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UTAH SUPREME COURT
BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

MERVIN R. REID and ETHNA R. REID, Plaintiffs-Respondents, vs. MUTUAL OF OMAHA INSURANCE CO. and UNITED BENEFIT LIFE INSURANCE COMPANY, Defendants-Appellants.	:	Case No. ~~17637~~ 19678

BRIEF OF RESPONDENTS

Appeal From The Judgment of The Third

Judicial Court In and For Salt Lake County

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Clerk, Supreme Court, Utah

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MERVIN R. REID and ETHNA R. REID, Plaintiffs-Respondents, vs. MUTUAL OF OMAHA INSURANCE CO. and UNITED BENEFIT LIFE INSURANCE COMPANY, Defendants-Appellants.	:	Case No. 17637

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IN THE SUPREME COURT

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MERVIN R. REID and ETHNA R. REID, Plaintiffs-Respondents, vs. MUTUAL OF OMAHA INSURANCE CO. and UNITED BENEFIT LIFE INSURANCE COMPANY, Defendants-Appellants.	: : : : : : : : : : : :	Case No. 17637

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action for breach of a Lease Agreement and a Counterclaim for constructive eviction.

DISPOSITION IN LOWER COURT

The trial court sitting without jury rendered judgment in favor of plaintiffs and dismissed Defendants' Counterclaim.

RELIEF ON AN APPEAL

Respondents, Mervin and Ethna Reid, seek affirmation of the lower court's order granting judgment in favor of plaintiffs and dismissing Defendants' Counterclaim and remand to the District Court for an award of reasonable attorney's fees as provided for in the lease agreement.

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STATEMENT OF FACTS

On or about September 15, 1980 plaintiffs entered into a lease agreement with defendants. Plaintiffs occupied the top floor of the Reid Office Building and defendants, Mutual of Omaha and United Benefit Life Insurance Company (hereinafter referred to as "Mutual of Omaha") and Intermountain Marketing took possession of the bottom floor simultaneously (R. 431).

Beginning in November of 1980, Mutual of Omaha, by and through its General Manager, Hector Diaz, began complaining of alleged problems encountered as tenants in the Reid Building (R. 441). The alleged problems raised by defendants were concerns which are common in the rental of any building, noise from the adjacent tenant, improper maintenance of the common restrooms, improper use of the common areas by the adjacent tenant, parking problems, failure to properly remove ice and snow from the parking lot and sidewalks. Mr. Diaz complained to the Reids every time the restrooms were short on paper products or any time he perceived a problem (R. 643).

Plaintiffs, Mervin and Ethna Reid, listened to the complaints of defendants and then worked to solve the alleged problems of Mr. Diaz (R. 445, 451, 455, 456, 461-463, 465, 466, 770-776). On several occasions Mr. and Mrs. Reid met personally with Intermountain Marketing to attempt to alleviate any alleged problems created by them (R. 451, 456, 465, 473, 770-776, 763)

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and even caused their attorney to send a letter to Intermountain Marketing (R. 472). In each instance, Intermountain Marketing agreed to stop or limit practices that were being complained of by Mr. Diaz (R. 770-776). Intermountain Marketing even agreed to stop the complained of noise emanating from their office until after office hours (R. 607, 537).

Aside from the improper removal of ice and snow and the improper maintenance of the restrooms which Mr. Diaz admits was taken care of shortly after they entered the building, all of the other problems complained of were created or caused by Intermountain Marketing (R. 481). Mervin and Ethna Reid did not cause or authorize any of the problems complained of by defendants through Mr. Diaz (R. 486, 558, 557).

By his own admission, Mr. Diaz's major concern was the noise emanating from Intermountain Marketing (R. 555). Mr. Diaz asserts that after June 9, 1981 he had his secretary note each occurrence of noise from the adjacent tenants, Intermountain Marketing (R. 560, 561). Mr. Diaz is aware of only 19 separate occurrences, several of which were on the same date, during the 8 month period from June 1981 through February 15, 1982 (Responses to Interrogatories, R. 133-138 and Supplement Responses 210, R. 561). Mr. Diaz tape recorded these occurrences from Mutual of Omaha's office. Defendant selected excerpts from these tape recordings which were played to the court (R. 540,

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541) and Mr. Diaz testified that these tape recordings were representative of the noise that came from Intermountain Marketing (R. 539, 571).

However, other employees of defendants testified that Mr. Diaz's concern over the noise was exaggerated (R. 717, 718). The complained of noise consisted of applause, and laughter, as well as a countdown from 10 to 0 followed by "I feel great" repeated twice, followed by applause (R. 604,605). The countdown lasted approximately 12 seconds in duration and was referred to as a "fire-up" drill (R. 604, 605).

With regard to the alleged parking problems, Mr. Diaz admits that he was always able to find parking in the morning (R. 520). Also, there were always parking spaces available under the building (R. 489).

With regard to the alleged janitorial problems, no problems existed after talking with the Reids (R. 554, 555). Intermountain Marketing, who used the same restrooms and common areas, had no complaints concerning janitorial services (R. 621).

