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Genevieve A. Smith, Jesse E. Smith, Beth M. Smith, and Salli Smith Girard v. Charles L. Appleby, Jr., Catherine R. Appleby, Don Bjarnson, and Grace Bjarnson : Brief of Respondent and Cross-Appellant

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

GENEVIEVE A. SMITH, JESSE E. SMITH, BETH M. SMITH, and SALLI SMITH GIRARD,

Involuntary Defendants, Plaintiff, Respondent, and Cross-Appellant.

vs.

CHARLES L. APPLEBY, JR., CATHERINE R. APPLEBY, DON BJARNSON, and GRACE BJARNSON,

Defendants, Appellants, and Cross-Respondents.

Case No. 17662

BREIF OF RESPONDENT AND CROSS-APPELLANT

Appeal from Judgment of Fifth Judicial District Court of Washington County, State of Utah, the Honorable Robert F. Owens, District Judge, pro tem.

ATKIN, WRIGHT & MILES
John L. Miles
J. MacArthur Wright
Attorneys at Law
60 North 300 East
P. O. Box 339
St. George, UT 84770
Attorneys for Respondent and Cross-Appellant Salli Smith Girard

ALLEN THOMPSON & HUGHES
Michael D. Hughes
Attorney at Law
148 East Tabernacle
St. George, UT 84770
Attorney for Appellants and Cross-Respondents

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STATE OF UTAH

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

NATURE OF THE CASE

The Plaintiffs filed a Verified Complaint May 8, 1978 seeking the forfeiture of a lease by reason of Defendants' failure to cure various defaults set forth in a "Notice To Cure Defaults" given to Defendants on or about March 20, 1978, and incorporated by reference as Exhibit "B" in Plaintiffs' Verified Complaint, said notice itemized specific defaults, including insurance, health code violations, building code violations, and waste, alleging the premises posed risks of injury to the public.

DISPOSITION IN THE LOWER COURT

At trial, evidence was provisionally received on all defaults but the trial court ultimately ruled that the Verified Complaint stated a claim for relief only with respect to insurance. The trial court found a breach on the insurance issue that was not timely cured, but refused to declare a forfeiture of the lease, finding that the breach was not substantial enough to justify a forfeiture and that the forfeiture was waived by Plaintiffs' acceptance of rents (R304). The trial court found that Plaintiff was entitled to recover her attorney's fees under paragraph 12 of the lease (R340), but only for fees incurred relating to the insurance issue (R305), and found that amount to be $3,487.50 and awarded judgment accordingly (R341).

RELIEF SOUGHT ON APPEAL

Defendants attack the award of attorney's fees in five points consuming 36 pages of their brief and assert a sixth point that, even though they were in default, the trial court should have awarded attorney's fee to them.

Plaintiff naturally seeks the affirmance of the award of attorney's fees and cross-appeals by requesting the Supreme Court to find that Plaintiffs' Verified Complaint with exhibits attached and incorporated therein was sufficient to raise the issues of health code violations, building code violations, and waste on which considerable evidence was presented and which consumed most of the trial time, but which was excluded from the trial court's consideration when it ruled that a claim for relief was stated only with respect to insurance (R303).

Alternatively, assuming the trial court correctly ruled that only the insurance issue was sufficiently raised, Plaintiff requests the Supreme Court to find that the trial court abused its discretion by denying Plaintiff's motion to amend the complaint (R215) made during trial.

Finally, Plaintiff seeks reversal of the trial court's finding that the lessors waived breaches of the lease by acceptance of rent for almost three years between the filing of the Verified Complaint and the date of judgment.

STATEMENT OF FACTS

Respondent (Plaintiff) disagrees with the STATEMENT OF FACTS set forth in Appellants' brief, particularly as follows:

1. The lease was the joint product of both the Lessors and Lessees and was not drafted by Lessors only.

2. Plaintiff disagrees with Appellants' characterization of the legal effect of Plaintiffs' Verified Complaint as Plaintiff asserts it sufficiently raises issues other than insurance.

3. Plaintiff disagrees with Appellants' statement (page 10-11) that insurance coverage existed between April 27, 1978 and May 10, 1978. The insurance agent stated in a deposition on August 7, 1978 that there was no insurance between those dates and repeated that testimony on the witness stand at trial. A full reading of his testimony should reveal that he did not recant these statements, but merely admitted there might have been coverage during that period. The Verified Complaint was filed May 8, 1978 when no insurance coverage existed, and even if

it did, Plaintiff was not aware of it until Mr. Labrum supposedly recanted at trial. Regardless, the trial court found, and Defendants admit (page 7 of Appellant's brief), that there were breaches on the insurance issue.

