

1980

Ute-Cal Land Development v. Intermountain Stock Exchange : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

UTE-CAL LAND DEVELOPMENT,
a Utah corporation,

Plaintiff/Appellant,

v.

INTERMOUNTAIN STOCK EXCHANGE,

Defendants/Respondents.

Case No. 17063

INTERMOUNTAIN STOCK EXCHANGE,

Third Party Plaintiff/
Respondents,

v.

PETER BUFFO,

Third Party Defendant/
Appellant.

APPELLANT'S BRIEF

An Appeal From a Judgment of the Third Judicial
District Court of Salt Lake County, Utah,
Honorable James S. Sawaya, Judge

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Respondents

SEP 8 1980

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STATEMENT OF THE NATURE OF THE CASE

This is a civil action seeking a resolution between conflicting claims of right to possession of certain real property situate in Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The case was heard without a jury by the Honorable James S. Sawaya in the Third District Court of Salt Lake County, Utah. Pursuant to motions by defendants/respondents, the claims of plaintiff/appellant to the real property in question were severed so that a speedier resolution of the counterclaimed unlawful detainer could be obtained. The lower court determined that plaintiffs/respondents had neither assumed nor negotiated a new valid lease with defendants/respondents and that plaintiffs had been served with effective notice under §78-36-3, Utah Code Ann., (1953), to terminate their month-to-month tenancy. The Court declared the rights of defendants to possession of the premises and to damages for hold-over.

RELIEF SOUGHT ON APPEAL

Plaintiff/appellant seeks a reversal of the holding that it did not have the right to peaceful occupation of the premises through assumption of a lease from predecessor tenant

of defendants/respondents. Alternately, it seeks to have this Court declare the lease negotiated by plaintiff and defendants equitably enforceable.

The existence of a binding lease will mandate that purported service of notice to quit be found defective under Utah unlawful detainer standards. Thus no detainer action will sound or damages issue.

Should the Court determine that plaintiff/appellant is liable in unlawful detainer, then third party defendant/appellant seeks to be declared not personally responsible for damages. (Third party defendant/appellant was not explicitly found personally liable and argues that he is not.)

Finally, should the Court reject the arguments absolving either appellant, appellants then seek to have the amount of damages awarded reduced as improper.

STATEMENT OF THE FACTS

Defendant and third party plaintiff Intermountain Stock Exchange (Intermountain), a Utah corporation, owned certain real property known as the Exchange Building, located at 39 Exchange Place, Salt Lake City, Utah.

A part of the basement of this property was leased by INVESTESTATE, INC. (Investestate), a Utah corporation, for the purpose of operating a private club known as the "Exchange Club" on August 1, 1976. Investestate had leased this space from

Intermountain and operated a club there from at least as early as March 23, 1973, as evidenced by an earlier agreement. To operate the Exchange Club, Investestate entered into an equipment lease with Murray First Thrift (MFT), on July 31, 1973. As part of the ordinary course of business, MFT obtained a consent and waiver from the landlord, Intermountain, to protect its interests in the equipment.

The Exchange Club was unable to operate at a profit, and Investestate was forced to breach its property and equipment leases. Its principal owner, Stan Adams, an attorney, worked out various arrangements with Intermountain and MFT and paid his obligations as able. Results of the difficulties experienced by Investestate were an alleged termination of the August 1, 1976 lease and a later threat of foreclosure on the equipment.

Pete Buffo, in his capacity as President of Ute-Cal Land Development Corporation (Ute-Cal), a Utah corporation, became aware in May 1978 that the leased equipment was potentially available. Directed by MFT to Stan Adams at the Exchange Club to inspect the equipment, Buffo was asked by Adams to consider purchasing the Club intact, rather than merely the equipment for salvage.

The continuation of an ongoing business at the same location offered substantial advantages to all the parties.

MFT would not have to foreclose the equipment at a loss, but was agreeable to having Ute-Cal assume the lease. Intermountain would continue receiving rent on its property and avoid modification for a different tenant. Investestate and Adams would be relieved of their losses and obligations. Thus all parties entered into various mutual negotiations, making various representations and proposals. As a result, Ute-Cal assumed the equipment lease and took possession of the Exchange Club premises at the beginning of June 1978. Ute-Cal asserted right to possession either under a written assignment from Investestate, or as an equitable consequence of the dealings with Intermountain and its President, Reo Cutler. Specifically, Ute-Cal asserts the validity of a negotiated lease sent by its counsel, Loni F. DeLand, near August 1, 1978 to Jon Heaton, attorney for Intermountain. This lease was attached as Exhibit "A" to the plaintiff's Complaint in this action.