With regard to the alleged problems in hallways as well as all other problems, these concerns were all resolved by the Reids through talking with the tenants (R. 770-776).

Mr. Diaz cannot site any business that was lost because of the noise or the complained of problems by Intermountain

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Marketing or by plaintiffs, Mervin and Ethna Reid (R. 583). Moreover, Mr. Diaz admits that each year Mutual of Omaha was in the Reid Building, they increased their production from the previous year (R. 660-665).

Mr. Diaz told Mervin Reid that he needed more office space and asked him if Mutual of Omaha could rent more space (R. 386, 387). The new lease procured by Mutual of Omaha provides for approximately 20% more space than they had in the Reid Building (Exhibit 32P).

On November 17, 1981 plaintiffs received a letter from Mutual of Omaha's attorney, Larry Morton, stating that the noise must cease or that they would terminate the lease (Exhibits 23d). In response, the Reids replied with a letter of December 4, 1981 that they would hold Mutual of Omaha strictly to the terms of the lease obligations and would not allow the lease to be terminated (Exhibits 33P). At the end of December, defendants had not heard any further noise from Intermountain Marketing and accordingly Mutual of Omaha instructed that January's rent should be paid (Exhibit 25D, R. 695-697). Mervin and Ethna Reid, likewise, heard no disturbances nor were they contacted by Mr. Diaz regarding any other problems with noise or any other complaints (R. 775, 776). From January 1, 1982, Mervin and Ethna Reid received no further complaints from either Mutual of Omaha or Mr. Diaz regarding any problem until February 14, 1982

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wl2hen the moving van appeared at the Reid Building and Mr. Diaz indicated that he was leaving the leased premises (R. 487, 776). The Reids received a letter the following day, February 15th, indicating that Mutual of Omaha considered the lease agreement terminated (Exhibit 2P).

Mervin and Ethna Reid then filed suit against Mutual of Omaha for breach of the lease agreement and the verified complaint was signed on April 8, 1982.

On April 9, 1982 Intermountain Associated Marketing requested a lease for a substantial portion (Exhibit 31P) of the space previously occupied by Mutual of Omaha. On June 30, 1982 Intermountain Marketing agreed to lease the remaining portion of the premises taken up by Mutual of Omaha (Exhibit 30P). In November, 1982 Intermountain Marketing vacated the premises and declared bankruptcy (R. 614).

The suit for the breach of the lease agreement was tried before the Honorable Peter F. Leary on July 18, 19 and 20, 1983 and the Court found after hearing all the evidence and listening to the tapes of the noise that all of the complained of problems of Mutual of Omaha were without merit and did not amount to a constructive eviction (R. 354, 355). The Court awarded plaintiffs damages for breach of lease agreement in the amount of $26,884.23 plus Judgment for the remaining payments due under the lease.

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ARGUMENT

POINT I

WHERE THE TRIAL COURT DETERMINED THAT TENANT MUTUAL OF OMAHA'S ALLEGED PROBLEMS ARE WITHOUT MERIT, THE COURT PROPERLY DISMISSED DEFENDANT'S CLAIM OF A CONSTRUCTIVE EVICTION.

A. This Court should not overturn the trial court's finding that no constructive eviction occurred where the court's findings were based on reasonable and substantial evidence.

The case of Brugger v. Fonoti, 645 P.2d 647 (Utah 1982) is directly on point and provides the applicable law for the case at bar. In that case the Court held that tenants were not constructively evicted from premises leased for the purpose of running a restaurant. Defendants claimed that the noise emanating from a disco below the restaurant as well as lack of maintenance and other associated problems which caused the restaurant to shut down one weekend were grounds for constructive eviction. In that case, defendants entered a ten year lease with plaintiffs for the second floor of plaintiff's building. Some four months after defendants moved into the building, a disco was allowed to move into the building directly below defendants. Defendants complained to the owners that the loud disco music interfered with their business as well as attracting undesirable people. Defendants also complained a sewer problems and of leaks in roofs or holes in walls. The fan

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in the kitchen also broke requiring the restaurant to be closed over the weekend. The defendants then quit the premises, claiming they had been constructively evicted from the premises as a result of the disco noise, the lack of maintenance and the associated problems.

The case was tried to a judge sitting without jury and the court held no constructive eviction occurred. This Court confirmed the judgment of the trial court and held that where competent evidence exists that the landlord or person under his control did not render premises or part thereof unsuitable for its intended purpose, a constructive eviction does not exist. This Court also explained that the evidence must be viewed in the light most favorable to the finding of a trier of fact.

In the Brugger case, the main concern of the tenant claiming a constructive eviction was the noise, the disco in the basement, emanating from an adjacent tenant. Id. at 648. Likewise, Mutual of Omaha's primary concern was the noise emanating from Intermountain Marketing (R. 487). In the Brugger case, the Court found that disco was a disturbance but the noise had a limited effect on defendants' operation. Under the facts of this case, the Court found the noise made by Intermountain Marketing was distracting, but stated specifically that it was not of sufficient magnitude to warrant abandonment of the leased premises (R. 279) or otherwise make the premises unsuitable for

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the purpose for which they were leased (Finding of Fact No. 5, R. 354). The Court further found in the case at bar that no evidence was presented that as a result of the noise or other alleged culative act, plaintiffs caused defendants any loss of business or damages (R. 279-80, Findings of Fact 7 and 8, R. 355).

