2001

# Carl L. Pingree, James W. Pingree, Wallace B. Pingree, and Joyce P. Sparrow v. The Continental Group of Utah and Leslie W. Van Antwerp, Jr. : Brief of Appellant

Utah Supreme Court


Brian R. Florence; Florence and Hutchison; Attorney for Defendant.
Elwood P. Powell; Christensen, Gardiner, Jensen and Evans; Attorney for Plaintiffs.

REME COURT

OF THE STATE OF UTAH

D.
J. R.

CARL L. PINGREE, JAMES W. PINGREE, WALLACE B. PINGREE and JOYCE P. SPARROW, trustees,

Plaintiffs and Respondents,

vs.

Case No. 14484

THE CONTINENTAL GROUP OF UTAH, INC., a Utah Corporation, and LESLIE W. VAN ANTWERP, JR., doing business as VAN'S BLUE OX,

Defendants and Appellants.

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# BRIEF OF APPELLANT

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Appeal from the judgment of the Second District Court for Weber County, Honorable John F. Wahlquist presiding.

FLORENCE AND HUTCHISON

BRIAN R. FLORENCE
818-26th Street
Ogden, Utah 84401
Attorney for Appellant
Leslie W. Van Antwerp, Jr.

CHRISTENSEN, GARDINER, JENSEN & EVANS

ELWOOD P. POWELL
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs-Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

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ELWOOD P. POWELL
900 Kearns Building
Salt Lake City, Utah 84101
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TABLE OF CONTENTS



CASES CITED

TABLE OF CONTENTS
(Continued)

STATUTES CITED

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---

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# BRIEF OF APPELLANT

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## STATEMENT OF THE NATURE OF CASE

Appellant, Leslie W. Van Antwerp, Jr., appeals the Court decision finding him in breach of a lease agreement with the plaintiffs and the award of damages.

## DISPOSITION IN LOWER COURT

The Honorable John F. Wahlquist, sitting without a jury, found that the appellant was obligated to pay increased rentals of $900.00 per month and had failed to

make repairs of the premises as requested by respondents and awarded damages for the repairs. Appellant was also dispossessed of the premises effective January 15, 1976.

## RELIEF SOUGHT ON APPEAL

Appellant, Leslie W. Van Antwerp, Jr., requests this Court to set aside the decision of the trial court on the grounds that the evidence did not show that appellant was obligated to pay increased rentals or to make the repairs for which damages were awarded.

## STATEMENT OF FACTS

The respondents are owners of a restaurant in Roy, Utah, which had been doing business as Ma's and Pa's until 1967. (T 205).

The premises were subsequently leased to Tampicos for a term of five years with rentals of $1,000.00 per month. (T 205). Tampicos' business lasted approximately seven months and subsequently the business took out bankruptcy. (T 206).

On September 12, 1969, the respondents entered into an Earnest Money Agreement with the Continental Group of Utah, Inc. for the lease of the premises for a five year term, plus two 5-year renewal options. The Earnest

Money Agreement provided rentals of $500.00 per month, plus three percent of the gross income over $10,000.00 per month for the first five year period. The renewal periods were to have increased rentals of four percent of the gross income over $10,000.00 per month in addition to the $500.00 per month base rental. (Defendants' Exhibit 1).

On September 24, 1969, the respondents executed the formal Lease with the Continental Group of Utah, Inc. The Lease, as adopted, was for a five year term commencing October 1, 1969 and ending September 30, 1974 with two 5-year renewal options. The rentals were $500.00 per month, plus additional rent of three percent of the gross receipts of the business over $10,000.00 per month.

The rentals for the renewal periods, by the terms of the Lease, were to be renegotiated with the provision that the maximum total monthly rental would not exceed $900.00 per month. The Lease specified that, in determining the rent to be paid for the renewal periods, factors of tax increases, cost of business increases or decreases, business volume and success, and insurance costs and other reasonable allowances would be the basis for the renegotiation. (Plaintiffs' Exhibit A).

On May 12, 1972, the Continental Group of Utah, Inc. assigned its interests in the Lease with respondents

to appellant, Leslie W. Van Antwerp, Jr. (Plaintiffs' Exhibit B).

Appellant paid to the Continental Group of Utah, Inc. $15,000.00 and assumed all responsibility of the Lease, plus all interest in the inventory and fixtures which the Continental Group of Utah, Inc. owned. (Plaintiffs' Exhibits U and V).

Pursuant to the requirement of the Lease, appellant exercised his right to the renewal terms by letter to respondents dated February 21, 1974.

On March 8, 1974, respondents acknowledged receipt of appellant's letter exercising his right for the first renewal period and informed appellant that, pursuant to Exhibit "D" of the Lease, he would be expected to pay monthly rentals of $900.00 per month commencing October 1, 1974. (Defendants' Exhibit 3).

