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Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

PETER LYSENKO Plaintiff-Appellant, vs. MITCHELL J. SAWAYA and LILLIE MARIE SAWAYA, Defendants-Appellees.	Case No. 980011-CA Oral Argument Priority 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, UTAH
THE HONORABLE DONALD J. EYRE

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

Sawayas repeatedly emphasize their claim that the equipment was "old and dilapidated." (Sawayas' brief at 6, 8, 10; *see also* 11, 13 n. 2, 15.) This improper attempt to prejudice the Court should not be rewarded. Of course the equipment was used, some of it for 18 years, but all of the equipment valued by Mr. Steenblik was still being used by Sawayas' tenant. (Tr. 32, 73.) In fact, the equipment had been in use by Sawayas' tenant for nearly two years at the time of valuation by Steenblik. (Tr. 74-75.) This conclusively shows that the equipment was not as "old and dilapidated" as Sawayas would have this Court believe. Whatever the condition of the equipment, that condition was already factored into the appraisal made by Mr. Steenblik.

Some of the equipment, such as the fryer, was almost new. The fryer had been purchased at a cost of $10,000.00 only six months

before Lysenko was forced to close his restaurant. (Tr. 92, 127-28.)

ARGUMENT

POINT I

LYSENKO PRESENTED SUFFICIENT AND COMPELLING EVIDENCE OF UNJUST ENRICHMENT AT THE TRIAL.

A. The Claim Of Unjust Enrichment Was Raised At Trial.

Sawayas assert (at page 11 of their brief) that Lysenko's unjust enrichment claim was raised for the first time several months after trial. The record is simply contrary to this argument.

Lysenko acknowledges that the claim of unjust enrichment is not specifically raised in his complaint. The issue was litigated, however, and therefore was properly before the Court. J.J.N.P. Co. v. State Division of Wildlife Resources, 655 P.2d 1133, 1139 (Utah 1982). To raise an issue at trial, a party must (1) timely bring the issue to the attention of the trial court, (2) specifically raise the issue to a level of consciousness before the trial court, and (3) introduce to the trial court supporting evidence or relevant legal authority concerning the issue. Hart v. Salt Lake County Commission, 945 P.2d 125, 130 (Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997).

The claim of unjust enrichment was timely raised. With the first witness on the first day of trial, Lysenko offered into evidence a copy of the lease between Sawayas and HB Properties.

Sawayas objected to the evidence as irrelevant. Lysenko argued for the admission of the evidence on the ground that it showed the equipment "had value and he [Sawaya] was receiving money on it." (Tr. 20.) Whether Sawaya was receiving money for the equipment was relevant only to a claim of unjust enrichment. (Additional evidence was presented on the unjust enrichment issue, as shown below.)

The issue was raised to the level of consciousness before the trial court. In closing argument, Lysenko's counsel argued as follows:

> Mr. Slaugh: But he did have -- I think the <u>Court has to look at the unjust enrichment in determining the value</u>. The case says the measure of damages was the full value of the property, and the full value is the value in place.
>
> The fact that it may not have been able to sell on the open market for a whole lot of money is not particularly important. Mr. Lysenko testified that he had a use for it. What he's going to have to pay is what it's going to cost to buy new equipment, since a lot of this is not readily marketable.
>
> Then again, I go back to policy issue. The <u>unjust enrichment</u> of claim. Mr. Sawaya and Mrs. Sawaya have that much value. If the Court rules otherwise, there's always going to be an incentive.[1] You know, if you have that difference, you need to pay the full value.

---

[1]Referring to the same argument as raised in Lysenko's initial brief at p. 15: "A rule authorizing payment of only liquidation value under these circumstances also creates a very improper incentive: if a landlord knew it could obtain $35,185.00 worth of equipment for only $10,980, by wrongfully preventing the owner from taking possession, the choice would usually be in favor of conversion."

. . . .

> The case of Brewerton versus Dixon is somewhat analogous situation. There was a fruit grower out in I believe Edgemont that had his crop burned up because of someone's negligence. The grower who had -- I mean, the contractor who had started the fire tried to argue that the measure of damages, the value before and the value after, the land was worth a whole lot less, and they tried to argue that as a measure of value.
>
> The Supreme Court held the measure of value as the income stream that could have been generated from that fruit that was on the property. It shows that really you're looking at what the value was to the person who had that property.

(Tr. 255-56, emphasis added.)

