1998

Brown's Shoe Fit Co., Tom Brown, and Brown's General Office v. Jon Olch, Janet Olch, Henry Sigg, and 330 Main Street Partners : Reply Brief

Utah Court of Appeals

Paul Van Dam, Esq.; Bruce Wycoff, Esq.; Jones, Waldo, Holbrook .
Richard D. Burbidge; Stephen B. Mitchell; Burbidge & Mitchell.

BRIEF

IN THE UTAH SUPREME COURT

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and BROWN'S GENERAL OFFICES, an Iowa corporation,	)	
Petitioners,	)	
vs.	)	Case No. 980208
JON OLCH; JANET OLCH; HENRY SIGG; and 330 MAIN STREET PARTNERS,	)	
Respondents.	)	

PETITIONER'S REPLY BRIEF

Petition for Review of Decision of
Utah Court of Appeals
Affirming a Judgment of the
Third Judicial District Court of Summit County

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I. THE JUNE 11 HEARING FATALLY PREJUDICED BROWN'S

The Olches brush off the June 11 hearing two hours before trial as "unremarkable". To make the hearing appear "unremarkable", the Olches assert that (1) everyone knew the hearing would be for summary judgment; and (2) Brown's had no evidence to support its claim. Neither assertion is correct.

A. The Trial Court Never Indicated the June 11 Hearing Would be a Summary Judgment Hearing.

The concept of summary judgment arose at the June 6 hearing only in connection with Brown's request for ten trial days. The trial court had announced it would allow only seven. Brown's objected. (R. 1563-64) At that point the Olches' counsel alluded to a continuance of the June 11 trial, if the continuance would permit the Olches to bring a summary judgment motion:

> We are not afraid to try it. We are ready to try it. We are happy to try it. If they need more time, because I am the defendant. I don't want to do that. All the pressure bears on me. I don't want that.
>
> We have counterclaim. We are very serious about it. We need time. I would not oppose putting it off to two weeks in August. I have no idea what your Honor's calendar looks like, if we could have an opportunity to have a motion for summary judgment heard. (R. 1564)

The Olches again made this point during the same hearing:

> If [Brown's] need additional time, then I would go along with that, if we could have just an hour's hearing on summary judgment. A modest request, I think. We ought not be afraid of it . . .
>
> MR. VAN DAM: Two different things going on here. I appreciate Mr. Burbidge's skillfully tying them together. I don't think the extension and a summary judgment motion ought to be synonymous or tied together. . . . (R.1566)

The notion of a summary judgment hearing therefore arose solely as a possibility in the event of a continuance. Nothing

occurred at the June 6 hearing that gave any notice that a summary judgment hearing would evolve two hours before the June 11 trial.

In fact, at the June 11 hearing the Olches' counsel showed their own understanding that the hearing was to be on purely legal issues: "[W]hat I want to do is keep it out of any realm of factual question." (R. 1321) The mere fact that Brown's counsel made a passing characterization of the June 11 hearing as "kind of arguing summary judgment" (R. 1569), does not establish that Browns' had any forewarning the June 11 hearing would evolve into a summary judgment hearing. To the contrary, Brown's objected to any effort of the trial court to do so: "We have had very little time. We never researched or responded to [the Olches'] motion for summary judgment."[1]

B. Brown's Did Not Present, and Could Not Have Presented, All of its Evidence in the June 11 Hearing.

In their effort to convince this Court that the Court of Appeals properly affirmed the dismissal of Brown's fraud claims as a matter of fact, not of law, the Olches contend at page 12 of their Brief: "Brown's did, in fact, tell the trial court at trial what evidence it had to support its fraud claim. [R. 1302-07]. The problem was that Brown's had no evidence that was legally sufficient to support that claim." (Emphasis added).

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[1] Contrary to the Olches' assertion at page 9 of their brief that Brown's was successful at the hearing in obtaining the dismissal of the Olches' counterclaim based on lack of evidence, Brown's did no such thing. The trial court raised the issue sua sponte, and Brown's counsel gave two short answers totalling sixteen lines to questions the trial court directly posed. (R. 1323). The court of Appeals affirmed this dismissal as a matter of law, not of fact. See Slip Opinion at 17-18. Brown's did not seek dismissal of the Olches' counterclaim for "lack of evidence".

