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Raymond S. King v. Howard Firm and Paul J. Cox : Brief of Appellant

Utah Supreme Court

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Case No. 8201

IN THE SUPREME COURT
of the
STATE OF UTAH

RAYMOND S. KING,

Plaintiff and Appellant,

— vs. —

HOWARD FIRM and PAUL J. COX,

Defendants and Respondents.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this Brief, Appellant will be referred to as plaintiff, and respondents will be referred to as defendants. All italics are ours.

STATEMENT OF FACTS

The appeal is from a judgment in favor of defendants and against plaintiff. The cause was tried to the Court without a jury. The judgment terminated plaintiff's lease on certain premises in Washington County and awarded defendants \$242.25.

Defendants own real property at Springdale, Washington County. On the property, they operate a grocery store, a nine (9) unit motel and a cafe (R-160).

In early Spring 1950, plaintiff and defendant Firm discussed the feasibility of operating a soft ice cream machine in the grocery store at Springdale (R-26, 161). During the Summer of 1950, plaintiff placed in the grocery store a soft ice cream machine. It operated during the summer but was not as successful as was desired because of the inadequacy of the water supply at Springdale (R-26, 27).

In the Fall of 1950, plaintiff and defendant Firm discussed the possibility of constructing a separate building in which to operate soft ice cream machines (R-28). Plaintiff furnished to defendant photographs of the kind of building in which such businesses were carried on and in the Spring of 1951 defendants constructed a structure which was to house the Frosty Freeze place of business. The arrangements for the use of the building and for its equipment were contained in a document entitled "Lease", dated the 1st day of May, 1951, and executed on the 18th of June, 1951. This exhibit speaks of the building as though it were in existence on the 1st of May. As a matter of fact, the building was still in the process of construction at the time of the lease.

The lease provided generally for a leasing of the real property on which the Frosty Freeze stand was constructed, describes generally the business to be con-

ducted, and provides for a \$50.00 per month rental or 5% of the gross sales. It specifically provides that the Lessors shall furnish sufficient water to the Lessee for the operation of the business. The lease provides that the rent shall be paid on the 1st of the month and provides for a twenty (20) day grace period (Exhibit "5"). The term of the lease is for a period of six (6) years, or from the 1st of May, 1951, to the 1st of May, 1957. The Frosty Freeze building was not completed by the 1st of May, 1951 and plaintiff was not given possession until the 1st of July, 1951. Even at the time of his possession, the building had not been completed as was contemplated by the parties (R-28, 29).

When plaintiff took over the unfinished building on July 1st, sufficient water had not been supplied and the soft ice cream machinery was not placed in operation. On August 1, 1951, defendant Firm completed and made available to plaintiff water from a well (R-62). From the 1st of August and as long as the well water was available, plaintiff was able to operate his soft ice cream machinery and hardening cabinets. In 1952 the well had been abandoned by defendants and there was no adequate water supply furnished to plaintiff for the operation of the soft ice cream machinery.

Because of the failure to have the Frosty Freeze place of business completed and the inability of defendants to supply adequate water prior to August 1, 1951,

plaintiff and defendant Firm agreed that for the first year of operation instead of 5% of the gross, plaintiff would pay 5% of the net.

The Frosty Freeze business was located in the mouth of Zion Canyon, was a seasonal operation and the lease contemplated operation from May through October of each year.

When plaintiff started his operation for the 1952 season, because the water supply was inadequate, he, at a cost of \$129.68, equipped his soft ice cream machines with an air cooler so that it could be operated in spite of the lack of a sufficient water supply (R-67).

Plaintiff continued to operate the ice cream business during the summer of 1952 and was personally present until approximately the 1st of August, 1952. In July, 1952, plaintiff and defendant Firm discussed the first year of operation. Plaintiff testified that as a result of the conversation, the first year of operation was to end on the 1st of August, 1952. That for that first year, plaintiff was to pay as rent 5% of the net of the Frosty Freeze business. Defendants dispute the day of termination of the first year of operation, and the Court found that what was intended was the first season of operation rather than the first year of operation and that the season of operation ended with October, 1951 (R-78, Findings of Fact 10 and 11, File Page 23).