Finally, Lysenko offered both evidence and argument on the issue. The arguments are set forth above. The evidence included the lease with HB Properties described above, and evidence that HB Properties used the existing equipment and therefore saved at least $60,000.00 in start-up expenses. (Tr. 228-29, 250; see Lysenko's initial brief at p. 10.) Most notably, Lysenko presented evidence through Reid Steenblik concerning the value of the equipment in place, which was the benefit to Sawayas.

B. Lysenko Established A Proper Measure Of Damages For Unjust Enrichment.

Sawayas argue that there is no evidence delineating what percentage of the monthly rental paid by HB Properties to Sawayas may be attributed to Lysenko's equipment. (Sawayas' brief at 11.) Lysenko had no duty to present such evidence. Such evidence would

have been one way to demonstrate the amount of benefit received by Sawayas, but not the only way. Where Sawayas retained possession of property owned by Lysenko, the in-place value of that property was a proper measure of damages. Horseshoe Estates v. 2M Co., 713 P.2d 776, 779 (Wyo. 1986) (unjust enrichment by installation of sprinkler system measured by value of the materials installed rather than the benefit conferred (increased value of the land)); Robertus v. Candee, 670 P.2d 540, 542 (Mont. 1983) (measure of damages is either the value of labor and materials or the value of the enhancement to the property) (citing Restatement of the Law of Contracts 2d § 371). Where there are two potential measures of damages, "and the plaintiff gives evidence only as to one, it is up to the defendant to show that the other measure of damages would be less." Ault v. Dubois, 739 P.2d 1117, 1121 (Utah Ct. App. 1987).

The evidence in this case conclusively showed that Sawayas had leased Lysenko's equipment to HB Properties. The evidence further showed that HB Properties saved at least $60,000.00 in start-up costs by using Lysenko's equipment. The conclusion is inescapable that Sawayas benefitted from the use of Lysenko's equipment. The best measure of that benefit was the value of the equipment itself, in place and as used by Sawayas. The trial court erred in not accepting that measure of damages.

POINT II

LYSENKO DID NOT WAIVE HIS CLAIM TO POSSESSION OF THE EQUIPMENT.

Count II of plaintiff's complaint alleged: "Plaintiff is entitled to an Order declaring that plaintiff is the owner of each of the items of personal property and permitting plaintiff to take possession of such property." (R. 2.) The prayer for relief in the complaint sought a "declaration that plaintiff owns the personal property," which would include the incidents of ownership including the right of possession. (R. 1.) In his opening statement, Lysenko's counsel argued that Lysenko was "entitled to either receive the equipment back--it's removable. We could go out today and take it out--or he is entitled to the value of the equipment." (Tr. 6-7.) Lysenko submitted a trial memorandum, the first point of which argued that "Peter Lysenko now owns [the interest of Central Bank] and is entitled, pursuant to Utah Code Ann. § 70A-9-503, to take possession of the personal property." (R. 274.) In his testimony, Mr. Lysenko testified that he had a use for the equipment and wanted the items returned to him. (Tr. 102.)

In response to Sawayas' motion to dismiss at the close of Lysenko's evidence, Lysenko's counsel presented the following arguments to reenforce Lysenko's claim for possession:

> Mr. Slaugh: Okay, that gets to the final point of this memo. In the Complaint we ask for possession. That is one of the rights [---] [T]hat's the way you enforce the security interest. The secured party has the right under UCC [sic] 78-9-503 to go and take possession. We asked for the right to go in and take possession.

> Alternatively, if the Court doesn't allow that, we would ask for the right to foreclose it. That's the same kind of thing; take possession or sell it. Or we've asked for a conversion remedy. If they have taken the property, which is the subject of the security interest, we're entitled to the damages, the loss of what that value was, which is the value of the property.
>
> Now, our real preference is to go in and take possession, pursuant to the security interest. The property is still subject to that security interest. We've presented evidence that the security interest was perfected and --

(Tr. 164-65.)

Finally, in closing argument, Lysenko's counsel argued that Sawayas needed to pay for the equipment or return it. (Tr. 251.) Counsel concluded closing arguments by reaffirming the request for possession:

> We simply request the Court either declare, as was asked in our complaint, that Mr. Lysenko owns that, and he is entitled to go out and pick [it up]; or grants the value of it, based on the in-use value, which is what it was worth to Mr. Lysenko, and which is the value that Mr. Sawaya gained from it.

(Tr. 257.)

