1979

Olaf Theodore Stevensen And Barbara Ann Stevensen v. Bailey Bird And Virginia Bird : Brief of Defendants-Respondents

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

OLAF THEODORE STEVENSEN and BARBARA ANN STEVENSEN, Plaintiffs and Appellants, vs. BAILEY BIRD and VIRGINIA BIRD, Defendants and Respondents.	Case No. 16416 & 16397

BRIEF OF DEFENDANTS-RESPONDENTS

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BERMAN & GIAUQUE
Craig E. Smay
500 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Defendants-Respondents

WATKINS & FABER
Michael A. Neider
606 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

OLAF THEODORE STEVENSEN and BARBARA ANN STEVENSEN, Plaintiffs and Appellants, vs. BAILEY BIRD and VIRGINIA BIRD, Defendants and Respondents.	Case No. 16416 & 16397

BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

Appellants brought this action to obtain a declaration of their rights, as lessees, under a lease of a commercial building and adjoined parking areas, to re-arrange and control configurations of parking; respondents, lessors, counterclaimed seeking a declaration that the lease contemplates human occupancy of the building involved, and requires appellants to improve the building for that purpose.

DISPOSITION IN THE LOWER COURT

The District Court ruled, inter alia, that the lease required appellants to make, prior to the renewal date

of the lease in 1981, at least basic improvements to the leasehold, including the installation of heating and cooling, lighting, electrical, and plumbing systems, and certain structural repairs, admitting evidence regarding the negotiation of the lease, from which it concluded that use of the building for gymnasium and/or lodging facilities was intended by the parties.

STATEMENT OF FACTS

The lease in question (Exhibit 1), was entered into November 21, 1961. It covers the second and third floors of a large building at 251-253 East Second South Street, Salt Lake City, together with a substantial parking area to the rear. It provides an initial term of 10 years, renewable twice for additional ten year terms. The original rent is $350.00 monthly, to be adjusted at the end of the second term. The lease is in its second term, which expires November 11, 1981.

Appellants own adjoining property in the same block, in which they operate the Townhouse Athletic Club and related businesses. Appellants' Townhouse building is joined to the building leased from respondents by the parking area leased from respondents. Appellants and respondents' other tenants use the parking area in common. Except for minimal after hours parking in the vicinity, appellants have no other parking for their Townhouse business except that leased from respondents. Appellants have, in fact, extended the Town-

house facilities so that they extend into the leased parking area.

The lease was negotiated by Mr. Stevenson and Mr. Bird, and their attorneys, Mr. Hanni representing appellants and Mr. Tibbles representing respondents. The lease in its final form was drafted by Mr. Hanni. (R. 342 et seq.)

At the time of the lease, the upper floor of the leased building had been recently gutted by fire. These floors were in need of appropriate structural repairs, together with installation of heating and cooling, electrical, and plumbing systems to make them tenantable. (R. 339 et seq.) Mr. Stevenson inspected the premises, and these matters were called to his attention, because he had represented that he intended to devote the two floors to use by his patrons in connection with the Townhouse Athletic Club. (R. 326 et seq.)

Mr. Stevenson plainly stated that he wished to "tie-up" the space in Mr. Bird's building for future expansion of the Townhouse Club. (Id.) He had numerous alternatives for the type of facilities he might construct in Mr. Bird's building for use by his patrons. He wished the language of the lease left broad enough to permit him a choice between these alternatives. (R. 346-47). Among the alternatives discussed were various athletic facilities and rooms for lodging. Mr. Stevenson indicated that he might wish to

construct a causeway, at the second floor level, between his building and Mr. Bird's. (R. 326 et seq.)

Mr. Stevenson never intimated that he would leave Mr. Bird's building entirely vacant, except for storage of excess supplies and materials, and that alternative was never discussed. (R. 339 et seq.)

Since any of the uses proposed by Mr. Stevenson required extensive improvement of Mr. Bird's building, the lease was made to provide that improvements would accede to the lessor, and lessee would be given a long, renewing term at low rent in which to amortize these improvements. At the end of 20 years, lessee would be permitted a third ten year term, but at an adjusted rental reflecting the value of the building as improved. (Id.)