Subsequent to respondents' March 8th letter, respondents and appellant had some discussions concerning the increased rentals, and appellant had indicated to respondents that the gross volume of the business could not justify paying $900.00 per month. (T 213).

On September 24, 1974, respondents' attorney wrote to the appellant itemizing twelve specific areas of

disrepair on the premises, and again reminding him that his monthly lease payments would be increased to $900.00 per month effective October 1, 1974. (Plaintiffs' Exhibit H).

On October 15, 1974, appellant's attorney at that time, Felshaw King, replied to respondents' letter of September 24th denying some of the allegations of disrepair and indicating that others would be remedied. The appellant also told respondents that the rentals for the renewal period, according to the terms of the Lease, were to be renegotiated by the specific factors referred to in the Lease, all of which were in favor of the appellant paying a lower rental than $900.00 per month. (Plaintiffs' Exhibit I).

On October 19, 1974, the appellant paid his first renewal period rental in the sum of $900.00 under protest. (Defendants' Exhibit 4).

On November 1, 1974, respondents' attorney wrote to appellant's attorney requesting a conference concerning the increased rental demand, (plaintiffs' Exhibit A), and there was a subsequent meeting in Mr. King's office in Clearfield, Utah. (T 187).

During the course of the meeting between the parties, respondents requested verification of appellant's

claim that the factors to be considered in the renewal rentals, such as cost of business increases and business volume, etc., were in favor of a low rental amount. (T 188).

On December 17, 1974, appellant's attorney wrote to respondents' attorney stating that (a) real property taxes had declined six percent over the past three years; (b) personal property taxes had remained the same; (c) the cost of doing business had risen eighty-one percent; and (d) business volume had declined twenty-four percent. (Plaintiffs' Exhibit K). These four areas are the facts specifically mentioned in the Lease to determine what the renewal rentals should be. Appellant subsequently furnished documentation of the claims made in the December 17th letter. (Plaintiffs' Exhibits Y and Z).

On December 27, 1974, respondents' attorney wrote to appellant's attorney outlining other factors such as the appraised value of the property and reasonable rentals per square foot of other locations in the area as being the basis for justifying the increased rental of $900.00 per month. Appellant further refused to consider arbitration as a basis for concluding the controversy. (Plaintiffs' Exhibit L).

During this period of time, appellant was

informed by Roy City that the second floor of the building had no fire exit and the second floor could not continue to be used without the installation of a suitable exit. This had been ordered by Roy City in January of 1972 when the Continental Group of Utah, Inc. was in possession of the premises. (Plaintiffs' Exhibit N). Demand was made upon respondents to install the fire exit pursuant to the Lease provision, paragraph fifteen, that there were no restrictions, covenants, zoning, or other ordinances which would prevent the lessee from conducting its business.

On December 28, 1974, respondents, by letter to appellant's attorney, refused to take any responsibility for the fire escape and demanded that the appellant make the modifications within thirty days. (Plaintiffs' Exhibit O).

The appellant did not put in the fire escape and had to quit using the second floor of the premises, greatly reducing his business.

On February 26, 1975, appellant was served with a Notice dated February 12, 1975, to vacate the premises for failure to correct the deficiencies enumerated in respondents' September 24, 1974 letter. (Plaintiffs' Exhibit R).

On February 25, 1975, respondents initiated legal action against appellant and the Continental Group of Utah, Inc. requesting that the renewal provision of the Lease be declared void for vagueness, or in the alternative, that rents be determined to be payable at the rate of $900.00 per month. (T 1-6).

On May 10, 1975, respondents made a motion for judgment on the pleadings, and oral argument was held on May 20, 1975. On May 29, 1975, Judge Hyde, pursuant to memorandum decision, ruled that the renewal option of the Lease contained sufficient certainty so as not to be void as a matter of law. (T 14).

Respondents subsequently filed an Amended Complaint realleging the allegations of the original Complaint, and added allegations concerning the failure of appellant to make necessary repairs to the premises.

The matter was tried before the Honorable John F. Wahlquist on December 16, 1974. By memorandum decision, Judge Wahlquist held that the rent should have been negotiated at $900.00 per month based upon the value of the premises and the failure of appellant's business, and awarded damages for $400.00 per month, the difference between the $500.00 that had been paid by the appellant and the $900.00 requested by respondents, from October 1,

1974 to January 15, 1976. The Court further held that damages should be awarded in the sum of $4,000.00 for delayed maintenance, which included a pull-down fire escape. No Judgment was entered against the co-defendant, the Continental Group of Utah, Inc. (T 32-39). The Court further ordered appellant to remove himself from the premises by January 15, 1976.