The Olches therefore candidly admit the trial court conducted a trial by summary judgment with no notice. The Olches' arrogant assertion that Brown's produced during that two-hour hearing all the evidence it would have introduced during a two-week trial is palpably fatuous. At trial Brown's would have introduced handwritten notations Jon Olch, Henry Sigg or their attorney made on a July 12, 1994 letter from Tom Brown. On page two, one of the defendants or their attorney wrote: "Final lease → make it unsignable for Lessee [Brown's]." (emphasis added) (Brown's attaches a copy of those marginal notations as Exhibit "A"). On November 11, 1994, shortly after receiving Brown's objections to the Olches' "unsignable" final lease proposal, the Olches' attorney, Gordon Strachan, wrote Jon Olch: "We need to send [Brown's] a 'termination of good faith negotiations' letter by November 16." (Brown's attaches a copy of that letter as Exhibit "B")

Brown's marked 132 documents as exhibits for trial. Neither the trial court nor the Court of Appeals was aware – due to the procedure the trial court adopted – of those documents, including the two referred to above. Brown's documentary evidence, along with the oral evidence it expected to offer through direct and cross examination, presented a jury question of whether the Olches ever intended to honor their agreement with Brown's.

The Court of Appeals has designated its Opinion for publication. Published Utah appellate law now sanctions truncated bench "trials" with no notice. This procedure may be an efficient way of dispensing with jury trials, but is contrary to longstanding legions of decisions of this Court.

II. THIS COURT SHOULD REEXAMINE *PINGREE, SINE* AND *TSERN*.

The Court has before it only a Petition for Certiorari. In its Petition Brown's calls the Court's attention to the fact that § 4.3 of Corbin, the sole non-Utah authority this Court relied on in Tsern, is directly contrary to Tsern's holding. The simple fact that this Court's acknowledged authority contradicts this Court's decisions should persuade the Court that further briefing is necessary on whether the Court should explain or overrule Pingree, Sine and Tsern. The conflict between those decisions and § 4.3 provides the "good reason" the Olches' assert is lacking.

The briefs to be filed upon a grant of certiorari are the proper forum to explore the policies Corbin adopts in reaching its conclusions. A petition cannot adequately address those policies in the confines of a certiorari petition. Nevertheless, one of the Olches' own two cited authorities provides a window into some of the policies that underlie the conclusions of § 4.3:

> In contracts which make no provisions for termination in the event future agreement is not reached the intent of the parties becomes an issue to be explored. In *May Metropolitan Corp. v. May Oil Burner Corp.*, 290 N.Y. 260, 263-265, 49 N.E.2d 13, 15-16) the Court of Appeals reversed the judgment dismissing the complaint insofar as it sought enforcement of a contract containing a renewal clause providing that the precise "quota" amounts in a distributorship agreement were "to be mutually agreed upon." "We do not think," the court declared, "that our search for the meaning of this renewal clause comes to a full stop as soon as the phrase 'mutually agreed upon' is encountered." If the parties intended the agreement to be binding only if a mutually satisfactory agreement be reached, then "until they arrive at that point," the court said, "there is no contract"—but it concluded that the plaintiff should have the opportunity of "exploring before a jury" the entire issue of intent.
>
> There is no practical reason why lease provisions providing for future agreement as to some material term

> of a contract should be excepted from the rule articulated in *May* or be treated as merely precatory.
>
> * * *
>
> Thus, we hold that (1) a renewal clause in a lease providing for future agreement on the rent to be paid during the renewal term is enforceable if it is established that the parties' intent was not to terminate in the event of a failure to agree; and (2) under such circumstances, in the absence of another standard provided for in the agreement, the court is not precluded from fixing a reasonable rent. To the extent that [three specified decisions] hold to the contrary, we now expressly overrule them. (Emphasis added).

Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 419 N.Y.S.2d 558, 561-62, 564 (App. Div. 1979).

Schumacher is apparently one of the two most favorable judicial opinions[2] the Olches could find. Yet it expressly overruled decisions reaching the same legal conclusions as Pingree, Sine and Tsern. There are numerous policy reasons why this Court should re-examine and either clarify or overrule those decisions. In doing so, this Court should declare specifically enforceable agreements to set renewal rents at "fair market value.[3]" This Court should grant certiorari so it can explore and consider those policies.

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[2] The New York Court of Appeals reversed the opinion the Olches rely on. See Joseph Martin Jr. Delicatessen, Inc. v. Schumacher, 417 N.E. 2d 541 (N.Y. 1981). Corbin § 4.3 roundly criticizes that reversal as ignoring "the obvious intent to contract and enrichment of the landlord at the tenant's expense. . ." 1 Joseph M. Perillo, Corbin on Contracts § 4.3 (rev. ed. 1993) at 571-72.

[3] The Olches repeatedly assert that the statute of frauds dooms Brown's claims. The statute of frauds is analytically irrelevant because John Olch wrote Brown's on August 5, 1994: "So that there is absolutely no misunderstanding on your part, the figure which would be used as a 'gross volume figure from which to base additional rent', is a figure which would compensate the landlord for the fair market value of that leased space." (Emphasis added). (Brown's has attached a copy of that letter as Exhibit "C").

DATED June 8, 1998.

Respectfully submitted:

R. PAUL VAN DAM

JONES, WALDO, HOLBROOK & McDONOUGH

By Bruce Wycoff
Bruce Wycoff
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF** were mailed via first class mail, postage prepaid on the 8th day of June, 1998, to the following:

Robert Felton
39 Exchange Place, #200
Salt Lake City, Utah 84111

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Salt Lake City, Utah 84111

Bruce Wycoff

264880.1

IN THE UTAH SUPREME COURT

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and, BROWN'S GENERAL OFFICES, an Iowa corporation, Petitioners, vs. JON OLCH; JANET OLCH; HENRY SIGG; and 330 MAIN STREET PARTNERS, Respondents.	)	Petition No.980208

APPENDIX

Appendix A

Brown's Shoe Fit COMPANY

GENERAL OFFICES · 846 HIGUERA STREET, SUITE 2
SAN LUIS OBISPO, CALIFORNIA 93401

TELEPHONE 541-2732 · AREA CODE 805

July 12, 1994

FAX COPY

To: Henry Sigg **FOR YOUR EYES ONLY**

Henry: Understand the following is only a loose association of my thoughts. This is not any sort of offer. I look forward to hearing from you.

From: Tom Brown

Re: Outline of current lease status and options that might be explored.

Since our meeting last Friday I have had time to reflect on some of the things we discussed. I hope that since we met you also have spent a little time thinking about some of the options that could be created which would be beneficial to all of us. This letter is an attempt to share with you some insight into my thinking about some of the possibilities that might work out. As I suggested to you on the phone yesterday: It is impossible for me to do more than just present my side of the equation. You are the one that knows just where all the "players" are and what negotiations that have continued to be played out on a day to day basis.

Probably the most important thing to mention is that I realize just why 330 Partners would now like to have Browns find another location. The offer from Dansk that you have before you is very inviting I'm sure.....But the fact remains that Browns has moved ahead based on signed agreements for a lease space at 330 Main Street. If Browns is now being asked to consider other options, Brown's shouldn't also be asked to increase it's exposure beyond what it has agree too up to this date. Browns should also be compensated for any increased expenses it will incur. → opportunity cost!

Please know that I feel Brown's Shoe Fit Co. has a location to open a store in Park City. This is a location to be built at 330 Main Street.(hereafter referred to as "330") If no other options are made available to Brown's this is the location that we will work toward occupying.

