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Thirteenth and Washington Streets Corporation v. Clarence C. Neslen, Elliott W. Evans, H. D. Lowry, and Marvin J. Bertoch : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

THIRTEENTH AND WASHINGTON
STREETS CORPORATION, a California
Corporation,

Plaintiff and Appellant,

— vs. —

CLARENCE C. NESLEN, ELLIOTT W.
EVANS, H. D. LOWRY, and MARVIN J.
BERTOCH,

Defendants and Respondents.

BRIEF OF APPELLANTS

FABIAN, CLENDENIN, MOFFAT
AND MABEY,
PETER W. BILLINGS,
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and Appellant.

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8 Encl. Ev. 65

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CLARENCE C. NESLEN, ELLIOTT W.
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BERTOCH,

Defendants and Respondents.

Case No.
7875

STATEMENT OF FACTS

This is an action for rent to which Defendants answered with the affirmative defense, inter alia, of constructive eviction. It is on appeal from a judgment rendered by the District Court of the Third Judicial District against Appellant-Plaintiffs for no cause of action, and from a denial by the Court of Appellant's motion to amend the judgment, Findings of Fact and Conclusions of Law. The lower Court held that the manner of operation and maintenance of the building in question constituted an eviction of Defendants and legally justified abandonment and subsequent non-payment of rent.

Appellant is a California corporation. On March 27, 1948, Appellant and respondents, a law firm, entered into a written five-year lease (Exhibit "A") for certain rooms in the third floor of the Darling Building, located at the corner of Main Street and Third South, Salt Lake City, Utah. The lease was for five years commencing on May 1, 1948 and ending on April 30, 1953. Rent was Three Hundred Ten Dollars (\$310.00) per month, payable in advance.

The Darling Building is one of Salt Lake City's older downtown buildings. It was originally built to be used as a department store, and the first floor and mezzanine are still used as such. It is almost square in shape with no center light well, high "loft type" ceilings, large windows, and is five (5) stories high. (R. page 84).

The upper floors have not been used for several years. In 1948, the owners of this building had decided to convert them into office space. Their plan, which was subsequently followed, was to convert one floor at a time to such use, commencing with the third floor.

Mr. Kipp, Plaintiff's agent and building Manager, stated that it was his and the owner's intention to maintain and operate the building as first-class office building, at least to the extent the physical structure permitted, and that he intended to lease space to first-class tenants (R. page 84).

Respondents examined the building before signing the lease, checking the entrance, elevators, stairs and restrooms. Plaintiff agreed to arrange respondents'

space according to their desires, and did so. Partitions were constructed in their suite dividing it into six (6) separate offices, a reception room, and a separate law library. The rooms were lighted accordingly. The total area of space let was approximately 1700 square feet at the rent agreed to be paid, which was about Two Dollars (\$2.00) per square foot per year. (R. page 79; Exhibit "B").

Respondents were the first tenants above the department store and went into occupancy in May, 1948. At that time, Appellants had not completed remodeling of the floor which respondents occupied. Mr. Kipp, who had long experience in the field of building management (R. page 83), testified that the upper floors could have been more easily rented if they had been blocked into smaller rooms, but that this was avoided because it would attract undesirable tenants. (R. page 90). The office space was gradually filled, and in January of 1950 numbered such tenants as the Utah Foundation, the Hartford Accident and Indemnity Company, the Commercial Credit Corporation, a Retail Credit Company branch, a dentist, a Christian Science reading room, the Utah Dental Supply Company, and the office of the Chinchilla Breeders Association of America. (R. page 85). These tenancies were augmented at the time of trial by the Mountain States Telephone and Telegraph Company, Bausch and Lomb Optical Company, and S. H. Claussin Company, watch distributors. (R. page 86).

Appellant leased space adjacent to the building entranceway on the first floor to a barber shop. Persons

entering the building proceeded up a short stairway facing the barber shop, and then turned to the right to the elevators. This led to some confusion (R. page 37), and Appellant therefore constructed a partition between the hallway and the barber shop, and posted signs indicating the direction to the elevators. (R. page 45). Subsequent to respondents' abandonment, Appellant constructed a new entrance leading from the street directly to the elevators, which was completely separated from the barber shop and beauty salon.

Shortly before the installation of the partition, Appellants received a letter from Defendant Neslen pointing out the desirability of moving a beauty parlor, which he represented, from its location on the mezzanine of the building to a new place behind the barber shop. This was subsequently done. This new location had no effect on access to the elevators. Although the hair dryers from the beauty salon occasionally partially obstructed the back hall leading to the firetower stairs, this hall was only used when the elevators were not operating. The elevators operated until after 8:00 o'clock, by which time the beauty salon was closed (R. page 46), and a semi-rigid curtain (Exhibit 2) was pulled across the space between the beauty salon and the hall. (R. page 46).

At times during the winters of 1948-49 and 1949-50, the building was inadequately heated, and overclothing had to be worn. Subsequent to the winter of 1948-49, a new thermostatic control was placed throughout the building (R. page 36), and after a few adjustments, Mr. Kipp testified that it worked satisfactorily, and has been so working ever since.

The rest rooms were at times dirty and odoriferous, although the janitorial force had been increased during the course of respondents' tenancy to facilitate cleaning and building maintenance. (R. page 105).

Elevator service commenced at about 8:00 A.M. and stopped at about 8:30 P.M. The doors to the building were locked by the watchman at about 8:00 P.M. and on holidays and Sundays. Respondents had keys, but their clients, of course, did not, and clients visiting respondents after about 8:00 P.M. or on Sundays or holidays would have to be admitted.

The lease provided with regard to these matters:

“Eleventh—the lessors shall be further the sole judge as to the amount of and time when heat and light shall be supplied to said premises, and shall be the sole judge of the janitor and elevator service to be supplied.”

With regard to heat, the lease further provided:

“Heat will be provided from the apparatus for heating the building from 8:00 A.M. until 9:00 P.M. (Sundays and legal holidays excepted) whenever such heat shall, in the owners' judgment, be required for the comfortable occupation of said premises. Temporary failure to furnish heat shall not, however, be construed as an eviction of the tenant, and shall give tenants no claim for damages against owners, and shall not justify tenants in failing to observe and perform any of the obligations under his tenancy . . .” *Rules and Regulations* No. 14.

