

2001

Mervin R. Ried, Ethna R. Reid v. Mutual of Omaha Insurance Company : Petition for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

19678

IN THE SUPREME COURT
OF THE
STATE OF UTAH

MERVIN R. REID and ETHNA R. REID,	:	PETITION FOR REHEARING
	:	
Respondents.	:	Case No. 19678
	:	
vs.	:	
	:	
MUTUAL OF OMAHA INSURANCE COMPANY, and UNITED BENEFIT LIFE INSURANCE COMPANY,	:	
	:	
Appellants.	:	

PETITION OF MUTUAL OF OMAHA INSURANCE COMPANY

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MERVIN R. REID AND ETHNA R. REID V. MUTUAL OF OMAHA

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BACKGROUND FACTS PERTINENT TO THIS PETITION

1. The Defendants, hereinafter referred to as Mutual, leased 60% of the main floor of Plaintiffs' premises, (R. 403) and were required to use a common entryway and hallway with Intermountain Marketing, (Exhibit 42-d). (R. 601, 606)

2. Intermountain Marketing attracted large groups of sales trainees (R. 600) and in the process of interviewing, training and motivating the various trainees engaged in

practices which included:

a. The serving and consumption of refreshments in the halls during break time. (R. 543, 590-591, 625-626, 672)

b. Setting up registration tables in the hallway. (R. 522-523, 589-590, 606, 672)

c. Permitting the trainees to engage in practice sessions with one another in the halls during break times. (R. 544, 626, 716)

d. Permitting large numbers of trainees and salespersons to overload the bathrooms, smoke, put lipstick on the wall, (R. 675) fill the sinks with paper towels, extinguish cigarettes on the floors and in the toilets, and consume all the paper service making the bathrooms unsuitable on frequent occasions for the Defendants or their clients to use. (R. 441, 445-446, 544-546, 548-549, 607, 643-644, 672-673, 675-676, 712, 723-724)

e. Permitting boxes of merchandise to remain in the halls to be sold or delivered to salespersons and/or customers of Intermountain Marketing. (R. 462, 522-523, 592-593, 728) ["The hallways...looked like a warehouse."] (R. 518)

f. Permitting employees of Intermountain Marketing to direct clients of Mutual into the Intermountain Marketing

sales and training sessions. (R. 447, 521-522, 543, 586-590)

g. Permitting the instructors of Intermountain Marketing to engage in extremely noisy and disturbing activities which included:

(1) Count down drills in which the participants would count down backwards, shouting out loud, in unison from the number ten to the number one, followed by the shout "I feel great!", followed by loud clapping, cheering, and the stamping of feet. (R. 439-440, 447-448, 450, 525, 534, 542, 604-605, 620, 624-625, 632, 670, 712, 715-716, 721, 723, 727)

(2) Loud laughter and clapping on a periodic basis. (R. 465, 525-527, 609, 623, 624) The throwing of a pie in the face of someone present to get the trainees to scream with laughter. (R. 524-525)

(3) Playing loud stereo music, (rock, new wave, etc.) every day to establish an atmosphere as the young trainees would come to their office. (R. 528, 615-616, 624, 669-670)

3. Mutual was separated from Intermountain Marketing by semi-portable walls called "ultra-walls" installed over

the carpet, (R. 449), with insufficient insulation to insulate Mutual's premises from the noise emanating from the Intermountain Marketing's premises. (R. 511, 642-643) The ceilings were suspended ceilings which were not insulated between offices. (R. 526)

4. When the noise and disturbances would emanate from Intermountain Marketing's premises, Mutual would have to terminate their activities until the disturbance would cease, and either stop or delay their telephone conversations and/or stop or delay their sales presentations to their clients. (R. 526-527, 727-728)

5. The disturbances continued or increased so that just prior to the time that Mutual vacated the premises, Mutual's secretaries and personnel were becoming upset (R. 671); and, although the most important function of the office was sales, Mutual could no longer use the offices to make sales presentations. Ninety percent of the business Mutual conducted at their offices consisted of interviews with clients. (R. 513, 649) Mutual's salespersons stopped bringing their clients and prospective clients into the office for fear of loss of sales which would occur as a result of the problems in the halls, and the noise and outbursts. The salespersons began to conduct all their

business outside of the office to avoid the embarrassment and potential loss of sales. (R. 659-660, 664-665, 712-713, 718) Mutual was regularly embarrassed by the outbursts of noise and cheering and it was necessary for Mutual to make explanations to pacify their clients. (R. 527, 532, 579, 671-672, 716, 728)

