

1980

# Bailey Bird, Midtown Auto Parts, Steven Surrey, and the Athenian Restaurant v. Olaf Theodore Stevensen : Brief of Plaintiffs-Respondents

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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BAILEY BIRD, MIDTOWN AUTO :  
PARTS, STEVEN SURREY, and :  
THE ATHENIAN RESTAURANT, :

Plaintiffs-Respondents, :

vs. : Civil No. 16416, 16397

OLAF THEODORE STEVENSEN, : & 16647

Defendant-Appellant. :

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BRIEF OF PLAINTIFFS-RESPONDENTS

---

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

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BRIEF OF PLAINTIFFS-RESPONDENTS

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NATURE OF THE CASE

Respondents, lessor Bird and Lessees, Athenian Restaurant, Church of Scientology, and Midtown Auto Parts brought this action against another lessee of the same premises, Stevensen, to enforce the injunction in Katsanevas dba Athenian Restaurant v. Stevensen, Civil No. 226232, Third District Court, Salt Lake County (1975), against interference with an existing arrangement of parking for lessor and the first named lessees in the leasehold, and to enforce that portion of the judgment in Stevensen v. Bird, Civil No. 243475, Third District Court, Salt Lake County, 1978, recognizing and preserving the Katsanevas injunction.

## DISPOSITION IN THE LOWER COURT

The District Court, Judge James Sawaya, ruled that Stevensen's construction of a steel fence on the premises forced the subject parking into a configuration in violation of the Katsanevas injunction, that the judgment in Stevensen v. Bird preserved the Katsanevas order and did not overrule it, and that plaintiffs were entitled to the relief of having the fence removed forthwith. The Court reserved the question of damages to plaintiffs, and dismissed Stevensen's Counterclaim that Stevensen v. Bird overruled Katsanevas and authorized Stevensen to do the things forbidden in the Katsanevas injunction.

## STATEMENT OF FACTS

The disputes arising in this matter commenced in late 1961, with the signing of a lease by lessor Bird and lessee Stevensen. The leasehold included parking, and the lease reserved from the parking let to Stevensen parking for lessor Bird and his earlier lessees. Over time, numerous disagreements have arisen between lessee Stevensen on one side and lessor Bird and the remaining lessees on the other side over the parking reserved to Bird and the other lessees.

In 1974 and again in 1975, the parties attempted to settle the ongoing disagreements by entering into agreements for a particular configuration of reserved parking on the leased premises. For some time prior

thereto, Bird and his other tenants had parked in an area immediately off East Second South Street. In 1974, a drawing was made showing this configuration of parking, and language was added thereto indicating that the configuration could not be changed without the consent of all parties. Stevensen and Bird, and each of the other lessees, approved and signed the diagram. In January, 1975, the drawing was slightly modified, and again approved and signed by all.

In 1975, Stevensen attempted to unilaterally alter the configuration of reserved parking. The result was an action by one of Bird's lessees, the Katsanevas brothers doing business as the Athenian Restaurant. In that action, the Athenian owners sued Stevensen to enforce the configuration of parking agreed upon in 1975, and to enjoin any further interference with that configuration by Stevensen without the consent of the other lessees. Katsanevas v. Stevensen, Civil No. 226232, Third District Court of Utah 1975. The Third District Court, Judge Sawaya, held that the drawing approved and endorsed by the parties constituted the current agreement between the lessor and all lessees, including Stevensen, and could not be unilaterally altered without the consent of the others. A permanent injunction was issued against Stevensen unilaterally interfering with the configuration of parking shown on the drawing endorsed by all the parties. This ruling was not appealed.

In 1977, Stevensen sued the lessor, Bird, seeking an interpretation of the lease which would permit Stevensen to rearrange the parking on the lease premises in the manner shown upon a drawing attached to the Complaint. Stevensen v. Bird, Civil No. 243475, Third District Court of Utah, 1978. In response, Bird pointed out that the matter of the configuration of parking had previously been settled, and was then the subject of a current injunction. Bird also pointed out that any attempt to modify the injunction, or to make the showing required by its terms, would require the presence as indispensable parties of the lessees specifically protected by the injunction.

At trial, the Court, G. Hal Taylor presiding, ruled that Stevensen's proposed rearrangement of the parking did not comply with the requirements of the lease, that the drawing approved and endorsed by the lessor and all lessees in 1975 constituted a current modification of the lease which could not be altered without the consent of the parties, and granted lessor Bird judgment on his counterclaim. In the written judgment, however, the Court recognized that, under the lease as drafted, lessee Stevensen had certain rights to alter the parking arrangement, holding that any such rights could be exercised only in compliance with earlier orders of the Court, namely, the order in Katsanevas v. Stevensen.