On the 26th of July, defendants served on plaintiff notice of termination of lease, which demanded that plaintiff pay 5% of the gross sales for the period May, 1951 to October, 1951 and 5% of the gross sales from May, 1952 to date of receipt (Exhibit "7"). The notice was served on plaintiff on the 26th day of July, 1952 and demands immediate possession of the premises from plaintiff. On the 19th of August, 1952, plaintiff presented an accounting to the defendants (Exhibit "8"), and tendered his check in the sum of \$100.00 to apply on the rental of the Frosty Freeze premises. The accounting shows that on the basis of net proceeds, there was no rent due and owing, but on the basis of gross proceeds, there would have been approximately \$355.00 owing from plaintiff to defendants.

Defendants refused to accept the tender of the 19th of August. On the 23rd of August, defendant Firm padlocked the Frosty Freeze building. At that time, plaintiff was out of the State. Upon his return, he requested permission to remove some of his things from the Frosty Freeze premises and defendant Firm informed him that he could not let him in.

Plaintiff commenced this action against the defendants alleging that he had been unlawfully, wrongfully and in violation of his rights dispossessed of the Frosty Freeze premises. Plaintiff alleged that he had been damaged by reason of the defendants' failure to furnish sufficient water. He set forth that there was an open account

due and owing to him by defendants in excess of the amount of rent which, under any circumstance, might be due and owing by plaintiff to defendants. He alleged that he had suffered damages from the loss of his place of business, its inventory of perishables and alleged conversion of the equipment which was in place in the Frosty Freeze building. He also prayed damages for future loss of profits from the Frosty Freeze business.

Defendants' answer alleged that they rightfully repossessed the premises and did lawfully refuse plaintiff's request to return and enter the Frosty Freeze building. Defendants' prayer of their counterclaim asks for rental due and owing on the premises and also alleged the conversion of certain property for which they prayed judgment in the sum of \$500.00.

After the trial, the Court made its Findings of Fact, Conclusions of Law and Decree and found the existence of the lease, its terms and the general evidence concerning the construction of the building. The Court found in Paragraph 4, that there was an agreement for the year 1951 that the rent was to be 5% of the net proceeds instead of 5% of the gross proceeds. The Court found in Paragraph 5 that the water supply was not adequate for the operation of the soft ice cream machines and that the defendants caused a well to be dug. The Court further found that the lack of a sufficient water supply caused loss and expense to plaintiff but refused to find the amount of such expense. The Court also found that no

accounting was made by plaintiff until August 18 or 19, 1952 at which time Exhibit "A" and the check for \$100.00 was tendered to the defendants. The Court then found that no net profits were realized in the year 1951 and that the gross proceeds from the business from May 18, 1952 to July 31, 1952 was in the sum of \$3,583.15 and that 5% of such amount was \$179.15 (Paragraph 11 of the Findings). It further found that on July 26th, the date of the notice of termination, there was \$87.10 due from plaintiff to defendants as rental.

Finding No. 12 is to the effect that defendants had executed and delivered to plaintiff the promissory note and chattel mortgage (Exhibits "10" and "11") in the face amount of \$2,146.00; that on this note there was paid on or about June 16, 1952, \$1,942.50; that there remains owing \$346.00 together with interest. This promissory note was given by defendants to plaintiff to replace a note for \$1800.00 (Exhibit "B") and to pay the price of equipment furnished by plaintiff to defendants, a list of which is shown as Exhibit "C". The note was secured by chattel mortgage on a large number of items in use in defendants' grocery store, cafe, motel and the Frosty Freeze place of business.

