

1980

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

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,

vs.

INTERMOUNTAIN STOCK EXCHANGE,

Defendants/Respondents.

INTERMOUNTAIN STOCK EXCHANGE,

Third Party Plaintiff/
Respondents,

vs.

PETER BUFFO,

Third Party Defendant/
Appellant.

Case No. 17063

BRIEF OF RESPONDENTS INTERMOUNTAIN STOCK EXCHANGE
AND EXCHANGE ASSOCIATES

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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FILED

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STATEMENT OF THE NATURE OF THE CASE

Respondent INTERMOUNTAIN STOCK EXCHANGE ("INTERMOUNTAIN") regained possession of the basement of the Intermountain Stock Exchange Building in Salt Lake City after an unlawful detainer action, and UTE-CAL LAND DEVELOPMENT ("UTE-CAL") and PETER J. BUFFO ("BUFFO") appealed.

DISPOSITION IN THE LOWER COURT

The Honorable James S. Sawaya, in the Third District Court of Salt Lake County, Utah, heard the case without a jury on March 6th and 7th, 1980. After service of a Notice to Quit on December 12, 1979, appellant BUFFO filed a declaratory judgment action on December 31, 1979 seeking to establish the existence of a lease. The lower court granted accelerated consideration of respondent INTERMOUNTAIN's unlawful detainer counterclaim. Judge Sawaya found that appellant BUFFO had neither assumed a prior, terminated lease for the same premises nor negotiated a new lease with respondent INTERMOUNTAIN. The Memorandum Decision, Findings of Fact, Conclusions of Law and Judgment (Unlawful Detainer) held that appellant BUFFO's month-to-month tenancy had been properly terminated when he was duly served with Notice to Quit under Utah's Unlawful Detainer Statutes, 78-36-1 through 78-36-11 U.C.A. 1953, as amended. The lower court granted respondent INTERMOUNTAIN immediate possession of the premises and awarded the statutory treble damages for the period of appellant BUFFO's unlawful detainer from January 1, 1980, until appellant BUFFO vacated the

RELIEF SOUGHT ON APPEAL

Appellant BUFFO filed a Notice of Appeal on May 5, 1980, seeking a reversal of the April 3, 1980 Judgment that he was unlawfully detaining respondent INTERMOUNTAIN's premises after January 1, 1980. Appellant BUFFO does not seek repossession of the premises. Rather, appellant BUFFO hopes to overturn the award of statutory treble damages in the amount of \$13,688.00 (R. 234) made to the respondent INTERMOUNTAIN by Judge Sawaya.

If the lower court's determination of the unlawful detainer issues is upheld, appellant PETE J. BUFFO seeks declaration from this Court that he is not personally liable for damages awarded and already paid. Alternatively, appellant BUFFO seeks reduction in the damages awarded by the trial court.

Respondent INTERMOUNTAIN respectfully requests this Court to affirm the Judgment of the lower court.

STATEMENT OF FACTS

Rule 75(p) (2) (d), Utah Rules of Civil Procedure requires that the appellant's brief contain "a concise statement of the material facts of the case citing the pages of the record supporting such statement." However, appellant does not once cite the Record in his Statement of Facts.

The Statement of Facts in appellant BUFFO's Brief is controverted by respondent INTERMOUNTAIN with references to the pages of the Transcript on Appeal and the Exhibits. Appellant BUFFO has failed to refer to the lower court's Findings of Fact and supporting Transcript on Appeal and Exhibits

necessary for the resolution of this dispute. Although appellant BUFFO's Brief attacks Judge Sawaya's Findings of Fact, there are no citations to the testimony at trial. Instead, there are inappropriate citations to the depositions of witnesses who appeared at the two-day trial. Such misstatements, omissions and detailed citations to BUFFO's deposition are puzzling, for appellant BUFFO apparently objects to only one aspect of the lower court's decision - the provision for treble damages.

On August 1, 1976, INTERMOUNTAIN leased a portion of the basement of its Exchange Building, at 39 Exchange Place, Salt Lake City, Utah, to Investestate, Inc., ("INVESTESTATE"), a publicly held Utah corporation (R. 332, Defendant's Exhibit No. 1, R. 390-1). INVESTESTATE operated a private club on the premises (R. 332).

The INVESTESTATE lease was to run for a period of two years - from August 1, 1976, to July 31, 1978 (Defendant's Exhibit No. 1, Article II, Section 1). The lease specifically provided that INVESTESTATE could not assign the lease without "the express written consent of the Landlord (INTERMOUNTAIN)" (Defendant's Exhibit No. 1, Article VI, Section 4). The lease also provided that INVESTESTATE had an option to extend the initial term for an additional five-year term by giving written notice to INTERMOUNTAIN of its intent to do so at least six months prior to the expiration of the original term (Defendant's Exhibit No. 1, Article XVII).

INVESTESTATE was unable to operate profitably and was forced to breach its lease in 1977 (R. 441, also admitted by appellant BUFFO at Page 3 of Appellant's Brief). In October of 1977, INTERMOUNTAIN terminated INVESTESTATE's lease for failure to pay rent (Trial Court's Findings of Fact No. 4; Defendant's Exhibit No. 2; R. 333; R. 392). INVESTESTATE was allowed to remain as a month-to-month tenant until it abandoned the premises in May of 1978. (Trial Court's Findings of Fact No. 4; R. 225-26; R. 334). As of the date of INVESTESTATE's abandonment, over \$2,000 was past due as rent. (Defendant's Exhibit No. 2). This amount was reduced to judgment against INVESTESTATE in November, 1978 (R. 395). That amount was never paid to the landlord INTERMOUNTAIN either by INVESTESTATE (R. 395) or by BUFFO (R. 348) though BUFFO admits he promised to pay that judgment amount (R. 464-465).