Thereafter, on a Saturday morning at 7:00 a.m., Stevensen brought workmen onto the premises and installed in concrete a chainlink fence forcing the reserved parking into a configuration in direct violation of the Katsanevas order. He claimed as authority to do so the judgment in Stevensen v. Bird. Thereupon, the successors to the Katsanevas brothers in the lease and business of the Athenian Restaurant brought suit to enforce the Katsanevas injunction. They were joined by lessor Bird and the remaining lessees, who sued both under the Katsanevas order and the judgment in Stevensen v. Bird insofar as it specifically preserved the Katsanevas order. Judge Sawaya found that the fence erected by Stevensen violated the injunction in Katsanevas, and was not in any sense authorized by the judgment in Stevensen v. Bird, and ordered that the fence be removed forthwith. Stevensen brings this appeal, which, for purposes of convenience, has been consolidated with the appeal and cross-appeal in Stevensen v. Bird.

#### ARGUMENT

Point I. The Matter at Issue is Controlled by the Doctrine of Res Judicata.

Appellant correctly points out in his Brief that the question whether he may now rearrange the parking as he has attempted to do is controlled by the doctrine of

res judicata. Noticeably, however, he neglects even to mention the Katsanevas injunction, or that it came prior to the judgement in Stevensen v. Bird, and is clearly dominant as to the question of rearrangement of parking.

It is simply immaterial whether, under the 1961 lease as drafted, lessee Stevensen had certain powers to rearrange the reserved parking on the parking area adjoining East Second South Street, or whether, at present, he retains certain powers to rearrange parking on other parts of the leased premises. The plain fact of the matter is that in 1975, in an effort to settle disputes over the exercise of such powers, Stevensen, Bird, and the remaining lessees entered into a written and enforceable agreement regarding the configuration of parking for Bird and the other lessees on the parking area adjoining East Second South Street. This agreement is the subject of a current injunction against lessee Stevensen. The new agreement is enforced in the order in Katsanevas. The order in Katsanevas is preserved in the judgment in Stevensen v. Bird.

The judgment in Stevensen v. Bird cannot, and did not overrule the judgment in Katsanevas v. Stevensen. In the first place, Stevensen was collaterally estopped, by the ruling in Katsanevas, to even raise the question

of authority to alter the existing configuration of parking for Bird and his other lessees on the part of the parking area adjoining East Second South Street. In Katsanevas, the Court made a specific ruling regarding the authority of lessee Stevensen to alter the then existing configuration of parking for lessor Bird and his other lessees. It found that there was a valid existing agreement between the lessor and all lessees regarding the configuration of parking. It found that the agreement could not be unilaterally altered without consent, and it permanently enjoined all attempts to do so. That judgment, fully litigated by lessee Stevensen and his fellow lessee the Athenian Restaurant, specifically regarding Stevensen's authority to unilaterally alter the configuration of parking for his fellow lessees without their consent, is plainly collateral estoppel against lessee Stevensen to raise the same issue in a subsequent action. E.g., Knight v. Flat Top Mining Co., 305 P.2d 503 (Utah 1960); Natl. Finance Co. v. Daley, 382 P.2d 405 (Utah 1963); Richards and Richards v. Hodsen, 485 P.2d 1044 (Utah 1971); Wheadon v. Pearson, 376 P.2d 946 (Utah 1962).

Furthermore, while the Katsanevas judgment does not purport specifically to construe the underlying lease between Stevensen and Bird, it is plainly based upon the theory that the 1975 drawing and agreement supercedes

the underlying leases among the parties. If Stevensen had anything to claim to the contrary - for example, that some power to rearrange parking remained in him under the lease despite the subsequent agreement - he was required by the Utah cases to put such claim forward in the Katsanevas action and have it adjudicated there. E.g., Knight v. Flat Top Mining Co., supra; Nat'l Finance Co. v. Daley, supra. The Utah cases plainly do not permit a lessee to fully adjudicate the question of authority to rearrange the parking of his lessor and fellow lessees under an agreement involving all parties, and then subsequently litigate the identical question under an earlier agreement between himself and the lessor only.

Katsanevas v. Stevensen settles the question of the authority of lessee Stevensen to alter the parking reserved for lessor Bird and the other lessees. To the extent that the action in Stevensen v. Bird was intended to subvert the earlier order in the Katsanevas v. Stevensen, it was wholly improper. In fact, if that was the purpose in Stevensen v. Bird, it failed, since the judgment in Stevensen v. Bird specifically makes any powers therein recognized subject to compliance with the Katsanevas order.

Point II. The Athenian Restaurant was an Indispensable Party to any Action Attempting to Modify the Order in Katsanevas v. Stevensen.