4. Plaintiff takes exception to Appellants' reliance (pages 11-12 and 19) on a stipulation (R162) and partial dismissal with prejudice (R164) as somehow insulating Defendants from an assessment of attorney's fees. On Plaintiff's motion (R210), supporting affidavit (R208-09), and testimony of five witnesses at trial on February 20, 1981 (R 198-99), the stipulation and partial dismissal was properly set aside (R302-03).

Plaintiffs' primary concern in giving Defendants the "Notice To Cure Defaults" and in filing the Verified Complaint was to protect the general public from safety hazards on the leased premises and to protect themselves from liability (R364). The premises were found "unsafe and dangerous to human life" (R365-367) by state and local health and building inspectors.

Additional facts relied upon by Plaintiff will be referred to as appropriate to support the arguments made hereinafter on this appeal.

RESPONDENT'S POINTS ON APPEAL

POINT I

THE AWARD OF ATTORNEY'S FEES TO THE PLAINTIFF WAS PROPER, BEING BASED UPON A CONTRACTUAL AGREEMENT AND SUPPORTED BY CREDIBLE EVIDENCE.

The basis for awarding attorney's fees was paragraph 12

of the lease (R14, 363) which provides:

> "12. ATTORNEY'S FEES: In the event of a default in the performance on the part of either Lessor or Lessee, the party determined to be guilty of such default or breach of the instant Lease shall be liable and responsible to the non-defaulting party for reasonable attorney's fees incurred by the non-defaulting party in enforcing the terms of this agreement or exercising any rights or remedies hereunder or any rights or remedies otherwise provided by law."

Defendants were aware of this provision and were reminded of it by the last paragraph of the "Notice To Cure Defaults" (R21, 364) which stated:

> "Should legal action be necessary to recover possession of the leased premises, lessors will ask the court for an award of attorney's fees against lessees, and each of them, for all reasonable attorney's fees incurred by lessors in enforcing the terms of the lease agreement or any other rights or remedies available thereunder as provided in paragraph 12 of the lease agreement."

Paragraph 13 of the Verified Complaint (R3) alleges that Defendants were served with this notice on or about March 21, 1978 and incorporates the entire notice as Exhibit "B" to the complaint. Paragraph 13 of Defendants Answer (R45) admits that Defendant Donald Bjarnson received said notice. Paragraph 28 of Plaintiffs' Verified Complaint alleges Plaintiffs are entitled to recover attorney's fees.

The trial court found (R304) that:

> "6. With respect to the insurance issue, the court finds that the failure by lessee to maintain liability insurance with $300,000 limits breached the requirements of paragraph 15 of the lease, and was not cured within 30 days of notice, although efforts were made by lessee."

The trial court's remedy for this default was not a forfeiture of the lease, but an attempt to place the Plaintiff (Lessor) in the same condition as if the breach had not occurred, citing 49 Am.

Jur. 2d 1038 (R304, 340). This was done by awarding Plaintiff her attorney's fees, but only those incurred with respect to the insurance issue.

During the trial, many motions, rulings, and triable issues were taken under advisement. After ruling that Plaintiff was entitled to attorney's fees incurred in enforcing the insurance covenant the court stated (R305) that:

> "While this relief (attorney's fees) was requested in the complaint, no evidence was given at the trial. Since the uncertainty as to triable issues may have contributed to this omission, the court will receive evidence within ten days by way of affidavit from both sides on this issue, unless either party requests a hearing, or unless plaintiff is waiving this claim."

Plaintiff thereafter submitted affidavits of John L. Miles (R322-324) and Ronald Boutwell (R337-339) on this issue and Defendants submitted two affidavits of Michael D. Hughes (R327-328 and R332-334). The trial court then ruled for Plaintiff, awarding $3,487.50 as attorney's fees on the insurance issue to place Plaintiff in the same condition as if the breach had not occurred (49 Am. Jur. 2d 1038).