Economic difficulties at the Club again caused difficulties between landlord and tenant.

In August 1979, disregarding an alleged first right of refusal to Ute-Cal, Intermountain sold the Salt Lake Stock and Mining Exchange to Exchange Associates (Exchange Associates), whose managing partner was Whitney Cluff.

Exchange Associates and Ute-Cal were unable to reach a lease agreement. Consequently, Exchange Associates caused

to be served a Notice to Quit the premises on December 12, 1972.

Based on the totality of the circumstances, Ute-Cal reacted to the Notice by filing suit claiming the existence of a lease, that defendants Intermountain and Exchange Associates should be estopped from denying the lease, or alternately damages for loss of use and benefit. Plaintiff also sought a declaration of its right of first refusal and conformity with same, attorney's fees, court costs and other just relief. Defendants counterclaimed against Ute-Cal for unlawful detainer, and filed a third party complaint against Buffo for unlawful detainer. The unlawful detainer action was subsequently severed from plaintiff's action so that a swift determination of the right of possession could be reached. It is from the finding of hold-over and the award of damages that Ute-Cal and Buffo now appeal.

A R G U M E N T

POINT I

NEITHER UTE-CAL NOR PETE BUFFO WERE MONTH-TO-MONTH TENANTS.

The standard of appellate review in Utah views the evidence in the light most favorable to sustain the lower court. However, the findings will be disturbed if they are clearly against the weight of the evidence or if it manifestly appears that the Court misapplied the law to the established facts. Hardy v. Hendrickson, 495 P.2d 28, 29 (Utah 1972). The present

case provides just such an instance where the findings of the lower court are so grossly conflicting with the evidence that this Court should be compelled to correct and reverse.

A. THERE WAS SUFFICIENT EVIDENCE TO SHOW
A VALID ASSIGNMENT OF INVESTESTATE'S
LEASE TO UTE-CAL.

Ute-Cal asserts alternate theories in the present action. It claims that its right to possession of the Exchange Club is based on assumption of a legitimate lease to the property or through negotiations for a new lease that cause a particular negotiated lease to be equitably enforced. Thus the first question considered must be the rights assigned by Investestate to Ute-Cal.

Respondents admit the validity of an August 1, 1976 lease with Investestate (Exhibit 15), but claim that lease was terminated on October 13, 1977 by a notice of termination (Exhibit 2). The August 1 lease did contain, in Article XVI, a first right of refusal, and in Article XVII an option to extend for two five-year periods.

The lease was not terminated effectively by Exhibit 2 because that notice was never delivered to or signed by Stan Adams (as admitted by counsel for Intermountain, Tr. 63). Rather, that document was delivered to the secretary of Stan Adams' brother, with whom Stan has never been associated.

Adams further denied ever having seen the termination notice before the present litigation (Tr. 65).

The continuation in full force and effect of the lease is bolstered by the testimony of James Carline and Pete Buffo. Carline testifies at Tr. 103 concerning Cutler's representations about the existence of the Adams lease "in jeopardy." Buffo's testimony meanwhile supports Adams' belief of the validity of the lease in May or June of 1978 (Tr. 114). See also Buffo's deposition (BD) 36.

Exhibit 31 is an assignment of Investestate's rights under the August 1 lease to Ute-Cal. Thus Ute-Cal acquired not only the right of first refusal and options to extend, both privileges that are repeated frequently throughout the transcript as necessary for making the business feasible and the acquisition of the equipment lease possible, but received as well the right to estop defendants from denying the effect of that lease. And although it is true that Ute-Cal failed to exercise its right to extend the original term, it did so only because it had received assurances from Intermountain that Exhibit 17, Ute-Cal's negotiated lease that contained equivalent terms and protections, was acceptable and would soon be ratified. (See BD 25, 52.) Respondents should not now be heard to assert that the presumed valid lease was not extended because it was their actions that prevented the option from being exercised.