6. The Intermountain Marketing trainees and salespersons who would attend the meetings which were held three days a week every week, (R. 602, 603) would completely fill the entire parking lot, overflow to the street, fill all the available nearby street parking and would overflow into the church parking lot down the street. (R. 446, 520-521, 641, 679, 766-767)

7. At least three days a week, during most of the day, there were no parking spaces available in the parking lot or nearby where either the employees of Defendant or their clients could park. (R. 520-521, 608, 669, 674, 724, 729) See testimony of Hector Diaz (R. 520-521); Alice Thompson (R. 669, 674); Verlyn Nelson (R. 674); Blaine Stonebraker (R. 729); and John Greco of Intermountain Marketing (R. 608).

8. The only testimony offered by Plaintiffs to rebut the detailed testimony presented by Defendants regarding the parking was the testimony of Plaintiff Ethna Reid, who

basically testified that when she arrived early in the morning, from time to time, she would find a parking place in the back parking lot. (R. 781)

SUMMARY OF ARGUMENTS

POINT NO. 1. Mutual presented a substantial amount of uncontroverted evidence at trial which demonstrated that it was constructively evicted. The Utah Supreme Court failed to recognize that overwhelming evidence in its majority opinion.

POINT NO. 2 When the overwhelming, uncontroverted evidence is reviewed and compared with Utah case law concerning constructive eviction, it must be concluded that Mutual was constructively evicted and the decision of the trial court must be reversed.

POINT NO. 3 Plaintiffs breached the lease agreement by not providing the parking required by the lease agreement. The majority opinion failed to recognize the overwhelming evidence which established such breach.

POINT NO. 4 Mutual was improperly prohibited by the trial court from introducing testimony as to the professional standard required for its offices, and the Supreme Court has failed to recognize this issue.

POINT NO. 5 The standards for review in cases of equity and law are different, but under either standard,

Mutual was and is entitled to a reversal of the trial court's decision.

ARGUMENT

POINT NO. 1

MUTUAL PRESENTED SUBSTANTIAL UNCONTROVERTED EVIDENCE, AND THE TRIAL COURT FAILED TO MAKE FINDINGS CONSISTENT WITH THE EVIDENCE, AND THE UTAH SUPREME COURT HAS OVERLOOKED THE OVERWHELMING UNCONTROVERTED EVIDENCE IN ARRIVING AT THE MAJORITY OPINION.

At the trial, Mutual presented substantial, uncontroverted evidence and testimony which demonstrated:

1. That three days each week, after the early morning hours, there were no parking spaces available.

2. That several days a week, the hallways were jammed with people, filled with registration tables, refreshment tables, and boxes of merchandise.

3. That several days a week the restrooms were unavailable either because of the number of people using them, or because of the lack of paper service after the enormous use had occurred.

4. That several days a week the noise emanating from the Intermountain Marketing premises, consisting of loud music, count down drills, laughter, clapping, stamping of feet and yelling was so substantial as to distract, and

during certain periods, preclude Mutual from conducting business until the disturbance ceased.

5. That Mutual stopped using the premises to make sales presentations to its clients because of the conditions which existed at Mutual's offices.

Since no testimony or evidence was introduced to rebut the foregoing facts established by Defendants, it must be presumed that the foregoing statement of facts is true, and the trial court was obliged to make findings consistent with that testimony and evidence. In the majority opinion, the Utah Supreme Court has ignored the uncontroverted facts.

In Boyer v. Lignell, 567 P.2d 1112 (Utah 1977), the Utah Supreme Court stated:

" . . . The law is well settled that it is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived . . . "

(Id. at 1113.) See also Romrell v. Zions First Nat. Bank, N.A., 611 P.2d 392 (Utah 1980) wherein the Utah Supreme Court stated that the making of findings is mandatory and may not be waived, and failure to make findings on "all material issues is reversible error".