Access to the third floor was gained either by elevator, when operating, or when available on the main

floor for self operation, or by the stairwell. The stairwells were given particularly keen surveillance by the Fire Marshal because of the upward reclassification of the building, and the Marshal's only complaints referred to obstruction of the back corridor by the beauty salon operators. (R. page 103). The building manager stated that instant action was always taken against the salon operators whenever such matters came to his attention, and a threat to cancel their lease was made. (R. page 101).

Respondents made an inquiry at the Newhouse Building (R. page 74) for substitute space, and inquired frequently at the Continental Bank Building. Inquiries at the latter building were unsuccessful until the Spring of 1950 (R. page 74) when space became available there. An attempt was made to rescind the lease on a voluntary basis (R. page 74) so that respondents could move to the Continental Bank Building. When Appellants would not agree, respondents wrote a letter dated May 13, 1950 (Exhibit 5) in which they stated some, but not all, of the grievances brought out in testimony, and requested release from the lease without litigation.

This request was refused by Appellant, and respondents thereupon abandoned the premises on June 30, 1950. Despite due diligence, Appellants were unable to relet the premises until March 1, 1951.

The District Court concluded that these acts and omissions of Appellant and of other tenants constituted an eviction which justified respondents in vacating the premises and in not paying rent. It is Appellant's posi-

tion that neither the facts found by the Court nor the evidence presented support a finding of constructive eviction as a matter of law. Appellants further contend that the Court's findings of fact with regard to the loss of practice suffered by respondents because of the inconveniences complained of, and the conclusion that respondents vacated as soon as they found new premises do not conform to the testimony given, nor are they reasonably implied therefrom.

STATEMENT OF POINTS

I. THE FACTS AS FOUND BY THE LOWER COURT DO NOT CONSTITUTE AN EVICTION AS A MATTER OF LAW.

- A. *The acts of omission of Appellant do not constitute an eviction.*
- B. *Respondents have not shown Appellant's actions to have been made with the intent to evict.*
- C. *The results of the conditions complained of were not grave, substantial and permanent.*
- D. *Respondents did not abandon the premises as a consequence of the conditions complained of, nor did they leave within a reasonable time after such conditions occurred. Respondents thus waived any defense the conditions might offer.*

II. THE FINDINGS OF FACT OF THE LOWER COURT ARE NOT JUSTIFIED BY THE EVIDENCE OF RECORD.

- A. *There is no evidence presented that such alleged inconveniences were "greatly to the detriment of Defendant's professional practice" as*

found by the Court in Findings of Fact XI, XII, XIII.

- B. *There is no evidence presented to substantiate a Finding of Fact that Defendants vacated said premises "as soon as they could find suitable quarters for their use," as found by the Court.*

ARGUMENT

I. THE FACTS AS FOUND BY THE LOWER COURT DO NOT CONSTITUTE AN EVICTION AS A MATTER OF LAW.

- A. *The acts of omission of Appellant do not constitute an eviction.*

The great majority of the complaints made by respondents involved acts of omission of Appellant or actions by other tenants. Thus, respondents complained of inadequate elevator service and heat, improper cleaning of rest rooms, improper lighting, and the obstructions created by the barber shop and beauty salon.

To define such inaction as "eviction" is contrary to the original concept of eviction, which derived from trespass,

32 *Am. Jur.* 231, Landlord and Tenant, Sec. 246,

and has been adequately provided for in our law by an action for breach of the covenants of repair or other similar covenants.

Because eviction is a defense to an action for rent, some courts have extended the concept to fit the facts where they feel rent should not be paid. The legal fal-

lacy of this is admirably stated in *Tiffany* on Real Property.

“An eviction by the landlord is properly an affirmative act on his part, an act of omission, involving an interruption or interference with the tenant’s possession or enjoyment of the premises. It is, in its nature, a wrongful act which involves a breach of the covenant of quiet enjoyment. Unfortunately, the courts have occasionally lost sight of the true nature of an eviction in this respect, and because an eviction is a recognized defense to a claim for rent, there is a tendency to say that there is an eviction whenever a condition exists on the premises which the court regards as justifying a failure to pay rent. Some courts have, for instance, applied the term to a mere failure of the landlord to perform covenants which he may have made, the non-performance of which renders the premises less desirable for some particular purposes. Thus, breaches by a landlord of covenants by him to furnish electric power for uses on the premises, to furnish heat, to mend leaking pipes, to make the walls watertight, to restore a building burned by fire, and to furnish proper elevator service, have each been referred to as constituting an eviction. Failure of the landlord to put a stop to the acts of other tenants which prevent quiet enjoyment of the premises has also been held to be a constructive eviction.

“Occasionally the expression has even been applied to an undesirable physical condition of the premises, not the result of any act or omission of the landlord, merely because the tenant has, by statute, the right to relinquish possession and refuse to pay rent if such condition is not removed.

The mere fact that the tenant is thus given the right to refuse to pay rent on account of such "untenantable" condition of the premises does not impose upon the landlord any obligation to remedy that condition, as appears from the fact which, it is conceived, is not open to question, that the tenant has no right of action against the landlord for failure to remove such condition, unless he has entered into a covenant to that effect. This being so, the statement that the existence of such a condition constitutes an eviction by the landlord is equivalent to a statement, it would seem, that the landlord may be guilty of an eviction because he fails to do what he is under no obligation to do. Even when the tenant has entered into a covenant, the failure to perform which results in an untenantable condition, it is not perceived how either the breach of covenant or the resulting untenantable condition, or both together, can properly be referred to as an eviction, whatever may be the effect on the liability for rent.

"Where the failure to perform a covenant does not render the premises untenantable, but merely renders their use for the purposes for which they were rented less convenient and more expensive, there is no eviction; in such case, the tenant has a remedy by an action for damages for breach of the covenant."

