

1954

John C. Cutler Association v. DeJay Stores, Inc. : Brief of Defendant and Respondent

Utah Supreme Court

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Case No. 8163

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN C. CUTLER ASSOCIATION,
a corporation,

Plaintiff and Appellant, and
Respondent on Cross-Appeal

—vs.—

DeJAY STORES, Inc., a corporation,

Defendant and Respondent,
and Cross-Appellant

BRIEF OF DEFENDANT AND RESPONDENT,
AND CROSS-APPELLANT

FILED
AUG 5 1954

Clerk, Supreme Court,

SAMUEL BERNSTEIN
RAY S. McCARTY

Attorneys for Respondent
and Cross-Appellant.

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—vs.—

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Case No. 8163

BRIEF OF DEFENDANT AND RESPONDENT,
AND CROSS-APPELLANT

INTRODUCTORY STATEMENT

The parties will be referred to as in the Court below.

Plaintiff in its brief has set forth the lease upon which the case is based and has also set out its version of the facts. In the main, the defendant agrees with the statement, but not with the conclusions interspersed therein, and there have been some omissions.

On page 11 of plaintiff's brief:

"that Bradley-Badger stored some merchandise in the store, but no rent was paid by them."

This short statement by plaintiff disregards the eviction of defendant and the taking possession of the premises by the plaintiff shortly after July 25, 1952, which was the date the defendant vacated the store (R. 49).

Let's look at the record:

"Q. And did you permit Badger-Bradley to store any merchandise in these premises during this period of time?

"A. Yes, they stored some things; not much.

"Q. And that arrangement took place shortly after the defendant vacated these premises, did it not?

"A. It wasn't long after." (R. 51)

The plaintiff has listed in its brief six points, and for the sake of clarity, the defendant will answer the arguments on the points as they appear in plaintiff's brief. After that the defendant, as cross-appellant, will present its one point upon which its cross-appeal is based, that is, that the trial court erred in awarding the plaintiff \$300.00 for damages to plaintiff's premises (R. 164).

ARGUMENT

POINT I.

THE TRIAL COURT WAS JUSTIFIED IN SUSTAINING THE OBJECTION TO THE QUESTION WHICH IS SET OUT IN PLAINTIFF'S POINT 1.

Harold G. Cutler, president and general manager of the plaintiff corporation, was asked if he had received a bid for the repair of the building, to which he responded that he had received one bid. He was then asked what was the amount of that bid. (R. 78) The lower court sustained the objection to the question upon the ground that it was hearsay.

Nichols' Applied Evidence, Vol. 3, page 2436:

"Testimony on knowledge gained solely from a letter or a statement received from another is hearsay.

"The ultimate test as to whether a statement is hearsay is whether the witness may be cross-examined concerning the fact about which he testifies."

The writers have examined with interest the insert from Jones Commentories on Evidence, 2d ed., Vol. 2, page 1325. There is no question as to the statement cited in their brief on page 20, however, the citation nor any part of it implies that hearsay evidence may be used to prove what a competent man would charge for that service. The competent man should have been subpoe-

naed, testified and subjected himself to cross-examination. We will quote from Jones Commentories on Evidence, 2d ed., Vol. 2, page 1325, the paragraph just preceding that quoted by the afepllant:

“Personal service. (In General). With regard to personal service rendered without any agreement as to the amount to be charged for them, inasmuch as the law implies that they are to be paid for at a reasonable rate, it is manifest that some means must exist for giving evidence of that rate to the court. The mode of conveying it has led to several nice distinctions, for while the plaintiff may produce testimony of the nature of the service and the necessary qualifications for it and the value put upon it by witnesses competent to estimate its worth, bare evidence of usual or probable charges, by others or the plaintiff himself, leads to collateral issues and renders such testimony inadmissable.

“The proper method is to produce evidence of the price which a competent man would charge for that particular service, or has charged for similar services.”

See: 31 C. J. S., page 919, et seq.

The plaintiff has not been able to show that the hearsay answer called for came within the exceptions to the hearsay rule. Mr. Cutler was not asked if he was familiar with what the cost of repairs would be. The question did not call for Mr. Cutler's knowledge; it merely called for a hearsay statement made to him by a third party, and naturally it was inadmissable when objected to upon the grounds of hearsay.

See:

State Bank of Beaver Co. v. Hollingshead,
25 P(2) 612, 82 U. 416;

Baglin v. Earl Eagle Mining Co.,
184 P. 190, 54 U. 572.

The plaintiff failed to prove any damage to the building by any *competent* evidence.

POINT II.

THE TRIAL COURT DID NOT ERR AND WAS JUSTIFIED IN ITS FINDING NO. 7, THAT IN SEPTEMBER, 1952, THE PLAINTIFF ACCEPTED AND TOOK POSSESSION OF SAID DEMISED PREMISES FOR ITS SOLE USE AND PURPOSE.

