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Thach P. Dang and His Wife, Bach T. Le, dba Saigon Restaurant and Food Store v. Cox Corporation, a Utah Corporation, and Paul Cox : Brief of Plaintiffs-Respondents

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsMarcus G. Theodore; Attorney for Plaintiffs-RespondentsThach P. Dang; Plaintiff-RespondentBach T. Le; Plaintiff-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

THACH P. DANG and his wife, BACH T. LE, dba SAIGON RESTAURANT AND FOOD STORE,	:	
Plaintiffs-Respondents,	:	
vs.	:	Case No. 17515
COX CORPORATION, a Utah corporation, and PAUL COX,	:	
Defendants-Appellants.	:	

BRIEF OF PLAINTIFFS-RESPONDENTS

Appeal from the Judgment of the Third

District Court for Salt lake County

Hon. James S. Sawaya, Judge

MARCUS G. THEODORE
TRASK & BRITT
345 South State Street, Suite 105
Salt Lake City, Utah 84111
Telephone: (801) 532-1922

Attorney for Plaintiffs-Respondents

JAMES R. BLAKESLEY
NEMELKA, BLAKESLEY & BLAKESLEY
455 East 400 South, Suite 302
Salt Lake City, Utah 84111
Telephone: (801) 328-8024

Attorney for Defendants-Appellants

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BRIEF OF PLAINTIFFS-RESPONDENTS

NATURE OF THE CASE

This is an action initiated by plaintiffs-respondents against defendants-appellants for failure to timely deliver certain leased premises and an addition thereto, breach of the covenants of quiet enjoyment, and assault and battery. Defendants counterclaimed upon various theories of ejectment and unlawful detainer.

DISPOSITION IN THE LOWER COURT

After a trial of the facts by the lower court, sitting without a jury, the District Court entered judgment upholding the validity of the Lease, finding that defendants had breached the same by failing to timely complete the addition to the restaurant, and rendering an accounting for various sums due

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and owing. The lower court also denied defendants' counterclaims, and found no damages as to the assault and battery claim.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Respondents seek affirmation of the judgment of the District Court.

STATEMENT OF THE FACTS

In September of 1979, Thach P. Dang and Paul Cox met to sign a five year Lease to remodel the Sandwich World restaurant and the adjoining garage located at 1346 South State Street, Salt Lake City, Utah, into an oriental restaurant and food store (Dang, R-174). A Lease drafted by Mr. Cox (Cox, R-210) was signed approximately September 10, 1979 (Exhibit P-1) with the representations that the addition for the food market would be completed on October 1, 1981 (Dang, R-175; Oviatt, R-214). The addition was never approved for occupancy (Exhibit 17), but plaintiff-respondents moved into the addition on or about February 15, 1980 (Thach, R-188). Nor did defendant-appellants supply any heat to the building until November 20, 1979 (Dang, R-177, 178).

When the addition to the building was not delivered, a dispute arose as to how the rent was to be apportioned. Plaintiffs-respondents finally agreed to pay one-half the rent because only half of the building was delivered (Dang, R-180). Another dispute then arose when defendants-appellants began

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sending separate bills for construction items not agreed to in the Lease (Exhibit 2; Thach, R-181). These various construction items will be more fully discussed below regarding the court's accounting.

During the delay in delivery of the building, plaintiffs-respondents had to continue to maintain another store location (Dang, R-190; Exhibits 13 and 14). Defendants-appellants then started serving Eviction Notices on or about January 20, 1980 (Exhibit P-5) claiming construction and renovation charges.

On or about February 1, 1980, Mr. Cox came into the restaurant and demanded his money. He then physically grabbed Mr. Dang by the neck and threw him out of the building hitting his head, hand and elbow on the door frame (Dang, R-189). Fortunately no permanent injuries were sustained. Suit was then commenced on or about February 6, 1980 for an accounting and a restraining order (Complaint, R-2). On or about February 22, 1980, a restraining order was entered preventing defendant Cox from entering the restaurant without prior approval of counsel (Order Granting Preliminary Injunction, R-20). Plaintiffs-respondents then deposited various rent checks into court pending trial of the matter pursuant to a Court Order issued February 22, 1980 (Ex Parte Motion and Order To Deposit Rent Into Court, R-23).

Prior to trial, two addition eviction notices were then served (Exhibits 4 and 5). These notices were served well after the action had been commenced.

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ARGUMENT

POINT I.

THE LOWER COURT DID NOT ERR IN DENYING DEFENDANTS-APPELLANTS CLAIM IN UNLAWFUL DETAINER

If there is substantial evidence to support the lower court's judgment affirming the Lease in question, the court's finding will be affirmed on appeal; see Leon Glazier & Sons, Inc. v. Larsen, 491 P.2d 226, 26 U.2d 499 (1971); and Lynch v. MacDonald, 12 U.2d 427, 367 P.2d 464 (1962). The court's finding that there was a binding, valid written Lease is clearly supported by Exhibit P-1. Therefore, the lower court did not abuse its discretion in upholding the validity of said Lease. Further, defendants-appellants argument that the failure to tender the exact amount of rent due after service of a notice to quit automatically results in unlawful detainer ignores the provisions of Section 78-36-10, Utah Code Annotated, 1953, as amended. The applicable provisions of Section 78-36-10, U.C.A., 1953, as amended, provide:

> "...When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of judgment and costs, and thereupon the judgment shall be satisfied, and the tenant shall be restored to his estate. ..."