Defendants raise five points in a 42 page brief objecting to the award of attorney's fees. The lengthy brief is notable only for its lack of relevant authority. The first point asserts a lack of proper testimony because the award was based upon sworn affidavits instead of upon sworn testimony subject to cross examination at trial. The Defendant conveniently ignor the fact that the trial court afforded both parties the opportunity for a hearing upon request (R305). Defendants waived their opportunity for such a hearing by electing to submit affidavits

on the issue instead of requesting a hearing. Because the trial court gave more weight and/or credibility to Plaintiff's affidavits, the Defendants are attacking the procedure they implicitly agreed to when they chose to submit affidavits. The trial judge presided over the five day trial, was able to review the extensive pleadings, and being on attorney himself, was able to make a determination of the value of services rendered by Plaintiff's attorneys. The Supreme Court of the United State has expressed the view that a court can proceed upon its own knowledge of the value of an attorney's services (Harrison v. Perea 168 U.S. 311, 42 L. Ed. 478, 18 C. St. 129).

The second point appellants raise relies upon the stipulation executed December 8, 1980. Page 24 of Appellants brief states that Mr. Boutwell informed Mrs. Girard to find a new attorney about that time when, in fact, Mrs. Girard already had retained Mr. Miles as her attorney (R117) as early as September 2, 1980. As explained in paragraph 4 of Respondent's STATEMENT OF FACTS, this stipulation and the resulting order were thrown out of this case and cannot be effectively asserted against Plaintiff. Appellants' argument indulges in speculation, totally irrelevant, about whether Plaintiff has actually paid these attorney's fees, ignoring the fact that in this case the amount of attorney's time would be the same whether there was one Lessor or 100 Lessors. Mr. Boutwell represented all three Lessors at the time he performed his services relating to the insurance issue and the work he performed would be the same regardless of the number of Lessors (R337).

The third point appellants raise claims the trial court committed reversible error under Rule 61, U.R.C.P., in allowing the parties to submit proof, by affidavit or hearing, on the issue of Plaintiff's attorneys fees. Appellants' claim that attorney's fees were not raised or plead by Plaintiff is simply not in conformity with the facts, set forth above, showing that attorney's fees were claimed in both the "Notice To Cure Defaults" and in the Verified Complaint. Appellants' argument under Rule 61, U.R.C.P., ignors the more relevant Rule 54(c)(1), U.R.C.P., which provides:

> "(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves."

This rule was considered in Palombi v. D. & C. Builders, 22 U. 2d 297, 452 P. 2d 325 where the Utah Supreme Court held that even though Plaintiff did not (emphasis supplied) ask for attorney fees in the complaint, this fact would not preclude the trial court from awarding them to Plaintiff since Rule 54(c) indicates that there shall be liberality of procedure to reach the result which justice requires. Here, attorney's fees were requested by Plaintiffs and because of confusion over triable issues the court allowed both parties to submit affidavits or request a hearing on attorney's fees prior to final judgment. The trial judge's actions were in harmony with the objective of Rule 54(c)(1), U.R.C.P.

Had Plaintiff's attorneys presented evidence on attorney's fees at trial, subsequent affidavits or hearings still would have been necessary, under the trial court's final ruling, to eliminate from such fees all time spent on matters not related to the insurance issue.

Appellants' fourth point on attorney's fees asserts that the relief afforded Plaintiff at trial was no greater than what Defendants stipulated to prior to trial. This assertion is not supported by the trial court's finding (R341) that:

> "The stipulation to issuance of a preliminary injunction (with a $500.00 bond) was not the same as stipulating that a breach of the insurance covenant had occurred, and that a permanent injunction could issue, without bond. This issue was in fact litigated, and gave rise to the entitlement to attorneys fees."

Appellants' reliance on the stipulation (R 162) which was thrown out (R 302) is unavailing because that was not made with Plaintiff's knowledge or consent, nor did it stipulate to a breach of the insurance covenant or to a permanent injunction and an award of $3,487.50 to restore Plaintiff to the same condition as if the breach had not occurred.

The appellants' fifth argument on attorney's fees asserts that the trial court improperly tried the issue by affidavit. Appellants rely on Freed Finance Co. v. Stoker Motor Co. 537 P.2d 1039, (Utah 1975). In that case the Utah Supreme Court held that the trial court's summary judgment must be set aside, and in reference to attorney's fees said that:

> "Even if there were no disputed issue of material fact, the summary judgment could not award an attorney's fee without a stipulation as to the amount, an unrebutted affidavit, or evidence given as to the value thereof (emphasis supplied). Without any basis therefore, the

trial court awarded plaintiff an attorney's fee in the sum of $30,000.00."

In this case, the trial court was not considering summary judgment where a material issue of fact would preclude the summary judgment. A further distinction is that both sides did, in fact, submit evidence by way of affidavits on the value of attorney's fees and waived the opportunity to request a hearing on this issue.