B. THE TRIAL COURT'S DETERMINATION THAT
NO EXCEPTIONS TO THE STATUTE OF FRAUDS
APPLY IS CONTRARY TO THE EVIDENCE.

Disregarding the rights allegedly conferred through the assignment of Investestate's lease, other rights rest with Ute-Cal. Respondents have attempted to negate the effect of the unsigned agreement between Ute-Cal and Intermountain claiming that Utah's Statute of Frauds, § 25-5-3, Utah Code Ann., (1979 Supp.), voids any interest in land unless there is a subscribed writing. However, the actions of the parties prove not only "equitable estoppel" and "part performance" exceptions to the Statute, but show a waiver by Intermountain of the execution of the lease. This Court should find, therefore, that the Statute of Frauds does not bar the present action and that Ute-Cal's negotiated lease should be enforced.

Defendants, in their trial brief, analyze the requirements of prior Utah law for a finding of part performance seemingly unaware of the growing trend in favor of part performance or the more recent Utah Supreme Court decision. In Adams v. Taylor, 391 P.2d 837 (Utah 1964), the Court was willing to find that the acceptance of payments by lessor removed the case from the Statute of Frauds because of the inherent unfairness of allowing lessor to receive the benefits of an unratified agreement while denying his obligations. "[I]t has become established law for equity courts to hold the statute inapplicable

when a contracting party has partially performed his share of the bargain." Williston on Contracts, § 533, p. 776, (3d Ed. 1960).

Ute-Cal's performance is not merely its improvements to the property of the assumption of the equipment lease on the representation that it would acquire the real property lease, but its tender of rental, which although admittedly late on occasion was nonetheless accepted by respondents. This action of accepting rent as well as various other actions and representations estop lessors from asserting the Statute.

The necessary elements of estoppel have been defined as conduct by the party to be estopped that intentionally or through culpable negligence influences another justifiable action taken by the induced party, and injury caused by the reliance. Joy Enterprises, Inc. v. Reppel, 537 P.2d 591 (Ariz. 1975). The Reppel court held that when all three of the above elements were present, a lease that falls short of being a valid contract would estop lessors from denying enforceability. Lessor had in that case accepted rent, allowed improvements and allowed lessee to pay some of lessor's debts. Estoppel from denying an oral lease was also held as the proper remedy in Collier v. Foster, 365 So. 2d 1136 (La. 1978), where the plaintiff after being assured he could farm the land through 1979 assumed notes on a tractor.

The Utah Supreme Court has hinted at an acceptance of the estoppel theory in Evershed v. Berry, 436 P.2d 438 (Utah 1968). The Court held that receipt of rent by lessor would suffice to create either a tenancy at will, or at most, one from year-to-year. In a footnote the Court stated that standing by silently while another expended sums for improvements was "a possible basis for involving an estoppel."

In the present action, Cutler, as President of Intermountain, represented to Buffo that it was "okay" to expend monies on the property (Tr. 118). He also made representations to Glen Groo, leasing manager of MFT, that a lease agreement sufficiently long to protect MFT's interest in equipment had been arranged with Buffo (Tr. 83, BD 52). Groo was satisfied enough with the purported Ute-Cal/Intermountain agreement that he encouraged Buffo to assume Investestate's liabilities. The effect of respondent's actions should clearly be to estop them from denying the existence of a valid lease.

The question of how to provide content to the presumed valid lease is answered by either allowing a continuance of tenancy on same terms and subject to same covenants as in original lease. (In this instance, Investestate's). See Arol Development v. Goodie Brand Packing, 372 N.Y.S.2d 324 (1973), affd. 378 N.Y.S.2d 231. Otherwise, a principle stated by this Court is to look to the terms of the lease, even if invalid, and weigh with other factors to adjust the rights of the parties.

The result of the latter course is to validate the terms of Exhibit 17, the unsigned lease agreement sent by Ute-Cal's counsel (Tr. 72), which was indicated as acceptable to Buffo (BD 25; 64) by Intermountain causing him to forego a possible extension of the Adams lease and expend heavily on improvements.

This testimony at page 64 of Buffo's deposition raises the final theory validating the negotiated lease agreement. Respondents waived their right to execution of their lease. In McKennon v. Anderson, 298 P.2d 492 (Wash. 1956) the court held that plaintiff/tenant was entitled to possession of premises despite the Statute of Frauds. The court held that the failure of appellants to present plaintiff with a formal lease after repeatedly asserting such would be done, waived the necessity for such a document through inducing the respondent to change his position on the face of the agreement.