## ARGUMENT

### POINT I

### THE EVIDENCE FAILED TO PROVE THAT APPELLANT WAS RESPONSIBLE FOR THE DAMAGES AWARDED AGAINST HIM BY THE COURT.

Judge Wahlquist, in his memorandum decision concerning damages for maintenance, stated:

> "The Court finds that the current maintenance deficiency presently is approximately $4,000.00. This includes the failure to install a pull-down fire escape so as to be able to reasonably utilize the premises on the second floor. The Court believes that, clearly under this Lease and the history of the matter, such an improvement would fall on the tenant. The Court recognizes that the estimates for the repairs made by third parties and placed in evidence are correct, but believes that if such repairs were made today, the premises would be in better shape than they were at the time they were rented to the Continental Group of Utah, Inc., but not grossly so. The Court fixes the present delayed maintenance at $4,000.00."

The items of repair complained of by respondents are itemized in twelve sections by the letter dated September 24, 1974. (Plaintiffs' Exhibit H). Evidence showed the problems in the restrooms were a result of normal wear and tear. The allegations concerning the wall-paper in the coffee shop and the floor tile was repaired by the appellant. The allegations concerning the kitchen linoleum were basically correct. The broken windows complained of were all replaced by appellant. The dumb waiter was repaired each time it became inoperative by the appellant. The walls that were alleged to have been knocked out had to be opened up for access to repair the dumb waiter and other walls had been repaired. The air conditioners were operable. The carpet belonged to the appellant, having been installed by the Continental Group of Utah, Inc., and respondents had no right to complain. The roof tiles and leaks complained of existed at the time the Continental Group of Utah, Inc. took possession of the premises and were a result of the fire in the premises at the time it was operated by Tampicos. The exterior siding was missing when the appellant took possession of the premises. There was a door knob missing, but it could not be matched with the one remaining. The shrubs were in good shape. The premises did not need

repainting. (T 389-395 and T 246-247).

Many of the items mentioned above were in the condition complained of at the time the Continental Group of Utah, Inc. had possession of the premises. (T 244).

The evidence presented by respondents concerning the cost of repairs included siding on the north side of the building, roof tile which needed replacing, two doors in the rear to be replaced, sheet rock replaced in two of the baths and the area of the kitchen, some floor that needed to be repaired, and some walls that needed to be replaced for the estimated cost of $2,624.00. (T 339).

The majority of the repairs for which the respondents estimate was obtained were items which were in existence at the time appellant took possession of the premises and should have properly been a responsibility of the defendant, the Continental Group of Utah, Inc. The sheet rocking had already been done by the appellant. The bid for the painting was $1,940.00. (T 347).

The balance of the damages awarded by the Court involved the fire escape exit from the second floor of the premises. It is the appellant's contention that the fire escape was not a proper element of damage since it was not his responsibility to put the fire escape in. The Lease, paragraph fifteen, stated that the lessor

covenanted that there were no restrictive ordinances or regulations which would prevent the lessee from conducting its business. Paragraph twenty-two provided that the lessor and lessee should both promptly comply with all applicable ordinances and regulations of a municipal authority pertaining to the use and occupancy of the premises. Appellant contends that as a very minimum, the fire escape was a joint responsibility of the respondents. Beyond that, the appellant has been dispossessed of the premises and there was no evidence that the respondents were going to continue to use the premises in such a manner that the fire escape would be a requirement. Certainly, if appellant chose not to use the second floor, he should not be required to put in a fire escape for the benefit of the respondents.

POINT II

THE COURT ERRORED IN AWARDING DAMAGES BASED ON A RENEWAL RENTAL RATE OF $900.00 PER MONTH.

The renewal provision of the Lease, Exhibit "D", provides that the rental amount of the Lease for the renewal period was to be renegotiated with a maximum total monthly rental not to exceed $900.00 per month. The Lease specified as follows:

> "Factors of tax increase, business volume and success, insurance costs, and other reasonable allowances will be the basis for term of negotiation."

All of the specified factors, with the exception of insurance costs paid by respondents, were in favor of the appellant. The real estate taxes which were the responsibility of respondents, had decreased slightly during the term of the lease. (T 297). The business volume and success had decreased twenty-four percent. (Defendants' Exhibit 6). Costs of business had increased an average of eighty-one percent. (Plaintiffs' Exhibit Y). The only possible added burden on the respondents was a minor amount of insurance premium increase, but even that was not clear. (T 234-235).

Respondents introduced evidence to show that $500.00 per month was not a current fair rental value for property with comparable square footage in that location.

Judge Wahlquist held that respondents were justified in demanding $900.00 per month as the fair rent. The Court gave no reason for arriving at that figure, and it is submitted that it is not consistent with the evidence produced at trial.