RESPONDENT'S POINTS ON CROSS-APPEAL

POINT I

PLAINTIFFS' VERIFIED COMPLAINT WITH EXHIBITS ATTACHED AND INCORPORATED THEREIN SUFFICIENTLY RAISED THE ISSUES OF HEALTH CODE VIOLATIONS, BUILDING CODE VIOLATIONS, AND WASTE SO THAT EVIDENCE PRESENTED AT TRIAL ON THESE ISSUES SHOULD HAVE BEEN CONSIDERED BY THE COURT, DEFENDANTS NOT BEING UNFAIRLY SUPPRISED OR PREJUDICED.

Plaintiffs' Verified Complaint alleges, in pertinent portions, the following:

> "13. On or about the 21st day of March, 1978, Defendants were served a NOTICE TO CURE DEFAULTS. A true copy of said notice is attached to this complaint as Exhibit "B" and incorporated by reference as if fully set forth." (R3). . .
>
> "24. Lessee defendants are in default under the lease and have failed to cure said default within 30 days after receiving notice of said default.
>
> 25. Because of lessee defendants continuing default plaintiffs are entitled to re-enter the premises and take possession." (R4) . . .
>
> "30. The lease agreement provides that the leased premises shall be operated in the main as a recreational and therapeutic spa.

31. Such operation allows many customers to come onto the premises for the purpose of bathing in a pool area and a grotto area.

32. In the pool area, there are no life guards or anyone else to prevent accidents or prevent small children from swimming unattended in the large swimming pool.

33. The grotto area is located under steep cliffs of rocks and boulders. Occasionally a rock or boulder will fall onto the grotto area where bathers are bathing." (R5). . .

"35. Operation of the leased premises poses risks of injury to body and property. It is because of such risks that plaintiffs have continually tried to make lessee secure liability insurance on the premises as provided for in the lease agreement." (R5). . .

"WHEREFORE; plaintiffs pray for judgment against defendants as follows:

1. Declaring defendants have breached the terms of the lease agreement.

2. Quieting plaintiff's title to the real property described in the lease agreement.

3. Placing plaintiffs in possession of the leased property." (R7)

The "Notice To Cure Defaults", in pertinent portions, lists, in addition to insurance, the following defaults (R 19-20):

"3. Lessees must not continue to operate the leased premises in violation of Utah State Division of Health, Code of Camp, Trailer Court, Hotel, Motel and Resort Sanitation Regulations, adopted by the Utah State Board of Health on February 21, 1968, under authority of 26-15-4, U.C.A., 1953, as amended.

4. Lessees must eliminate waste on the leased premises and restore said leased premises to that condition which the leased premise would now be in if said leased premises had been cared for in a reasonable and prudent manner as provided in paragraph 10 of said lease agreement. Particular areas where lack of care or waste has allowed the leased premises to become dilapidated are as follows:

(a). The grotto area on the leased premises has become, and continues to be, unclean, unkept and dangerous to users.

(b). The swimming pool area is falling into disrepair and is a health hazard. The pool area is in violation of the Utah State Division of Health, Regulations Relating to Operation and Maintenance of Public Swimming and Wading Pools.

(c). The cabin motel units are falling in disrepair and are not in clean, sanitary and operable condition. There is no adequate or approved screening to control insects and the windows, shades, curtains, furniture and fixtures are not clean and in good repair. The units are in violation of State law as referred to in paragraph 3 above, as well as county health laws.

(d). The roads on the leased premises are in disrepair with chuck holes and inadequate graveling.

(e). Electrical and plumbing on the leased premises is unsafe and does not comply with any standard of safety."

Paragraph 13 of Defendants' answer (R45) admits that they received the "Notice To Cure Defaults" putting them on notice of the defaults claimed. That Defendants were well aware of the breaches alleged in the "Notice To Cure Defaults" is shown by Interrogatories filed by their attorney on August 21, 1978, specifically numbers 31, 32 (R58); 36 (R59); 43, 44, 45 (R60); and 46, 47, 48 (R61). These Interrogatories were answered on November 13, 1980 (R128-157) and supplemental answers on questions 28 and 29 were filed January 28, 1981 (R 172-183).

Defendants objected strenuously to the inspection reports of the building inspectors and health inspectors, claiming unfair surprise, but these inspectors had communicated the problems to Defendants at or shortly after the time of inspection. These reports found the premises "to be unsafe and dangerous to human life" (R 366, 365, 367).