In the Brugger case defendants complained of, in addition to noise, children being in the halls and maintenance problems which were significant enough to require the business to have been shut down over a weekend. Likewise, Mutual of Omaha complained of people in the halls and maintenance problems.

Moreover, in Brugger, the defendants remained in possession of the premises for 8 months after complaining of the noise and physical problems. In the case at bar, Mutual of Omaha complained of problems with the office building almost daily from the day they moved in (R. 441). These complaints were confirmed on June 10, 1981 by letter of Mr. Diaz indicating specific problems with the noise (R. 530). Like the complained of problems in Brugger, Mutual of Omaha waited a lengthy period, in this case fifteen months, before breaching its lease.

In Brugger v. Fonoti, this court was asked to overturn the findings of the trial judge. This court specifically held that the Court would review the evidence in light most favorable to plaintiffs that unless the evidence was so clear and

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persuasive that all reasonable minds would necessarily conclude otherwise that it would uphold the trial court's findings. The Court stated:

> It is a well established rule that the Court will review the evidence and all inferences to be drawn therefrom most favorable to the findings of the triers of fact. Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (1965). Id. at 648.

In the case at bar defendants are requesting precisely what the appellant sought in the Brugger case, that is to overturn the trial judge's findings of fact that a constructive eviction did not exist. In this instance, the trial court's findings are well documented. Mutual of Omaha asserts that the real problem is the problem with the noise. (R. 555). Mutual of Omaha admits that they can attest to only 19 occurrences of noise since June 1981 (R. 133-138, 210, 561). These occurrences lasted approximately 12 seconds (R. 604, 605). Moreover, the Reids took precautions to prevent any problems from occurring (R. 445, 451,455, 456, 461-466, 763, 770-776). Mutual of Omaha indicated that the noise had indeed ceased as of the end of December, 1982 (Exhibit 25D, R. 695-697).

Likewise the other problems, parking problems, problems with people in the hall, and maintenance problems had all resolved themselves after the attempts by Reids to solve the problems (R. 770-776). Plaintiff by his own admission, admits that the janitorial problems were remedied (R. 554, 555).

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Intermountain Marketing indicates that the halls were cleared, and those problems associated with blocking the halls were alleviated (R. 770-776). Under these facts, the trial judge clearly had evidence upon which he could make a decision. These facts taken in light most favorable to plaintiffs as required by law, require that the holding of the trial court should be upheld. See Also, Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (1965); Thirteenth and Washington STS Corp. v. Neslen, 123 Utah 70, 254 P.2d 847 (1953).

B. Normal problems encountered in buildings which are remedied within a reasonable time do not amount to a constructive eviction.

Mutual of Omaha's complaints as outlined above are merely ordinary complaints which may be encountered in any building. Where these complaints are acted upon and remedied by the landlord within a reasonable period of time, they do not amount to a constructive eviction. This court stated in Brugger v. Fonoti, 645 P.2d 647 (1982):

> . . . where the maintenance problems were remedied within a reasonable time, constructive eviction does not occur . . . Defendants' basic complaints were that the toilet overflowed a couple of times, the roof leaked, and an exhaust fan failed when they were closed for a few days. These appear to be nothing other than the normal problems encountered with most any building, and were each taken care of as soon as reasonably possible. Id. at 648 (emphasis in original)

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In the case at bar the alleged problems are normal problems encountered in most any building and were remedied within a reasonable time. Accordingly, a constructive eviction did not exist.

C. Where tenant Mutual of Omaha did not abandon the premises within a reasonable amount of time constructive eviction did not occur.

In Brugger v. Fonoti, 645 P.2d 647 (Utah 1982) citing Thirteen and Washington STS Corp. v. Neslen, 123 Utah 70, 254 P.2d 847 (1953), the Court found that where defendants did not leave the premises after complaining of problems until after 8 months, the constructive eviction did not exist. The court stated:

> Tenant must, however, abandon the premises within a reasonable time after the alleged interference. Id. at 648.

In the case at bar, Mutual of Omaha began to claim problems almost immediately upon entering the building. However, it remained in the building for 16 months. Even after providing the Reids a formal notice of complaint of the noise in June of 1980, it still remained in the building 8 months before vacating the premises. This is analogous to the facts situation in Brugger which the court found to be an unreasonable amount of time. Accordingly, this Court should uphold the trial court's decision which found that a constructive eviction did not occur.

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D. <u>Where plaintiffs, Mervin and Ethna Reid, did not interfere with tenant, Mutual of Omaha, and where the complained of acts do not render the premises unsuitable to conduct business, a constructive eviction has not occurred</u>.