POINT NO. 2

THE UNCONTROVERTED FACTS PROVED AT TRIAL
COMPEL THE LEGAL CONCLUSION THAT MUTUAL
WAS CONSTRUCTIVELY EVICTED.

The doctrine of Constructive Eviction has long been recognized by the Utah Supreme Court. In Barker v. Utah Oil Refining Co., 111 Utah 308, 178 P.2d 386, 388 (1947), the Utah Supreme Court recognized the common law regarding constructive eviction and quoted from Black's Law Dictionary.

In Thirteenth & Washington STS Corp. v. Nelsen, 123 Utah 70, 254 P.2d 847 (1953), the Utah Supreme Court recognized the right of a tenant to claim a constructive eviction where the tenant's enjoyment of the premises was substantially disturbed.

In the case at hand the facts are so similar to the impact of the facts in Thirteenth & Washington STS. Corp. v. Nelsen, 123 Utah 70, 254 P.2d 847 (1953), as to make the case controlling law and to compel a conclusion that Mutual was constructively evicted. The majority opinion has failed to recognize the compelling facts and precedent in this regard in the case at hand.

In Deseret Fed. Sav. v. U.S. Fidel & Guar., 714 P.2d 1143 (Utah 1986), the Utah Supreme Court recognized a constructive eviction where it appears as though the interference with enjoyment was equal to or less offensive than in the case at hand.

Mutual's claim of constructive eviction is not only

supported by specific controlling Utah Supreme Court case law, but is also supported by the case law of many other jurisdictions as follows:

Hannan v. Harper, 189 Wis. 588, 208 N.W. 255, 45 A.L.R. 1119 (1926), held that the leasing of an upper apartment of a two-family flat for the use of a college fraternity constituted a breach of the covenant of quiet enjoyment. Millbridge Apartments v. Linden, 151 N.J. Super. 168, 376 A.2d 611 (1977), held that the Reste principle relating to constructive eviction could be applied to a situation similar to that before us where the tenants frequently complained to their landlord that their neighbors were extremely loud. Gottdiener v. Mailhot, 179 N.J. Super. 286, 431 A.2d 851 (1981), held that the failure of a landlord to prevent adjacent tenants from making excessive amounts of noise constituted constructive eviction. Bruckner v. Helfaer, 222 N.W. 790 (Wis. 1929), held that too much noise from an adjacent tenant caused a constructive eviction of the tenant. Wade v. Herndl, 127 Wis. 544, 107 N.W. 4 (1906), held that shaking and vibration caused by acts of an adjacent tenant constituted a constructive eviction. Lay v. Bennett, 4 Colo. App. 252, 35 P. 748 (Colo. 1894) held that the leasing of a portion of the premises for the purpose of prostitution

constituted a constructive eviction of the neighboring tenant. Maple Terrace Apartment Co. v. Simpson, 22 S.W.2d 698 (Texas 1929), held that the act of a co-tenant in keeping a dog in its apartment contrary to the provisions of the lease prohibiting the keeping of animals on the premises and the failure of the landlord to take such action as was required to remove the dog from the premises constituted constructive eviction of the complaining tenant.

In the case at hand, the uncontroverted evidence compels the conclusion that the interference with Mutual's use of the premises equalled or exceeded the interference demonstrated in Thirteenth & Washington (supra).

POINT NO. 3

PLAINTIFFS BREACHED THE LEASE AGREEMENT
BY NOT PROVIDING THE REQUIRED ALLOTTED
PARKING.

In the case at hand, the lease agreement provided for a specific number of parking spaces which were to be allocated to Mutual. The applicable provisions of the lease agreement are as follows:

"8. Parking: Landlord shall provide off-street parking for 12 automobiles. In the event that parking is reserved in the covered parking area, tenant will be allotted his proportional share in addition to access to all non-covered, unreserved parking that is available for all tenants use."

Plaintiffs did not take any action to assure Mutual's use of their allotted parking space. Plaintiffs did not even bother to designate parking spaces. Plaintiffs' failure to take any action to provide the necessary parking spaces for Mutual was in direct breach of the lease agreement specifically requiring the allocation of parking spaces for Defendants' use.