Considerations of public policy dictate that when a public facility is found to be dangerous to human life, the court should not, on technical grounds, rule that the default was not raised in the pleadings and thereby allow the dangerous condition to continue.

Defendants place unwarranted reliance on their claim that because Plaintiff did not provide them with a detailed list of deficiencies on the building and health code violations, Plaintiff cannot assert these violations at trial. Defendants seem to forget that it was they who agreed, in paragraph 11 of the lease, to abide by the laws, ordinances, or regulations of Washington County and the State of Utah (R 14) and that it was their duty as Lessees and operators to know the applicable laws, ordinances and regulations and abide by them. When the "Notice To Cure Defaults" was given to them, it became incumbent upon them to call in the inspectors, learn the deficiencies, and cure the same. Instead, they attempted to shift this responsibility onto Plaintiff by filing a set of 79 Interrogatories and then objected at trial when the evidence was offered. Had Defendants spent a few minutes making telephone calls to the building and health inspectors instead of hours drafting interrogatories, they would have quickly learned what defects existed. It should be remembered that these public inspectors were equally available to Defendants as they were to Plaintiffs.

The "Notice To Cure Defaults" specifically referred to the Utah State Division of Health, Code of Camp, Trailer Court, Hotel, Motel and Resort Sanitation Regulations adopted by the

Utah State Board of Health on February 21, 1968 pursuant to Section 26-15-4 of the Utah Code. This regulation is available without charge from the health department in St. George, Utah and was admitted at trial as Plaintiff's Exhibit 11 (R 368). Plaintiffs' could not have been more specific as to the standard Defendants were required to meet. They should not be heard in claiming unfair surprise or prejudice.

Particularly is this true when Plaintiffs' proposed Pre-trial Order (R 75-82) and Defendants own proposed pre-trial order (R 83-92) included the issues of building code violations, health code violations, and waste (R 87-88).

Plaintiffs' Verified Complaint, with attached Exhibits incorporated therein, is sufficient under the liberalized rules of pleading. Rule 8(a), URCP, only requires a pleading to set forth a short and plain statement of the claim and a demand for the relief Plaintiff seeks. Rule 10(c), URCP, provides that:

> "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes."

Plaintiff's complaint sets forth her claims in the numbered paragraphs thereof and in the exhibits adopted by reference.

In Blackham v. Snelgrove 3 Utah 2d 157, 280 P. 2d 453 the Supreme Court said that the complaint need only give fair notice of the nature and grounds of claim and an indication of the type of litigation. Defendants certainly had fair notice since the March 20, 1978 "Notice To Cure Defaults" specifically sets forth the defaults Plaintiff claimed then and is claiming

now. When that notice was adopted in the complaint the Defendants again had fair notice that these defaults were seriously being pursued. That Defendants knew this fact is evidenced by the interrogatories filed as early as August, 1978. The same remedy, that is, forfeiture of the lease, was being sought on account of all defaults, so no new relief was requested on account of building and health code violations that was not being sought because of failure to maintain insurance.

Rule 8(f), URCP, provides that "All pleadings shall be so construed as to do substantial justice." This is consistent with the fundamental purpose of liberalized pleadings to allow parties to present their legitimate contentions on the merits.

Defendant's failure to object to Exhibit "B" as a part of the complaint by a motion for a more definite statement or a motion to strike has been waived under Rule 12 (h), URCP and Defendant cannot now complain that the issues raised by Exhibit "B" are not in the pleadings. Rule 1(a), URCP, states:

"They (the Rules of Civil Procedure) shall be liberally construed to secure the just, speedy and inexpensive determination of every action."

In Bunting Tractor Co. vs. Emmett D. Ford Contractors 2 Utah 2d 275, 272 P.2d 191 the court held that in liberally construing and applying the Rules of Civil Procedure, the courts should seek to afford litigants every reasonable opportunity to be heard on the merits of their cases. In liberally construing the rules, courts look to the substance and merits of a controversy rather than to technicalities of terms and

superficialities of form (Crist v. Mapleton City 28 Utah 2d 7, 497 P.2d 633).

In Prince v. Peterson 538 P.2d 1325 (Utah 1975) the pleadings were attacked as being deficient. The Utah Supreme Court held otherwise, stating, on page 1328, that:

> "In regard to the claimed deficiencies in the pleading and proof of damages, these observations are to be made: the purpose of pleadings is to advise the opponent and give him an opportunity to meet the issues and the contentions. If that purpose is served, the requirements of the law are met."

