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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RAYMOND S. KING,
Plaintiff and Appellant,

— vs. —

HOWARD FIRM and PAUL J. COX,
Defendants and Respondents.

Case No.
8201

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

Respondents will be referred to herein as defendants, and Appellant will be referred to as plaintiff.

STATEMENT OF FACTS

Plaintiff brought this action to recover the sum of \$31,920.40, his costs, and such other and further relief as to the court may seem just and equitable in the premises for the alleged wrongful and unlawful dispossession or ouster of the plaintiff from certain premises leased by defendants to plaintiff, under the terms and conditions of a written instrument designated "Lease" and identified as Exhibit "A."

The premises involved are described in the lease as follows:

Description of Property

A part of Lot 16 of O. D. Gifford's survey of the East half of the Northwest quarter and the North half of the Southwest quarter of Section 28 Township 41 South Range 10 West Salt Lake Meridian, located on property of the Lessors on the West side of the Utah State Highway #15 and consisting of the refreshment building 20 ft. x 20 ft. in size and opposite the Zionville Cafe and Motel with 100 feet of ground fronting on said road and extending back of West side about 50 feet to a semicircular terrace; the said premises being located about one-third mile from the South entrance to Zion National Park.

The term of the lease was from May 1st, 1951 to May 1st, 1957.

The purpose of the lease as set forth therein was to permit the plaintiff "to conduct a refreshment business furnishing sandwiches, hot dogs, soft drinks, beer, candy, cigarettes and novelties."

Without objection from the defendants, plaintiff testified that the operation of a soft ice cream machine was contemplated by the parties (Rec. 110-112). See Defendants' testimony on this point (Rec. 161-162). Even this evidence does not support any specific agreement between the parties that the defendants were to supply adequate water for the operation of a soft ice cream machine. The water supply was sufficient to operate a refreshment business such as delineated in the lease agreement.

As shown by the record much of plaintiff's claim for damages evolves about his contention that the failure of the defendants to furnish adequate water supply for

his soft ice cream machine caused great loss of business (Record 93-101), yet he admitted on cross examination that his experience with the operation of the soft ice cream machine at the cafe before the construction of the so-called Frosty Freeze Building proved definitely there was not sufficient water supply in the whole Spring Dale area to keep even one unit of such equipment in constant operation and at full capacity (Record 109-114). Defendants attempted to supply an auxiliary source of water through a well but this had to be abandoned when the water level in the river became too low. Plaintiff then installed an air cooler for the remainder of the 1952 season.

While plaintiff claimed damage through the loss of business allegedly attributed to failure of the defendants to have the building completed yet on the trial of the case he admitted that loss of business through this condition was practically nill(Record 121).

With respect to the modification of the lease to provide for the first year of operation rental at 5% of the net instead of 5% of the gross take the facts are Defendant Firm at all times relied on the terms of the lease for the meaning of the expression "first year" (Rec. 163-164). The Lease "Exhibit 5" 5th paragraph reads:

"The said lessee covenants and agrees to pay to said lessor as rental for said premises at the rate of \$50.00 per month during the summer months of May to October of each year, payable monthly in advance but such period to be limited to the months in which profitable business can be conducted also to be extended to other months in case profitable business can be conducted or in lieu of said above rental, the lessee may pay to

the lessors 5% of the gross sales of said business and he shall keep a strict account thereof and make payment on the first day of each month during the periods as above stated."

That the expression "first year of operation" as used by the parties in their modification agreement could mean only the seasonal operation in the year 1951 finds ample support in plaintiff's statement of facts (Page 4 of brief, 1st paragraph).

No accounting of sales or profits was made by plaintiff and no tender of any rent whatsoever until almost a month after defendants served plaintiff with written notice of termination of the lease Ex. 7. This notice was served on July 26th, 1952, and on August 29th, 1952, plaintiff presented an accounting to the defendants Plaintiff's Exhibit "8," and tendered a check in the sum of \$100.00. Firm refused to accept the accounting or the check and on August 23rd, 1953, placed a padlock on the door of the Frosty Freeze Building.

No demand was ever made by plaintiff for surrender of possession of the premises or of the contents. About all that happened in that regard is reflected in the cross examination of Mrs. Hirschi, plaintiff's witness when she and plaintiff went to Mr. Firm and asked to be let in the building to see some papers and some of his supplies (Record 17-18).