1 Tiffany Real Property, Third Edition, 1939,
Sec. 145, page 238-40.

That property is unfit for the purposes of the lease is not, in itself, grounds for constructive eviction. The law provides adequate and separate remedies for this. Even express covenants to repair and maintain are not the basis of constructive eviction.

“... according to the great weight of authority, a tenant cannot treat the mere failure of the landlord to perform a covenant to keep demised premises in repair as a constructive eviction, justifying the abandonment of possession of the premises. Generally speaking, the tenant’s remedy is either by an action for damages for breach of the covenant, by the making of repairs by himself and the recovery of expenses from the landlord, or by withholding the amount from the rent . . .”

32 *Am. Jur.* 242, Landlord and Tenant, Sec. 257.

Respondent here has instituted no claim for damages. The sole issue being that of eviction, the acts of omission are not relevant. Even those authorities that extend the concept to include omissions confine these to *willful* omissions of the landlord.

“Eviction necessarily being the result of an intended, willful, wrongful act, it must be by a willful omission of duty or a commission of a wrongful act.”

Barrett v. Boddie, 158 Ill. 479, at 485.

There is no evidence here that the omissions complained of were of a willful nature. To the contrary, as will be shown in detail later in this brief, Appellant’s acts with regard to acts of omission showed an intent to improve conditions.

The great majority of complaints made by respondents were with regard to acts of omission. The Court’s findings of fact which it held justified abandonment by respondents were confined to deficiency as to heat,

janitor service, elevator service and lighting. These were, if anything, acts of omission by Appellant. The Court found the halls to be obstructed at times and the entrance to be offensive in appearance—these were conditions created, if at all, by actions of another tenant, and Appellant's only act would be one of omission—i.e., failure to prevent a fellow tenant from so acting. The sole act of commission by Appellant found by the Court was the locking of the building's front door after 8:00 P.M. and on Sundays and holidays. The court included such acts of omission in its findings as being material and relevant to an eviction, citing such acts in its findings of fact, and stating as a conclusion of law,

“That the manner in which Plaintiff operated and maintained the premises constituted an eviction of the Defendants from said premises.”

It is mere speculation as to whether the Court would have come to the same result by considering the one act of commission alone. Acts of omission are irrelevant and immaterial to a question of constructive eviction, and yet they were used to a considerable extent, as shown by the space devoted to them in the Court's findings of fact. As such immaterial and irrelevant evidence cannot be segregated or omitted from any conclusion of law drawn from such finding of fact, it is submitted that the Court erred in basing its conclusions on such findings.

B. *Respondents have not shown Appellant's actions to have been made with the intent to evict.*

The law of eviction has shown gradual expansion of the facts encompassed therein. The old common law

required actual ouster or physical dispossession by the landlord. This rule has been modified by the concept of "constructive eviction." The boundaries of this have not been, as yet, clearly defined. Of the concept's several components, the question of intent is the least clear at all. However, the authorities seem of one mind with regard to this question; e.g.:

"An untentional act or omission of the landlord, or by those acting under his authority or with his permission, that permanently deprives the tenant without his consent of the use and beneficial enjoyment of the demised premises or any substantial part thereof, in consequence of which he abandons the premises, constitutes a constructive eviction."

52 *C.J.S.* 171, § 455.

"As a rule, in order to constitute a constructive eviction, acts or omissions of a landlord in interference with his tenant's use and enjoyment must indicate an intention on his part that the tenant shall no longer continue to hold and enjoy the demised premises."

36 *Corpus Juris* 263, Sec. 989.

"The landlord's interference with a tenant's use and enjoyment must be substantial and intentional, and their trespass is not sufficient to constitute a constructive eviction. And the act or omission complained of must be that of the landlord, and not merely that of a third person acting without his authority or permission."

36 *Corpus Juris* 262-263, Sec. 988.

"In order that an eviction may take place as a result of acts on the part of the landlord involv-

ing merely an interference with the tenant's possession and enjoyment as distinct from an actual dispossession, it is necessary that they be such as to indicate an intention on the landlord's part to deprive the tenant of the possession."

2 *Tiffany, Landlord and Tenant*, Sec. 185,
Sub Sec. B., Page 1259.

"... as has been said in a number of cases, acts of the landlord to constitute constructive eviction must be of a grave and permanent character clearly indicating his intention to deprive the tenant of beneficial enjoyment of the premises demised to him, to which the tenant yields, abandoning the possession within a reasonable time."

32 *Am. Jur.* 232, *Landlord and Tenant*, Sec. 246.

"The mere act or a default on the part of the landlord which renders the premises uninhabitable or untenable is not sufficient if that act or default is not accompanied by an intention on the part of the landlord to affect the enjoyment of the premises demised."

32 *Am. Jur.* 235, *Landlord and Tenant*, Sec. 249.

Such intention is, of course, not exclusively for the landlord to determine.

Central Business College vs. Rutherford, 47
Col. 277, 107 Pac. 279, 27 L.R.A. (N.S.)
637.

Moreover, tenants may be aided by the usual presumption in cases of intention that the landlord intends the natural consequences of his acts.

“The intent to evict may be indicated by the acts of the landlord. The intention of the landlord to evict or deprive the tenant of the enjoyment of the premises may be presumed from the character of the act, if the necessary result of it is to deprive the tenant of the beneficial enjoyment of the premises.”

32 *Am. Jur.* 236, Landlord and Tenant, Sec. 249.

“To constitute a constructive eviction, there must be an intention on the part of the landlord to evict.

‘The intent with which the act is done may be an actual intent, accompanying and characterizing the act, or it may be inferred from the act itself.’

Skally vs. Shute, 132 Mass. 367.

‘Where the issue was whether or not there was an eviction of a tenant, the intention of the landlord is material.’

8 *Encl. Ev.* 65.

“The consensus of judicial opinion seems to be that the act must amount in law to a willful trespass, which is but another way of saying that an intent to regain possession must be shown, or that the landlord has so wantonly or willfully interfered with the quiet enjoyment of the tenant, that an intent to oust will be presumed.”

Thompson vs. R. B. Realty Company, 105 Wash. 376, 177 Pac. 769, at 770.

For a clear summary of the history of cases in the State of Washington on the development of the concept of intention, see:

Cline vs. Altose, 158 Wash. 119, 290 Pac. 809
at 811-12.