During the first week of June, 1978, appellant BUFFO took possession of the abandoned premises without the prior consent or knowledge of INTERMOUNTAIN. (Trial Court's Findings of Fact No. 6; R. 226; R. 335-336). Appellant BUFFO informed INTERMOUNTAIN, through its President, Reo Cutler, that he, BUFFO, had taken over the premises from INVESTESTATE and that he wished to negotiate a lease agreement with INTERMOUNTAIN for the premises. (Trial Court's Findings of Fact No. 6; R. 226; R. 335-6). BUFFO stated expressly that "I told Mr. Cutler that in reference to the existing lease that was presently on the property, there was no use discussing it, because if

there was a problem on it, I was not going to buy a lawsuit" (R. 445). Reo Cutler, as President of INTERMOUNTAIN confirmed with BUFFO that a new lease would be necessary since the INVEST-ESTATE lease had been terminated in October of 1977. (Trial Court's Findings of Fact No. 7; R. 226; R. 335-6). Correspondence and proposed lease agreements were exchanged. (Trial Court's Findings of Fact Nos. 8, 9, and 11; R. 226-27; Defendant's Exhibits No. 3, 4 and 5). The essential terms proposed by each of the parties were in substantial conflict. (Defendant's Exhibit No. 8; Trial Court's Conclusion of Law No. 2; R. 228-29; R. 385-6; R. 400; R. 452). No agreement on the terms was ever reached and hence no lease was ever executed between INTERMOUNTAIN and UTE-CAL or BUFFO. (Trial Court's Findings of Fact No. 11; R. 227; Trial Court's Conclusion of Law No. 2; R. 228-29; R. 339-341).

Neither appellant BUFFO, UTE-CAL nor any other entity controlled by the felon PETE J. BUFFO made timely rent payments for the first three months BUFFO occupied the basement of the Intermountain Stock Exchange Building - June, July, and August of 1978. (Trial Court's Findings of Fact No. 12; R. 227; R. 477). When BUFFO finally sent a check for past due rent on August 3, 1978, the check bounced. (R. 343). Following the return of BUFFO's rent check for insufficient funds, Reo Cutler, the President of INTERMOUNTAIN, had a telephone conversation with Mr. Buffo. (R. 332; 343). During this telephone conversation, Mr. Cutler told "Mr. Buffo in August of 1978 that there would

be no further negotiation regarding the lease." (R. 344). This conversation implemented the decision of the Board of Trustees of INTERMOUNTAIN that they ". . . were just not interested in discussing the lease further until we (INTERMOUNTAIN) found out whether he (BUFFO) was going to pay his bills." (R. 344).

The brother-in-law of PETE J. BUFFO, Dr. Silvio Fasio, who originally introduced BUFFO to INTERMOUNTAIN, was a member of the Board of Governors of the Intermountain Stock Exchange when this decision to terminate lease negotiations was taken. (R. 487-8).

During the next nine months, BUFFO defaulted repeatedly on the rental payments due INTERMOUNTAIN on the month-to-month tenancy. (Defendant's Exhibit No. 6). BUFFO was served with a Notice to Quit or Pay Rent on three separate occasions. (Trial Court's Findings of Fact No. 14; R. 228; Defendant's Exhibits 22, 23 and 24). BUFFO admits receipt of these notices pursuant to the Unlawful Detainer Statutes. (R. 462; 471).

In August, 1979, INTERMOUNTAIN accepted an offer from co-respondent Exchange Associates to purchase the Intermountain Stock Exchange Building. (Findings of Fact No. 15; R. 228). The purchase was completed on October 15, 1979. (R. 372). After the purchase, Exchange Associates attempted to negotiate a lease of the basement premises with BUFFO and UTE-CAL. (Findings of Fact No. 15; R. 228; R. 372-376). Like INTERMOUNTAIN, Exchange Associates were unable to agree upon terms with BUFFO.

(Findings of Fact No. 15; R. 228; R. 377). Draft leases were prepared by Exchange Associates but never signed or accepted by BUFFO. (R. 376-7).

Exchange Associates served a Notice to Quit the premises on December 12, 1979. (Findings of Fact No. 16; R. 228; R. 378; R. 482). The December 11, 1979 Notice to Quit was served by Deputy Constable R. J. Reitz (Defendant's Exhibit No. 20). The Notice was personally delivered to the Manager of the private club BUFFO operated in the basement of the Intermountain Stock Exchange Building. (R. 482; Defendant's Exhibit No. 20). A copy was posted in the door of the premises. (R. 482; Defendant's Exhibit No. 20). A copy was mailed to BUFFO. (Defendant's Exhibit No. 20). A copy was delivered to counsel to BUFFO, Robert M. McRae and Loni F. DeLand, who had accepted notice before, apparently on behalf of BUFFO. (R. 482).

I. APPELLANT BUFFO'S NOTICE OF APPEAL FROM THE UNLAWFUL DETAINER JUDGMENT WAS NOT FILED WITHIN TEN DAYS, AS REQUIRED BY 78-36-11, UTAH CODE ANNOTATED.

The jurisdictional question presented in this case is whether Notice of Appeal filed on May 5, 1980, challenging an unlawful detainer judgment entered on April 3, 1980, was timely filed. If the Notice of Appeal was not timely filed, this Court should dismiss this appeal for lack of jurisdiction.

On June 30, 1980, respondent INTERMOUNTAIN raised this jurisdiction question by filing a Motion to Dismiss the Appeal pursuant to Rule 73B(a)(1), Utah Rules of Civil Procedure. On August 11, 1980, this Court deferred its ruling on the Motion and directed the parties to address the question in their briefs.