During our meeting last Friday you asked me if Brown's had "any contingency ... if this location was not ready on time or if offers made by other

interested parties in this location were to be considered by 330 Partners. At that time I said "no". The reason for that answer was that I didn't feel at that time, or do I currently have reason to believe, that Brown's won't be occupying the "330" location. - Delivery
- Final lease → make it unsignable for Lessee

I fully understand 330 Partners interest in this latest offer to rent the space already negotiated for by Browns. If the offer of $30 a foot is indeed a legitimate offer this is a sizeable increase in rental income to you and your partners. Even if there is a commission that needs to be paid out of that figure, it would still generate much more in income. In just working some of the figures (and my knowledge is limited in knowing just what all the figures are) it seems that there is a difference in *just the first three years* that could be more than $50,000 in increased rental income. This is only using the difference in income on the 1776 sq. ft. of the building that Brown's is scheduled to occupy! When you figure that the anticipated $30 a foot could also be applied to the remaining area in the building to be leased, the figure gets to be *over $100,000 difference in just the first three years.*

Now having said all of this let me get down to what I think can be done by us that might move things on a bit and be the best thing for Henry, 330 Partners and Browns. I'm agreeable to work collaboratively to see if we can't all come up with a solution to this situation that is in the best interest of everyone involved. I'm sure that as I'm writing this letter you are continuing to work with Dansk and negotiating for space that Browns is scheduled to occupy. Be advised that Browns doesn't expect to be left "out in the street". Browns is willing to work with you and 330 Partners on this whole matter, but we will not be considered the "stepchild" in the negotiations.

You are the one that knows all the different players and the different offers. Please forgive me if the following statements or assumptions that don't agree with the facts as you know them.....I'm only working off of what I know! But its seems apparent to me that the best thing is to see if we can't figure out how to get Browns to take the location that you currently occupy at 425 Main Street.(hereafter referred to as "425")

Browns already has a sizable investment planning to occupy "330". Unless we can come up with something that doesn't have added financial burden to Browns, there is really no reason for us to make any different plans than we have been making and move ahead to occupy "330".

I want to make sure this letter does not indicate to you anything other than what it is: This letter looks at what might be worked out to benefit all of the concerned parties! It in no way should be construed as thinking that Brown's is willing to leave on the table it's agreement to lease space at "330" unless further agreements for a different leased space are worked out that are agreeable to Browns.

Before I left Park City this last time I decided that it might be best for me to do a little "contingency planning". You tweaked my imagination on how this whole puzzle might come together. So, after having discussed with you the possibility of the "425" location, I went down and looked at it. As far as I can see the only advantage of taking this room, over the one that we will be leasing, is that it has a date of occupancy that is a little more determinable. This really is the only evident advantage. Additionally, there are several things that make it much less advantageous.

From the way it looks to me: A) The "usable" square feet of "425" are no greater than the usable of "330". Although there may be an additional 200 sq. ft. in "425", the actual *usable* doesn't seem to be any greater. So both rooms are approximately the same in size. B) There is no question that the cost to remodel/fixture "425" will be greater to Browns than design and fixture of "330". C) The anticipated rental of "425" would cost Browns at least $16,000 more for the first three years.

Henry: I could go into all sort of calculations, figures and suppositions that could be used to support an argument that Browns shouldn't even consider a move from "330" to "425". The move doesn't make a lot of sense for Browns. But if you really are interested in getting Browns in business and 330 Partners a higher paying tenant into "330", then we should try to hammer out some sort of agreement. This would also avoid any sort of possible future confrontation and get this whole matter resolved. ***From my point of view, it seems that 330 Partners should be coming to Browns with some sort of offer to get us to take "425". If they are seriously considering and offer from Dansk it is solely to their benefit to see if Browns won't consider a possible move to another location.*** I really don't know why I should be all hot and bothered to make any additional commitments. Did I miss something here? 500313

Now, having given the forgoing statements, let me give you some idea of what

knowledge I have of the rents/agreements currently in place and those anticipated to be made in the future.)

1) Browns would consider an offer to move from it's "330" location to "425" if there are no additional costs involved to Browns.

2) Browns would have to work out a mutually agreeable lease with the landlord at "425".