Rule 10(c), URCP, specifically provides for adoption by reference and states that "An exhibit to a pleading is a part thereof for all purposes."

In 61A Am. Jur. 2d 60 the general rule is stated as follows:

> "Many cases take the position that for the purpose of determining the sufficiency of the statement of the cause of action, an exhibit on which the cause of action is founded is to be deemed a part of the pleading when made so by apt words thereof, and that the pleading and exhibit forming a part thereof are to be construed together."

Defendants rely on Chesney v. Chesney 33 Utah 503, 94 P.989, an old Utah case following the minority rule and adhering to the technicalities of strict pleading. That case is not in harmony with the new more liberal rules of civil procedure and should not be followed by this court, particularly when Rule 10(c), URCP, now specifically follows the general rule. In this regard, 61A Am. Jur. 2d 61 states:

> "It seems generally agreed, even in the absence of any controlling statute or rule of practice, that it is permissible to refer to, and thereby make a part of one count or defense, the whole or a part of the allegations of another count or defense in the same

pleading. In many jurisdictions the statutes and rules of practice expressly authorize the adoption or the incorporation by reference of statements in different parts of the same pleading or of other pleadings or motions, and of matters incorporated in copies or exhibits attached to the pleadings."

Accordingly, the trial court erred when it ruled Plaintiffs' Verified Complaint did not sufficiently raise the issues regarding building code violations, health code violations and waste when those issues were specifically adopted by reference to the "Notice To Cure Defaults" attached as an Exhibit to the Verified Complaint and added no new claim for relief. Defendants were not unfairly surprised or prejudiced where the record shows the notice and complaint were received by Defendants nearly three years prior to trial and those issues were addressed in interrogatories and included in Defendants own proposed pre-trial order (R 83) submitted to the trial court more than a year prior to trial (R 74). The trial court should be instructed to consider the evidence presented in the five day trial on these issues and make appropriate rulings on them. These issues consumed most of the trial time (R 303) and it would be expensive and contrary to the purpose as expressed in Rule 1, URCP, to require a new trial on these issues.

POINT II

ASSUMING, FOR SAKE OF ARGUMENT, THAT POINT I ABOVE ON CROSS-APPEAL IS NOT WELL TAKEN, THE TRIAL COURT NEVERTHELESS ABUSED ITS DISCRETION BY DENYING PLAINTIFF'S MOTION TO AMEND MADE DURING TRIAL.

When it became apparent to Plaintiff during trial that Defendants' objections to evidence on waste and building and health code violations were being taken seriously by the trial court, Plaintiff filed a "Motion To Amend Complaint" (R 215) together with supporting points and authorities (R 216-218). As shown in POINT I above, the rules provide for liberal construction of pleadings and amendments in order to present controversies on their merits and, in this case, Defendants would not be unfairly surprised or prejudiced by allowing such an amendment because they not only knew of Plaintiff's claims and included them in their own pre-trial order, but also because continuances of the trial gave Defendants almost a full month (R 194 and R 266) to prepare to meet these issues even if Defendants had been surprised at trial by presentation of these issues.

However, Defendants were not surprised nor prejudiced by these issues, as these claims were included in Defendants' own pre-trial order (R 87-88). In this regard, Eng v. Stein 599 P.2d 769 (Arizona, 1979) is instructive. There the court, on page 800, stated:

> "The amendment of pleadings to conform to the evidence is to permit the case to be tried ultimately on the merits in one trial with all parties having a resolution of their disputes without a multiplicity of suits. Such trial amendments should be permitted when neither party is surprised nor prejudiced by the allowance of the amendment.
>
> In the case at issue the amount of the additional claims had been raised in pre-trial discovery, and the defendant cannot be said to be surprised nor prejudiced by the allowance of the amendment to reflect the additional amount."

Rule 8(f), URCP, provides that "All pleadings shall be construed as to do substantial justice."

Rule 15(b), URCP, provides, in part, that:

> "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

The Utah Supreme Court, in Cheney v. Rucker, 14 Utah 2d 205, 381 P. 2d 86 stated that the fundamental purpose of liberalizing the rules of pleading and procedure was to allow the parties to present all their legitimate contentions and that all the parties are entitled to is notice of the issues raised and an opportunity to meet them.