Respondent INTERMOUNTAIN's position is: On April 3, 1980, Judge Sawaya signed the Judgment entitled "Unlawful Detainer." (R. 233). The Judgment was entered later that day, April 3, 1980. (R. 233). On April 11, 1980, appellant BUFFO filed an "Objection to Judgment." (R. 238). Such a pleading is not authorized by the Utah Rules of Civil Procedure. This Court has held that such unauthorized pleadings are "abortive under the Rules." Utah State Employee's Credit Union v. Riding, 24 Utah 2d 211, 469 P.2d 1 (1970). Thus, the pleading is without effect and did not act to stay the ten-day appeal period provided in Section 78-36-11. Even if this pleading had stayed the ten-day period, Judge Sawaya affirmed the April 3, 1980 Judgment on April 23, 1980. So the ten-day appeal period would have run in any event on April 26, 1980. On May 5, 1980, thirty-two days after the unlawful detainer Judgment was entered, appellant BUFFO filed a Notice of Appeal. (R. 280-1). Section 78-36-11 specifically requires that an appeal from an unlawful detainer judgment must be taken within ten days: "Either party may, within ten days, appeal from the judgment rendered." This shorter period for filing a Notice of Appeal implements the policy of the Unlawful Detainer Statute in Utah of accelerated resolution of disputed possession of real property. Since the ten-day appeal period had expired on April 14, 1980, (three weeks before BUFFO's appeal was filed), this Court is without jurisdiction to hear the instant appeal, and it should be dismissed.

A. The Shorter Ten-Day Appeal Period Provided in 78-36-11, Utah Code Annotated, Rather Than The General One Month Appeal Period Provided in Rule 73(a), Utah Rules of Civil Procedure Controls in This Case.

BUFFO appealed from Judge Sawaya's April 3, 1980 Unlawful Detainer Judgment on May 5, 1980. (R. 280-1). BUFFO must argue that the appeals procedure in the instant case is governed by Rule 73(a), Utah Rules of Civil Procedure, which provides for a one month period within which to file a Notice of Appeal. BUFFO's argument fails because Rule 73(a) creates a one-month period for appeal "unless a shorter time is provided by law." Section 78-36-11 unquestionably establishes such a "shorter time" in unlawful detainer cases. Specifically, the statute provides that: "(e)ither party may, within ten days, appeal from the judgment rendered." (emphasis added).

The Utah Supreme Court has consistently applied the ten-day limitation to unlawful detainer actions rather than the general one month provision for other appeals. Hunsaker v. Harris, 37 Utah 226, 109 P. 1 (1910). In Madsen v. Chournos, 102 Utah 247, 129 P.2d 986 (1942), a landlord successfully brought an unlawful detainer action against her tenant. The landlord moved to dismiss the tenant's appeal "on the ground that the action is an unlawful detainer proceeding and that the appeal . . . was not taken within ten days as required by Section 104-60-14, R.S.U., 1933" (at 986). (the predecessor statute to Section 78-36-11, U.C.A., 1953). This Court dismissed the appeal after Madsen, holding that the appeal "should have been taken within the period of ten days." (at 986). In the more

recent case of Coombs v. Johnson, 26 Utah 2d 8, 484 P.2d 155 (1971), this Court acknowledged that Section 78-36-11 specified a ten-day period in which to file for appeal for an unlawful detainer judgment. Since the tenant in Coombs had not appealed within ten days, its appeal was dismissed by this Court.

Appellant BUFFO could argue that the one month limit should apply because Judge Sawaya's Findings of Fact supporting the unlawful detainer Judgment reflect upon other issues, such as the existence of an alleged underlying lease. The Utah Supreme Court has explicitly rejected such an argument in a case remarkably similar to the instant case. In Brandley v. Lewis, 97 Utah 217, 92 P.2d 338 (1939), a landlord obtained an unlawful detainer judgment. The tenant appealed, but not within ten days. When respondent/landlord filed a Motion to Dismiss the appeal, appellant argued that the ten-day period was not the applicable limitation period. Appellant tenant in Brandley reasoned that because the unlawful detainer judgment necessitated an interpretation of underlying lease terms, the judgment involved issues other than unlawful detainer. The Supreme Court rejected the tenant's argument:

To determine therefore whether defendant was in unlawful detainer the Court must determine the meaning and effect of the [lease terms], but that does not change the action from one in unlawful detainer. It is merely deciding a question the decision of which is necessary in making a determination as to whether defendant is in unlawful detainer. (at 339-340).

The Utah Supreme Court found that the ten-day limitation was applicable and dismissed the appeal.

Judge Sawaya's Memorandum Decision, Findings of Fact, Conclusions of Law, and the resulting Unlawful Detainer Judgment considered in light of the rule of Brandley establish that BUFFO's appeal procedure was governed by 78-36-11 (ten days) rather than Rule 73(a) (one month).

Appellant BUFFO could also argue that the Utah Supreme Court has not used the ten-day limitation period when the unlawful detainer judgment was coupled with a judgment for counterclaim liability or a declaratory judgment. Ottenheimer v. Mountain States Supply Co., 56 Utah 190, 188 P. 1117 (1920); Dunbar v. Hansen, 68 Utah 398, 250 P. 982 (1926). Of course, there is no such separate count in the case at bar: the unlawful detainer issues were severed from the plaintiff BUFFO's action for declaratory judgment by the trial court. Judge Sawaya's Memorandum Decision clearly establishes that the Judgment focused on unlawful detainer. Judge Sawaya's decision was prefaced by the statement: "On the issue of unlawful detainer, the Court finds from a preponderance of greater weight of the evidence as follows . . ." (R. 203). Furthermore, the Judgment of April 3, 1980, is entitled "Judgment (Unlawful Detainer)". (R. 233-4). Since the unlawful detainer judgment stands by itself, the ten-day limitation of 78-36-11, Utah Code Annotated controls.

B. Failure to Timely File a Notice of Appeal is a Jurisdictional Defect Requiring this Court to Dismiss Buffo's Appeal.

Utah and the federal courts follow the firmly held rule that a Notice of Appeal must be timely filed or the appellate

court is without jurisdiction to hear the appeal. This Court has upheld this requirement that a Notice of Appeal must be timely filed even when presented with assertions of substantial prejudice to the appellant or inadvertence or incompetence of counsel. Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955); Galanis v. Moyes, 16 Utah 2d 181, 397 P.2d 988 (1965); Estate of Ratliff v. Conrad, 19 Utah 2d 346, 431 P.2d 571 (1967); In re Lynch's Estate, 123 Utah 57, 254 P.2d 454 (1953).