The note and mortgage both required the signature of the wife of defendant Firm. When presented for her signature, she refused to sign either the mortgage or the note. The mortgage and note for \$2,146.00 were never recorded and subsequent to their preparation and presen-

tation, defendants disavowed the amount of the note and claimed that it was not due. On June 16, 1952, defendants paid to plaintiff \$1,967.50. Of this amount, \$1942.50 was on the note and mortgage of September 1, 1952. On the face of the note is typed a statement that the amount of \$1967.50 was received in full for the note and interest, that \$25.00 of the amount was for attorney's fees for drawing up unused papers. It is admitted by all parties that the unused papers referred to were the note and mortgage in the sum of \$2,146.00 (R-98-100, 130-132, 177, 178 and 183). Finding No. 13 is that a \$25.00 attorney's fee was for drawing of new papers. The Court found that the \$346.00 was owing under the chattel mortgage and was not on open account. It was, therefore, not due from defendants to plaintiff at the time the notice of termination of lease was delivered. The Court concluded that the \$346.00 was not due until the year 1954 and that there was due and owing as delinquent rent the sum of \$242.25.

The Court throughout the Findings, Conclusions of Law and Decree, refused to accept the plaintiff's records, books and estimates concerning losses and damages though there was no contrary evidence introduced by defendants concerning those various items.

STATEMENT OF POINTS RELIED ON

POINT I.

DEFENDANTS UNLAWFULLY AND WRONGFULLY DISPOSSESSED PLAINTIFF AND TERMINATED HIS LEASE.

ARGUMENT

POINT I.

DEFENDANTS UNLAWFULLY AND WRONGFULLY DISPOSSESSED PLAINTIFF AND TERMINATED HIS LEASE.

A great majority of the facts in this action are undisputed. The undisputed facts show that the defendants wrongfully terminated plaintiff's lease. The following facts are undisputed:

(1) That during the year 1952, defendants did not furnish sufficient water to plaintiff for the operation of the soft ice cream machines.

(2) That during the year 1951 and until June 16, 1952, defendants were indebted to plaintiff in the sum of \$1942.50.

(3) That from June 16 until August 23, 1952, defendants were indebted to plaintiff in the sum of \$346.00 on open account.

(4) That defendants took over forcibly from plaintiff's employees possession of the Frosty Freeze place of business on the 23rd of August, 1952.

(5) That thereafter, defendants have been in sole, exclusive and continuous possession of the Frosty Freeze premises and all equipment and supplies therein.

(6) That on October 6, 1952, defendants refused plaintiff permission to re-enter and remove personal properties from the Frosty Freeze premises.

(7) That the Frosty Freeze building has never been completed as contemplated by the parties.

(8) That the failure to furnish sufficient water for the operation of the Frosty Freeze business and the failure to complete the Frosty Freeze building have caused damage to plaintiff.

(9) That the wife of defendant Firm, refused to sign the chattel mortgage and promissory note and that none of the parties considered the chattel mortgage and promissory note for \$2146.00 as a valid instrument.

It is plaintiff's position that at no time prior to the 23rd of August, was he indebted in any way to the defendants; that his claims against defendants more than offset any sum which could possibly be due and owing to defendants as rent on the Frosty Freeze place of business.

The first and major setoff was the amount due under the first promissory note and chattel mortgage in the sum of \$1800.00. Second, the sums that became due and owing from defendants to plaintiff by reason of his furnishing equipment and material in the Fall of 1951 and Spring of 1952, amounted to \$346.00 and is due on open account. These two items made up the chattel mortgage for the sum of \$2,146.00.

Apparently, the Court misread the receipt which was typed on defendants' Exhibit "B" for in the Court's finding, it stated that the \$25.00 item was for *new papers* when as an actual fact the receipt stated that the \$25.00 was for drawing up of *unused papers*. The unused papers were the chattel mortgage and promissory note which Mrs. Firm refused to sign. The \$346.00 item could only be due on open account and would be a proper offset against the sums coming due as rent for the Frosty Freeze premises.

The most that could possibly be due to defendants as rent under the interpretation most favorable to them, which was adopted by the Court, is the sum of \$242.25, more than \$100.00 less than the amount owed to plaintiff on open account.

The offset for equipment and materials furnished by plaintiff to defendants are in amounts agreed upon by the parties prior to the time when the dispute arose. The amount is liquidated and certainly would be a proper setoff against any rent falling due on the Frosty Freeze premises.