There are no Utah cases directly in point. *Barker vs. Utah Oil Refining Company*, 111 Utah 308, 178 Pac. 2d, 386, is the closest. This case was an action for rent, to which Defendants raised the defense of constructive eviction. Defendant appealed, assigning as error, inter alia, the Court's holdings that the evidence admitted, together with that tendered (the exclusion of some of this was assigned as further error), did not constitute an eviction.

There was a dispute as to the amount of land covered by the lease, which on its face included a dance hall together with a service station, while Plaintiff claimed it should cover the service station alone. The dance hall was converted from a garage by Plaintiff subsequent to the lease, and Defendants claimed this to be a constructive eviction.

The Trial Court heard no evidence as to the extent of the lease's coverage, although the findings of fact included a finding that the lease was confined as Plaintiff contended. As the coverage was held a controlling issue, this Court ruled this prejudicial error.

With regard to eviction, the Trial Court ruled that because Plaintiff remained in the operational control of the premises, Defendant could not prove eviction regardless of Plaintiff's acts. This Court held that the question of possession was not in issue by the pleadings, and thus, evidence as to eviction would not be barred as the Trial Court had ruled. This Court held that suit for a non-

payment of rent assumes possession by the Defendant while the pleading of eviction by Defendant also assumes possession. It was in this context, and this alone, that this Court turned to Black's Law Dictionary to show that according to that source, both a definition of actual eviction and constructive eviction include the element of possession. The use of the definition cited for any other purpose would be pure dicta at best. *Barker vs. Utah Oil Refining Company*, supra, gave no sanction to the Dictionary's concept of the role of intent here.

Thus, the statement in Black's Law Dictionary that "there is constructive eviction when the former (landlord) without intent to oust the latter (tenant) does some act * * *" must stand or fall on the case law that supports it. Black's Law Dictionary cites *Realty Co. vs. Fuller*, 33 Misc. Rep. 109, 67 N.Y. Supp. 146; *Talbott vs. English*, 156 Ind. 299, 59 N.E. 857; *General Industrial & Manufacturing Co. vs. American Garment Co.*, 76 Ind. App. 629, 128 N.E. 454-455; *Santrizos vs. Public Drug Co.*, 143 Minn. 222, 173 N.W. 563-4.

Examination of these cases reveals the surprising fact that only one of these can be said to fully substantiate the absence of intention, while others are in agreement with our contention herein, or are completely silent in the matter.

Thus, in *Realty Co. vs. Fuller*, supra, an action for rent with the alleged defense of constructive eviction, the Court held for the landlord, and in reversing the lower Court, said:

"To constitute a constructive eviction, there

must be an intentional and injurious interference by the landlord, which deprives a tenant of the beneficial enjoyment of the demised premises, or materially impairs such beneficial enjoyment * * *. An eviction cannot be predicated on acts or conduct, however wrongful or distressing, unless committed, encouraged or connived at by the landlord. He is not responsible for the conduct of other tenants acting within their rights in their own apartments * * *.

“But the defense is not without other infirmities. Where the right to abandon premises exists, the tenant must be removed, with reasonable promptitude, after the circumstances creating the eviction arise; and, if he fails to do so, his right to repudiate the hiring is lost * * *. He testified that the annoyance complained of began in November, 1899 and continued from time to time until the latter part of April, 1900, when he removed from the building. The retention of the premises for such a period after the commencement of the alleged annoyance was a confirmation of the tenancy, and must be treated as an election by the tenant to perform the covenants of the lease and to retain its benefits.”

Santrizos vs. Public Drug Co. was an action for rent, with the usual defense. The Court, on holding for the landlord, summarily defined constructive eviction, and did not mention the element of intent at all.

Talbott vs. English, *supra*, was another action for rent, in which the landlord prevailed despite a plea by the tenant of constructive eviction. The Court here uses several quotations and makes reference itself to intention as a requisite to “eviction” (not more par-

ticularly specified) and only after this discussion, does it make a definition of constructive and actual eviction which distinguishes between the two on the ground, among other things, of intention. However, any such definition would have been more dicta in that case, as no constructive eviction was held to exist.

Only *General Industrial & Mfg. Co. vs. American Garment Co.* appears to support the dictionary's definition, and only then to the extent that it quotes the Court in *Talbott vs. English*, supra; and did allow the defense of constructive eviction to prevail. There was no question of intent in the case, and it was not discussed further.

Even assuming *General Industrial & Mfg. Co. vs. American Garment Co.* to be authority on the point, it is clearly against the great weight of authority referred to above, and can only be termed a seldom followed, seldom cited minority rule.

The *Barker vs. Utah Oil Refining Company* case supra, is not authority for the proposition that Utah follows this minority rule.

Respondents here made no attempt to show any actual intent to deprive them of beneficial enjoyment on the part of appellant. At best, they must argue that such intent was reasonably presumed from the facts.

Yet, rather than progressive deterioration of the annoyances complained of, one sees that the landlord has a record of consistent improvement. The first winter the building was used for offices, there were heating difficulties. By the second winter, the landlord had

installed a completely new thermostatic control system, which after a time for adjustments, has worked without complaint, according to the testimony of the building manager. This is borne out by the fact that the building is still filled. Confusion as to the main entrance was soon discovered. The management first had a partition constructed to screen off the barber shop. Subsequently, when this proved not completely satisfactory, they constructed an entirely new entrance from the street directly to the front of the elevators, and completely cut off the barber shop by a separate access to the street.

The cleaning and janitorial staff was increased (R. page 105). Care was taken to plan the fourth floor in the same manner as the third (i.e. without inner rooms), so as to continue to attract only the higher class tenants who demanded such planning.

The chain of improvements of progressively better service does not infer an intent to evict—rather, it infers the converse. It infers the desire of the landlord to accommodate itself in every way that the physical surroundings allow to retain its tenants.

It is submitted that the Trial Court erred in not ruling on the question of intention in its findings of fact and could not have found such intention, either actual or presumed, from the facts found.

C. *The results of the conditions complained of were not grave, substantial and permanent.*

The law requires a certain quantum of deprivation of beneficial enjoyment.