The court in <u>Brugger</u> stated specifically that in order for a constructive eviction to occur, the landlord or someone under his control must interfere with the enjoyment of the leased premises and render those premises unsuitable for the purpose for which they are intended. The Court specifically enunciated the standard required for constructive eviction:

> Construction eviction occurs where tenant's rights of possession and enjoyment of the leased premises is interfered with by the landlord, or person under his control, as to render the premises, or a part thereof, unsuitable for the purposes intended. <u>Id</u>. at 648.

In the case at bar, there is no indication that the premises were rendered unsuitable for the purpose intended. Mutual of Omaha at all times was able to conduct its selling of insurance. In fact, there is no proof of any loss of business (R. 583). Furthermore, production increased each year over the previous year while Mutual of Omaha was in the Reid Building (R. 660-665). There is no testimony that the building was not suitable as office space, the purpose for which it was intended.

The fact that Mutual of Omaha may have had specific standards for which they required their office space, does not

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render the building unsuitable for the purpose for which it is intended. No specific standard is required by the lease agreement. The standard for determining whether constructive eviction exists as outlined in Brugger v. Fonoti, and Thirteenth and Washington STS Corp. v. Neslen is an objective test. The premises must be rendered unsuitable for the intended purpose by a reasonable person. Other courts have likewise imposed a "reasonable person" objective standard. In Gottdiener v. Mailhot, 431 A.2d 851 (N.J. Super. 1981), a case dealing with a constructive eviction of a residential tenant, the court stated:

> The test is objective, the noise or disruptive conduct "must be such as truly to render the premises uninhabitable in the eyes of a reasonable person." Id. at 854.

In the case at bar, the trier of fact determined that a reasonable person would not find that the premises were unsuitable for the purpose intended (Finding of Fact No. 5, R. 354), Mutual of Omaha's standard is therefore irrelevant. The weight of the evidence indicates that the Reid Building was suitable as office space.

Furthermore, the main concern of Mutual of Omaha was the noise emanating from Intermountain Marketing (R. 555). In this instance, the noise was not created by the landlord nor did the landlord's have control over the activities of the adjacent tenant, Intermountain Marketing (R. 481). If the noise and alleged problems are created by Intermountain Marketing, then

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then Mutual of Omaha's action should be against Intermountain Marketing and not against the landlords, Mervin and Ethna Reid.

Defendants in their brief, in point II, cite a string of cases standing for the proposition that excessive amounts of noise may constitute constructive eviction. Initially it should be noted that these cases deal with residential tenants and accordingly are distinguishable. Even if they were not distinguishable, they add nothing to the analysis provided for in *Brugger v. Fonoti* that constructive eviction requires (1) interference by the landlord or a person under his control and (2) that the premises be rendered unsuitable for the purpose intended.

Defendant next attempts to suggest that *Thirteenth and Washington STS Corp. v. Neslen*, 123 Utah 70, 254 P.2d 847 (1953) is the appropriate standard for this court to use in determining whether a constructive eviction has occurred. Again the *Thirteenth and Washington STS Corp.* case adds nothing to the *Brugger* case. The standard is the same. There must be action by the landlord or someone acting under his authority to rendering the premises unfit for the purpose for which it was intended.

The *Thirteenth and Washington STS Corp.* case is distinguishable from the case at bar. In that case the entrance to the building was obstructed by fixtures placed in the building by the landlord. A barber shop and shoe shine stand were established in the entrance and lobby. Visitors to the office

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were required to go through the barber shop and shoe shine stand in order to get to the elevator. The stairway was also blocked off.

Furthermore, in that case, the defendants also experienced difficulty with the hours the building remained open. The doors were locked at 8:00 p.m. each evening and on holidays while the lease provisions provided for the building to be open until 12:00 p.m. No elevator service was provided after 8:00 p.m. and tenants were required to use a stairway which was not lit and which was used as a "latrine." Moreover, there was a lack of heat in the building and improper ventilation and continually foul smelling soap, towels and other essentials for the barber shop made the premises unacceptable as an office building. Under these conditions the trial judge determined that a constructive evictions existed. However, the factual allegations of Thirteenth and Washington STS Corp. case and the case at bar are readily distinguishable. In that case the court found the tenants' complaints were substantial and taken in total, prevented tenant from using the building for the purpose for which it was rented. In this instance, the trial court properly held that all of the alleged complaints of Mutual of Omaha were without merit and did not render the premises unsuitable for the purpose for which it was intended.

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POINT II

WHERE THE TRIAL COURT HAS A REASONABLE OR SUBSTANTIAL BASIS IN EVIDENCE TO SUPPORT ITS FINDINGS, THIS COURT SHOULD NOT REVERSE AND COMPEL A CONTRARY FINDING.

A. The trial court's refusal to make certain findings of fact is based on a reasonable or substantial basis in evidence.

Mutual of Omaha argues that the trial court failed to make specific findings on pertinent issues before the Court. The standard where the trier of fact has refused to make a finding is outlined in the case of Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139 (1972). In that case, plaintiff sought to recover damages caused to their home by irrigation water. Defendant made a motion to dismiss and the court made findings and entered judgment. Appellants sought to have the judgment overturned because the court did not make a finding of fact as to the negligence. The court held that in order for appellant to prevail, there must be a finding of fact to negligence and determined that under the facts of the case a reasonable man could have concluded that the evidence was insufficient to prove negligence. The court stated specifically that no finding of fact need be made unless the evidence is so clear that all reasonable minds would conclude in favor of the finding of fact.