The Utah Supreme Court has entirely ignored Mutual's claim of breach of the lease agreement, even though Mutual established the breach by substantial, uncontroverted evidence.

POINT NO. 4

THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENDANTS TO INTRODUCE TESTIMONY AS TO THE STANDARDS TO BE MAINTAINED BY DEFENDANTS IN THEIR LEASED PREMISES.

Thirteenth & Washington STS. Corp. v. Nelsen, 123 Utah 70, 254 P.2d 847 (1953), indicates that premises were to be fit for the purpose for which they were leased so as to be conducive to the conduct of their business in a professional manner.

The trial court refused to permit Tony Supancic from Mutual's national headquarters, to testify concerning the standards which Mutual maintains and requires nationwide concerning their leasehold premises. Tony Supancic handled

all leasing agreements for Mutual and had negotiated and concluded the lease agreement which is the subject matter of this action. The Utah Supreme Court has failed to address and properly resolve this issue.

POINT NO. 5

THE CASE AT HAND INVOLVES A QUESTION OF EQUITY. THE STANDARDS FOR APPELLATE REVIEW OF QUESTIONS OF EQUITY NOT ONLY PERMIT, BUT ALSO COMPEL THE APPELLATE COURT TO REVIEW THE FACTS AND THE EVIDENCE TO DETERMINE IF THE TRIAL COURT PROPERLY DETERMINED THE FACTS AND APPLIED THEM TO THE CASE AT HAND.

In Nokes v. Continental Mining & Milling Co., 6 Utah 2d 177, 308 P.2d 954 (1957), the Utah Supreme Court stated:

"This being a case in equity, it is our responsibility to review the evidence. . . . Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.

(Id. at 954)

In accord with Nokes is Givan v. Lambeth, 10 Utah 2d 287, 351 P.2d 959, (1960), wherein the Utah Supreme Court recognized that in cases of equity it is the duty and the prerogative of the appellate court to review the evidence. The Court recognized that if the evidence clearly

preponderates against the trial court's findings, the judgment must be reversed. See also Barker v. Dunham, 9 Utah 2d 244, 342 P.2d 867 (1959).

The weight of the evidence clearly preponderates against the trial court's so-called findings and legal conclusions. All the evidence refutes the the trial court's findings and conclusions that the circumstances did not constitute a constructive eviction.

The Appellants respectfully submit that the Court may properly look at the unrebutted and overwhelming weight of the evidence and reverse the decision of the trial court on the grounds that the unrebutted and overwhelming weight of the evidence was contrary to the trial court's decision.

Whether the Utah Supreme Court follows the rule of law set forth in Nokes v. Continental Mining & Milling Co., (supra) Givan v. Lambeth, (supra), Barker v. Dunham, 9 Utah 2d 244, 342 P.2d 867 (1959), and several previous opinions, or the two cases cited in the majority opinion which appear to be inconsistent with previous holdings, the result is the same. There was no evidence introduced at the trial which contraverted the evidence submitted by Mutual as to the disturbing actions of Intermountain Marketing, and the lack of parking as required by the Lease. The testimony and

evidence submitted compels a conclusion that all the facts recited by Mutual were established by uncontraverted, substantial testimony. When you apply the facts established to the law of constructive eviction the compelling conclusion is that Mutual was constructively evicted from the premises.

RELIEF SOUGHT

Mutual seeks to have the Utah Supreme Court grant Mutual's Petition for Rehearing to reconsider its decision and to determine that Mutual demonstrated factually and legally that it was constructively evicted from the premises; and, to determine that the decision of the trial court should be reversed and the Complaint of Plaintiffs be dismissed.

CERTIFICATION OF GOOD FAITH

Pursuant to Rule 35 of the Rules of the Utah Supreme Court, counsel for Appellant (Mutual) hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully Submitted.

Dated this _____ day of June, 1989.

Jack L. Schoenhals

MAILING CERTIFICATE

I hereby certify that I mailed four copies of the foregoing Petition for Rehearing to the following, this ____ day of June, 1989.

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Jack L. Schoenhals