In Wells v. Wells 2 Utah 2d 241, 272 P.2d 167, Rule 15(b), URCP, was examined in detail. The Utah Supreme Court quoted Jackson v. Cope 1 Utah 2d 330, 266 P.2d 500 with approval on page 170 as follows:

> "'* * * amendments should be liberally allowed in the interest of justice whenever it will aid in settling an entire controversy. The limitations thereon should be whether the matters involved are such as can be conveniently and effectively handled in one trial without injury to substantive rights.'"

The Wells case discussed the confusion caused by different meanings and construction given the term "cause of action" and then stated, on page 170, that the:

> "test is not whether under technical rules of pleading a new cause of action is introduced, but rather the test is whether a "'wholly different cause of action'" or "legal obligation" is introduced, that is, an amendment will be allowed if a change is not made in

the liability sought to be enforced against the defendant."

The same liability has been sought by Plaintiff on the waste and building and health code violations as on the insurance violation, namely, a forfeiture of the lease. No new legal obligation is introduced by a consideration of these additional defaults. The subject matter throughout the course of this case has been whether or not Defendants have committed breaches of the lease justifying forfeiture. As this court held in Graham v. Street 166 P.2d 524 (Utah 1946), pages 527 and 528:

> "The new allegations do not introduce matters which interject an entirely new, distinct and unrelated legal obligation but enlarge on the facts so as to present a series of transactions all germane and forming a connected whole reflecting the manner in which the plaintiff suffered injury, the bounds of an amendment are determined by what can [be] conveniently and efficiently [handled] as a single unit * * * without injury to substantive rights."
>
> . . . . . .
>
> "It is not required that a series of transactions so closely related in time and fact as to produce a substantial cause and effect transition be grouped and compartmentalized so as to fall into designated types of legal actions. The law serves life."

The law should also protect life when the evidenced presented showed that this public facility was "dangerous to human life" (R 365, 366).

In 61A Am. Jur. 2d 297-98 it states:

> "An application for leave to amend is ordinarily addressed to the sound discretion of the trial court, and as a rule, this discretion will not be disturbed on appeal except in case of an evident abuse thereof, or unless the appellant shows affirmatively that he was prejudiced by the ruling. The discretion with which the court is vested in respect to the allowance or refusal of amendments is a sound discretion to be exercised in the furtherance of justice, and may not be exercised to defeat justice. The court may not unreasonably refuse leave to amend."

. . . . . .

"It is a general rule that amendments to pleadings are favored and should be liberally allowed in furtherance of justice, in order that every case may so far as possible be determined on its real facts, and in order to speed the trial of causes, or prevent circuity of action and unnecessary expense."

These general rules are followed in Utah, as shown by Gillman v. Hansen 26 Utah 2d 165, 486 P.2d 1045 where this court stated, on page 1046:

"Ordinarily the allowance of an amendment by leave of court is a matter which lies within the sound discretion of the trial court. This discretion, however, is to be exercised in the furtherance of justice and must not be exercised so as to defeat justice. The rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial."

This court then recited Rule 1(a), URCP, and held that the trial court abused its discretion in refusing the amendment. In First Security Bank of Utah v. Colonial Ford 597 P.2d 859 (Utah 1979) the court quoted Rule 15(b) in its entirety and noted that it was in harmony with Rule 54(c)(1), quoting that rule, and then stated, on page 861 that:

"Whatever else may be said about whether it is mandatory or discretionary under the rules just quoted to grant such a motion to amend, it could not be made plainer that the underlying purpose of the rules is that judgment should be granted in accordance with the law and the evidence as the ends of justice require; and that this is true whether the pleadings are actually amended or not."

Defendants, since the "Notice To Cure Defaults" dated March 20, 1978, have known of Plaintiff's claims. The health code violations were specifically pleaded by reference to state statute and the date the specific regulations were adopted by the Utah State Division of Health. Under Rule 9 (i), URCP, this is a

sufficient allegation. From that moment, Defendants had equal access to such regulations and an opportunity to request an inspection to determine what was necessary to cure the default. In paragraph 11 of the lease agreement, Defendants agreed to operate the premises in compliance with the laws, ordinances and regulations of Washington County and the State of Utah.

From the moment the lease was executed the Defendants are deemed to know the requirements of such laws, ordinances and regulations. In fact, the existing laws, ordinances, and regulations become a part of the contract. (17 Am. Jur 2d Contracts Section 374).

POINT III

THE TRIAL COURT ERRED IN RULING THAT PLAINTIFFS HAD WAIVED THE FORFEITURE BY ACCEPTANCE OF RENT.