On July 25, 1951, the plaintiff was served with a written notice (Exhibit D-2) whereby the defendant tendered possession of the leased premises to the plaintiff and returned the keys of said premises to the plaintiff (R. 49). Shortly thereafter, according to the testimony of Harold G. Cutler, plaintiff's president and general manager, the plaintiff permitted Badger-Bradley Company to store merchandise on said premises rent free; it leased said premises to a political organization for a period of ten days from October 20, 1952, to November 4, 1952; it placed "For Lease" signs in the front store windows of the premises; it advertised said premises "for rent" in Salt Lake City newspapers; and it leased the premises for a period of five years to Badger-Bradley

Company at a rental of \$575.00 per month commencing May 1, 1953, and possession was given to the new lessee on March 1, 1953. All of the foregoing, according to Mr. Cutler, was done without any notice to defendant and without the latter's knowledge or consent (R. 50-51).

Under the authorities this constituted a surrender as a matter of law, thereby discharging the lessee defendant from further liability under the lease. We quote from *Tiffany on Real Property*, 3d ed., Section 962:

"A second mode of surrender by operation of law, and one which frequently occurs, results from the relinquishment of possession by the tenant and the resumption of possession by the landlord. The theory of such surrender would seem to be that the reverting of possession in the landlord to the exclusion of the tenant, by the action of both parties, being inconsistent with the continuance of an outstanding leasehold in the tenant, both are estopped to assert that the relation of landlord and tenant still exists. It is immaterial whether such change of possession is the result of agreement. The tenant may relinquish possession to the landlord in accordance with an agreement to that effect, but more frequently the change of possession occurs as a result of the abandonment of the premises by the tenant and the subsequent resumption of the possession thereof by the landlord."

See also:

Enoch C. Richards v. Libby, (Maine), 10
Atl. (2) 609; 126 ALR 1215;

Baker v. Eilers Music Co. (Dist. Ct. of
App., Calif., 1915) 146 P. 1056;

Rehkoph v. Wirz (Calif. 1916), 161
P. 285;

Willis v. Kronendonk, 58 U. 592, 200
P. 1025;

Casper Natl. Bank v. Curry (Wyo.)
65 P(2) 1117.

The Utah Supreme Court, in the case of Willis v. Kronendonk, *supra*, cited with approval the California cases, and stated:

“Assuming, however, that there had been merely an abandonment of the premises by the defendant, then the result, in view of the undisputed facts, would still have to be the same. As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, nor sue for damages. If he desires to reserve that right, he must recognize the tenant’s rights in the premises for the unexpired term, and sue him for damages upon his breach of covenant to pay rent. This, however, is elementary doctrine.”

A very recent case, *Roger Belanger, et al. v. Lester Rice*, U., P(), Case No. 8125 in the Supreme Court of the State of Utah, this court held a surrender took place where the lessor accepted a new tenant for a period of eight days and lessee paid the advertising costs.

The foregoing amply justify the court's Finding No. 7, that plaintiff accepted and took possession of said demises premises for its sole use and purposes in September, 1952. The defendant urges that the court could have found that the surrender took place on July 25, 1952, the date plaintiff accepted the keys and possession of said premises. That the plaintiff took possession and exercised exclusive dominion thereof shortly after July 25th is admitted. The trial court apparently construed the statement, "shortly thereafter," as meaning a lapse of the period of time extending from July 25, 1952, to September 30, 1952, and awarded plaintiff a judgment for rents at the rate of \$400.00 a month for the months of July, August and September.

POINT III.

THE TRIAL COURT WAS JUSTIFIED IN FAILING TO FIND THAT DEFENDANT AGREED TO REMAIN OBLIGATED TO PAY THE RENT ON THE DEMISED PREMISES UNTIL A NEW LEASE COULD BE RECEIVED.

The claim that plaintiff should recover on some promise or assurance or agreement to remain obligated to pay the rent on the premises until a new lease could be obtained was not urged in the pleadings, nor did plaintiff request a finding to that effect. It is a new theory cast into the case after it had left the jurisdiction of the trial court. Mr. Solomon, a witness, testified as is material to the this point:

“A. The purpose of the conference was to advise Mr. Harold Cutler, President of the John C. Cutler Association, that DeJay Stores were interested in negotiating a new lease and location at 317 South Main Street, and that they had been conducting a business at 36 South Main Street at a loss; that they had purchased certain fixtures from the Salt Lake Knit which Mr. Cantor represented were paid for and belonged to DeJay Stores, and that they wanted to move these fixtures to their new location at the earliest possible date, but Mr. Cantor advised Mr. Cutler that they in no way intended to discontinue recognizing their responsibility on the lease, and the payments would be made in accordance with the terms of the lease.” (R. 103)

“The conclusion of the visit that we had was that it was satisfactory with the Cutlers for DeJay Stores to move to the new location, and Mr. Harold Cutler expressed a willingness to help us, cooperate in seeing if we could find another tenant, a sub-tenant, a sublease of the property, and I repeat that I had no impression that DeJay Stores in any way considered they were getting out of their lease; they had every intention of taking the responsibility of making the payments, and so advised Mr. Cutler.” (R. 104)

The above conversation was prior to the time that plaintiff took possession and effected surrender of the property. (See defendant's argument under Point 2.) This appears to be immaterial. The plaintiff sued on the lease and not on any promise, direct or implied. The eviction of the defendant shortly after July 25, 1952, relieved

the defendant of all written promises contained in the lease, and naturally all oral and implied promises claimed by the plaintiff.