Section 78-36-11, Utah Code Annotated, provides: "Either party may, within ten days, appeal from the judgment rendered." The Utah Supreme Court has strictly enforced the ten-day limitation period. In Coombs v. Johnson, 26 Utah 2d 8, 484 P.2d 155 (1971), an appellant filed a Notice of Appeal from a July 1 judgment on July 15. The court held that the appeal was not timely, and that therefore the Supreme Court was without jurisdiction to hear the appeal. Justice Tuckett, for a unanimous Court, stated: "It is apparent that the appeal was not taken within the time prescribed by Section 78-36-11, Utah Code Annotated, 1953, and this Court is without jurisdiction to entertain it." (at 155).

In a more recent case, Fernandez v. Purdue, 30 Utah 2d 389, 518 P.2d 684 (1974), an unlawful detainer judgment was entered on April 3, 1973, and defendants filed their Notice of Appeal from that judgment on April 30, 1973. Chief Justice Callister held that: "This appeal was not taken within ten days, the time provided in Section 78-36-11, Utah Code Annotated,

1953. This Court is without jurisdiction to entertain the instant appeal." (at 685).

In another recent case, Vickery v. Kaiser, 556 P.2d 502 (1976), a tenant appealed from an unlawful detainer judgment. This Court observed that the unlawful detainer statutes (and specifically 78-36-11) require that "an appeal must be taken within ten days from the judgment rendered" (emphasis added) (at 503). Justice Elliott, for a unanimous court, held that "the appeal in this matter was not taken within ten days after judgment . . . thus, this Court did not acquire jurisdiction to determine the matters." (at 503).

In the instant case, the Clerk of the Court entered Judge Sawaya's Unlawful Detainer Judgment in the Register of Actions on the 3rd day of April, 1980. (R. 233). Appellant BUFFO filed his Notice of Appeal on May 5, 1980. (R. 280-1). The Court has no jurisdiction to entertain this appeal since it was not filed "within ten days", the time provided in Section 78-36-11.

C. Filing an Unauthorized "Objection to Judgment" Does Not Toll the Ten-Day Limitation Period For Filing a Notice of Appeal in an Unlawful Detainer Action

Appellant BUFFO may argue that the appeal period did not end on April 14, ten days after the April 3, 1980 date of entry of the Judgment, because he filed an "Objection to Judgment" on April 11, 1980. (R. 238-9). There is no such pleading or document entitled "Objection to Judgment" authorized or permitted by either the Utah Rules of Civil Procedure or the Forcible Entry and Detainer Statutes. Such a document could not terminate or stay the running of the time for appeal.

Appellant BUFFO may try to argue that the "Objection to Judgment" was a motion made pursuant to Rules 50, 52, or 59, Utah Rules of Civil Procedure, even though none of those rules or the relief authorized pursuant to them was mentioned in the Objection to Judgment. Motions filed pursuant to Rules 50, 52 and 59 are, of course, the only means for tolling the time for appeal provided in Rule 73.

There are two reasons why this potential argument by appellant BUFFO should be rejected. First, to appeal a judgment entered in a forcible entry and detainer action, the appellant must appeal pursuant to Section 78-36-11, not Rule 73. Section 78-36-11 does not contain provisions analogous to Rules 50, 52 or 59. Instead, in consonance with the other accelerated procedures authorized to obtain repossession of real property unlawfully held, the only remedy from an adverse judgment is an appeal within ten days. BUFFO did not do that and cannot now be heard to argue that his inartful attempt to file a post-judgment motion, pursuant to the inapplicable Rule 73, stayed the time for filing an appeal under the proper statute, Section 78-36-11.

Second, this Court has recently held that the pattern of regularity of procedure provided by the Rules of Civil Pro-
stions presented and the finality of actions. In Peay v. Peay, 607 P.2d 841 (Utah 1980), the defendant filed an unauthorized "Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment." Justice Hall stated: "It is important to note in this regard that a party cannot extend the

time for filing an appeal by simply filing a 'Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment.'" (at 843)

BUFFO's unauthorized pleading is rendered ineffective by the rule announced in Utah State Employees' Credit Union v. Riding, 24 Utah 2d 211, 469 P.2d 1 (1970):

Under the record here, we are unaware of any such motion under our rules. . . . We think the motion to reconsider the motion to vacate the judgment is abortive under the rules We conclude that the judgment of foreclosure, unappealed from, must stand absent any timely appeal. (at 3)

The Rules of Civil Procedure were carefully prepared to assure a "just, speedy, and inexpensive determination of every action." (Rule 1, Utah Rules of Civil Procedure). But the rules must be followed. Respondent INTERMOUNTAIN should not be forced to speculate as to the true or intended nature of appellant BUFFO's pleadings. The Supreme Court observed this principle in Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966): " . . . the new rules of procedure . . . were designed to provide a pattern of regularity of procedure which the parties and the courts could follow and rely upon. . . ." (at 663).

The reasoning in Peay, Riding and Drury is sound and controlling in the instant case. Appellant BUFFO's Objection to Judgment is "abortive under the rules" and therefore did not stay the time for filing the Notice of Appeal.

Finally, even if the Objection to Judgment did toll the ten-day limitations period (as appellant BUFFO may contend), the May 5, 1980 Notice of Appeal still was not timely filed.

After Judgment was entered on April 3, 1980, BUFFO filed his Objection to Judgment on April 11, 1980. The limitation period was running for that interval (eight days). If the Objection to Judgment did indeed toll the ten-day period on April 11, 1980, it tolled that period only until April 23, 1980, (R. 254) when BUFFO's Objection was rejected by Judge Sawaya and Unlawful Detainer Judgment was reaffirmed. Another twelve days expired before the Notice of Appeal was filed. Thus, even if the limitation period were tolled during the consideration of the Objection to Judgment, the Notice of Appeal was not filed until May 5, 1980 - well after the expiration of the ten-day period.