3) Because of the difference in the average rental that Browns would be required to pay at "425" compared to "330" over the course of the first three years and the additional amounts that will be necessary to remodel/fixture "425" compared to "330", Browns would expect an up front payment of $25,000 in order to make the move.

4) If there is a monetary settlement that needs to be made with you, in order to move your business out of "425" (and maybe a settlement to the other tenant in "425") this amount would need to be negotiated with 330 Partners. I'm sure 330 Partners see that even if there are some up front costs to getting an agreement worked out for Browns to move to "425" that this is to their benefit in order to get their $30 a foot tenant. Keep in mind: **Browns gets no benefit by giving up their lease space in "330".** If 330 Partners can make positive steps in order to have Browns pack their bags and go down the street to "425" they would then have the freedom to sign a tenant for $30 a foot for the entire building. I'm sure you have figured out how much Browns agreeing to move into "425" would mean in additional income at "330".

Please note that I have not tried to share in what I anticipate will be a rather large profit by 330 Partners by Browns moving to "425". They need to recognize that I'm willing to give them the opportunity to lease the space they have already agreed to lease to Browns, but I don't see how they could possibly expect Browns to shoulder any additional burden without some compensation.

Please know that I am more than

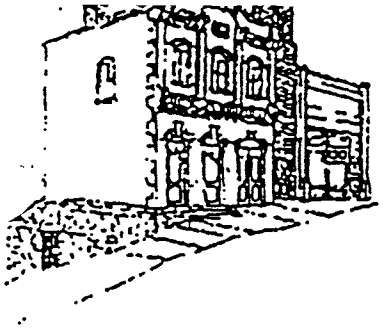
out to everyone's benefit.....But it has to be fair and reasonable to everyone involved.

I look forward to hearing from you at your earliest convenience.

Sincerely,

Tom

Appendix B



STRACHAN & STRACHAN

A LIMITED LIABILITY COMPANY

Old City Hall, Upstairs
520 Main Street
P. O. Box 3747
Park City, Utah 84060-3747
Tel (801) 649-4111 Fax (801) 649-9429

November 11, 1994

Jon Olch
BALD EAGLE REALTY
P.O. Box 2040
255 Main Street
Park City, Utah 84060

Re: Brown's Shoe Fit

Dear Jon:

Enclosed is Brown's Shoe Fit counsel's response to our proposed lease. After you have reviewed it, please call me. We need to send them a "termination of good faith negotiations" letter by November 16.

Sincerely,

STRACHAN & STRACHAN

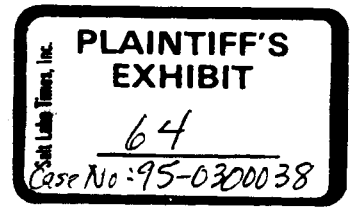
Gordon

Gordon Strachan / kw

GS:kw

Enclosure

Appendix C



August 5, 1994

Mr. Tom Brown
Brown's Shoe Fit Company
846 Higuera Street, #2
San Luis Obispo, CA 93410

Re: Possible Lease Terms: 330 Main Street
Park City, Utah

Dear Tom:

I have recently been advised by Henry Sigg of one or more telephone conversations between you and Henry regarding your intention to lease the above referenced property. Henry has informed me that you apparently consider the letter of intent (which was signed by you and Henry last March 18th) as a binding lease agreement. As you may not be aware, my wife, Janet, and I are the owners of the property on which we propose to build a commercial building in which you would like to lease retail space. The purpose of this letter is to let you know the position of myself and Janet regarding your intention to lease space in this building.

I was involved in one meeting with you regarding your possible lease of space. This took place last February. In pursuing the financing for the proposed building, the bank wanted us to have a letter of intent from a prospective tenant in order to make a preliminary determination as to the viability of a construction loan and permanent loan for the building. In that context, Henry was instructed to prepare a preliminary letter of intent for use in the bank's evaluation of a possible loan application. Henry was not instructed by me or Janet; nor was he authorized by either of us to enter into a lease or any other agreement of any kind.