"However, not all wrongful acts of the lessor which interfere with the enjoyment of the premises by the lessee amount to a constructive eviction. To constitute a constructive eviction, the interference by a landlord with the possession of his tenant or with the tenant's enjoyment of the demised premises, must be of a substantial nature, and so injurious to the tenant as to deprive him of the beneficial enjoyment of a part or the whole of the demised premises * * *."

32 *Am. Jur.* 232, Landlord and Tenant, Sec. 246.

"A constructive eviction occurs only where, through the landlord's acts, the tenant has been substantially deprived of the beneficial enjoyment of the demised premises. Not every breach of covenant for wrongful act on the part of the landlord constitutes an eviction. If a tenant has not actually been removed from the premises, he can establish an eviction only where he shows that the landlord's acts deprived him substantially of the consideration of the rental which he agreed to pay."

Bookman vs. Polachek, 165 N.Y.S. 1023, 1024.

"The foregoing cases plainly do not announce the rule of any interference by the landlord with the possession of the tenant, however slight, will work a constructive eviction, but, on the contrary, hold that the interference must be of a substantial nature, and so far injurious to his rights to deprive him of the beneficial use and enjoyment of the premises."

Cline vs. Altose, 158 Wash. 119, 290 Pac. 809, 812, 70 A.L.R. 1471.

"That eviction must be, 'not a mere trespass,

but something of a grave and permanent character done by the landlord for the intention of depriving the tenant of the enjoyment of the demised premises'; and * * * more fully and accurately defined as 'an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or of a part of it.' "

Upton vs. Townend, 17 C.B. 30, cited in *Meeker vs. Spalsbury*, 66 N.J.L. 63, 48 Atl. 1026, 1027.

Applying this law to the instant facts, one sees at most a series of minor, petty annoyances. Respondents introduced no evidence that their practice suffered as a result of these inconveniences.

Much testimony was devoted to the locking of the building doors after about 8:30 at night. Despite respondents' testimony that nocturnal labor was "not unusual" (R. page 43) it would appear that even with such industrious and able lawyers as respondents unquestionably are, the great majority of their labors, like that of the entire legal profession, and the business world in general, is confined to the twelve hours between 8:00 A.M. and 8:00 P.M.

Thus, mere impairment of access, not amounting to exclusion, during such peripheral working time could not be termed a grave, substantial or permanent impairment over the entire time of tenancy.

No stronger statement of respondents' alleged grievances could be expected than from the list contained in respondent's letter in which they sought a release from

their tenancy. (Exhibit 5). Yet, in this letter, no mention is made whatsoever of the locked doors. One can only imply that the inconvenience of the locked doors was not considered significant of mention at that time and would be hardly termed "grave, substantial or permanent." Only upon the advent of litigation did it assume significance in even respondents' eyes.

This is not a case where the lease, the instrument which creates the legal relationship which is now in dispute and through which all problems with regard to such relationship must initially be viewed, is silent. It is not even a case where the lease is ambiguous as to most elements in dispute.

One should first turn to this instrument. Indeed, except in the case of omission, ambiguity or wanton and flagrant abuse of discretion granted therein, the law prevents the parties from turning elsewhere. An inspection of that document shows that it effectively deals with most of the problems in dispute. Thus, the lease provides:

"The building will be open from 8:00 A.M. until 12:00 P.M. Tenants desiring the use of office before or after those hours should apply at the building office for permission." *Rules and Regulations* No. 25.

The only dispute, therefore, appears as to the three and a half ($3\frac{1}{2}$) hours from about 8:30 to midnight during which the building was locked. Even at this time, the building was "open" (i.e. accessible to tenants) by means of the keys furnished them.

Moreover, the lease provides further:

“Night Watch—After 7:00 P.M. the building is in charge of the night watchman, and every person entering or leaving the building is expected to be questioned by him as to his business in the building, if unknown to him.” *Rules and Regulations* No. 23.

This is the only provision of the lease in bold faced type. It is assumed special importance was attached thereto. The barring of access of non-tenants, unless admitted by the tenant or by the watchman, may be considered a reasonable interpretation of this provision.

With regard to the heat, janitorial, and elevator service, it is expressly stated as a term and condition of the lease:

“Eleventh—The lessors shall be further the sole judge as to the amount of and time when heat and light shall be supplied to said premises, and shall be the sole judge of the janitor and elevator service to be supplied.”

This clearly cannot be ignored. Conceding that such a clause would probably not protect a landlord from flagrant or wanton abuse of the discretion given therein, it is clear that these services, even as found by the Court, were only found “inadequate.” The Court found as fact:

VII

“That on frequent occasions, during the cold months when defendants occupied the premises, there was *inadequate* heat and defendants and their employees and clients were obliged to wear heavy winter overclothing.”

VIII

"That the janitor service to the premises supplied by the plaintiff was *inadequate*."

IX

"That the restroom facilities furnished by the plaintiff for the use of defendants, their employees and clients were *inadequate* and were not kept clean, properly ventilated or *adequately* supplied with soap, towels and toilet paper."

X

"That the janitor service of the halls, stairways and lobby was *inadequate*."

XII

"That the plaintiff failed to furnish elevator service after 8:00 P.M. on week days and on Sundays and holidays, which greatly *inconvenienced* the defendants and which was a detriment to their professional relationships with clients who were, on frequent occasions, obliged to come to defendants' offices, located on the third floor of said building by way of the stairways which were, on numerous occasions, totally unlighted and also used as a latrine by persons unknown." (Emphasis added).

Moreover, with regard to heat, the lease further provided:

"Heat will be provided from the apparatus for heating the building from 8:00 A.M. until 9:00 P.M. (Sundays and legal holidays excepted) whenever such heat shall, in the owners' judgment, be required for the comfortable occupation

of said premises. Temporary failure to furnish heat shall not, however, be construed as an eviction of the tenant, and shall give tenants no claim for damages against owners, and shall not justify tenants in failing to observe and perform any of the obligations under his tenancy * * *.”
Rules and Regulations No. 14.