While the order in Katsanevas v. Stevensen is based upon an agreement to which the lessor and all of

his lessees in the subject premises are parties, it specifically protects the Katsanevas brothers doing business as the Athenian Restaurant. Any action, therefore, intended to modify the order in Katsanevas v. Stevensen, or intended to show compliance with the terms of the Katsanevas injunction in order to obtain permission to rearrange the parking, would have required that the Katsanevas brothers, or their successors in the lease and business of the Athenian Restaurant, be joined as indispensable parties. Obviously, any persons whose rights are specifically protected by an order of the Court are indispensable parties in any action attempting to modify such an order in any way. Rule 19, Utah Rules of Civil Procedure.

If the purpose of the action in Stevensen v. Bird was to obtain permission to do the things specifically forbidden by the order in Katsanevas v. Stevensen, namely, rearrange the parking reserved to Bird and his lessees, it is obvious that the Athenian Restaurant was an indispensable party to the action. To the extent that the Athenian Restaurant was not joined in Stevensen v. Bird, the action could not proceed to any judgment which affected the rights of the Athenian Restaurant under the order in Katsanevas v. Stevensen.

These matters were pointed out to the Court in Stevensen v. Bird. Apparently, the Court felt that

Insofar as the action could not result in any judgment which permitted any rearrangement of parking in contravention of the Katsanevas order, the suit could proceed without joinder of the Athenian Restaurant. In fact, the judgment rendered in Stevensen v. Bird preserves the Katsanevas order, and thereby effectively forbids any rearrangement of parking not in compliance with the order in Katsanevas v. Stevensen. If appellant Stevensen's claim were correct that the judgment in Stevensen v. Bird attempted to overrule Katsanevas v. Stevensen, and permit a rearrangement of parking in violation of the earlier order protecting the Athenian Restaurant, it is plain that the judgment in Stevensen v. Bird would be wholly void for failure to join indispensable parties.

Point III. The Judgment in Stevensen v. Bird is not Res Judicata of the Question Whether Appellant Stevensen . . . Rearrange the Parking Reserved to Respondent Bird and Others.

The subsequent decision in Stevensen v. Bird, can hardly be res judicata of matters decided in the prior action Katsanevas v. Stevensen. In fact, as demonstrated above, to the extent that the judgment in Stevensen v. Bird purports to dispose of the matters decided in Katsanevas v. Stevensen, the judgment in Stevensen v. Bird must be held void. If Stevensen v. Bird were what appellant Stevensen now claims it to be, it would present

the strange and unseemly spectacle of a collision between judges of the same Court on the same subject.

In fact, the judgment in Stevensen v. Bird specifically preserves the order in Katsanevas v. Stevensen. The Court in Stevensen v. Bird specifically found from the bench that the 1973 drawing regarding parking, endorsed by the lessor and all lessees, including Stevensen, was a written modification of the lease attempted to be construed in Stevensen v. Bird, which modification could not be altered without consent of the lessor and remaining lessees. The Court, however, felt that some decision regarding of the lease might be rendered without reaching the question whether the rights of the parties were presently bound by a subsequent modification of the lease. The Court therefore rendered a judgment which interprets the powers of the lessee under the lease as drafted, requiring that such powers be exercised in compliance with the earlier Katsanevas order based upon the subsequent modification of the lease. The affect of the judgment is to recognize certain powers with regard to parking under the lease, and to permit them to be exercised in compliance with the subsequent modification of the lease protected and enforced in the Katsanevas order. Effectively, the judgment in Stevensen v. Bird permits Stevensen to rearrange parking in other areas of

the leasehold than that occupied by Bird and his other tenants under the Katsanevas order. If this is not so, the judgment in Stevensen v. Bird is in direct conflict with the judgment in Katsanevas v. Stevensen, without the slightest showing upon the record of any basis therefor.

There was a way in which the Court in Stevensen v. Bird could properly have modified the judgment in Katsanevas v. Stevensen. The order in Karsanevas v. Stevensen forbids alteration of the configuration of parking shown in the 1975 agreement among the parties, except upon a showing by appellant Stevensen of "extreme good cause" why a modification was necessary. Had Stevensen made such a showing, it might have been proper for the Court in Stevensen v. Bird to modify the Katsanevas order to permit some alteration of the configuration of parking protected therein. It would have been necessary, however, to the making of such a showing, (a) that Stevensen add as indispensable parties, the Athenian Restaurant, and (b) that some evidence be produced that a modification of the earlier order was strictly necessary. Neither of these conditions was met. The Katsanevas brothers, or their successors in the Athenian Restaurant, were not joined, and the record is wholly devoid of any evidence whatever of "extreme good cause" why the parking

arrangement should be changed.