In a transaction between plaintiff and the defendants entirely independent of the lease involved in this action, plaintiff loaned money to the defendants, and took as security a mortgage on properties other than the Frosty Freeze Building. This mortgage was dated September 1,

1951, and called for \$1800.00 principal. In the spring of March 1, 1952, nothing had been paid on this mortgage and the parties then agreed upon a new note and mortgage for \$2146.00. The difference of \$346.00 represented the cost of some equipment installed by plaintiff and was intended to secure a promissory note of even date in the amount of \$2146.00. Between the time of the execution of the original \$1800.00 mortgage and the spring of 1952 defendant Firm became married. The new papers were drafted to include the signature of Firm's wife. Plaintiff's counsel advised her signature was not necessary because the original transaction took place before Firm's marriage, but said in substance it would do no harm to have Mrs. Firm sign the note and mortgage and it might help (Record 128). Mrs. Firm refused to sign, but Mr. and Mrs. Paul J. Cox and Mr. Howard Firm, all parties to the original deal, signed and plaintiff took possession of the documents and retained same to the day of the trial, and at that time made no attempt to deliver same to the defendants or either of them or to declare they were of no value or use to him. On the contrary plaintiff testified he was still holding the chattel mortgage for \$2146.00 to secure the payment of the \$346.00 (Rec. 133).

The court found the new note and mortgage for \$2146.00 were valid and subsisting obligations of the defendants, except for the payments made thereon and that defendants still owed plaintiff \$346.00 thereon, but not due and payable until March of 1954. Plaintiff contends payment of \$1967.50 was credited on the old mortgage and that the \$346.00 embraced in the new documents, making a principal obligation of \$2146.00 instead of \$1800.00 then became an open account, although he still

held the note and mortgage for \$2146.00 as security for the 346.00 (Rec. 133).

STATEMENT OF POINTS RELIED ON

POINT 1

DEFENDANTS RIGHTFULLY TERMINATED PLAINTIFF'S LEASE AND TOOK POSSESSION OF THE PREMISES FOR PLAINTIFF'S FAILURE TO RENDER THE ACCOUNTINGS AND PAY THE RENTALS PROVIDED BY THE LEASE AGREEMENT.

ARGUMENT

THE DEFENDANTS RIGHTFULLY TERMINATED PLAINTIFF'S LEASE AND TOOK POSSESSION OF THE PREMISES FOR PLAINTIFF'S FAILURE TO RENDER THE ACCOUNTINGS AND PAY THE RENTALS PROVIDED BY THE LEASE AGREEMENT.

At the outset it is clear from plaintiff's pleadings, his position taken at the pre-trial, his statement to the Trial Judge at the commencement of the trial (pages One and Two of the Record), his conduct throughout the trial, and his position taken in his brief before this Honorable Court, that the action is brought under the Forcible Entry and Unlawful Detainer Statute, although no foundation was laid for such action and no demand for restitution of the premises was made in the pleadings or sought at the trial. The Forcible Entry and Unlawful Detainer Statute of Utah is essentially and primarily a remedy provided for restitution of premises forcibly entered and/or forcibly or unlawfully detained. Forcible entry and de-

tainer as a civil proceeding is based on, and has by modern legislation been evolved from the English forcible entry and detainer which was a criminal proceeding merely. The remedy is purely statutory and is summary in character. The action is strictly possessory in its nature, so that ordinarily the immediate right to be reinstated in possession of the realty is all that is involved and can be determined. It is a remedy for the protection of possession of realty, whether rightful or wrongful, against forcible invasion, its objects being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence.

The Utah statute clearly authorizes recovery of damages in a forcible entry and detainer action. The damages must be such as are the natural and proximate consequences of the acts complained of. The remedy for damages is purely incidental to the primary or summary remedy provided for restitution of the realty, and the statute makes no provision for recovery of damages by separate action for trespass, as is provided under the statutes of some of our states, such as Michigan (Lane vs. Ruhl, 61 N.W. 347, 103 Mich. 38).

Under these circumstances the Trial Judge, Hon. Will J. Hoyt, took the position, and tried the case, upon the theory that plaintiff's suit was not, and could not be, predicated or bottomed on the forcible entry and detainer statute under the pleadings presented, but rather was an action for damages for alleged breach of defendants' agreement to construct a refreshment building and furnish adequate water supply to operate the business contemplated by plaintiff's lease.

Defendants alleged and proved substantial performance of their covenants under the lease; alleged and proved failure of the plaintiff to render accounting of his conduct of the business and payment of the rentals provided by the lease agreement.

