rental Investment Company as landlord requested the Furniture Company to continue occupancy of the premises after the fire as "a watchdog" and that it was not considered as a tenant.

Much confusion can be avoided in this case if it will be kept in mind that Howard Christiansen was President of both the Rental Investment Company, the landlord, and the appellant Furniture Company, the tenant. Hence any agreements alleged to have been consummated after the fire regarding the matter of rent to be paid would be merely a state of mind existing within the person of Howard Christiansen, an agreement conveniently made with himself. Had this been the usual landlord-tenant situation, where the two corporate entities were unrelated insofar as their officers were concerned, the tenant would have been obliged to immediately vacate the premises or in lieu thereof, stand liable for the rent. The contents of the building in the form of furniture stock would not have been the concern of the landlord had not the President been one and the same for both Corporations.

Counsel for the appellant details at length the testimony of Howard Christiansen in support of his contention of non-suit. However, the testimony of the most important witness, Scott Wetzel, Jr., has been entirely ignored. He testified that he was an independent insurance adjuster employed by the Insurance Company to investigate the fire and handle the adjustment of the rental loss with the Rental Investment Company (Tr. 60 and 61). His investigation began the day of the fire (Tr. 61) and continued throughout the two-month period of occupancy of the premises by the Furniture Com-



pany, and for several months thereafter until settlement was finally concluded (Tr. 74). Witness Wetzel had photographs taken (Plaintiff's Exhibits D through I) on May 29th when it became apparent that Howard Christensen was intentionally delaying in an effort to effect a more favorable settlement with the other insurance carriers on the damages to the building. An entire alteration of the store from the original architectural design was contemplated and vacating by the Furniture Company was accordingly delayed (Tr. 64). During this course of events the Furniture Company continued to occupy the premises, conducted a fire sale on June 24th and 25th, and not until July 2nd or 3rd were the premises finally vacated. The evidence is uncontradicted in this respect and the photographs (Plaintiff's Exhibits D to I) conclusively show that the damage to the building was not extensive and that most of the furniture was undamaged except for smoke (Tr. 66 and 67).

The agreed rental of the premises was \$875.00 per month (Tr. 65 and 66—Plaintiff's Exhibit A). The Furniture Company retained possession for its exclusive use and benefit during the two-month period following the fire and accordingly incurred liability for the rent. The Insurance Company desired to settle the claim for loss of rental with the Rental Investment Company upon a fair basis but when the Furniture Company intentionally delayed vacating the premises for over two months after the fire, it insisted upon an agreement of subrogation permitting it to seek restitution for the period of time the Furniture Company occupied the building as a tenant (Tr. 65). The subrogation agreement contained a

covenant whereby the Rental Investment Company warranted that it had not released or discharged the Furniture Company from any claim it may have had for rent during the occupancy of the premises following the fire (Plaintiff's Exhibit A).

The Court's attention is invited to a portion of the testimony of witness Wetzel (Tr. 73 and 74) which aptly explains the difficulties in concluding settlement in view of the collusion existing between the Furniture Company as tenant, and the Rental Investment Company, as landlord:

By Mr. Skeen. "You know of no agreement of any kind with respect to rental as between the Rental Investment and the Christiansen Furniture Company after the date of the fire on May 2?

A. I know of no agreement.

Q. And in your testimony here and in the claim that is made you were simply assuming that the same rental would carry on after the fire as before the fire?

A. Well, as you should remember, there was contention by me that the loss of rental to the Rental Investment Company was a difficult thing for me to determine, for the reason that as I dealt with you, you were the attorney for the Rental Investment as against the attorney for the Christiansen Furniture Company, for whom you were also the attorney; so I was actually dealing with two merged corporations who were actually one and the same—the same officers, practically every one.

It was hard for me to determine what the obligation was to the tenant and back to the landlord. I contended from the beginning that after the inventories had been completed and the insurance

companies had all agreed with the Christiansen Furniture Company as to the extent of the damage, the insurance company which had the Rental Investment was prejudiced by the fact that the Christiansen Furniture Company remained in the premises and did nothing else to facilitate the date that they could return to the premises.

Q. That was the basis of the controversy between the Christiansen Furniture Company and the insurance company which finally resulted in the \$4,000 settlement?

A. The \$4,000 settlement was made on demand from you, and any excess of that amount of money, the agreement was to reduce it in round figures, and I passed it on to my principals, and they authorized me to settle with this subrogation agreement.

The Trial Court had all of the evidence before it at the conclusion of the plaintiff's case. It was the trier of the facts and had opportunity to observe the demeanor of the various witnesses. The Court concluded that the plaintiff had sustained its burden of proof in showing a legal obligation on the part of the Furniture Company to pay rent for the two-month period following the fire and I respectfully submit that the defendant's motion for non-suit and dismissal was properly denied.

## II

THE TRIAL COURT DID NOT ERR IN ITS FINDINGS THAT THE RENTAL WAS \$875.00 PER MONTH AND IN AWARDING PLAINTIFF JUDGMENT AGAINST THE DEFENDANT FOR TWO MONTHS RENT PLUS INTEREST.

The only question of law really involved in the instant case is whether the Furniture Company is liable for the full amount of rent as a result of having retained possession of the premises for a two-month period after the same were partially damaged by the fire. The evidence amply shows that the Furniture Company did make substantial use of the premises and that the same were not vacated until July 2nd or 3rd, two full months after the fire.