In fact, appellants have never used respondents' building for anything but storage. While they have carried out extensive additions and improvements to their own buildings, they have made no improvements in respondents' buildings. They now refuse to make any improvements to respondents' building.

In 1973, respondents sued appellants to cancel the lease, asserting that appellants had failed to take the steps necessary to renew the lease, and that the use then being made of the building by appellants had allowed the building to fall into a condition not permitted by the lease. The

Court, in Bird v. Stevenson, Civ. No. 206422, Third District Court of Utah (1973), declined to cancel the lease.

ARGUMENT

Point I. The Lease Requires The Making Of "Necessary Improvements."

The lease by its plain terms requires the making of certain improvements understood by all parties to be necessary to make the premises tenantable.

The lease recites, on page 1, that the two upper floors of the leased building "are in need of repair and the installation of heating equipment to make the said floors tenantable." Paragraph 2 of the lease provides that "Lessee shall make all improvements necessary or desired by lessee to the second and third floor of the said building at 251-253 East Second South Street in Salt Lake City, Utah, including the furnishing of any heating facilities, lighting facilities and building structural repairs," and that "such improvements shall become the property of the lessor, including the heating facilities installed by lessee and all lighting fixtures, plumbing or other fixtures so installed by lessee, upon the termination of said lease or any extension thereof." (Emphasis added.) Paragraph 6 of the lease requires lessee to pay all increased taxes due to his improvements.[1]

---

[1] 6. Lessee further covenants and agrees that in addition to payment of the rentals and making available of parking stalls hereinabove provided, Lessee shall pay any

Paragraph 9(f) assumes that the premises will be improved by lessee, and requires that lessee leave the premises in their improved condition upon termination of the lease.[2] Paragraph 15 assumes that such improvements as are necessary to make the premises tenantable will be made, since it treats the possibility of the premises becoming untenantable thereafter.[3]

Paragraph 1(a) requires that the rent on the premises be renegotiated prior to the commencement of any third term, in view of "changed conditions" brought about

---

(fn. 1 cont.) and all additional taxes levied upon the said premises by reason of any improvements made by Lessee including any increase in the general property taxes levied by Salt Lake County, said increase in property taxes to be determined based solely upon increased valuation by reason of Lessee's improvements. Lessee shall not be responsible for any increase in taxes resulting solely from an increase in the amount of the levy.

[2]9. Lessee further covenants and agrees with Lessors as follows:

(f) Upon termination of this lease to leave the demised premises in their improved condition with all improvements in place that have been made thereon by Lessee. Lessee shall have the right to remove any furniture or personal property of his from the demised premises including the second and third floors of the building at 251 East 2nd South.

[3]15. If the building at 251-253 East 2nd South is so damaged or destroyed by whatever means, except by the act of Lessee, as to thereby be rendered untenantable during the term of this lease, then in such event the rentals payable hereunder, shall be reduced to the sum of $100.00 per month from the date the same becomes untenantable to and including the first day that it shall again become tenantable.

during the first two terms. Such a provision is commonplace in such commercial leases: it allows the lessor to take advantage of the benefit of his bargain, the improvements constructed by lessee, by increasing the rent to reflect the building's improved state.

While the obligation of the lessee to make improvements under this lease is contained principally within paragraph 2, the lease is to be construed as a whole, and the District Court properly referred to the additional provisions cited above in making its ruling. In using these other provisions to interpret and construe the contract the court (1) gave meaning to the intent of the parties, (2) interpreted the document consistently with its other provisions, (3) made effective upon the Stevensens an obligation clearly intended and (4) produced a more fair and equitable result. In so doing the trial court, on each of the four points, followed this Court's clearly enunciated standards for contract interpretation and construction. Waverly Oil Works Company v. R.B. Epperson, 105 Utah 553, 144 P.2d 286 (1943); Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 142 P.2d 657 (1943); Ross v. Producers Mutual Insurance Company, 4 Utah 2d 396, 295 P.2d 339 (1956); Plain City Irrigation Co. v. Hooper Irrigation Co., 11 Utah 2d 188, 356 P.2d 625 (1960); Stangl v. Todd, 554 P.2d 1316 (Utah 1976); Mark Steel Corp. v. Eimco, 548 P.2d 892 (Utah 1976); Thomas

J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 446 (1973).