Defendants-appellants withdrew all tendered rents from court (Motion and Order To Withdraw Funds From Court,

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R-146); and the deficiencies in the Order were paid. Therefore, by receiving tender of the monies, plaintiffs-respondents leaseheld estate was restored by operation of law; see Monter v. Kratzers Specialty Bread Co., 29 U.2d 18, 504 P.2d 40 (1972).

Further, by withdrawing all rentals from court, and subsequently receiving over $15,000.00 in additional monthly rentals, defendants-appellants have waived and are estopped from objecting to previous breaches of the Lease; see Zeese v. Estate of Max Siegal, 534 P.2d 85 (1975); Jensen v. O.K. Investment Corp., 29 U.2d 231, 507 P.2d 713 (1973).

The lower court's finding that there is a valid and binding Lease governing the rights of the parties should therefore be affirmed on appeal, particularly where unlawful detainer statutes provide a severe remedy and must be strictly complied with before a cause of action thereunder may be maintained; see Van Zyverden v. Farrar, 15 U.2d 367, 393 P.2d 468 (1964).

The Eviction Notice drafted by Mr. Paul Cox prior to the commencement of this action (Exhibit P-5) was defective in that it failed to allow defendants, in the alternative, to pay rent or surrender the premises within three days of the service thereof pursuant to Section 78-36-3(3), U.C.A., 1953, as amended. Exhibit P-5 was a modified notice to vacate a nuisance, and provided:

> "In the event of your failure to vacate the said premises within such period of three days you will be deemed guilty of an unlawful detainer and legal action will be initiated against you for restitution of the premises and for three times the

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damages assessed against you in accordance with the provisions of Section 78-36-10, Utah Code Annotated 1953."

This failure to provide plaintiffs-respondents the option of alternatively performing was therefore defective to support an action in unlawful detainer; see American Holding Co. V. Hansen, 23 U.2d 432, 464 P.2d 592 (1980). Nor can the notices served in May 1980 (combined in Exhibit 5), after the action was commenced, remedy the previous defects in notice; see Van Zyverden v. Farrar, supra.

The lower court therefore properly rejected defendants-appellants claims for unlawful detainer or common law ejectment.

POINT II.

DEFENDANTS-APPELLANTS ARE NOT ENTITLED TO RECOVER THE COSTS OF MODIFYING THE LEASED PREMISES, OR THE OTHER CHARGES COMPLAINED OF

Exhibit P-1, the Lease in question, is not an "as is" Lease. Paragraph eleven states:

"Eleventh:

Lessor agrees to remove extra fixtures and build an addition on the Southeast part of the building."

Therefore, defendants-appellants were required to remodel the premises and add to the building an addition at its own expense. The record previously cited supports the court's findings that defendants-appellants were required to complete the addition within thirty (30) days for a combined restaurant and food market operation.

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Defendants-respondents therefore had the burden of proving that they were entitled to additional compensation above the expenses of renovating the Sandwich World Restuarant and adjoining garage into the Saigon Restaurant and Food Market.

The large electric Sandwich World sign in front of the building was a permanent fixture for which Mr. Cox wanted $900.00 (Dang, R-201; Card, R-269). The court was overly generous in providing $100.00 to Mr. Cox for use of the sign frame during the Lease. As a fixture, this sign frame was part of the leased premises and paid for out of the $1,600.00 monthly rental. Mr. Dang paid $450.00 to change the face of the sign to advertise his business at his expense (Dang, R-270). The remodeled sign will revert to defendants-appellants at the end of the Lease. Therefore, they have lost nothing.

The gas line plumbing charge of $300.00 is part of the remodeling. Without adequate plumbing, the building addition could not be delivered and approved for occupancy. Further, this $300.00 plumbing work had to be entirely redone because it violated the building code (Gardner, R-262, R-264). The court was therefore correct in denying charges for unprofessional work.

The other claims for swinging doors $50.00, re-installation of air conditioning ducts $65.00, $185.00 for related gas and electrical services, and $700.00 for a damaged planter were denied. These claims were based upon the self-servicing biased statements of Mr. Cox. The lower court was

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well within its prerogative in rejecting the frailty of this testimony. The trial court is the exclusive judge of credibility of witnesses and is not obligated to believe testimony in which there is any inherent frailty, including the self-interest of the witnesses; see Peoples Finance & Thrift Co. v. Doman, 27 U.2d 409, 497 P.2d 17 (1972); De Vas v. Noble, 13 U.2d 133, 369 P.2d 290, cert. den. 835 S.Ct. 37, 371 U.S. 821, 9 L.Ed. 66 (1966).

For the foregoing reasons, defendants-appellants failed in their burden of proof to establish that the lower court erred in its accounting under the terms of the Lease.

CONCLUSION

The lower court's findings that there is a valid Lease governing the parties to this appeal is supported by the record, and should therefore be affirmed on appeal. Further, defendants-appellants failed to establish that they have complied with the statutory requirements of unlawful detainer, and have waived any claims they may have had by accepting the rentals paid into court. The lower court's accounting should also be upheld on appeal, as supported by the record.

Dated this 23rd day of June, 1981.

Respectfully submitted,

TRASK & BRITT

By _____
Marcus G. Theodore

ATTORNEYS FOR PLAINTIFFS-RESP

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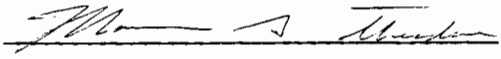
CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing BRIEF OF PLAINTIFFS-RESPONDENTS were served on the Defendants-Appellants by mailing two copies thereof, first class, postage prepaid, to their attorney, James R. Blakesley of Nemelka, Blakesley & Blakesley, 455 East 400 South, Suite 302, Salt Lake City, Utah, 84111, this 23rd day of June, 1981.



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