POINT IV.

THE TRIAL COURT WAS JUSTIFIED IN REFUSING TO AWARD PLAINTIFF DAMAGES FOR \$1,725.00, REAL ESTATE BROKER'S COMMISSION.

The court found in its Finding No. 7 (R. 164) that there had been a surrender in September, 1952, and that the plaintiff had taken possession of the premises. It naturally follows that from then on the defendant owed the plaintiff no duty whatsoever, either as to payment of rentals or expense in securing new tenants.

POINT V.

THE TRIAL COURT WAS JUSTIFIED IN REFUSING TO AWARD THE PLAINTIFF JUDGMENT FOR RENTALS AFTER SEPTEMBER, 1952.

Under this point the plaintiff has urged, as it did in its argument (plaintiff's brief, pages 16-18), that the defendant had no right to defend this action because of the provisions of Section 16-8-3, Utah Code Annotated, 1953, on account of defendant's failure to comply with Sections 16-8-1 and 16-8-2, U. C. A. 1953.

The plaintiff's brief plays upon the word, "transactions." Plaintiff has quoted cases that in the defend-

ant's opinion have no bearing on the situation. Plaintiff's contention that it is entitled to practically a default judgment is not upheld by this court:

Clawson v. Boston Acme Mines Development Co., 72 U. 137, 269 P. 147, 59 A.L.R. 1318:

"The Utah statute, section 947, only prohibits a noncomplying corporation from prosecuting or maintaining any action, suit, counterclaim, or cross-complaint in any court of the state. It does not prohibit such corporation from defending an action brought against it."

The court goes on to say:

"There is much force in the contention of appellant that to deprive even a foreign corporation of the right to defend against an action brought against it would savor strongly of unconstitutionality. We doubt if that would be true as to the defense of the statute of limitations, but even as to such defense, it would seem that such corporation is entitled to it, where there is no express statute withholding the right."

The above case was quoted and followed with approval in the case of *Earle v. Froedtert Grain & Malting Co.* (Sup. Ct. Wash., 1938), 85 P(2) 264.

Vol. 23, *Am. Jur.*, page 313:

"Such a statute does not prevent the corporation from defending an action brought against it in the state courts, unless, as in some jurisdictions the statute contains a provision expressly prohibiting it from defending in any suit."

Of interest also is *Heyl v. Beadel* (Sup. Ct. Iowa, 1940), 294 N. W. 335, 130 A.L.R. 994 and annotation.

POINT VI.

THE COURT WAS JUSTIFIED IN REFUSING TO AWARD JUDGMENT AGAINST DEFENDANT FOR \$600.00 FOR ATTORNEYS' FEES.

As stated in plaintiff's brief, page 32, it was stipulated that the court determine the amount of attorneys' fees to award plaintiff without calling witnesses. This stipulation was suggested by the attorney for plaintiff and acquiesced in by the attorney for defendant (R. 77). The court fixed the fees at \$300.00. That the court is an expert in his own right to determine fees requires no bolstering of authority. The court could accept or reject the testimony of experts as to the value of the services of an attorney. It seems incongruous that the plaintiff should request the court to make the determination of the attorneys' fees, and then object because it felt it should receive twice as much. There is certainly nothing in the record that suggests that \$300.00 is an abuse of discretion by the court.

DEFENDANT'S CROSS-APPEAL

POINT I

THE TRIAL COURT ERRED IN AWARDING THE PLAINTIFF \$300.00 FOR DAMAGES TO PLAINTIFF'S PREMISES (R. 164).

As appears from the argument on Point 2 in this brief, there was absolutely no competent evidence upon which the court could find that the plaintiff had suffered damage to its property in the sum of \$300.00 or any other sum. This arbitrary figure of \$300.00 was not supported by the evidence of any witness and it would have been so easy had the plaintiff really suffered damage, to have brought in any number of competent witnesses to inform the court as to the amount of damage, if any had been done to plaintiff's premises.

CONCLUSION

The defendant feels that it has fully answered plaintiff's brief, and that this court should sustain the findings of the lower court in every particular, except as to the \$300.00 awarded to plaintiff for damage to the premises, which was the basis of defendant's cross-appeal, and as to that \$300.00 award, the lower court's judgment should be reversed, and that the defendant should be awarded its costs.

Respectfully submitted.

SAMUEL BERNSTEIN
RAY S. McCARTY

*Attorneys for Respondent
and Cross-Appellant.*