> ...where the fact trier has not been convinced, and has refused to make a finding essential to the appellant's cause, this Court will not reverse and compel such a finding unless the evidence is so clear and pervasive

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that all reasonable minds would necessarily so conclude. Id. at 141.

In the case at bar, Mutual of Omaha attempts to allege certain complaints which it claims constitute constructive eviction. Mutual of Omaha contends that direct evidence rebutting the statements of defendants was not presented. However, direct rebuttal evidence was not necessary for the court to make its finding as defendants' own statements minimizing the alleged problems or statements by other individuals disclaiming the alleged problems or declaring the problems had been solved were sufficient to controvert the evidence and testimony of defendants. Under these circumstances, based on a reasonable or substantial basis in evidence, the court properly omitted any finding of fact dealing with a constructive eviction.

Defendants assert that failure to make findings on all material issues constitutes reversal error and cites three Utah cases. A careful reading of these cases, Remel v. Zion's First National Bank, N.A., 611 P.2d 392 (Utah 1980); Boyer Company v. Lignell, 567 P.2d 1112 (Utah 1977); Gaddis Investment Company v. Morrison, 30 Utah 2d 43, 278 P.2d 284 (1954) indicates that none of these cases were reversed. The court in each instance remanded to the trial court for further findings. Accordingly, even if findings were not made all that is mandated is a remand for further findings. A reversal would be improper under the circumstances.

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B. A mixture of conclusionary findings mixed with findings of ultimate facts, does not create reversible error.

The applicable law in this instance is stated by The New Mexico Supreme Court in the case of In the Matter of the Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (1982), involving the contesting of a will. The court stated specifically that the mixing of conclusionary facts and ultimate facts would not create reversal error.

> Ultimate facts and conclusions of law are often indistinguishable, and their intermixture in the court's decision as written does not create reversal error where fair construction then justifies the court's judgment. Id. at 491.

Even if there were a mixture of ultimate facts and conclusiary law, in this instance these findings justify the court's judgment and would not amount to reversal error.

POINT III

ELECTION OF REMEDIES IS NOT APPLICABLE IN THE CASE AT BAR.

Initially, respondents have no argument with appellants' characterization of election of remedies other than the fact that it is not applicable in the case at bar. Mutual of Omaha correctly points out that the doctrine of election of remedies applies to bar two actions which are inconsistent, generally based on incompatible facts. In the case at bar, the Reids did not pursue two inconsistent remedies. The remedies which the

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Reids pursued were clear from the outset of the dispute between the parties. In their letter of December 4, 1981 the Reids clearly indicated that Mutual of Omaha would be held liable for the entire rent obligation as well as attorney's fees in that it would seek strict compliance with the obligations required in the lease (Ex. 33P). The Reids then filed their complaint which clearly expressed the causes of action for damages resulting from breach of the lease agreement, including past due rents as well as future rents (R. 2-8). The Amended Complaint likewise addressed the exact same issues and exact same causes of action (R. 107-126). Defendants were at all times aware that the lease agreement was in effect and that plaintiffs sought to hold defendants for the entire rental balance due under the terms of the lease provision.

Under the terms of the lease provision, an election to terminate the lease need not be made and plaintiffs may pursue damages under the terms of the lease. The lease provision specifically states that plaintiffs may recover from defendants the amount by which the rent reserved exceeds the amount paid as rent by reletting (Ex. 1, Lease Agreement para. 19). The paragraph further provides that in the event the landlord does not collect rent from the new tenant, such deficiency shall be calculated and paid monthly by tenant (Ex. 1, Lease Agreement para. 19).

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Under these circumstances, it is clear that the court is not dealing with inconsistent or incompatible facts as described in Farmers and Merchant Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045 (1955). The remedies sought by plaintiffs-respondents are for damages for breach of the lease obligation as defined by paragraph 18 of the lease between the parties. Plaintiffs-respondents have neither expressly, nor by their actions, sought to terminate the lease agreement.

Furthermore, the court has determined that the remedy which the Reids pursued was clear from the pleadings and the record. No termination existed either expressly or impliedly (Conclusions of Law, R. 360) and no such evidence of a termination was presented (R. 279). The court also implied, by denying Mutual of Omaha's motion for election of remedies, that an election of remedies was not appropriate or mandated in this action (R. 279). Moreover, defendants do not suggest that they have been prejudiced by the Court failing to rule on their motion. Defendants' evidence would have been no different had the court required an election from the outset. The question of constructive eviction was independent from the question of damages and Mutual of Omaha was allowed to present all of its evidence.

POINT IV

THE TRIAL COURT PROPERLY AWARDED DAMAGES TO PLAINTIFFS, MERVIN AND ETHNA REID, AND AGAINST MUTUAL OF OMAHA PURSUANT TO THE TERMS OF THE LEASE AGREEMENT.