The term "tenantable," as used in conveyances of commercial properties, such as this lease, has a fixed and known meaning. It means fit for human occupancy for the commercial purposes intended. E.g., Wolff v. Turner, 65 S.E. 41 (Ga. App. 1909); Acme Ground Rent Co. v. Werner, 139 N.W. 314 (Wis. 1912); Louis v. Ada Lodge No. 3, Independent Order of Odd Fellows, 254 P.2d 1095 (Idaho 1956); Mottman Merchantile Co. v. Western Union Telegraph Co., 100 P.2d 16 (Wash. 1940). There can be no serious question that the present lease intends lessee to make the building tenantable, or that certain improvements - heating and cooling, electrical, plumbing, structural repair of fire damage - were agreed to be necessary for that purpose. The only question that arises is not whether the building should be made fit for human occupancy, but what form of human occupancy was contemplated, given the alternatives discussed at the time of making the lease. That question arises only because appellants requested that the lease not bind them to a specific choice, representing that they would choose in due course from among the alternatives proposed.

Against this plain language of the lease, appellants interpose only the observation that paragraph 2 provides that lessee "shall make all improvements necessary or

desired by lessee." Appellants read this language as if the phrase were "necessary to or desired by lessee"; as if, in fact, lessee were the arbiter of what was necessary as well as what he desired. The actual language does not comport with appellants' reading, and the reading does not account for the immediately following provisions that the "necessary or desired" improvements are "including the furnishing of any heating facilities, lighting facilities and building structural repairs", and that "such improvements shall become the property of the lessors, including the heating facilities installed by Lessee and all lighting fixtures, plumbing or other fixtures so installed by lessee." Plainly, lessee does not have discretion about the "necessary improvements". They are as enumerated: heating and cooling, plumbing, electrical and structural repairs. It is immaterial on this appeal that lessee may have discretion about "desired" improvements: the judgment here is for the necessary improvements only.

Appellants' argument that the purpose of paragraph 2 is the negative one "to emphasize that Bird was not responsible to make (improvements)" is specious. Paragraph 4 specifically provides that lessor shall not be responsible for improvements.

Point II. The Court Properly Admitted Testimony Regarding Negotiations For The Lease.

The District Court's interpretation of the language of the lease regarding necessary improvements is fully justi-

fied without resort to other evidence. It is also supported by evidence admitted by the Court regarding the negotiation of the lease.

Appellants object to the admission of evidence of the negotiations of the parties for the lease, on the ground that it was parol proffered for the purpose of varying the terms of the agreement. The evidence was neither proffered nor admitted for such purposes.

In the main, the evidence was offered for the purpose of showing the types of human occupancy discussed by the parties in the negotiations. The purpose was not to alter the requirement of the lease regarding making the premises tenantable, but to show the kinds of tenancies contemplated. The Court heard evidence regarding discussion of use of the premises by lessees' Townhouse Athletic Club patrons for various athletic endeavors and for lodging, and the entire lack of discussion of the possibility that the premises would not be used for human occupancy.

The Court was entitled to admit this evidence both for the purpose of disposing of appellants' claim that the language of the lease was intended to permit them an option whether to improve the premises, and to clarify the question, created by appellants' request that the lease not limit them to a specific kind of occupancy, of the purposes for which improvements were required by the lease. Such evidence is always permissible for the purpose of clarifying the terms of

an agreement if the Court entertains any uncertainty about them. See Russell v. Park City Corp., 548 P.2d 889 (Utah 1976); Ewell & Sons, Inc. v. Salt Lake City Corp, 27 U.2d 188, 493 P.2d 1283 (1972); Continental Bank & Trust Co. v. Stewart, 4 U.2d 228, 291 P.2d 890 (1955).