In short, it appears upon the face of the judgment in Stevensen v. Bird that it does not attempt to modify the order in Katsanevas v. Stevensen. Furthermore, the record is wholly devoid of any proper basis upon which the Court in Stevensen v. Bird could have modified the judgment in Katsanevas v. Stevensen. The only proper interpretation of the judgment in Stevensen v. Bird is the one outlined above. Stevensen v. Bird is not, therefore, res judicata of the issue of the right of appellant Stevensen to rearrange the part of the parking on the leased premises reserved for respondent lessor Bird and his other lessees. To otherwise interpret the judgment in Stevensen v. Bird renders it void.

Point IV. The Plaintiffs in Bird et al., v. Stevensen had Ample Standing, and the Action was Entirely Proper.

The standing of respondent Bird in Bird et al., v. Stevensen is conferred by the judgment in Stevensen v. Bird. The latter case preserves, in favor of respondent Bird, the order in Katsanevas v. Stevensen. That is, respondent Stevensen cannot exercise any of the powers conferred in Stevensen v. Bird, as against respondent Bird, except in compliance with the order in Katsanevas. Respondent Bird may certainly sue to enforce the order in Stevensen v. Bird.

The present Athenian Restaurant, as successor to the Athenian Restuarant which was plaintiff in Katsanevas v. Stevensen, succeeds to the rights protected by the order in Katsanevas v. Stevensen. It assumed both the business and the lease of the Katsanevas brothers in the premises. The Athenian Restaurant may always sue to enforce its rights under the Katsanevas order.

The remaining respondents herein, also lessees from respondent Bird, and respondent Bird himself, may always bring an original action against appellant Stevensen to prevent interference with their parking rights in the leased premises, and may allege therein that appellant Stevensen is bound by principles of collateral estoppel in his actions with regard to such parking by the judgment in Katsanevas v. Stevensen.

The action in Bird et al., v. Stevensen is based upon proper standing if even one of the plaintiffs therein had standing. In fact, all plaintiffs therein had proper standing. The principles of law recited by appellant Stevensen in his brief attempting to show that all of the respondents herein, as privees under leases of the leased premises, would be bound by the judgment involving lessor Bird only in Stevensen v. Bird, demonstrate, in fact, that all of the respondents herein would have standing to sue both under the judgment in Stevensen v. Bird

and under the judgment in Katsanevas v. Stevensen.

The action in Bird et al., v. Stevensen, is not an improper attempt to appeal the judgment in Stevensen v. Bird. There is no need to appeal such judgment to the extent that is not in conflict with the judgment in Katsanevas v. Stevensen. In fact, as Judge Sawaya found in Bird et al., v. Stevensen, there is not a conflict between Stevensen v. Bird and Katsanevas v. Stevensen, because the former preserves the latter. To the extent that Stevensen v. Bird is, as appellant claims here, in conflict with Katsanevas v. Stevensen, it is simply void. In short, the order in Katsanevas v. Stevensen is a final, unappealed, existing injunction against Stevensen doing the very things he now claims that Stevensen v. Bird authorizes him to do. Either Stevensen v. Bird does not authorize him to do such things, or it is void.

There is nothing improper in an action which claims that an existing order of the Court has been violated, and that a subsequent order of the Court contains no authority for the violation, and seeks redress. Bird et al., v. Stevensen did nothing more. The Court in fact found that Stevensen's actions violated the injunction in Katsanevas, that they were not authorized by Stevensen v. Bird, and granted relief.

CONCLUSIONS

Appellant Stevensen's right to rearrange the parking reserved to lessor Bird and his other lessees in the parking area of the leased premises adjoining East Second South Street are determined by the judgment in Katsanevas v. Stevensen. Nothing in the judgment in Stevensen v. Bird alters this. In fact, the judgment in Stevensen v. Bird specifically preserves the order in Katsanevas v. Stevensen. It could not do otherwise. To read the judgment in Stevensen v. Bird as appellant here demands that it be read, renders it void both upon the ground that the judgment in Katsanevas v. Stevensen was binding collaterally upon appellant Stevensen, and the Court in Stevensen v. Bird therefore had no jurisdiction to overrule the earlier order of the same Court, and upon the ground that to alter the judgment in Katsanevas v. Stevensen would have required joinder of the Athenian Restaurant as an indispensable party. The judgment in Bird et al., v. Stevensen must be affirmed.

Respectfully submitted this 30<sup>th</sup> day of March,  
1980.

  
\_\_\_\_\_  
E. Craig Smay  
Attorney for Plaintiffs-Res

CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing  
Brief of Plaintiffs-Respondents was mailed, postage  
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