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A. Mervin and Ethna Reids' actions in mitigating damages after the abandonment of tenant Mutual of Omaha was proper under the terms of the lease agreement and principles of common law and did not constitute an acceptance of the abandonment.

The appropriate law to be applied in this instance is best enunciated in the case of Noce v. Stemen, 77 N.M. 71, 419 P.2d 450 (1966). The court dealt with an action by landlord to recover rents due under a written lease and for damages to the leased premises. Tenants claimed that the lease had been terminated by operation of law when plaintiffs entered the leased premises and attempted to procure a new tenant. The court held that when a tenant abandons the premises, landlord may rent the leased premises and the tenant would remain liable for any rents due for the unexpired term. The court in that case stated specifically that:

> "but even had the appellees attempted to procure a new tenant, this act would not necessarily constitute an acceptance of appellants' surrender, depending upon the lessor's intent, either express or implied . . ." In Hughes v. Porterfield, . . . it was recognized that a landlord may rent the leased premises on behalf of the tenant, the tenant remains liable for any rents due for the unexpired term. See also, McAdam, Landlord and Tenant, (5th Edition) ¶ 322; Tiffany, Real Property, supra; and 3A Thompson Real Property, supra Id. at 451.

In the case at bar, plaintiffs', Mervin and Ethna Reid, clear intent was to hold Mutual of Omaha liable for the entire

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rents due under the lease. Mervin and Ethna Reid cited in their letter to Mutual of Omaha that they intended to hold Mutual of Omaha to the entire lease payments (Ex. 33P). Immediately after the abandonment, Mervin and Ethna Reid filed suit seeking the unpaid rents for the unexpired term.

Moreover, plaintiffs, Mervin and Ethna Reid, were merely seeking to enforce their remedies as provided for under the lease which provides that plaintiffs may re-enter the property, release the premises and hold defendants liable for the entire rental amount due and owing (Lease Agreement ¶ 19, Ex. 1).

Mutual of Omaha, at all times knew that no termination had occurred. Even up to the date of trial, Mutual of Omaha, requested that plaintiffs elect whether it planned to terminate the lease (R. 398,399). The lease agreement specifically provided that should lessors, Mervin and Ethna Reid, attempt to terminate the lease, notice was required to be given by the lessor (Lease Agreement ¶ 19, Ex. 1). In this case, no notice was ever provided (R. 279).

Not only did the act of re-entry and an attempt to lease the premises not constitute termination, but re-entry and remodeling were expressly provided for in the lease agreement (Lease Agreement ¶ 19, Ex. 1). The lease provision specifically provided that remodeling and reletting would not constitute a

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termination but were allowed for under the terms of the lease (Lease Agreement ¶ 19, Ex. 1).

Under these circumstances, the trial court properly held that no termination occurred (R. 360).

Mervin and Ethna Reid at the time of the abandonment of the premises were in a precarious position. They were subject to a common law duty to mitigate even where the rental or lease agreement specifically states no mitigation of damages is required in the event of a breach, Ross v. Smigelski, 166 N.W.2d 243 (Wis. 1969). Under these circumstances plaintiffs, in order to attempt to mitigate damages was under a duty to relet. It would be extremely inequitable and unjust under the circumstances to now penalize plaintiffs for attempting to mitigate damages by declaring a termination. The better ruling is that of the trial court that no termination occurred since plaintiffs were merely following the procedure as outlined in the lease and clearly enunciated their intent to bind Mutual of Omaha to the entire unexpired rent.

Defendant Mutual of Omaha cites certain cases in which it attempts to establish the position that an abandonment releases the lessee from the duty to pay rent. Although, tenants are relieved from liability to pay rent where they abandon the premises and landlord accepts the abandonment, this is not the case where the abandonment is not accepted by the landlord.

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Otherwise, no lease would be of any validity since all tenant would have to do is abandon the property to rid itself of any lease obligations. The proper point of law is stated in the case of Roosen v. Schaffer, 127 Ariz. 346, 621 P.2d 33 (Ariz. App. 1980) where the court addressed the problem of abandonment of the tenant and reletting by the landlord. In that case lessor brought suit against lessee seeking unpaid rents accrued prior to his reletting of the premises and the balance of rent owing under the first lease. Defendant attempted to defend by stating that a surrender absolved him from any liability of paying rent. The court in that case properly held that lessor who refuses to accept surrender of the lease may recover the unpaid rent due prior to reletting the premises and future rents due under the balance of the lease subject to duty to mitigate damages by making reasonable effort to relet the premises.

In the case at bar, plaintiffs, Mervin and Ethna Reid, had no choice but to mitigate damages. Where plaintiffs clearly followed the lease provisions and notified Mutual of Omaha of their intent to hold them to all future rents, plaintiffs, Mervin and Ethna Reids', actions should not be construed as an abandonment.

B. In Utah the question of whether or not there has been an abandonment of a lease and an acceptance is a question of fact.