The document which you signed on March 18th was, in terms of my understanding, a preliminary letter of intent that was prepared in the context of our discussions last February, and specifically, for the purpose of a possible loan application, and was subject to normal lease negotiations. In February it made no business sense to enter into a lease agreement with anyone at that early stage in the process. It barely makes sense now. In either event, it makes even less business sense to do so in a single sheet of paper. I am now informed by Henry that it is you position that this is a firm lease agreement. If that is in fact your position, I must inform your that both Janet and I respectfully disagree with you.

500320

255 Main Street · P.O. Box 2040 · Park City, Utah 84060
Phone: 801-649-4212 · Fax: 801-649-4232 · Toll Free: 1-800-645-4212

Let me explain to you what my areas of concern are as it relates to your intention to lease the space in this building. First of all, Henry's discussions with you (and my brief discussion) operated on the basic premise that the building would be ready for occupancy by the end of 1994. The per square foot lease rates discussed in the letter of intent also presumed occupancy by the end of this year. If you are not already aware, I need to inform you that in view of the present project approval delays at Park City Municipal Corporation, I cannot anticipate commencing construction until this fall, if then. We will under no circumstances be in a position to deliver a completed building by the end of this year. Therefore, the base lease rate will need to be reevaluated to correspond with a 1995 completion date for the building.

With further reference to the lease rate, you will note that the March 18th document refers to two separate option periods and the need for the parties to come to an agreement on what the lease rate will be at the commencement of those option terms. So that there is absolutely no misunderstanding on your part, the figure which would be used as a "gross volume figure from which to base additional rent", is a figure which would compensate the landlord for the fair market value of that leased space. In other words, at minimum, the lease rate at the commencement of the first and second option periods would be reflective of the fair market value for that space at the time the respective options are exercised. That is why the language is in there.

Furthermore, as was clearly understood at the time, I would need to be in a position to recapture some of the losses incurred during the first three years of the lease as a result of offering a lower entry lease rate as a inducement to the tenant to come in and establish a new business. Stated simply the entry rate is subsidized. The recapture of the rent subsidy would also have to be factored in to the base rate calculated for each of the two option periods. Before there can be a binding lease, we would need to negotiate, among other items discussed above, the specific language for the option periods.

In addition to the subject of the lease rate, there is equally significant factor of the actual space in the building which you intend to occupy. In my discussions with you last February, as well as in discussions you have had with Henry, you discussed aspects of all three of the floors in the building, with no precise determination of the final configuration for the lease space. It is not clear to me now, nor was it clear to me last February, just exactly what space you intended to finally occupy upon completion of the building. I think you can clearly understand the difficulty in assessing a generic lease rate when you may occupy one of more floors in the building including the main floor.

I think the above discussion points out the concerns I have in your apparent assertion that you have a binding lease agreement with me. There are simply too many very significant issues that have not been resolved at this time - not in the least of which is that fact that our discussions early last spring anticipated your occupancy of a building this coming December. That is simply not going to happen. Although I can certainly understand your frustration, I think you can understand my position. Regardless of any differences we may have at present, let me assure you that I am willing to sit down and personally discuss with you the terms under which I would Be willing to enter into a binding lease agreement.

If we can work out the appropriate specific language in a manner that is acceptable to both of us, we can then move forward with a lease. We are still interested in pursuing discussions with you, but there are a lot of issues to be resolved. I would suggest that we delay any firm discussions until such time as I complete the approval process with Park City. When the approval process is completed, I will be able to obtain some accurate construction cost figures which will enable us both to realistically look at lease rates and the related issues of completion and occupancy dates, etc.

Again, I regret the misunderstanding that has developed and I am hopeful that when this project is approved by the City, we can sit down and hammer out a mutually satisfactory lease agreement. If you are willing to pursue lease negotiations based on the input I have provided you in this letter, please let me know by August 15, 1994. If I do not hear back from you by that date, I will assume that you have no interest in pursuing a lease. In the event you do contact me, I would request that we meet jointly with Henry so that we are all in agreement. I look forward to hearing from you.

Sincerely,

Jon Olch

cc: Henry Sigg
Janet Olch