Respondents, by their profession, are versed in the art of contract negotiation. They are learned in the legal sanction of agreement. It would be unlikely that they would become parties to this agreement not fully cognizant of its provisions, and respondents do not allege otherwise. In these matters expressly covered by contract, it is submitted that respondents must not only show that such conditions resulted in a grave, substantial and permanent deprivation of their beneficial enjoyment, but they must go farther. They must show that there was a wanton and flagrant deprivation of this enjoyment. Respondents did not approach the first requirement, let alone the second.

It is clear that this is not the case of the poor lay tenant being coerced, intimidated and misled by a corporation and its battery of legal counsel. The very profession of these tenants is the drawing and interpretation of legal instruments. One may wish to preserve the term “constructive eviction,” which gives to the law an equitable flexibility in the field of the landlord-tenant, and yet clearly see that to apply it to the case where the lease provisions are clear with regard to this matter, and where the lessees are men trained by their profession in the sanctity of contract and the importance

of the written word, is to say that such lease provisions shall never be enforced. If men as prominent in the bar of this State as respondents are not bound by their written contract, then may not any tenant subsequently wishing escape from his lease justifiably ask, "Why should I be bound?"

The complaint of obstructions in the stairwell by, and odors from, the main floor beauty salon presents the problem of acts of other tenants. The law is clear in this respect.

"A landlord is not responsible to one tenant for the acts of another tenant which are not expressly or impliedly authorized by him; such act cannot be treated as a breach of a covenant for quiet enjoyment or as a constructive eviction, unless the landlord is shown to be in some way responsible therefor. But where the act or conduct of which complaint is made has the expressed or implied approval of the landlord, it may afford a basis for the claim of constructive eviction."

32 *Am. Jur.* 247-48, Landlord and Tenant, Sec. 263.

The evidence shows no approval of such act by appellants, but rather drastic steps to force the tenant to eliminate such practice. Moreover, it was upon the urging of respondents that the beauty salon was given its allegedly objectionable location. In the letter written by Defendant Neslen (Exhibit C) he states that there would be "ample space" for such enterprise behind the barber shop, and the letter refers to this location as the "ideal solution." Admittedly, Defendant Neslen was

merely presenting the arguments for a client. However, it would take objectivity of a remarkable type for counsel to advocate an issue for a client which, if decided in his client's favor, would adversely affect counsel himself in a very personal way. Nothing happened upon the removal of the beauty salon to its place adjacent to the entrance that could not have been reasonably foreseen. The results, particularly in the light of respondents' advocacy, could not be termed grave, substantial or permanent impairment.

One fact stands out concerning all of the conditions complained of by respondents. These were all conditions applicable to *all* of the tenants of the building. Respondents were not the sole tenants nor were they the subject to discrimination by Appellant or its agents. Thus, if the landlord's actions created a grave, substantial or permanent impairment of respondent's beneficial enjoyment and evicted them, it would create the same for all tenants. Yet, respondents' abandonment was not marked by an exodus of their fellow tenants. In fact, Appellant has retained the remainder and has added to this the Mountain States Telephone and Telegraph Company, Bausch and Lomb, and several other tenants of like caliber.

"Inadequacy" is not grave, substantial or permanent impairment. It is contended that respondents have, as a matter of law, not met the requirements as to sufficiency of impairment to the extent of constituting an eviction.

D. Respondents did not abandon the premises as

a consequence of the conditions complained of, nor did they leave within a reasonable time after such conditions occurred. Respondents thus waived any defense the conditions might offer.

The law in this respect is clearly stated in *American Jurisprudence*:

“Abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction based upon that wrongful act, or to defend against liability for rent on account of such act * * *. Possession must be given up by the tenant in consequence of the landlord’s acts, and those acts must be such as to justify the tenant in doing so.”

32 *Am. Jur.*, page 236, Landlord and Tenant, Sec. 250.

Such a waiver is most clearly evident with regard to the failure to furnish heat.

32 *Am. Jur.*, 243-4, Landlord and Tenant, Sec. 259.

Here respondents abandoned at the end of June when there was no heating problem. They had paid their rent up until June 30. Such facts come squarely within the province of:

Orcutt vs. Isham, 70 Ill. App. 102, cited in *Baptist General Convention vs. Wright*, 276 Pac. 777 at 782.

There the Court said:

“A tenant remaining in possession and paying rent not only for months during which a cause

of complaint existed, but for several months afterward, is estopped from setting up such complaint and justification of an abandonment of the premises * * *. Appellants' principal defense was a breach by Appellee of her agreement and duty to furnish a requisite amount of steam, heat and hot water. All the evidence upon that question related to the winter months and cold weather from February 15, 1894 to the end of June, 1894, during all of which time, and three months longer, the Appellant paid her rent * * *. Appellant herself testified that she moved out because she was 'afraid to try it the rest of the winter.' In other words, she moved out because of something she feared in the future and not because of what existed * * * in the past. All complaints that may have existed in the past were waived by the Appellant by paying all rent for the months in which occasion for complaint existed * * *. A lessee is not at liberty to select out such portion of the term as she is pleased to enjoy and repudiate the balance."

Waiver is particularly important with regard to heat.

"It is, however, necessary in order to justify an abandonment on the ground of the landlord's failure to furnish heat that such failure must have continued to the time of the abandonment; a tenant cannot justify his abandonment by reason of the landlord's failure to furnish heat if, at the time, such failure has ceased."

32 *Am. Jur.* 244, Landlord and Tenant, Sec. 259.

The other conditions complained of were all of long duration. They did not increase in magnitude during

at least the last year of tenancy. For a court to find the cause and effect relationship between those conditions and the abandonment, it was necessary for respondent to prove that the abandonment was within a reasonable time after such offense.

75 A.L.R. 1114.

The facts clearly do not show this. The barber shop and the entrance way were there soon after respondents moved in in 1948. The beauty salon was in its allegedly objectionable position over a year prior to respondents' abandonment. No evidence was submitted by respondents as to a deterioration in janitor or elevator service. By respondents' testimony, they existed in the same condition for the entire time of the occupancy (R. page 73).