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The appropriate law is cited in John C. Cutler Association v. De Jay Stores, 3 Ut.2d 107, 279 P.2d 700 (1955), where the Utah Supreme Court stated:

> The question of surrender, being generally one of fact as to what was the intention of the parties, needs to be determined from all of the attendant circumstances, including the conduct and expression of the party. The defendant De Jay having prevailed, is entitled to have us view the evidence and every fair instance and intendment arising therefrom in the light most favorable to it. And if, when so regarded, there is any substantial evidence, or as sometimes stated, any reasonable basis in the evidence, to support the finding made by the trial court, it will not be disturbed. Id. at 703.

In the case at bar there is clearly reasonable basis in evidence to support the finding. Plaintiffs wrote letters to defendants, the lease agreement provides for the remedy plaintiffs exercised without a finding of abandonment and plaintiffs filed lawsuit immediately after the abandonment asking for the damages it sought (See Novack v. Fontaine Furniture Company, 146 A. 2d 525, 536 (N.H. 1929) holding that the filing of a lawsuit for breach of lease serves as notice of intention to hold the lessee to the terms of the lease.) Under these circumstances, reasonable evidence suggests that plaintiffs did not surrender or abandon the property.

C. The trial court properly awarded damages of rental due under the balance of the lease.

In Roosen v. Schaffer, 127 Ariz. 346, 621 P. 2d 33 (Ariz. App. 1980), lessor brought suit against lessee for breach

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of the lease agreement seeking unpaid rent accrued prior to the reletting of the premises and the balance of rent owing under the lease. In that case, the lease provision provided specifically that lessor would have the right to remedies of accepting both rents past due and future rents. In that case plaintiff was allowed by the lease provision to recover for rents past due. However, recovery of unpaid future rent had not been specified under the lease as an available remedy. The court held because the lease provision provided for remedies in addition to those provided by law, the plaintiff was entitled to both the common law remedy of future rents as well as remedy provided for past due rents under the lease. Accordingly, plaintiff was awarded both past due rents and future rents. The court stated specifically that:

> the lessor may recover the unpaid rent to prior to reletting the premises and the future rent due under the balance of the lease, subject to the duty to mitigate the damages by reletting the premises. Id. at 36.

In the case at bar, the lease agreement provides for the specific measure of damages. The lease agreement provides for damages of the costs of reletting plus the rent due under the lease provision minus any amounts received in rent from reletting. Like the Roosen case, Mervin and Ethna Reid are seeking a remedy for damages as provided for under the lease agreement and which is consistent with common law. In this instance only the

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remedy they seek will provide them with the benefit of their bargain in entering into the lease with Mutual of Omaha.

The facts indicate that plaintiffs, Mervin and Ethna Reid, expended over $10,000.00 in providing excellent, first-rate office space for Mutual of Omaha. In order to recoup their expenses, the Reids are entitled to collect rentals for the entire 5-year lease period. Only by being insured of their rental would Mervin and Ethna Reid receive the benefit of their bargain. By allowing them their past due rents, future rents, plus costs of reletting minus any sums received by new tenants, Mervin and Ethna Reid are merely being insured the benefit of their bargain during the lease period, i.e., a guaranty of the amount they would have received had Mutual of Omaha stayed in the building the full five years. Anything less would deprive them of the benefit of their bargain.

Should Mervin and Ethna Reid be relegated to accept only rents from the time of Judgment, they would be required to accept the risk of the poor rental market. If they were not given the costs of reletting, they would receive less than what they would have received had Mutual of Omaha stayed in the premises. The Reids should be entitled to the exact benefit they would have had had Mutual of Omaha not left the premises. The Reids are merely seeking to enforce the terms of the lease agreement.

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Defendant-appellant wrongly asserts that plaintiffs are seeking future damages. They are merely seeking the remedy provided for under the lease agreement, that is, the amount the rent reserved for the period of reletting exceeds the amount paid by the new tenant on a monthly basis. Paragraph 19 of the lease states:

> "[L]andlord may take possession pursuant to this lease and relet said premises or any part thereof for term or terms (which may be for a term extended beyond the terms of this lease) and if such rental or rentals and upon such other terms and conditions as landlord in the exercise of landlord's sole discretion may deem advisable with the right to make alterations and repairs to said premises. Upon each such reletting, tenant shall be immediately liable for and shall pay to landlord, in addition to any indebtedness due hereunder, the costs and expenses of such reletting due hereunder, the costs and expenses of such reletting including advertising costs, brokerage fees, and reasonable attorney's fees incurred and the cost of such alteration and repairs incurred by landlord and the amount, if any, which the rent reserved in this lease for the period of such reletting (up to but not beyond the term of this lease) exceeds the amount agreed to be paid as rent for the premises for said period by such reletting. If tenant has been credited with any rents to be received by such reletting and such rents shall not be promptly paid to landlord by the new tenant, such deficiencies shall be calculated and paid monthly by tenant. No such re-entry or taking possession of the premises by landlord shall be construed as an election by the landlord to terminate this lease unless the termination thereof by decree by a court of competent jurisdiction or stated specifically by the landlord in writing addressed to tenants." (Lease Agreement ¶19, Ex. 1).