POINT II

THERE WAS NO VALID SERVICE UNDER THE UTAH UNLAWFUL DETAINER STATUTE.

As the trial court noted at 152, the occupying tenant must be served in order for compliance with the Unlawful Detainer Statutes, §§ 78-36-3; 38-36-6, Utah Code Ann., (1953). Not only must the proper party be served, but the form of the notice is mandated. Thus the 15-day notice to quit held sufficient

in § 78-36-3(2), Utah Code Ann., to terminate a month-to-month tenancy has no effect if served upon one requiring notice under subdivision 78-36-3(5), Utah Code Ann., such notice having to be in the alternative form of performing the covenants or surrendering the premises. Ute-Cal asserts that notice was deficient for both of the above reasons.

This Court has held that an unlawful detainer action is the sole remedy at law for recovery of premises by a tenant for less than life and that a landlord has no cause of action for restitution without having complied with the Unlawful Detainer Statute by giving notice complying with the terms of the statute, American Holding Company v. Hanson, 464 P.2d 592 (Utah 1970). Since Ute-Cal is asserting a lease with a definite period, it does not fall under § 78-36-3(2). If respondents are attempting an action under either § 78-36-3(3) or (5), the statute quite clearly calls for alternative notice. Exhibit 20 is a Notice to Quit and does not list an option to perform to regain status quo ante. The notice is deficient and there is no cause of action in unlawful detainer.

Further, the Court has held that no one other than a tenant of real property for a term less than life can be guilty of unlawful detainer. Holladay Coal Co. v. Kirker, 57 P. 882 (Utah 1899). Disregarding the form of the notice, valid service

must be made upon the tenant. The strict compliance with the service of notice is enforced as rigidly as form requirements, with an eye toward legislative intent, the harshness of the remedy and the summary nature of the proceeding. Perkins v. Spencer, 243 P.2d 446 (Utah 1952); Carstensen v. Hansen, 152 P.2d 954 (Utah 1944).

Appellants allege that there was no valid notice of service as to either form or delivery upon the tenant of the Exchange Club, Ute-Cal. Likewise, mailed service to Buffo as an individual was void as to Ute-Cal for lack of good personal service. Respondent should not be heard to claim surprise or prejudice at these facts, since the record indicates Ms. Halliday informed the servers she could not accept service (Tr. 155). In a like vein, earlier service to Jim Racine, a nonmember of Ute-Cal, was ineffective to create a month-to-month tenancy for Ute-Cal.

In interpreting the strictness to which the notice requirement is held, the Supreme Court held an attempt to comply with an alternative means of service was to no effect even though a copy of service was left at plaintiff's place of business with a suitable person because the statute also required a copy sent through the mail addressed to the tenant. Perkins, supra, at 449. (ruling on former § 104-60-6(2), Utah Code Ann., (1943)). Thus the Court established that actual knowledge of

the recipient with regards to the notice was irrelevant. This stance was stated flatly in Carstensen, supra, at 955:

Under statutes like this, it is not the fact that the party to be notified has actual knowledge of the fact, but it is proof that it has been conveyed to him in the prescribed method, that gives the right of action. (citing cases)

Appellants in the present action have not received a valid notice under any theory of service. No alternative form was used, no agent of the corporation received a copy served personally, and the mail service on Buffo was not in his capacity as a corporate officer (Tr. 135; 152), nor was the mailing simultaneous with effective personal service as required in §§ 78-36-6(2) and (3).

§ 78-36-6 allows three possible types of service of notice to quit. Subsection (1) has not been met. Appellants claim that neither subsection (2) nor (3) have been fulfilled. Subsection (2) requires leaving a copy of service with "some person of suitable age and discretion." Although this might seemingly validate the notices served upon Exchange Club personnel, a cross-reference to Rule 4(e)(4), Utah Rules of Civil Procedure, proves this is not so. The above rule sets the standard for personal service of a corporation in Utah. The section authorizing service by delivery to any person doing business or in charge of a place of business has been defined

by the Court to require more than a mere employee. The person must have significant responsibility with the corporation. Beard v. White, Green & Addison Associates, Inc., 8 U. 2d 423, 336 P.2d 125. Appellants have already shown that the persons served had no relationship to Ute-Cal corporation. Thus there is no service under subsection (2). Subsection (3) allows the same service to a person that must be referenced to Rule 4, Utah Rules of Civil Procedure. In addition, it allows service by affixing a copy in a conspicuous place on the leased property. Respondents did not meet this requirement or any of the options allowed above. There was no valid service on Ute-Cal, either to alter its tenancy or place it into unlawful detainer. The action should be dismissed for lack of service, Carstensen, supra.