II. THERE WAS NO VALID ASSIGNMENT OF INVESTESTATE'S LEASE TO UTE-CAL.

Appellant BUFFO proposes two theories to establish the existence of a valid lease between UTE-CAL and PETE J. BUFFO, as tenant, and INTERMOUNTAIN, as landlord. The first theory argues that the INVESTESTATE-Stan Adams lease of August 1, 1976, was effectively assigned to UTE-CAL and PETE J. BUFFO. (Appellant BUFFO's Brief at 6). The purported assignment is Plaintiff's Exhibit No. 31).

A. INVESTESTATE's Lease Was Terminated on October 13, 1977.

The trial court found that INVESTESTATE's lease was terminated on October 13, 1977 (Trial Court's Findings of Fact No. 4; R. 225-26; R. 335), long before the attempted assignment to UTE-CAL and PETE J. BUFFO in May of 1978. (R. 439-440). The October 13, 1977 Notice of Termination of the INVESTESTATE-Stan Adams lease was admitted into evidence at trial as Defendant's Exhibit No. 2. Since the prior, INVESTESTATE's lease was terminated on October 13, 1977, the attempted assignment to UTE-CAL and PETE J. BUFFO in May of 1978 was invalid.

had been terminated on October 13, 1977, the trial court properly concluded, as a matter of law, that no valid assignment of the lease could have occurred. (Conclusions of Law No. 1; R. 228). Appellant BUFFO cannot cite to any evidence in the Record to contradict the trial court's Findings of Fact No. 4 (R. 225) that the INVESTESTATE-Stan Adams lease was validly terminated in October, 1977, over six months before the purported assignment to UTE-CAL and BUFFO. This finding of the trial court should therefore be sustained as there is no contradicting evidence much less evidence which preponderates against the trial court's Findings of Fact. Elton v. Utah State Retirement Board, 28 Utah 2d 368, 503 P.2d 137 (1972).

B. Even if The Lower Court's Finding of the October 13, 1977, Termination is Overturned, No Valid Assignment of the INVESTESTATE Lease Could Have Occurred.

The purported assignment of the INVESTESTATE-Stan Adams lease to UTE-CAL and PETE J. BUFFO was invalid because it violated the express terms of the lease. (Deefendant's Exhibit No. 1, Plaintiff's Exhibit No. 31). Article VI, Section 4, of the lease precludes any assignment without the express written consent of the landlord, INTERMOUNTAIN. (Defendant's Exhibit No. 1). The record shows that INTERMOUNTAIN never gave such consent. (R. 335), and appellant BUFFO has not attempted to prove otherwise. Consequently, the May 1978 purported assignment by INVESTESTATE-Stan Adams to UTE-CAL and PETE J. BUFFO is in violation of the terms of the previously cancelled lease between INTERMOUNTAIN as landlord and INVESTESTATE-Stan Adams as tenant. The purported assignment transferred no rights to as INVESTESTATE had none to transfer.

C. Even if the INVESTESTATE Lease Was Not Terminated On October 13, 1977, It Expired By Its Own Terms on July 31, 1978.

The INVESTESTATE lease provided for a two-year term that ended on July 31, 1978 (Article II of Defendant's Exhibit No. 1). The tenant (INVESTESTATE-Stan Admas) could have extended the lease for an additional five years by giving written notice to the landlord INTERMOUNTAIN at least six months prior to the expiration of the lease (Article XVII of Defendant's Exhibit No. 1). However, the President of INVESTESTATE, Stan Adams, stated unequivocally at trial that he did not "exercise the option to extend that lease." (R. 391).

An option to renew a lease must be exercised by the tenant in order to effectuate the renewal. Aiken v. Less Taylor Motor Co., 171 P.2d 676 (Utah 1946). In Utah, the notice to exercise a tenant's right to extend a lease must conform to the precise terms required by the lease agreement. I.X.L. Furniture & Carpet Installation House v. Berets et al., 91 P. 279 (Utah 1907). If the renewal option terms are not complied with, equity cannot intervene to protect the tenant from its own failure to give the required notice of its option to renew the lease. Host International Inc. v. Summa Corp., 583 P.2d 1080 (Nev. 1978).

INTERMOUNTAIN, of course, never received any written notice of intent to extend the lease from INVESTESTATE as none was ever sent. (R. 391). UTE-CAL and PETE J. BUFFO could not have extended the INVESTESTATE-Stan Adams lease because notice to landlord INTERMOUNTAIN had to be given at least six months

prior to the expiration of the lease. (Defendant's Exhibit No. 1). The lease expired on July 31, 1978, and therefore any notice of intent to extend would have to have occurred by January 30, 1978. (Defendant's Exhibit No. 1). However, it was not until May, 1978, four months after the notice date, that UTE-CAL and PETE J. BUFFO attempted an assumption of the lease. (Defendant's Exhibit No. 1, R. 439-440, Appellant BUFFO's Brief, Page 3). Consequently, the final date for extending the lease had expired before UTE-CAL and PETE J. BUFFO even attempted to extend the original term of the INVESTESTATE-Stan Adams lease. (Defendant's Exhibit No. 1, Appellant BUFFO's Brief, Page 7). Therefore, even if the lease continued in existence after the October 13, 1977 Notice of Termination (Defendant's Exhibit No. 2) the lease expired by its own terms on July 31, 1978 and could not have been extended in May, 1978. (Defendant's Exhibit No. 1).

III. INTERMOUNTAIN AS LANDLORD AND UTE-CAL AND PETE J. BUFFO AS TENANT NEVER AGREED UPON LEASE TERMS.

Appellant BUFFO's second theory is that a valid lease was created by a set of negotiations which occurred between INTERMOUNTAIN and UTE-CAL from June to August, 1978.

Appellant BUFFO does not argue that a written lease agreement exists. The testimony of INTERMOUNTAIN's President, Reo Cutler, (R. 348, 353) and that of PETE J. BUFFO (R. 459) confirm that there never was a written lease agreement acceptable to and signed by both parties. The absence of any written agreement between the parties creates a fatal statute of fraud

problem for the appellant BUFFO: Utah law provides that any lease for a term longer than one year is unenforceable unless reduced to a signed writing. Section 25-5-3, U.C.A. Furthermore, the trial court found, based upon two days of testimony by eleven witnesses and thirty-one exhibits, that no recognized exception to the statute of frauds had been established by UTE-CAL and PETE J. BUFFO. (Trial Court Conclusion of Law No. 4; R. 229).