Under the provisions of the lease agreement, Plaintiffs are not entitled to all future rents in one lump sum. Rather, plaintiffs are entitled to a month to month guaranty that they

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will receive the rental due under the lease agreement. Thus, the trial court properly awarded plaintiffs an award of a monthly rental amount minus any amounts they are able to collect in mitigation.

Only in this way may plaintiffs, Mervin and Ethna Reid, receive the benefit of their bargain. Defendants contest that the proper measure of damages is the difference between the value of the rent reserved and the present fair market value of the remainder, and that the two are presumed to be the same. However, in the case at bar, plaintiffs presented evidence that they were not able to obtain a tenant for over 8 months, that they had not obtained a tenant at the time of the trial and that the market was experiencing difficulty in the area where plaintiff's building exists (R. 357, 358). Under these circumstances the presumption has been rebutted and the fair rental value cannot be determined to be the market value.

Moreover, in this instance, the damages were agreed upon by the parties as outlined in the lease agreement. Accordingly, these provisions should take precedence and damages should be determined by the lease agreement. C.D. Stimson Co. v. Porter, 195 F.2d 410, 413 (10th Cir. 1952).

D. Future rents are a proper measure of damages.

In Penelko, Inc. v. John Price Associates, plaintiff sought damages for profits lost due to tenant's breach of a

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lease agreement. That case held that the award of future damage involving a breach of lease was appropriate. The court stated specifically:

> The crucial question awarding future damages involving a breach of the lease which affects the long-term value of the lease or the lessee's profit making potential is whether such damages can be ascertained with reasonable certainty. Id. at 1235.

In the case at bar, the lease provides specifically with reasonable certainty the damages to which plaintiffs are entitled. The so called "future damages" are simply the exact amount of the rental due minus any mitigation. This amount is as reasonably certain as is possible. Sixty-six thousand dollars was to be paid at a rate of $1,100.00 per month. Although defendants tried to characterize the damages as future damages, the trial court awarded only $1,100.00 per month minus any amount received in mitigation. This is exactly the remedy provided for in the lease agreement. No acceleration was provided for, only a month to month rental as they accrue. Therefore, the damages awarded by the court are not future damages. But even if they were, they are ascertainable with reasonable certainty and would be proper under the holding of the Penelko case.

POINT V

THE CASE AT BAR INVOLVES QUESTIONS OF LAW AND FACT INTERPRETING THE LEASE AGREEMENT AND DOES NOT REQUIRE COURT TO REVIEW QUESTIONS OF EQUITY.

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Plaintiffs, Mervin and Ethna Reid, are merely asking the court to interpret the agreement and to make findings of fact pursuant to that agreement. There are no issues of equity that need to be determined in plaintiffs' case only issues of fact as to whether the lease agreement was indeed breached.

Appellants contend that their counterclaim for constructive eviction is somehow a question of equity. This is clearly not the case. What amounts to a constructive eviction is a question of fact and accordingly a determination of equity is not required in this instance.

> What amounts to a constructive eviction is the question of fact. Gottdiener v. Mailhot, 431 A.2d 851 (N.J. Super. 1981).

Accordingly, under the facts of the case at bar, the court is not required to determine the issues of equity.

CONCLUSION

The trial court had an opportunity to review all the facts regarding Mutual of Omaha's alleged constructive eviction. The court even had an opportunity to listen to the noise which defendants recorded and which they claimed was the major concern of rendering the space inoperable. After hearing the rendition of the complained of noise, the court found that the complaints of defendants were without merit. All of the other complaints involved problems common to any business and all were resolved by the actions of plaintiffs, Mervin and Ethna Reid. Under the

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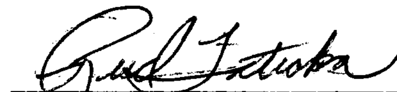
circumstances the court is clearly justified in finding that no constructive eviction occurred.

The trial court then addressed itself to the issue of damages. Finding that the parties agreed on specific damage provisions, the court determined that the only way which Mervin and Ethna Reid could receive the benefit of the bargain is to provide them with rentals due and to become due under the lease minus any money received through mitigation. Only in this way will Mervin and Ethna Reid receive the benefit of their bargain in light of the fact that they clearly did not intend to terminate the lease agreement but rather affirmatively asserted that they would hold defendants to strict compliance under the terms of the lease including all rental obligations.

Accordingly, the trial court's determination should be upheld and this matter should be remanded to the trial court for an award to plaintiffs of attorney's fees provided for under the lease agreement.

Respectfully submitted this 16th day of May, 1984.

McKAY, BURTON, THURMAN & CONDIE



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CERTIFICATE OF MAILING

I hereby certify that 2 true and correct copies of the foregoing brief were mailed, postage prepaid, to Jack Schoenhals, Attorney for Defendants-Appellants, 721 Kearns Building, Salt Lake City, Utah 84101 this 17th day of May, 1984.

L. Schneider

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