We therefore take the position before this honorable court that the trial judge took the right theory of this proceeding at the outset, and that the findings, conclusions, and judgment are amply supported by the evidence.

To justify our position that we rightfully terminated plaintiff's lease and took possession of the premises we shall attempt to respond seriatim to the points presented by plaintiff in support of his assertion that defendants wrongfully and unlawfully dispossessed plaintiff and terminated his lease.

(1) THAT DURING THE YEAR 1952, DEFENDANTS DID NOT FURNISH SUFFICIENT WATER TO PLAINTIFF FOR OPERATION OF THE SOFT ICE CREAM MACHINES.

a. Operation of soft ice cream machines was not specifically specified in the lease agreement.

b. Assuming the parties dehors the lease provisions had in contemplation operation of soft ice cream machines, plaintiff had full knowledge of the fact that the only water supply for the entire area was insufficient to operate even one unit of such a machine at full capacity constantly, and that if defendants' by their efforts to supply additional water from a well failed they had done all that was physically possible to perform their covenant to supply adequate water. Plaintiff was not misled by this provision

of the lease and when the water supply from the well failed he installed an air cooler. This substitute he must have had in mind when he undertook the soft ice cream business, after his experience at the cafe.

c. Alleged damage from this source was too speculative and no substantial evidence was presented upon which a judgment could lie.

(2) THAT DURING THE YEAR 1951 AND UNTIL JUNE 16, 1952, DEFENDANTS WERE INDEBTED TO PLAINTIFF IN THE SUM OF \$1,942.50.

a. This statement is correct, but the indebtedness was founded upon an independent transaction between the parties; the indebtedness was secured by a chattel mortgage and in no sense could have been a proper off-set to plaintiff's obligation for rent under the lease.

(3) THAT FROM JUNE 16th UNTIL APRIL 23, 1952, DEFENDANTS WERE INDEBTED TO PLAINTIFF IN THE SUM OF \$346.00 ON OPEN ACCOUNT.

a. There is absolutely no evidence to support this statement. Plaintiff at all times after the execution of the note and mortgage of March 1st, 1952, for \$2146.00 took the position that this \$346.00 was secured by the mortgage (Record 133).

b. The indebtedness was not due and payable until March 1st, 1954, hence could not be used as an off-set to plaintiff's obligation to the defendants for rent.

(4) THAT DEFENDANTS TOOK OVER FORCIBLY FROM PLAINTIFF'S EMPLOYEES POSSESSION OF THE FROSTY FREEZE PLACE OF BUSINESS ON THE 23rd DAY OF AUGUST, 1952.

a. No force was applied in taking possession of the premises. Defendant Firm simply told plaintiff's employee, Mrs. Hirschi, he would have to padlock the door, which he proceeded to do.

b. Written notice of their intention to terminate the lease and take possession of the premises had previously been personally served on plaintiff, under date of July 26th, 1952, alleging or stating the cause to be the failure of the plaintiff to make accountings and pay rent as provided in the lease. Plaintiff's offer of August 19th, 1952, was not a compliance with his agreement and was properly refused by defendant Firm.

(5) THAT THEREAFTER, DEFENDANTS HAVE BEEN IN SOLE, EXCLUSIVE AND CONTINUOUS POSSESSION OF THE FROSTY FREEZE PREMISES AND ALL EQUIPMENT AND SUPPLIES THEREIN.

a. This statement is correct. Possession has been rightful at all times indicated.

(6) THAT ON OCTOBER 6, 1952, DEFENDANTS REFUSED PLAINTIFF PERMISSION TO RE-ENTER AND REMOVE PERSONAL PROPERTY FROM THE FROSTY FREEZE PREMISES.

a. No demand or request was made by plaintiff on Oct. 6, 1952, to remove any property from the Frosty Freeze premises. Plaintiff asked permission to enter to look at some supplies and papers. This was refused by defendant Firm, unless it was all right with Mr. Cox. It is not clear from the record whether Firm referred to his partner Paul Cox or his then attorney LeRoy H. Cox.

b. Plaintiff made no offer to pay the rental obligation at that time.

(7) THAT THE FROSTY FREEZE BUILDING HAS NEVER BEEN COMPLETED AS CONTEMPLATED BY THE PARTIES.

a. No substantial evidence was ever presented as to just what a completed building for Frosty Freeze business meant in the contemplation of the parties.

b. The plaintiff waived any deficiency in this respect for the first season of 1951 when he got his rental reduced to 5% of net take.

c. For the year 1952, additional work was done on the building and plaintiff himself admitted little, if any, damage resulted from anything yet to be done to complete the building (Record 121).