Appellant BUFFO must argue that the statute of frauds does not bar his claims. Appellant BUFFO addresses the issue of whether an exception to the statute of frauds applies, (Appellant BUFFO's Brief at Page 8) but, in so doing, appellant BUFFO has overlooked a prior question. Before the statute of frauds becomes relevant, appellant must establish that there was in fact, a contract, which was not reduced to a signed writing. BUFFO, at trial, could not establish the existence of an underlying contract. The parties were far apart on all terms, including rent, term and the consequences of a sale of the building. (Defendant's Exhibit Nos. 5, 8 and 16; R. 453) Since there was no contract, or meeting of the minds, the Court needn't address the question of whether it should be in writing. Skeen v. Van Sickle, 15 P.2d 344 (Utah 1932). In Skeen, the heirs of a landowner alleged the existence of a contract wherein the landowner had agreed that her land would revert to all her heirs as tenants in common. The defendants raised the statute of frauds as a defense. The court found that the statute of

frauds was irrelevant because the plaintiffs had failed to prove the extence of the underlying contract: "The finding of no contract at all eliminates any question as to a requirement that it should be in writing" (at 346).

A. There Was No Underlying Contract Which Would Make The Statute of Frauds a Relevant Consideration.

The trial court reached the legal conclusion that no written lease was signed by the parties (Trial Court Conclusion of Law No. 1; R. 228; R. 352-3). No signed lease was offered at trial and both INTERMOUNTAIN's President (R. 348, 397 and 399) and PETE J. BUFFO confirmed that no such lease was ever signed. (R. 459). Consequently, the appellants claim to find the requisite underlying contract in the unsigned, draft agreement which UTE-CAL and PETE J. BUFFO's counsel, Loni F. DeLand sent to INTERMOUNTAIN's counsel, Jon C. Heaton on August 1, 1978. (Defendant's Exhibit No. 5). Appellant BUFFO now asks that this "negotiated lease" be enforced as an exception to the statute of frauds (Appellant's Brief, Page 8).

The August 1, 1978 proposed lease was prepared by counsel to UTE-CAL and PETE J. BUFFO, (R. 384-386, 452) but it cannot be construed as the necessary underlying contract. The trial court found that INTERMOUNTAIN rejected, in writing, the terms of that proposed lease and sent a counterproposal to BUFFO's counsel. (Findings of Fact No. 11; R. 227; R. 345-6; R. 384-6). Neither party's proposal was accepted by the other party (Court's Findings of Fact No. 11; R. 227, R. 346, 348, 459). Since the parties' proposals differed substantially

(Defendant's Exhibit No. 8) no meeting of the minds has occurred (Trial Court's Conclusion of Law No. 2; R. 228-29).

Since no contract was ever agreed upon by the parties, the Court need not address the question of whether the contract had to be in writing. The statute of frauds simply doesn't apply.

B. Even If a Contract Existed, It Is Within The Statute of Frauds To Which There Is No Applicable Exception.

If any contract existed, as appellant BUFFO argues, it was a lease for a period of longer than one year and, thus, within the statute of frauds, Section 25-5-3, U.C.A. The trial court reached the legal conclusion that "UTE-CAL and/or BUFFO have failed to establish any recognized exception to the statute of frauds" (Conclusion of Law No. 4; R. 229). In an attempt to have this Court overturn that decision, appellant BUFFO argues that the parties' actions might establish three exceptions to the statute of frauds: part performance, equitable estoppel, or waiver. The decisions of this Court, however, hold that none of these possible exceptions is applicable to the facts of the instant case.

1. Part Performance. In Ravarino v. Price, 260 P.2d 570 (Utah 1953), this Court recognized the "part performance" exception to the statute of frauds. The Court outlined the circumstances under which part performance would obtain: acts will constitute sufficient part performance if they are clearly referable to some contract existing between the parties, if they relate to the subject matter in dispute and as a result of these acts, the plaintiff has been defrauded. Such circumstances are not evident in the case at bar: appellant BUFFO has failed to

prove the existence of any underlying contract, (Trial Court's Findings of Fact No. 11; R. 227; Defendant's Exhibit No. 8) and no fraud has been alleged by either party. To establish the part performance exception to the statute of frauds, BUFFO and/or UTE-CAL would have had to demonstrate that their part performance claim was referable only to the alleged oral lease. Price v. Lloyd, 86 P. 767 (Utah 1906). The acts performed by BUFFO and/or UTE-CAL - possession and periodic late payment of rent - are not referable only to the alleged oral lease, but rather are entirely consistent with a month-to-month tenancy existing between INTERMOUNTAIN and BUFFO and/or UTE-CAL.

Appellant BUFFO cites Adams v. Taylor, 391 P.2d 837 (Utah 1964) in support of its "part performance" argument. In Adams, tenants made extensive improvements, timely paid monthly rent for two years in reliance upon an oral contract to lease the premises for five years; more importantly, tenants had a memorandum signed by the landlord evidencing their agreement. There is no such written agreement in this case, and the trial court expressly found that BUFFO had failed to prove any contract other than a month-to-month tenancy. (Trial Court's Findings of Fact No. 11; R. 227; Conclusions of Law No. 2; R. 228-29). Consequently the "actions" by BUFFO, including late rent payments made by UTE-CAL and BUFFO merely confirm the existence of a month-to-month tenancy rather than any lease.