POINT III. The Trial Court Correctly Ruled That The Necessary Improvements Must Be Completed On Or Before 1981.

Appellants very briefly argue (page 5 of appellants' brief) that the trial court erred when it held that appellants must make the improvements before the 1981 expiration date of the first ten year renewal term of the lease. Appellants assert that, since they might renew the lease in 1981, any obligation to improve the premises would not arise until the expiration of the second ten year option term of the lease in 1991.

The argument is misleading because plaintiffs can, of course, choose not to renew the lease. Thus, they would attempt to escape completely from the clearly imposed duty to make improvements to the premises. In fact, the improvements are required to be in place at any time the lease is terminated (or lessors would have a claim for the value of those not done), and in no case later than November 11, 1981, at which time the lease is to terminate or continue with the rent adjusted upward in view of the improved condition of the premises.

In concluding that the lease requires the necessary improvements to be completed by the end of the first ten year option period in 1981, the court specifically referred to paragraph 1(b) which provides for the second ten year renewal of the lease. This provision states that for the second option period a new rent will be either agreed upon or arbitrated, with the new rent to be based upon the state of the premises. The court drew from these provisions the reasonable conclusion that the parties contemplated that the required improvements would be made prior to the 1981 expiration date. As the court summarized its ruling:

> (I)t was recognized by the parties at the time that they would take a look at the facilities and what fair rental would be, and if they couldn't agree, they had an arbitration set forth in that lease as to what rental properties would be. And it appears to me that it was contemplated that those rooms being finished at least by the end of the second ten year period would be taken into consideration. (R. 372).

Point IV. Lessor's Counterclaim Is Not Barred By Res Judicata.

Since the improvements necessary or desirable to make are not due to be turned over to lessor until termination of the lease, it would be permissible, though apparently not anticipated, for lessee to postpone making the improvements for some part of the first twenty years (the first two ten-year terms) so long as he keeps the lease in effect, intends to make the improvements, and leaves time to

do so before the end of the second ten years. At that point, paragraph 1 comes into play. It requires that the rent be renegotiated upon commencement of the third ten-year term in view of changes that have come about. Chief of such changes that would require renegotiation of the rent would be, of course, improvements enhancing the value of the building. Paragraph 1 therefore contemplates that the "necessary" improvements be completed before renegotiation of the rent at the commencement of the third term of the lease.

The plain intent is that, at the end of the first two terms, the lessor have a building tenantable as a public commercial space, and that lessee thereupon commence paying rent accordingly.

Regardless of the year in which the lease is terminated, upon termination the "necessary" improvements and any "desired" improvements actually constructed, are due to be turned over to the lessor. If the "necessary" improvements have not been completed, the lessor would be entitled to their value in damages.

Lessor's counterclaim asserts his right to the "necessary" improvements of heating and cooling, lighting and electrical, plumbing, and structural repairs. These are required to be made by November 21, 1981, the commencement of the third ten-year term of the lease.

Plaintiff's only response to this claim is an assertion that the matter has been adversely decided in Bird

v. Stevensen, supra, and that judgment therein is res judicata herein. The Order in that case has no effect upon the lessor's right to relief in this.

The Order in the earlier case first finds that the lease had been renewed, and that, as of the date of the Order, lessee's uses of the second and third floors of the demised building had not created a condition forebidden by the lease. At that time, lessee had made no improvements to the building. Lessee apparently now reads this ruling as one that no improvements are ever due. In fact, to the extent it bears upon the question of improvements at all, it is merely one that, the lease having been renewed rather than terminated, no improvements were then due to be turned over to lessor, so that lessee's failure then to have constructed any improvements was not a violation of the lease. The ruling effectively gave lessee the remainder of the renewal term in which to make improvements.