Notwithstanding these repeated demands for possession, from the initial complaint to the closing arguments at trial, Sawayas now claim that Lysenko somehow waived the claim because his new trial motion focused on a different issue and because he inadvertently omitted the issue from his docketing statement. These arguments should be rejected.

Lysenko's new trial motion raised an issue (measure of damages) on which Lysenko believed there was some potential for changing the trial court's decision. There is no requirement that a party file a new trial motion before appealing, Dugan v. Jones, 724 P.2d 955, 956 (Utah 1986), and therefore the failure to raise an issue in a new trial motion does not waive that issue.

Sawayas admit that the omission from the docketing statement does not prevent Lysenko from raising the issue on appeal, Nelson *for* Stuckman v. Salt Lake City, 919 P.2d 568, 572 (Utah 1996), but claim it shows that possession was an afterthought. The actual explanation for the omission is simple inadvertence of counsel.

Finally, Sawayas argue that "plaintiff was arguing primarily for damages." (Sawayas' brief at 15.) This claim does not withstand analysis. Sawayas do not cite to any statement emphasizing a claim for damages; there are none--all the statements on the subject emphasized the claim for possession. A review of the record and transcript reveals that the primary issue in the case prior to trial was whether Lysenko had any rights in the equipment. The trial testimony of Douglas Hurren and of Curtis Loosli was exclusively addressed at that issue as was much of the testimony of Mitchell Sawaya and Peter Lysenko. Beyond establishing that he had rights in the equipment, there was nothing more Lysenko needed to do to establish a right to possession. The issue was really quite simple: if Central Bank had a valid security interest in the equipment and if Lysenko owned that

interest, he therefore had a right under Utah Code Ann. § 70A-9-503 to take possession of the equipment. Lysenko presented all of those arguments to the trial court.

It is true that Lysenko also presented evidence and arguments concerning the alternative claim for damages. The nature of that evidence was such that it occupied a substantial portion of the trial testimony and was the focus of much of the closing arguments. The fact that the damage testimony took the greater time was a function of complexity, however, not of emphasis or preference.

Sawayas challenge Lysenko's explanation that he wanted to use the equipment in a new restaurant. Sawayas label the testimony as a "vague contemplation of the possibility of opening another restaurant someday." (Sawayas' brief at 16.) This is an inaccurate and unfair characterization. The fact is that Lysenko owns the restaurant property and the restaurant building. He is engaged in a diligent attempt to open the restaurant. The record does not reflect this because the use Lysenko wanted to make of the equipment is completely irrelevant. He owns the equipment and is entitled to possess it and use it for whatever purpose he chooses.

Sawayas also assert that "it was obvious from the nature of some of the equipment that the Premises would have been damaged by removing it." (Sawayas' brief at 15.) Sawayas cite no evidence to support this claim and the evidence squarely contradicts it. For example, a lay person might think that removing a walk-in cooler/ freezer might damage the building. The expert testimony on the

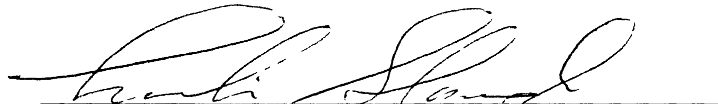
subject, by Reid Steenblik, was that the cooler comes in parts and could be removed without harm to the building. (Tr. 49.) Exhaust fans and hoods are regularly removed. (Tr. 50, 56.) Sawayas' unsupported argument to the contrary should be summarily rejected.

CONCLUSION

In his complaint and at every appropriate opportunity during the trial, Lysenko emphasized his preference for possession of the personal property. There was never any waiver of that claim. This case should be remanded with instructions to grant Lysenko possession of the equipment.

Alternatively, the case should be remanded with instructions to award Lysenko the in-place value of the property. Sawayas have benefitted from and leased the equipment in place, and it is simply unfair to not require that they pay for that value in place.

DATED this 30th day of June, 1998.



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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this ~~29~~ 30th day of June, 1998.

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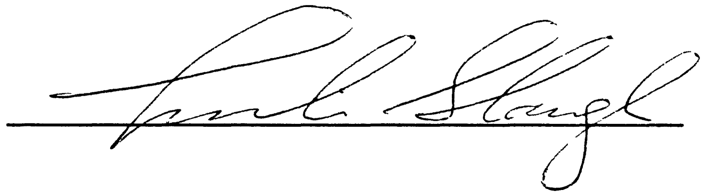

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