2. Estoppel. Appellant BUFFO next argues that respondent INTERMOUNTAIN is estopped from asserting the statute of frauds as a defense. (Appellant's Brief at 9). Appellant BUFFO bases

its estoppel argument on two allegations wholly unsupported by evidence at trial. The first unsupported assertion is that INTERMOUNTAIN represented "that it (UTE-CAL) would acquire the real property lease . . ." (Appellant's Brief, Page 9) while the second unsupported assertion is that INTERMOUNTAIN (through its President Reo Cutler) told appellant BUFFO that it was "Okay to expend the monies on the premises" (Appellant's Brief at Page 10). These allegations, however, are contrary to the facts established at trial and the Trial Court's Conclusion of Law No. 6 (R. 226): that the improvements made by UTE-CAL and BUFFO "were made prior to lease negotiations between INTERMOUNTAIN and BUFFO and/or UTE-CAL and after INTERMOUNTAIN's warning to BUFFO not to make such improvements until a written lease agreement was entered into by the parties." (R. 230-31). The evidence supporting the trial court's finding is Reo Cutler's testimony, as President of INTERMOUNTAIN, that he specifically warned PETE J. BUFFO not to make improvements without a lease (R. 337,358) and the improvements were made in June, 1978, while draft leases were not exchanged until August, 1978.

This Court recently emphasised that the trial court has the responsibility of determining disputed issues of fact and in so doing, the fact finder will "necessarily accept the testimony of certain witnesses, discounting conflicting testimony. We do not substitute our belief for theirs unless there is no competent evidence to support the verdict." Fillmore Products v. Western States Paving, 592 P.2d 581, 582 (Utah 1979). The trial court believed the testimony of Cutler and discounted the

testimony of the felon PETE J. BUFFO. Because there is competent evidence to support this finding by the trial court, this Court should not substitute its assessment of transcript testimony for the trial court's appraisal of these two witnesses' credibility.

Furthermore, even if INTERMOUNTAIN did promise to enter into a lease with BUFFO or UTE-CAL, such an oral promise does not estop INTERMOUNTAIN from interposing the statute of frauds as a defense. In Ravarino v. Price, 260 P.2d 570 (Utah 1953), the Utah Supreme Court relied upon the long recognized rule laid down by the United States Supreme Court in Union Mutual Life Insurance Co. v. Mowry, 96 U.S. 544 (1878) regarding estoppel in the context of a promise to perform in the future: "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act" (at 547).

In Ravarino, supra this Court provided an example of such an abandonment of a legal right. This Court cited Waugh v. Lennard, 211 P.2d 806 (Ariz. 1949), where the defendant induced the plaintiff to refrain from commencing an action on a promissory note by representing that he would not invoke the statute of limitations as a bar. In a subsequent action, the defendant did attempt to raise the statute as a bar. The Arizona court held that he was estopped from doing so: by his promise, the defendant had manifested an intent to abandon an existing right.

Appellant BUFFO's Brief does not suggest that any existing right was abandoned by INTERMOUNTAIN. Instead, appellant BUFFO

alleges, again without citation to any supporting evidence, that INTERMOUNTAIN represented that a lease would be executed at some time in the future (Appellant BUFFO's Brief, Page 9). Not only is such an allegation contrary to the evidence (Trial Court's Conclusion of Law No. 6; R. 230, 337), it is insufficient under the Ravarino test to estop INTERMOUNTAIN from asserting the statute of frauds.

INTERMOUNTAIN made no such promise which could function as an abandonment of an existing right (Trial Court's Conclusion of Law No. 5; R. 229-30). Any improvements to the property were made in spite of the warnings by INTERMOUNTAIN's President.

Appellant BUFFO's equitable estoppel argument is further weakened by the Utah Supreme Court's holding in Easton v. Wycoff, 295 P.2d 332 (Utah 1956). In Easton, the Court addressed the question of whether the reliance of the tenant upon the promise of the landlord to execute the written lease in the future would estop the landlord from asserting the statute of frauds as a defense. The Court applied the rule set forth in Ravarino, supra, that a mere refusal to execute a written contract as agreed, does not constitute fraud sufficient to remove the oral promise from the statute of frauds. The court emphasized that: "[The] mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damages occasioned by such refusal." (at

Ravarino and Easton hold that, even if INTERMOUNTAIN promised to execute a lease with UTE-CAL (a promise which the trial court concluded had never been made), such a promise does not estop INTERMOUNTAIN from raising the statute of frauds as a defense.

3. Waiver. Appellant BUFFO's final argument on the statute of frauds issue alleges that respondent INTERMOUNTAIN "Waived their right to execution of their lease." (Appellant's Brief at 11). Appellant BUFFO's entire argument is based upon an isolated case from a foreign jurisdiction. In that case, McKennon v. Anderson, 298 P.2d 492 (Wash. 1956), a tenant made improvements after the parties had agreed upon the terms of the lease. The Washington Supreme Court held that since a written contract existed, the lack of formalities did not defeat the validity of that contract. The landlord was not allowed to assert the lack of formalities as a defense to the existence of the lease. McKennon is neither controlling nor particularly persuasive: unlike the tenant in McKennon, UTE-CAL and BUFFO have failed to prove any underlying contract, either formal or informal. In McKennon, an offer and acceptance of the terms had occurred. Instead of a question of the compliance with certain formalities of execution, in the instant case, there is no evidence whatsoever of any agreement and the trial court properly so found.

IV. BUFFO AND UTE-CAL WERE VALIDLY SERVED UNDER 78-36-6, UTAH CODE ANNOTATED.

Appellant BUFFO next attacks the trial court's conclusion that the tenant, be it the felon PETER J. BUFFO or

his personal corporation, UTE-CAL, were duly and properly served with the Notice to Quit on December 12, 1979 (Trial Court's Findings of Fact No. 8; R. 231).