(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 THE PLAINTIFF.

a. These contentions we feel are amply answered by answers to Nos. 1 and 7 above.

(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 NOTE FOR \$2146.00 AS A VALID INSTRUMENT.

a. The note and chattel mortgage for \$2146.00 was a renewal of a previous obligation duly executed by all parties who signed the original note and mortgage for

\$1800.00. This was an obligation incurred by Firm prior to his marriage to the present Mrs. Firm who refused to sign the new note and mortgage. It was in no sense an obligation of Mrs. Firm. The plaintiff and his counsel both deemed her signature unnecessary, but added provision for it with the thought it would do not harm and might do some good (Rec. 128).

b. The testimony of defendant Paul J. Cox regarding the validity of the note and mortgage of March 1, 1952, for \$2146.00 was not directed to the matter of Mrs. Firm failing to sign the instruments, but to the fact that he later learned there was some controversy over the liability of the defendants for certain items installed at the Frosty Freeze building and which were included in the items of cost making up the bill for 346.00 which was added to the original obligation of \$1800.00.

c. Plaintiff retained possession of the note and mortgage in question and testified at the trial that he still regarded the instruments as security for payment of the \$346.00 (Rec. 133).

It is therefore clear from the evidence that there was no failure on the part of the defendants or either of them to comply with the terms of their agreement with plaintiff which justified plaintiff in failing to make monthly, accurate accounting of his conduct of the business and pay the rentals specifically agreed upon in the lease agreement.

If the defendants had regarded the lease agreement as tied into the previous indebtedness payable by them to plaintiff they might well have made claim to an off-set for the rental due them. Instead, they fully paid the principal

and interest of their obligation and permitted plaintiff to retain possession of the new note and mortgage which included the \$346.00 additional. The court found this a valid subsisting obligation from the defendants to plaintiff, but not due and payable until March 1, 1954, hence not a set-off against plaintiff's rent obligation to defendants.

Plaintiff cites the following cases in support of his contention that since Mrs. Howard Firm refused to sign the note and mortgage of March 1, 1952, for the principal sum of \$2146.00 none of the other parties who had already signed were bound by their signatures and the instruments were therefore null and void:

Ely vs. Phillips, 89 W. Va. 580, 109 S. E. 808.

Stockyards Nat'l Bank of South Omaha v. Bragg 67 Ut. 60, 245 Pac. 966, and Martineau vs. Hanson, 47 Ut. 549, 155 Pac. 432, and other cases cited in the Stockyards case.

Anthony Macaroni Co. vs. Nunziato, 5 Cal. App. 2nd 588, 43 Pac. 2nd 315.

We have carefully examined all of these cases but find none of them applicable to the facts in the instant case. We find no quarrel with the principle laid down in these authorities, but in each case the facts squarely support the principle. In the case at bar the obligation was but a renewal of an old obligation and was unhesitatingly executed by all the original signers, none of whom even tacitly indicated they would not be bound by their signatures unless Mrs. Firm would also sign. The fact that the holder did not record the mortgage does not make the obligation invalid. As between the parties themselves

the instrument is valid and subsisting and the Court so found.

In the Anthony Macaroni Co. vs. Nunziato case cited by plaintiff a lease agreement was involved in which two partners, Raulli and Bizzari, were to execute said lease as Lessors and Nunziato as Lessee. Raulli signed, but Bizzari refused. Nunziato agreed to take this lease in lieu of the assignment of prior lease on the same premises, provided both Raulli and Bizzari signed the second lease. Upon his refusal to sign the court held the lease invalid. This case is clearly distinguishable from the case at bar.

In passing on the Macaroni case the court cited with approval Cavanaugh vs. Cassellman, 83 Cal. 543, 26 Pac. 515, where the court held:

It is not the rule that a contract which upon its face purports to be inter partes must invariably be executed by all whose names appear in the instrument before it should be binding upon any. One reason why it is held in so many cases that an agreement is not to be operative upon one until it has been signed by another, is that such signing is the consideration upon which such other first signer is to be bound, but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he can show there were other considerations for his signing the instrument than those named in the instrument.