There was no doubt whatsoever in the minds of the parties to the promissory note that it was not a valid and subsisting instrument. It was never signed by one of the parties, namely, Mrs. Howard Firm, and in both instruments a place is provided for her signature and in the body of the documents she is named as a party. The

rule seems clear and unequivocal that where a document anticipates the signature of a number of persons and some of the people do not sign and refuse to become parties to the agreement, the document itself is not a binding instrument. The rule is stated most succinctly in *Ely v. Phillips*, 89 W. Va. 580, 109 S.E. 808, in the following language:

“The authorities are uniform in the holding that persons signing a contract prepared for signature of other persons, to be affixed along with theirs, and intended to be signed by all of the parties named in it, are not bound until all have signed it and incur no obligation, if any of those who were to have signed it refuse to do so.” (citing case)

The rule as applied by the Utah Courts has been stated in *Stockyards Nat. Bank of South Omaha v. Bragg*, 67 Utah 60, 245 Pac. 966. There the parties were concerned with a mortgage which had not been executed by some of the parties whose names appeared in the body of the mortgage. The Utah Court in applying the rule set forth above states our law in the following language, page 975:

“* * * Again, it is well settled that, where a bill, note, or mortgage, or other contract, is signed and delivered by one on condition that another, or others, shall also sign the contract and become obligated thereon, and, if such condition is not fulfilled, the contract as to him who signed and delivered it is of no binding effect as between the original parties or their privies, or

assigns having no equities other or greater than those of the original parties. *Martineau v. Hanson*, 47 Utah 549, 155 P. 432; *Central Bank v. Stephens*, 58 Utah 358, 199 P. 1018; 1 Joyce, *Defenses to Com. Paper* (2d Ed.) Sections 486 to 490. Where a stockholder of a bank executed a note to it on condition that all other stockholders should pay amounts proportionate to their shareholdings, the maker cannot be held liable on the note, except to a holder in due course, on a failure of fulfillment of such condition. *Bank of Tallassee v. Jordan*, 200 Ala. 182, 75 So. 930. * * *

See also *Anthony Macaroni Co. v. Nunziato*, 5 Cal. App. 2d 588, 43 P. 2d 315.

There is no dispute about the fact that Mrs. Firm did not sign either the note or mortgage, that the documents were never recorded and as defendant Cox stated, as far as he was concerned the \$2,146.00 mortgage was a nullity and did not have any force or effect (R-184). It is not until the Court made its Findings of Fact that any party gave any force or effect to the mortgage and promissory note dated March 1, 1952. When the payment of June 16, 1952 was made, there was typed on the face of the note dated September 1, 1951, Exhibit "B", the following:

"June 16, 1952
Springdale, Utah

"Received of Paul Cox \$1967.50 as payment
of principal in full and interest to date plus \$25
for attorneys fee for drawing up unused papers.

S/ Raymond S. King

Witness:

S/ Jesse W. Higley"

This statement shows beyond dispute the position of plaintiff concerning the note dated March 1, 1952 and refers to the note and chattel mortgage as "unused papers".

Whether or not the note of March 1, 1952 is a valid and subsisting document is of crucial importance for if it is not a valid and subsisting document, then the Court's Findings of Fact, Conclusions of Law and Decree must all fall. For then, the \$346.00 owing by defendants to plaintiff, would be owing on an open account. It would be a proper setoff against any amounts due and owing from plaintiff to defendants as rent and would more than wipe out the \$242.25 which the Court finds was the amount of rent owing by plaintiff to defendants. It would appear, therefore, that the \$346.00 being owed by defendants to plaintiff on an open account, termination of the lease for failure to pay rent in the sum of \$242.25 was wrongful and would not justify in any way the termination of the lease by defendants.

No proper notice of termination of lease or demand has ever been made upon plaintiff by defendants. Their demand of July 26th was greatly in excess of the amounts which were actually due as rent on the Frosty Freeze premises. The notice of termination of lease makes demand on plaintiff for 5% of the gross sales for the period May 1, 1951 to October, 1951, and the Court found, as was relatively undisputed, that for that period of time de-

fendants had agreed with plaintiff that he was to have the premises for 5% of the net earned in the business rather than 5% of the gross.