The law is clearly stated in 32 American Jurisprudence, Section 493, page 402:

"According to the common law as declared by the English courts and by a majority of the American courts, a tenant remains liable for the agreed rent of the demised premises so long as any part thereof remains in existence capable of being occupied or enjoyed by him, irrespective of injury or destruction by fire or other casualty. Thus, in the absence of a provision in the lease, or of a statute, to the contrary, the destruction of buildings upon the leased premises during the term by fire, inevitable accident, the violence of nature, or a public enemy, not so complete as to leave no part of the subject matter of the lease in existence, does not relieve the tenant from the obligation of his covenant to pay rent, or entitle him to an abatement of a proportional part of the rent."

36 C.J., Section 1130, page 325.

52 C. J. S., Section 486, page 255.

This is clearly the majority rule and is followed in the recent case of:

Anderson vs. Ferguson (Washington—1943) 135  
P. 2d 302.

wherein the Court adjudged the tenant liable for the payment of rent where a portion of the premises were destroyed by fire.

Another case quite in point is Knoblaugh et al vs. McKinney et al, Cal. 1935, 42 P. 2d 332.

In this case an earthquake rendered the plaintiff's apartment building uninhabitable for the most part, but the defendant, as a tenant, elected to remain in possession while the plaintiff made repairs. The Trial Court held that the defendant was liable for the full amount of the rent which was not affected by the impairment of the property by the earthquake.

Likewise in the case of White vs. Steele (Texas, 1930) 33 S.W. 2d 224, the Court held the tenant liable for rent during the period of occupancy following a fire which partially destroyed the premises. In that case the defendant was renting a store room in a hotel building when the building was about 50 per cent destroyed by fire. The defendant continued to use a part of the space and thereby became liable for the full amount of the rent.

Gamble-Robinson Company vs. Buzzard et al. 65 Fed. 2d 950.

Demund vs. Oro Consolidated Mines (Arizona) 108 P. 2d 770.

Nick Pedro vs. D. A. Potter et al, 242 P.926, 42 A. L. R. 1165.

In the case of Scharbauer vs. Cobean et al (N. M. 1938) 80 Pac. 2d 785, 118 A. L. R. 102, the tenant occupied a store building when the same was partially damaged by fire. The court held the tenant liable, following the majority rule as aforementioned.

The rule is also stated in Underhill, Landlord and Tenant, Vol. II, paragraph 788, page 1339, wherein the author says:

"The relation of landlord and tenant is not determined by the destruction of the premises either where the lease is for a term of years in writing or from year to year. It is a well settled rule of the common law that where lands are the subject of a demise and the buildings and improvements thereon are accidentally destroyed before the end of the term, this destruction of the buildings by fire, tempest or flood does not discharge the covenant to pay rent in the absence of an express stipulation to that effect."

See also Tiffany—Real Property, Third Edition, Volume 3, para. 905, page 567.

Applying the foregoing rule of law to the instant case, the trial court properly found that the Furniture Company was liable for rent for the two months in question and entered judgment accordingly.

I fail to see where the two cases cited in appellant's brief are applicable to the instant situation. These cases both involved bankruptcy matters wherein a receiver was appointed to liquidate the assets of the businesses. The premises were occupied for storage purposes in connection with preserving the property of each receivership. There was no claim that the relationship of landlord and tenant existed and accordingly under the changed conditions the receiver in each instance was liable only for fair and reasonable rental based upon the limited use of the premises. The respondent has no argument with the conclusion reached by the Court in the two aforementioned cases for the reason that in each of them a receiver

had replaced the tenant and hence the landlord-tenant relationship was terminated. However, the cases have no application to the instant situation.

I respectfully submit that the Trial Court did not err in its Findings and that the judgment as entered should be affirmed.

### III

THE FINDINGS OF FACT OF THE TRIAL COURT UPON CONFLICTING EVIDENCE SHOULD NOT BE DISTURBED ON REVIEW.

This was a law action, and the Court made its findings of fact based on evidence upon which there was little conflict, except for the biased testimony of witness Howard A. Christiansen.

In such a case, the authorities are in accord to the effect that, in a law case, findings of a Trial Court will not be disturbed, unless clearly against the weight of the evidence.

52 C. J. S., Para. 566, page 407:

"In an action for rent, questions of law are for the determination of the Court, while issues of fact are to be determined by the jury or by the trial court sitting without a jury."

3 Am. Jur. 470:

"The weight of conflicting evidence in an action tried by the court without a jury is exclusively for the trial court; and the appellate court must accept as true that

which tends to sustain the decision, and reject any testimony in conflict with it."

The foregoing rule has been recently confirmed by this Court.

See *Waverly Oil Works Co. vs. R. B. Epperson, Inc.*,  
105 Utah 553, 144 P. 2d 286.

As has been heretofore discussed at length under Points I and II, the trial court had substantial evidence to prove the questions of duration of the tenancy by the Furniture Company, and the time of termination thereof. The findings were in favor of the plaintiff on these issues and judgment accordingly entered. From a preponderance of the evidence, the Court properly drew its own conclusion as to the liability of the appellant Furniture Company for the payment of rent during the two-month occupancy of the premises following the fire.

In conclusion, I respectfully submit that the judgment as rendered by the trial court is, in all respects, correct and should be affirmed.

Respectfully submitted,

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*Attorney for Plaintiff  
and Respondent.*