In Bishop Contracts, 348, it is said:

“If by parol stipulation, or a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who

have signed it, but if nothing of this appears, the parties signing will be holden, even though on the face of it the signatures of others were contemplated by the draftsman. The same rule is stated in Kurtz vs. Forquer, 94 Cal. 91, 29 Pac. 413.

And again: In C.J.S. Vol. 59, Page 165, Sec. 119, It is said: "A mortgage intended to be executed by joint mortgagors is not binding on any who fail to sign and acknowledge it, but it may, if the circumstances permit be held valid against those who do execute it. Citing C.J. Vol. 41, Page 419, Sec. 273, supporting text with the following authorities:

Taylor vs. Riddle, (Tenn. Ch.) 57 SW 158.

East Texas Fire Ins. Co. vs. Clarke 79 Tex. 23, 15 SW 166.

Davis vs. Hall (Ark.) 179 SW 323.

11 L.R.A. 293.

See also:

Peacock vs. Horne, 126 S.E. 813, 159 Ga. 707.

Rubendall vs. Tarbox, 208 Ill. App. 376.

Utilities Ins. Co. vs. Stuart, a Nebraska case, 278 N.W. 827.

Winter vs. Kitto, 100 Cal. App. 302, 279 Pac. 1024.

We submit the great weight of authority will support the court's finding that Howard Firm, Paul J. Cox, and Mrs. Paul J. Cox are bound by the Note and mortgage executed by them on March 1st, 1952, although Mrs. Howard Firm failed to join in said instruments. Their indebtedness not yet due and payable under that obliga-

tion can not be used as an off-set by plaintiff under his rental obligation to the defendants.

Plaintiff having failed to predicate his case on the forcible entry and detainer statute, we are unable to see how the case of Paxton vs. Fisher, 86 Utah, 408, 45 P. 2nd 903, applies.

The alleged eviction of plaintiff by defendants must be proved on grounds wholly distinct from the principles laid down in the Paxton case.

Plaintiff cites the case of Hargrave vs. Leigh, 73 Utah, 178, 283 Pac. 298, in support of his alleged eviction by defendants. After carefully examining and considering that case, we believe that case is clearly distinguishable from the case at bar. In that case the tenant was a month to month tenant. She owed some rent, but no notice to quit was served upon her as provided by the statute, for that cause or any other.

Plaintiff also cites Richardson vs. Pridmore, 97 Cal. App; 2nd, 124, 217 Pac. 2nd 113, 17 A.L.R. 2nd, 1929. That case is also clearly distinguishable from the case at bar. In that case the tenant's rent was fully paid for the period involved. During his absence the landlord removed all the tenant's belongings to the basement, changed the lock on the door, and refused to admit tenant to the apartment upon his return. Tenant's wife was in an early stage of pregnancy and by reason of the landlord refusing to let her use the freight elevator to take her belongings out of the building, together with other abusive conduct, a miscarriage resulted. The court rightfully held the tenant was wrongfully evicted and that her miscarriage was the direct or proximate result of the mistreatment she

received on the occasion of her eviction. We fail to see how plaintiff can take any comfort from this authority.

CONCLUSION

Even if this court should determine the \$346.00 due and owing by defendants to plaintiff on open account rather than in the chattel mortgage, we contend lessee may not rely on a set off or counterclaim to excuse his failure to pay the rent so as to prevent a forfeiture, except in a case where the lessor has expressly or impliedly agreed thereto: Taylor vs. Brice, 34 N. E. 833, 7 Ind. App. 551; Morrill vs. De la Granja, 99 Mass. 383; Johnson vs. Douglas, 73 Mo. 168.

In the absence of a statute to the contrary, when the lease contains a provision the lessor may proceed to end the lease on the breach of a covenant to pay rent: American Surety Co. of New York vs. U. S. C.C.A., 112 Fed. 2nd 903; Bank of America Nat. Trust & Savings Assn. vs. Moore, 64 Pac. 2d 460, 18 Cal. App. 2d 522; Kulawitz vs. Pacific Woodenware & Paper Co., 155 Pac. 2d 24, 25 Cal. 2d 664; Weill vs. Centralia Service & Oil Co., 51 N. E. 2d 345, 320 Ill. App. 397.

The defendants rightfully terminated plaintiff's lease and took possession of the leased premises for his failure to pay the rentals provided in the agreement.

We respectfully submit that the Findings of Fact, Conclusions of Law and the Judgment in this case are amply supported by the evidence and should be sustained.

Respectfully submitted,

GROVER A. GILES,

Counsel for Respondents.