In response to the notice of termination of lease, plaintiff gave a proper accounting of the income, both net and gross, from the Frosty Freeze business. Exhibit "8", dated August 15, 1952, not only shows the net proceeds but shows the gross amounts which were received in the business. The tender of \$100.00, under protest, made in good faith, was more than was due on the date on which the notice to terminate was served. The Court found that as of July 26th, when defendants served the notice of termination, there was only \$87.10 due and owing by plaintiff for rent on the premises. The response to this was a tender of \$100.00.

Defendants never did comply with the terms of the lease and furnish to plaintiff sufficient water to operate the Frosty Freeze business except for a few months following August 1, 1951. It was found that there never was sufficient water furnished by defendants to plaintiff after 1951 and they were, therefore, at all times in default in their performance under the terms of the lease. This default necessitated the installation of a less efficient system of cooling the soft ice cream machines and necessitated that plaintiff install on the machines air coolers which cost \$129.68 (R-67). The air coolers were only two-thirds as efficient as were the water cooling units (R-69). This caused a loss to plaintiff in the ordi-

nary operation of the machines of \$7.50 per day. The Court found that the failure to furnish water damaged plaintiff but would not find the amount of damage even though plaintiff's evidence as to amount is undisputed.

The Utah law has always been clear and unequivocal that a repossession by a landowner through forcible entry and detainer is a wrongful action on his part and the Courts have determined that the tenant must be restored to possession and is entitled to damages suffered from such wrongful dispossession by the owner.

In the case of *Paxton v. Fisher*, 86 Utah 408, 45 P. 2d 903, this Court set forth its view concerning repossession by rightful owners of property. After stating that a reposessor cannot in an action for wrongful detainer prove his right to possession or his title, the Court set forth the logic behind our wrongful and forcible entry statute in the following language, page 906:

“Proceedings under the forcible entry and detainer statute are summary in character, speedy in enforcement, and penal for violation thereof. The purpose of the statute is to provide a speedy remedy, summary in character, to obtain possession of real property. Even rightful owners should not take the law into their own hands and proceed to recover possession by violence, or by entry in the nighttime, or during the absence of the occupants of any real property.”

While under the decision of the trial court plaintiff's right to damages was unnecessary, it would appear that

the question of whether or not in a wrongful entry and forcible detainer action the tenant is entitled to damages, should be set at rest.

The matter of a tenant's right to damages for wrongful eviction was considered by this Court in the case of *Hargrave v. Leigh*, 73 Utah 178, 273 Pac. 298. There the Court approved an award to the tenant of \$650.00 for wrongful eviction by the landlord. It would appear that the general rule is that either with or without a restoration of the premises, a tenant wrongfully evicted may be awarded the damages suffered by him.

See also *Richardson v. Pridmore*, 97 Cal. App. 2d, 124, 217 P. 2d 113, 17 A.L.R. 2d 929, where damages were discussed at length and the Appellate Court held that damages were properly recoverable in a wrongful eviction case.

Plaintiff submits that the \$346.00 owed him by defendants was on open account due and payable by the defendants; that it was a proper and legitimate setoff to any sums which became due and owing from plaintiff to defendants for rent on the Frosty Freeze place of business. In addition to said item, the failure of defendants to properly perform the covenants and terms of the lease agreement should be considered in granting them a right of termination.

The seizure by defendants of possession of the Frosty Freeze business on August 23rd was wrongful and unlawful and plaintiff is entitled to all of the damages suffered by him as a result of said seizure; that the trial court's decision denying any recovery to plaintiff and decreeing termination of the lease is contrary to the law and unsupported by the evidence; that this Court should reverse said decision and grant to plaintiff a new trial.

CONCLUSION

Plaintiff respectfully submits that the trial court's Findings of Fact, Conclusions of Law and Decree were erroneous and unlawful, and that plaintiff should be granted a new trial.

Respectfully submitted,

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Received copies of the within Brief of
Appellant this day of September, A.D., 1954.

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