As a general rule, in construing provisions relating to renewals where there is any uncertainty, the

tenant is favored and not the landlord because the latter, having the power of stipulating his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself. See Smith v. Russ, 184 P. 2d 286, and Edwards v. Tobin, 132 Or. 38, 284 P. 562.

The obvious value in executing a lease for a specified period of time as opposed to a month-to-month tenancy is to allow the lessee a guarantee of a specific period of time in the premises with advance knowledge of rentals to be paid and the lessor has the benefit of knowing that the premises are rented and the rentals that will be received.

It is also generally agreed that if the intention of the lessor and lessee as to the propriety of giving consideration to particular factors or elements can be divined from the language of the lease, such intention will be ascertained and enforced by the courts.

It is obvious that the trial court paid no attention to the factors specifically mentioned in the Lease for consideration of the renegotiation and only considered the fair rental value of the premises as of the date of the trial.

In Young v. Nelson, 121 Wash. 285, 209 P. 515 (1922), the Court, in upholding the decree of the trial judge, stated that a lessor would not be allowed to maintain an action for eviction if he fails to renew upon a reasonable rental when the lease provided for a five year extention at such rental as may be agreed upon by the lessor and lessee. In Diettrich v. J. J. Newberry Company, 172 Wash. 18, 19 P. 2d 115 (1933), the Court rejected the lessor's argument that he was entitled to a rental for a renewal period of an amount equal to what any other responsible party would pay. The Court stated:

> "This does not seem to us to be the proper theory. At the time the lease was first made, the lessors, in effect, agreed that the property might be leased for a fixed price over the initial term and for what it was reasonably worth over the extention period. To consider what the leased property would be worth when taken in conjunction with adjoining or other properties, cannot be a sound basis for determining the rental value. Under the lease, the specific property alone was considered, and in determining the rental value under the extention term, this should be the sole test."

See also Graseck v. Bankers Trust Company, 315 Mich. 650, 24 N. W. 2d 426 (1946).

All of these cases involve a renewal option with rentals to be renegotiated by agreement of the parties. None of the cases had the benefit of having specified factors to be used in considering the basis for the rental negotiation. As was stated in Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, options to renew granted to the lessee are obviously for his benefit and, it is presumed, are part of the consideration which induced him to execute the lease.

It has also been held that where an agreement to renew contained in a lease is independent from other covenants such as to keep the premises in repair, it does not release the lessor from his obligation to renew or extend, even if the covenant to keep premises in repair is breached. See Parsons v. Ball, 205 Ky. 793, 266 S. W. 649. Therefore, the respondents could not use their complaints concerning maintenance of the premises as grounds for failure to reasonably renegotiate the new rentals.

POINT III

THE TRIAL COURT WAS CORRECT IN NOT AWARDING TREBLE DAMAGES TO RESPONDENTS.

The respondents, in the statement of points in their cross-appeal, have stated that the lower court

errored in concluding that they were not entitled to treble damages pursuant to Utah Code Annotated, 1953, 78-36-10.

First, the Notice to vacate is deficient on its face in not requiring, in the alternative, the performance of the conditions of which they complain, or surrender of the property.

Second, respondents' Notice to vacate was only premised upon appellant's failure to make certain repairs. That would be the only claim which would be within the provisions of the unlawful detainer statute. The appellant had continued to pay the monthly rentals of $500.00 per month and was not in an unlawful detainer situation by refusing to pay the higher rental demanded by respondents.

There has never been any claim by respondents that appellant was unlawfully detaining the premises by his failure to pay the increased rentals as demanded.

It has been held that the damages which are comtemplated by the treble damages provision of the statute must be the natural and proximate consequences of the unlawful detainer and nothing more. See Forrester v. Cook, 77 U. 137, 292 P. 206.

Since the respondents' claim under the unlawful

detainer statute is based upon allegations of disrepair, they must show that additional damages occurred as a result of appellant's failure to remove himself from the premises. This was not done.

## CONCLUSION

It is submitted that the damages awarded for delayed maintenance were excessive in light of the evidence and many of them should have been awarded against the defendant, the Continental Group of Utah, Inc.

The Court failed to consider the factors specified in the Lease in determining increased rentals for the renewal period and errored in holding that the rentals should have been $900.00 per month.

Treble damages are not applicable to the facts of this case since there is no evidence to show that respondents were damaged by appellant's holdover in the specific area of delayed maintenance.

Respectfully submitted,

FLORENCE AND HUTCHISON
BRIAN R. FLORENCE
818-26th Street
Ogden, Utah 84401
Attorney for Appellant
Leslie W. Van Antwerp, Jr.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant, postage prepaid, to Elwood P. Powell, Attorney for Plaintiffs-Respondents, 900 Kearns Building, Salt Lake City, Utah 84101, on this 4th day of June, 1976.

Eileen Bronson

EILEEN BRONSON, Secretary