The earlier action did not involve the question presented here of whether upon termination of the lease, or at the outset of the third term, the specified improvements were due. Nothing in the ruling on the question posed by the earlier case implies any conflict with the ruling on the question posed by the later case: both find that improvements are not due to be constructed while the lease remains in effect during the first two terms.

Specifically, lessee relies upon a single conclusion of law in the earlier matter. There Judge Gordon R. Hall found that:

> 2. The written lease does not require any conditions, use, maintenance or repairs in regard to said second and third floors of said building different from the use defendant is presently making of said floors. (Conclusion of Law 2 in Civil No. 206422) (Ex. 15).

This language specifically refers to "present" use, and has no bearing upon ultimate duty.

This conclusion is strengthened by a reading of the additional conclusions of law and findings of fact found in Exhibit 15. In the eight findings of fact no reference is made to any duty to make improvements; indeed, all eight of the findings refer specifically to uses made of the premises during the period prior to the entry of those findings.

The same is true of the four conclusions of law. None of them refers to any duty to improve the premises. All references are to past uses of the premises.

Thus, res judicata is not applicable under the rule stated in East Millcreek Water Company v. Salt Lake City, 108 Utah 315, 159 P.2d 863 (1945). As this Court stated:

> "This action does not involve the same claim, demand or cause of action that was litigated in the former action. It does involve the interpretation of the same contract, but the question to be determined in the two actions are different, the provisions governing in this case are different from those governing in the former case. In fact the provisions

> governing this case had not become effective at the time the other case was tried, and in view of the fact that there was not nor could there have been any bona fide dispute on the interpretation of such provisions. (159 P.2d at 866) (Emphasis added). See also Leone v. Zuniga, 84 Utah 419, 34 P.2d 699 (1934).

The relief sought in the earlier action was to have the lease cancelled and damages assessed because lessee had failed to mail the proper notice required to renew at the end of the first ten-year term. Lessee had apparently mailed the notice late and had continued to pay rent, and the defense was that lessor had not been damaged, while cancellation of the lease would deprive lessee of property crucial to the conduct of his business. The Court in balancing the equities appears to have ruled that the damage to a substantial business, together with the imposition of damages, was a consequence to lessee that far outweighed the consequences to lessor, late receipt of the notice of renewal. Lessee takes this ruling as one that he may now avoid his chief responsibility under the lease, regardless of consequences to the lessor.

The lease in this case sets a low rent, with a long, renewing term, so that lessee can construct the improvements needed by lessor, and can amortize their costs over a substantial time. In exchange for having let the property for a low rent for twenty years, the lessor gets certain improvements, with an increased rental during the

third ten-year term. Lessee wishes the lease to be read to permit lessee to pay the same low rental throughout the entire thirty years, and to avoid entirely the making of any improvements.

In fact, lessee has had eighteen years use of the leased building in which he could have amortized the needed improvements, but in which he has paid nothing. If he is permitted to renew for a third term, he will have an additional twelve years in which to amortize the improvements required. In either case, there is certainly nothing unfair or onerous in requiring him, by the end of the first twenty years of the lease, to have made the necessary improvements, or to have paid their value to lessor, in order to keep the lease in effect. On the other hand, to refuse to enforce the plain language of the lease in lessor's behalf permits lessee to defraud lessor, and will result in imposing upon lessor for thirty years an extremely bad bargain as to rental, at the end of which lessor will be given back a once valuable building now rendered wholly useless. Obviously, the balance of equities at this time has become entirely reversed from the situation which existed at the time of the earlier trial.

CONCLUSIONS

Lessee in this case asserts extremely strained readings of the lease and an earlier ruling of the District Court in order to avoid his chief obligation under the lease.

The District Court quite properly rejected this attempt. None of appellants' objections to the ruling below have merit. The ruling should be affirmed.

DATED this ___ day of _____, 1979.

Respectfully submitted,

BERMAN & GIAUQUE
500 Kearns Building
Salt Lake City, Utah

By _____
E. Craig Smay
Attorneys for Defendants-Respondents