The "Notice To Cure Defaults" given to Defendants on or about March 20, 1978 stated at the bottom of page two (R 20, 364) that:

> "No waiver of this notice or the required thirty (30) days to cure the above-mentioned defaults will be granted unless in writing and signed by all parties concerned."

In the Verified Complaint Plaintiffs alleged Defendants had breached the lease and Plaintiffs were therefore entitled to possession (paragraph 25 on R 4). Plaintiffs also alleged that Defendants were in possession of the premises (paragraph 7 on R2), which fact was admitted by Defendants (paragraph 7 on R44). That situation continued from May 8, 1978 when the Complaint was filed until the trial which commenced on January 29, 1981, almost three years later. Monthly rent under the lease was $700.00 per

month (paragraph 2(B) of R 11). That amounts to $22,400.00 over the 32 months between the filing of the complaint and the trial. Apparently the trial court felt Plaintiffs, despite the express statement that no waiver would be granted unless in writing and signed by all the parties, should have refused the $22,400.00 rent even though Defendants continued in possession and collected all the income generated by the business during this period. Such a result is unconscionable as it rewards Defendants for being in default and penalizes Plaintiffs for resorting to the courts to preserve their legal rights under the lease.

The general rule is stated in 49 Am. Jur. 2d 1031-32 as follows:

> "It is a general rule that a lessor is estopped from asserting a forfeiture for a breach of covenant or condition in a lease, or that he waives his right to such a forfeiture, where after and with full knowledge or notice of such breach he accepts rent from his tenant, unless there are circumstances arising from such acceptance of rent by him so as to negative the presumption of his affirmance of the continuance of the lease."

Here there were circumstances negating the presumption of the general rule because the "Notice To Cure Defaults" expressly stated there would be no waiver and it would be unconscionable in this case to deny Plaintiffs the rents while attempting to assert their contractual rights, thereby rewarding Defendants for their alleged breaches.

In Kenny v. Seu Si Lun 101 Minn. 253, 112 NW 220 the court held that if payment to the landlord is not made as rent accruing under the lease, but as compensation for the lessee's wrongful withholding of the possession or on a quantum meruit

basis, it will not operate as a waiver. It cannot be doubted that the parties, through their attorneys, treated the rent either as compensation for withholding possession or as compensation on a quantum meruit basis, otherwise, they would not have pursued the litigation for three years until trial.

In Karbelnig v. Brothwell 244 Cal. App. 2d 333, 53 Cal. Rptr. 335 the court said that where the lessor gives notice such as given here, that the acceptance of rent after breach of a covenant will not be construed as a consent to the breach or a waiver of the right to assert a forfeiture.

The authorities are split on whether the acceptance of rent due after a forfeiture has been declared constitutes a waiver. In 49 Am. Jur. 2d 1035 it states:

> "The better view is said to be that the acceptance of rent due after a forfeiture has been declared does not waive the forfeiture as a matter of law."

The theory behind this general rule is that a declaration of forfeiture shows an irrevocable intention to avoid the lease. This better view is, in this case, buttressed by the express declaration of the Plaintiffs that no waiver would be granted.

Waiver has been defined, in Blacks Law Dictionary 96 (5th Ed. 1979) as "The intentional or voluntary relinquishment of a known right." The question of waiver then becomes primarily an issue of intent, and when that intent is expressly stated in the "Notice To Cure Defaults" that no waiver would be granted unless in writing signed by all parties, that expression of intent must control.

CONCLUSION

The award of Plaintiffs' attorney's fees should be sustained and the cause remanded with directions to the trial court to consider the evidence presented at trial on issues of waste, building code violations and health code violations and rule accordingly inasmuch as Plaintiffs' Verified Complaint either sufficiently raised these issues under the liberalized Utah rules and cases or the Plaintiff's motion to amend should have been granted. Further, that acceptance of rent was not a waiver of the forfeiture where Plaintiffs expressly stated in the "Notice To Cure Defaults" that no waivers would be granted.

RESPECTFULLY SUBMITTED this 8th day of February, 1982.

ATKIN, WRIGHT & MILES

John L. Miles

JOHN L. MILES
Attorney for Plaintiff,
Respondent And Cross-Appellant

DELIVERY CERTIFICATE

I hereby certify that on the 9th day of February, 1982, I delivered two true and correct copies of the foregoing BRIEF OF RESPONDENT to Mr. Michael D. Hughes at Allen, Thompson & Hughes at 148 East Tabernacle, St. George, Utah.

Carolee Hall

Secretary