Section 78-36-3(2), Utah Code Annotated, 1953, governs when a month-to-month tenant is in unlawful detainer. Appellant BUFFO seeks to avoid this statute by announcing that it was not a month-to-month tenant: "Since UTE-CAL is asserting a lease with a definite period, it does not fall under 78-36-3(2)." (Appellant's Brief at 12). But this bald assertion was rejected by the trial court and BUFFO does not cite in its Brief any conflicting evidence admitted at trial. (Trial Court's Finding of Fact No. 13; R. 227-28; Trial Court's Conclusion of Law No. 7; R. 231). The trial court found that the absence of a lease between INTERMOUNTAIN and UTE-CAL and/or BUFFO established a month-to-month tenancy. (Findings of Fact No. 13; R. 227-8). Therefore, 78-36-3(2) Utah Code Annotated, 1953, governs the form of the Notice to Quit in the instant case. Defendant's Exhibit No. 20 - the December 11, 1979 Notice to Quit was in the proper form to terminate the month-to-month tenancy. (Findings of Fact No. 16; R. 228).

Appellant BUFFO next argues that service of the Notice to Quit was inadequate. (Appellant's Brief at 11) for failure to comply with Section 78-36-6. The Court should reject this argument as appellant BUFFO in his January 22, 1980 Answer to Defendant's (INTERMOUNTAIN) Counterclaim at paragraph 10 (R. 49-50) "admit(s) service." At trial counsel for BUFFO sought

to avoid that admission (R. 403-05) but did not move to amend the answer and the trial court found that on "December 12, 1979, Exchange Associates caused a Notice to Quit to be served upon UTE-CAL and BUFFO, which Notice required UTE-CAL and BUFFO to quit the premises on or before the last day of December, 1979." (R. 228).

In addition, appellant BUFFO at trial stipulated, through his counsel that the Constable "served a copy of this notice . . . in accordance with his affidavit." (R403-04). Defendant's Exhibit 20 is the Constable's Affidavit of Service and he swears that on December 12, 1979, he "posted on door and mailed a copy to each at the usual place of business of said defendants."

Therefore, Section 78-36-6 was precisely complied with as to both UTE-CAL and BUFFO since copies of the Notice to Quit were posted on the door and mailed. Perkins v. Spencer, 243 P.2d 446, 451 (Utah 1952).

Appellant BUFFO next argues that Rule 4 of the Utah Rules of Civil Procedure overrides the specific service requirements of Section 78-36-6. Appellant BUFFO neither cites any authority for this proposition nor offers any particularly good reason why the carefully drafted unlawful detainer statute service provisions should be modified by a cross-reference to Rule 4, Utah Rules of Civil Procedure.

V. THE AWARD OF DAMAGES BY THE LOWER COURT SHOULD BE AFFIRMED

A. Judge Sawaya Properly Awarded Treble Damages In This Unlawful Detainer Action

Section 78-36-10, Utah Code Annotated, provides for treble damages in unlawful detainer actions. Appellant BUFFO now seeks to overturn the trial court's award of treble damages.

This Court's decisions establish that treble damages should be awarded in unlawful detainer actions. In Forrester v. Cook, 292 P. 206 (Utah 1930), the Utah Supreme Court stated: "The statute [i.e. an earlier statute which provides as does 78-36-10, that if the court assessed damages occasioned to the plaintiff by any unlawful detainer, the judgment should be rendered against defendant for three times the amount of damages assessed] . . . makes it mandatory upon the court to render judgment for three times the amount of damages thus assessed." (at 214).

Appellant BUFFO relies on Price Construction Co. v. Foutz, ___ P.2d ___ (Utah Supreme Court, May 30, 1980) (No. 16688), a recent case in which the Utah Supreme Court did not award treble damages in an unlawful detainer action. In a very brief opinion, the Utah Supreme Court affirmed a trial court's decision in which treble damages were not awarded. However, it is not established that the plaintiff in Price even sought treble damages at the trial level. Section 78-36-10 is not even mentioned in the opinion and this Court did not address the issue of treble damages. It would be difficult to conclude that this Court in Price did intend to overturn the well-established Utah rule regarding treble damages in

unlawful detainer actions since the Court announced that "this opinion does not add significantly to existing law and hence is not to be published" Whether an unpublished opinion should even be cited as authority overruling an unchallenged fifty-year old rule is unclear at best.

B. BUFFO is Personally Liable.

In its Brief, plaintiff/appellant declares that "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)." (Appellant BUFFO's Brief at 2).

BUFFO ignores the express conclusion of the trial court finding him personally liable. In Conclusion of Law No. 9, Judge Sawaya explicitly found that "treble damages shall be three times \$936 per month . . . for each month or a portion thereof which BUFFO and/or UTE-CAL unlawfully detained the premises known as the Exchange Club. Furthermore, BUFFO and/or UTE-CAL are also liable for rent for the months of April, 1979, and December, 1979" (R. 231) Similarly the Judgment (Unlawful Detainer) also expressly provides that "defendants and third-party plaintiffs (INTERMOUNTAIN) have and recover from plaintiff (UTE-CAL) and the third-party defendant (PETE J. BUFFO) jointly and severally, the sum of \$13,688.00, which includes treble damages" (R. 233-34).

CONCLUSION

Judge Sawaya correctly determined that BUFFO and/or UTE-CAL could not have acquired a valid assignment of the terminated INVESTESTATE lease. BUFFO also failed to establish any new lease agreement between UTE-CAL and/or BUFFO and INTERMOUNTAIN. Since the Notice to Quit was properly served upon UTE-CAL and BUFFO on December 12, 1979, both UTE-CAL and BUFFO remained in unlawful detainer of the premises after December 31, 1979. Hence, felon PETE J. BUFFO was properly determined to be personally liable for treble damages.

The Unlawful Detainer Judgment, supported by detailed Findings of Fact and Conclusions of Law after two days of trial before Judge Sawaya, should be affirmed.

DATED this 3rd day of October, 1980.

RESPECTFULLY SUBMITTED,

PRINCE, YEATES & GELDZAHLER

BY:



Gordon Strachan
Attorneys for Defendants and
Third Party Plaintiffs
INTERMOUNTAIN

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a copy of the foregoing Brief of Respondents Intermountain Stock Exchange and Exchange Associates to Robert M. McRae and Loni F. DeLand, McRae and DeLand, 72 East 400 South, #355, Salt Lake City, Utah 84111 this 6th day of October, 1980.

Gordon Quader