Respondents contend that they could delay abandonment until they found a new location. The authority for such a contention seems indeed scant, being limited in the sole annotation, 75 A.L.R. 1114, at 1119 to an English case of 1840, *Coure vs. Goodwin*, 9 Car. & P. 378, and the casual reference to such a justification for delay, when combined with many other extenuating facts, as something which the jury might consider, *Rome vs. Johnson*, (1931) Mass., 174 N.E. 716.

However, even assuming such a principle to be established, this did not give respondents license to shop around and select the best accommodations, or even more clearly, to merely wait until the best accommodations became available. The very requisites of a constructive eviction are that the beneficial enjoyment has

become intolerable. The longer the delay in moving, the less likelihood that the complaints impaired enjoyment sufficiently to constitute eviction.

What are the facts here? Respondents' only specific testimony on the subject is to the effect that they made inquiry at the Newhouse Building, and "on occasion" at the Continental Bank Building (R. page 74). No inquiry was made at any other building in the City (R. page 74). In the Spring of 1950, respondents finally found space in the Continental Bank Building (R. page 74). Only then did they make actual efforts to cancel their lease with Appellant (R. page 48).

It is clear that the cause and effect relationship present in this case was between the availability of space in the Continental Bank Building and subsequent abandonment, and not between the inadequacy of the Darling Building and subsequent abandonment.

The burden of proof to show the required causal connection was upon respondents.

Automobile Supply Co. vs. Scene-in-Action Corporation, 340 Ill. 196, 172 N.E. 35, 69 A.L.R. 1085;
Annotation, 75 *A.L.R.* 1114 at 1116.

By respondents' own testimony, the availability of office space was critical in the City (R. page 73). Yet, despite the admitted difficulty, respondents made only an inquiry at one other office building and then waited for space to become available in the newest office building in the area. An office shortage may extend the time

of reasonableness, but to so extend the time it is submitted that respondents must show that they took the extra care to locate new quarters that the exceptional situation required. This was not done here.

Cases of record seldom extend the time for claiming eviction beyond three (3) months. Indeed, the only A.L.R. annotation on the point says:

“In the great majority of cases abandonment after a month has been held not to have been within a reasonable time. There have been several cases where this has been held as a matter of law.”

75 A.L.R. 1117.

One court has put the matter succinctly.

“(Although) I am satisfied that Defendant was annoyed by some of Plaintiff’s actions * * * The law is clear that the tenant has only a reasonable time after the alleged eviction within which to exercise his right to vacate the premises, and if he fails to do so, he loses that right. Certainly the Defendant’s occupancy from March until October 1, during practically all of which time the alleged cause of abandonment continued, would operate as a waiver.” (*Ellis vs. McDermott*, 147 At. 236, 238).

The law does not look lightly upon eviction charges. As Beasley Ch. J., said:

“The legal effect of eviction is so penal, that the doctrine is not to be favored * * *.” (*Birckhead vs. Cummins*, 33 N.J.L. 44 at 56).

Eviction should not be a means of relief for a tenant

who, for reasons of prestige or other motives, chooses to move to more desirable quarters, presenting a catalogue of mere inconveniences extending throughout the entire two-year tenancy as an excuse to evade his contractual obligation.

II. THE FINDINGS OF FACT OF THE LOWER COURT ARE NOT JUSTIFIED BY THE EVIDENCE OF RECORD.

- A. *There is no evidence presented that such alleged inconveniences were "greatly to the detriment of Defendant's professional practice" as found by the Court in Findings of Fact XI, XII, XIII.*

The Court made the following Findings of Fact:

XI

"That Plaintiff permitted to be established in the lobby of said building, through which defendants, their employees and their clients were obliged to pass a barber shop, a shoe shining stand and a beauty shop, which gave rise to offensive sights and odors greatly to the detriment of defendants' professional practice and which were disagreeable to the defendants, their employees and clients."

XII

"That the Plaintiff failed to furnish elevator service after 8:00 P.M. on week days and on Sundays and holidays, which greatly inconvenienced the defendants and which was a detriment to their professional relationships with clients who were, on frequent occasions, obliged to come to defendants' offices, located on the third floor

of said building by way of the stairways which were, on numerous occasions, totally unlighted and also used as a latrine by persons unknown."

XIII

"That the plaintiff closed the building on Sundays and holidays and after 8:00 P.M. on other days, greatly to the inconvenience of the defendants and to the detriment of their professional relationship with their clients."

The only evidence submitted as to the result of the inconveniences was to the effect that complaints were received from a few clients as to these conditions.

Mr. Evans testified (R. page 30, 31) :

"Q. Did you ever receive complaints from your clients in that respect?

A. Yes, I did receive complaints from my clients to waiting out on the street until we could come down and let them in, and I can remember looking back specifically to two occasions, I can remember the individuals I had to let in that way.

Q. Along with others you no longer recall?

A. I can't recall every instance I let a client in at night, or on Sunday, or a holiday, but I do recollect the names of two people and one of them was either a little early or I was a little late for my appointment and I waited some time after arriving at my office, and later received a telephone call from him asking how he could get access to my office and I had to inform him if he would meet me at the door I would come down and let him in."

And also (R. page 37) :

“Q. Did you ever receive any complaints from persons with whom you were doing business to getting into your office?

A. Yes, I did receive some complaints particularly from ladies who entered the building and seeing the barber shop would leave, * * * then I received telephone calls asking how they would get into the building and I advised them that was the entrance they would come in, but there was confusion on the part of the people coming in the building.”

Mr. Neslen testified (R. page 68, 69) :

“Q. Now, what maneuvers did you have to go through to do business with clients and witnesses, or any other person, during the evenings or Sundays or holidays?

A. Well, on those occasions it was necessary either to arrange to get the client or the witness at the door and give him access, or wait in our office until we received a call that he was downstairs.

Q. By the way, was there any facilities for him to contact you from this locked door?

A. No, there were no facilities there, no bell, or anything of that nature, and there were occasions when I did have appointments during the evening hours, or on Sundays or holidays when I received calls from clients asking me how they could get into the building, and then I have gone down and let them in and then on several occasions when I was going to remain after the conference I have

gone down to let them out and have returned to the office."

