

1979

Karen R. Hofmann v. Elizabeth S. Sullivan : Respondent's Brief

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN R. HOFMANN,

Plaintiff-Appellant,

vs.

No. 16265

ELIZABETH S. SULLIVAN,

Defendant-Respondent.

RESPONDENT'S BRIEF

Appeal From the Order of the Third Judicial
District Court for Salt Lake County

Honorable Christine M. Durham, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN R. HOFMANN,

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vs.

No. 16265

ELIZABETH S. SULLIVAN,

Defendant-Respondent.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is an action to collect damages from Defendant's sale of her condominium, which had been previously leased to Plaintiff.

DISPOSITION IN THE LOWER COURT

At the hearing of Plaintiff's and Defendant's Motions for Summary Judgment, it was stipulated that no facts were in issue. The Court determined that the lease between the parties granted a conditional first right of refusal to Plaintiff to re-lease, or to buy in the event Defendant decided to sell, before or at the end of the lease period.

However, since there was no lease or sale at the expiration of the lease, Plaintiff's conditional right did not accrue. The Court said that the right did not indefinitely continue to any date in the future when Defendant might decide to sell or lease.

Plaintiff's Motion for Summary Judgment was denied, and Defendant's

cross motion granted.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Summary Judgment. Defendant asks
for an affirmance.

STATEMENT OF FACTS

The Court is familiar with this case, Plaintiff having appealed Judge Bryant H. Croft's decision at the trial which denied Plaintiff's first Complaint, Case No. 15742.

The lease agreement between the parties granted Plaintiff a first right of refusal in re-leasing or buying the property at the expiration of the lease, on October 14, 1977.

"13. Upon expiration of this lease, the Lessee shall have first right of refusal in signing of a lease for this premises, and first right of refusal in acceptance of the sale of said premises."

The facts are undisputed that Defendant notified the Plaintiff on October 5, 1977, that she would not be leasing or selling the property at the expiration of the current lease, as she needed the condominium for family use, and consequently, the first right of refusal would not arise. In spite of this notice, Plaintiff filed a Complaint to force Defendant to sell, and was denied specific performance or damages after trial, November 22, 1977. Defendant's Counterclaim for unlawful detainer was also denied. Plaintiff thereafter moved out. Later, when the family problem had straightened, Defendant decided to sell on January 13, 1978. Plaintiff again filed a Complaint to force an alleged continuing right of first refusal at whatever time Defendant sold or again leased her property.

Judge Durham decided such a right as Plaintiff asserts was an untenable limitation on Defendant's right to dispose of the property (Page 2,

Paragraph 2, lines 6 and 7 of Judge Durham's Memorandum Decision dated December 28, 1978). Defendant was granted a summary judgment.

ARGUMENT

POINT I

A RIGHT OF FIRST REFUSAL TO A LEASE OR SALE
IS CONDITIONAL UPON THE GRANTOR'S DESIRE
TO LEASE OR SELL

Appellant agrees and Utah cases confirm the point of law that a first right of refusal is conditional upon the Grant's desire to sell or lease.

A Utah case is cited in American Jurisprudence (49 Am Jur 2d 384, 368) for this holding. Chournos v. Evona Investment Company, 97 Utah 335, 93 P 2d 450, concerns a lease giving the co-tenants the first opportunity to purchase the leased land for the price lessor would receive from other parties. Such a provision did not constitute an option without the lessor's notice that he desired to sell.

When the lessor did give notice, it was well before the lease terminated. Chournos then tried to exercise his first opportunity, but his exercise was not according to the lease terms. He sought a unilateral, rather than a joint exercise with his co-tenant. The Court denied his complaint for specific performance.

Applying this law to our facts, the Sullivan lease also had a provision giving a first right of refusal, which could develop into an option had the lessor given notice that she desired to sell -- on the contrary, before the lease terminated, she gave notice that she did not desire to sell or lease again. The conditional first right did not accrue.

POINT II

THE DURATION OF A RIGHT OF FIRST REFUSAL TO A LEASE
OR SALE DEPENDS UPON THE TERMS EXPRESSED
IN THE LEASE PROVISION

The general rule is that all rights and provisions in a lease are terminated at the end of the lease term. (10 ALR 2d 885). The rationale is that the lease, its covenants and considerations, are interwoven and indivisible and they are so dependent on each other that the lease is essential to enforcement of rights under it.

Whether or not this general rule applies to a narrower issue such as the duration of a specific right of refusal, depends upon the express terms in the particular clause or the instrument granting the right.