POINT III

THE LOWER COURT MADE AN IMPROPER DETERMINATION OF DAMAGES.

Of course, should this Court find no action in unlawful detainer, the question of damages is moot. However, if appellants, either separately or jointly, are held liable for damages, this Court should declare an improper determination of damages.

A. TREBLE DAMAGES ARE NOT MANDATORY UNDER THE UNLAWFUL DETAINER ACT AND ARE UNJUST AND UNNECESSARY IN THE INSTANT CASE.

At least one sister jurisdiction with an unlawful detainer statute substantially the same as Utah's has held

that "absent a showing of malice, wantonness or oppression, treble damages cannot properly be awarded in an action for unlawful detainer." Mecham v. Nelson, 451 P.2d 529 (Id. 1969).

The relevant Idaho statute, I. C., § 6-316, provides:

Judgment - Treble damages - Restitution. - If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and fined the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due.

The Utah Supreme Court, whether influenced by this precedent or not, has recently issued an unlawful detainer decision in which it did not award treble damages, Price Construction Co., Inc. v. Foutz, No. 16688 (Utah May 30, 1980). In that case in which defendant/buyer/appellants were found

guilty in detainer, this Court ordered plaintiff/seller to return a down payment to buyers, but adjusted the amount returned by crediting defendants for improvements and allowing plaintiffs the amount of monthly rent agreed upon. This rental amount was not trebled by detainer.

The equities in the present case argue convincingly against declaring a treble recovery. Appellants were the original aggrieved parties who came to court seeking enforcement of their rights. They made a good faith tender of money into the court while pursuing that remedy. Although this Court may feel that some damages are just, certainly a treble award violates the concept of fundamental fairness. This Court should declare the trebling of unlawful detainer damages discretionary and decline to do so in this case.

Appellants should also be credited for the improvements they made to respondents' property, (admitted to in trial brief at 21). The credit for improvements should be deducted before trebling, if any, since it goes directly to the reduction of damage loss.

**B. RESPONDENTS SHOULD HAVE NO RECOVERY
FOR THE PERIOD AFTER MARCH 3, 1980.**

Appellants were charged by the court for \$936.00 rent, trebled, for the month of April 1980. This amount should be excluded. Appellants were prohibited from vacating the

premises by a Writ of Attachment entered by the Clerk of the Court on March 28, 1980 and served March 31, 1980 at respondents' request.

Appellant Buffo was physically restrained from removing his personal property from the premises by the police. Whereas, respondents admit that appellants removed their property from the leased premises as soon as respondents' restraint allowed, they should not be held liable for their failure to vacate.

CONCLUSION

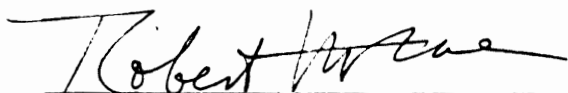
Appellants have quit the contested premises and do not seek repossession; however, this Court should declare that Ute-Cal had a legal or alternately an equitable right to the quiet enjoyment of those premises during the period disputed. This right was not terminated by any service of notice valid under the Utah Unlawful Detainer Statute. This lack of a substantive right on the procedural deficiencies involved preclude an award of damages to respondent.

Should the Court uphold the lower court's finding of law and fact, the amount of damages should be reduced. The Court should declare discretionary treble damages unfair under the circumstances and make a proper offset for improve-

ments to respondent's real property.

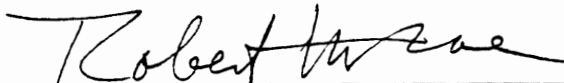
Appellants respectfully request the above relief.

RESPECTFULLY SUBMITTED this 5th day of September,
1980.



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MAILED OR HAD DELIVERED two copies of the foregoing
Appellant's Brief this 5th day of September, 1980, postage
prepaid, to Gordon Strachan of Prince, Yeates & Geldzahler,
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