Mr. Neslen further testified (R. page 70, 71):

"Q. Did you ever receive any comments, Mr. Neslen, from your clients, or any persons with whom you were doing business concerning the entrance, or lobby, or foyer to the building?

A. Yes, I remember one particular comment from a client just after the barber shop moved in there. This client explained to me he didn't know whether he was—

A. The nature of the comment was he could not tell whether he was entering a barber shop, a clothing store, or an office building."

Thus, Mr. Evans revealed only one or two complaints as to the locked door and received some from ladies as to the confusing appearance of the entrance. Mr. Neslen had received phone calls on evenings, Sundays or holidays from clients who asked how they could get into the building, and recalled a comment from a client as to the confusing nature of the entrance.

This was all the evidence presented in this regard. It is submitted that the testimony does not show a detriment to respondents' practice. At most, it shows inconvenience or confusion to a few clients. There is not even testimony by respondents that they did, in fact, lose business as a result of complaints about conditions. The burden is on respondents to show such a detriment to their practice. They have not done so, and it is urged that the Trial Court erred in so finding.

- B. *There is no evidence presented to substantiate a Finding of Fact that Defendants vacated said premises "as soon as they could find suitable quarters for their use," as found by the Court.*

The Court found as fact:

XVIII

"That the defendants moved from and vacated said premises by reason of the acts and omissions of the plaintiff as soon as they could find suitable quarters for their use as attorneys' offices."

The words "as soon as they could find" state a conclusion—i.e. that respondents vacated within a reasonable time. The testimony of respondents with regard to the search for substitute space is as follows:

In cross-examination, Mr. Neslen testified:

"Q. Mr. Neslen, I believe you said you had made attempts to find other space, just where did you inquire?

A. I inquired at the Newhouse Building.

Q. Yes,—

A. And on occasion at the Continental Bank Building, but without any encouragement whatsoever until in the Spring of 1950 our present space, where we now are, became available at the Continental Bank.

Q. Did you inquire in any other buildings for space other than those two?

A. No, those are the only two I recall where I made inquiry.

Q. There are other office buildings in Salt Lake City?

A. That is true.

Mr. Evans testified (R. page 47, 48) :

“Q. Now, I believe you said that you tried to find some space in some other building?

A. Yes.

Q. Among them the Continental Bank Building?

A. That is right.

Q. You are now in the Continental Bank Building?

A. That is right.

Q. When did you first find out space was available in the Continental Bank Building for you?

A. I think it was probably, I am speaking from memory, in the month of May, the early part of the month of May, 1950.

Q. It was about the time you wrote this letter designated Exhibit 5, wasn't it?

A. It was within, I think, a short time prior to the time we wrote this letter. I am not sure of the exact date. We found this space, it could have been within two weeks before.

Q. You did not write this letter until after you found space available in the Continental Bank Building?

A. That is right.

Q. After you wrote this, you had a discussion with Mr. Dayton, did you not?

- A. We had a discussion with Mr. Dayton.
- Q. Didn't you ask him if you couldn't get out of this lease, you had space in the Continental Bank and wouldn't they let you out on a voluntary basis?
- A. I think that was discussed, yes.
- Q. When you were talking with Mr. Brennan of the Continental Bank Building, and when he told you there was space in the building, didn't you tell him you would have to break this lease with the Darling people to come over to take his space?
- A. I did tell Mr. Brennan we did have space in the Darling Building, to take this space we would have to leave the Darling Building.
- Q. Didn't you tell him you would have to break the lease, Mr. Evans?
- A. I don't remember using that word, Mr. Billings."

Mr. Evans further testified (R. page 38) :

- "Q. Now, will you explain to the Court, Mr. Evans, if these conditions were as obnoxious as you have testified, why you failed to leave these premises earlier than that date?
- A. We couldn't get in any other quarters.
- Q. Did you investigate to find other suitable quarters?
- A. We had inquired about other quarters that would accommodate us. We had prior to moving particularly contacted the Continental Bank Building about quarters and when quarters became available, we would move."

If the Findings of Fact stated that respondents vacated "as soon as they *did* find quarters," it would be

a correct statement. Then the question would still be before the Court as to the reasonableness of the time of abandonment. The question could then be raised whether the limited search for quarters was indeed a reasonable one, considering the admittedly tight conditions of that date. It is Appellant's contention as shown above that such abandonment was not within a reasonable time.

Appellants submitted the following substituted finding of fact, which is felt more clearly states the facts as developed by respondents' testimony:

"That Defendants made an inquiry at the Newhouse Building and frequent inquiries at the Continental Bank Building and when a vacancy occurred in the latter building providing them with suitable quarters in that building, they moved thereto."

It is submitted that the Court erred in rejecting this.

SUMMARY AND CONCLUSION

Appellants submit that the Court erred in finding any financial detriment to respondents' practice from the evidence presented, and from finding as a fact that respondents removed as soon as possible.

Respondents further submit that the facts as found by the Court do not satisfy the demanding tests of the term "constructive eviction." Respondents based much of their case on acts of omission of Appellant, which are legally irrelevant to the question at hand. They have failed to present necessary evidence as to the intention of Appellant to evict, nor may this be implied from

the evidence presented. The Court found mere "inadequacies" in the services of Appellant, which finding does not meet the standard of "grave, substantial and permanent" impairment. Moreover, the inadequacies as to heat, elevator and janitor service, and the night time operation of the building were expressly covered by the lease which is controlling in all cases except where wanton and flagrant abuse of the discretion allowed thereon. Further, it is contended respondents waived any eviction by remaining in possession for over two (2) years despite the continuance of the offensive conditions during this whole period. Respondents are not excused from earlier removal because of the dearth of other office space, when they have not taken exceptional steps to meet this exceptional situation, let alone when they have confined their effective search for new quarters to one building.

Any one of these hurdles alone can prevent respondents from reaching their goal. Together they form a course which respondents, even when assisted by as able a steed as "Trial Court Discretion," cannot successfully complete.

Because of the foregoing, it is submitted that Plaintiffs are entitled to a reversal of the judgment of the Court below.

Respectfully submitted,

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