The case which appellant cites, Russell v. Park City Utah Corp., 548 P 2d 889, discusses this point:

"In this instance, for the purpose of determining whether this right of refusal survived the termination of the lease, we think the same rule applies as that which governs options contained in leases: that is, if by the express terms of the option, it can be seen as independent of the other covenants of the lease, and is supported by a valid consideration, it can continue . . ." (Russell, pp. 891, 892)

The Court cited Chournos approvingly, and looked at the lease language. The grant in the Russell lease is expressed as "during the entire term of the lease." However, the lease was forfeited and prematurely terminated. The Court held that the Russell right of first refusal was intended as an integral part of the total composite of the lease; and when the lease was forfeited and terminated, this covenant fell with it. (Russell, p. 892.)

Thus, the authority Appellant cites is contrary to the point she

asserts. The first right of refusal in Russell terminated with the lease.

Appellant also relies on Cummings v. Nielsen, 42 Utah 157, 129 P 619 (1912) which dealt with personal property rather than realty, and also is distinguished from our case in that the agreement stated no limit of time. Therefore, Cummings does not control here.

Turning now to our Sullivan lease, paragraph 13 grants the first right of refusal "upon the expiration of this lease." Reading that clause with the next paragraph 14, the lease says, "Upon the expiration of the lease (or before if mutually agreed upon). . .", the lessee can purchase at a certain price.

This language sets forth two conditions:

1. If mutually agreed upon, and
2. Upon expiration of the lease or before.

At the happening of the one event, i.e., the expiration of the lease, the other condition did not happen. There was no mutual agreement. The right ceased by the terms of the provisions creating it. Appellant contends the right sprang into being at the expiration of the lease and continued indefinitely thereafter. However, the lease language controls. The right was in existence before the expiration (if the parties agree) and upon the expiration. Nowhere does it say, after expiration. The lease expired and so did the first right.

POINT III

THE RIGHT OF FIRST REFUSAL TO A LEASE OR SALE
SHOULD NOT SURVIVE THE LEASE TERM, AS A
MATTER OF PUBLIC POLICY, ABSENT
EXPRESS PROVISION TO THE CONTRARY.

A continuing first right of refusal to a lease or sale in all lessees

under the standard residential leases would create havoc in the area of landlord ownership rights. The lease used by the parties was patterned after a standard residential lease of Prowswood.

It would be ludicrous to have such a right exist in lessee after a termination of the lease, after a complaint for unlawful detainer, as in this case, after non-payment of rent, and even after abandonment of the premises by lessee.

As Judge Durham stated, "It certainly could not be argued that if at any time, no matter how distant in the future, Defendant desires to lease again, she would have to lease it to Plaintiff." (Memorandum Decision, Op. cit. lines 13-16) The right of first refusal to lease goes hand in hand with the right of first refusal to sell. If one terminates at the expiration of the lease so does the other.

POINT IV

ATTORNEY'S FEES AND COSTS ARE TO BE PAID BY PLAINTIFF AS PROVIDED BY CONTRACT BETWEEN THE PARTIES

Attorney's fees are allowed when authorized by statute or by the express terms of a contract, Cliff v. Culmer, 556 P 2d 498 (1976) Utah, Blake v. Blake, 17 Utah 2d 369.

Where the lease provides that the lessee shall pay attorney's fees in an action to enforce the lease, the lessee was indeed found liable in Milliner v. Farmer, 471 P 2d 151, 24 Utah 2d 326, over the objection that the right to recover attorney's fees expired at termination of this lease.

The lease agreement of the parties signed by the Plaintiff requires her as lessee, to pay for the services of an attorney and costs in an action

"9. Should the lessor be required to employ the service of an attorney to enforce performance of this agreement or be compelled to sustain action at law to collect said rents or for any other cause, the lessee shall pay all costs in connection therewith."

Plaintiff instigated this action and has pursued for 20 months. She is seeking damages under the lease, and should be bound by the provisions for attorney's fees. A reasonable attorney's fee for the many appearances and voluminous paper work this case has engendered is suggested at \$2,500.00 or other amount the Court deems reasonable. The District Court did not consider this issue in the Memorandum Granting Summary Judgment.

SUMMARY

The issue of law is whether or not a first right of refusal to sign a new lease or accept a sale of the premises upon the expiration of the lease continues beyond that expiration, beyond a trial determining the rights of each party under the lease, and beyond the abandonment of the premises by lessee, to an indefinite time in the future whenever the owner may desire to sell or lease.

To allow such a continuing right in the lessee is an untenable limitation on the rights of the owner to dispose of his property.

Respectfully submitted,

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CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered the originals of the foregoing Respondent's Brief to the Court, State Capitol Building, Salt Lake City, Utah, and 2 copies of the same to the Attorney for Appellant, James R. Soper, 400 Ten Broadway Building, Salt Lake City, Utah 84101, on the 18 day of May, 1979.

Aiane R. Hall