

1983

Salli Smith Girard v. Charles L. Appleby, Jr.,
Catherine Appleby, Don Bjarnson, and Grace
Bjarnson : Respondent's Objection To Appellants'
Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SALLI SMJTH GIRARD,
Plaintiff, Respondent,
and Cross Appellant,
vs.
CHARLES L. APPLEBY, JR.,
CATHERINE APPLEBY, DON BJARNSON,
and GRACE BJARNSON,
Defendants, Appellants,
and Cross Respondents.)

Case No. 17662

RESPONDENT'S OBJECTION TO
APPELLANTS' PETITION FOR REHEARING

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

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FILED

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17662

Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

SAUL SMITH GIPARD,)
)
)
 Plaintiff, Respondent,)
 and Cross Appellant,)
)
)
 vs.)
)
)
 CHARLES L. APPLIFY, JR.,)
 CATHERINE AUSTLERY, DON BJARNSON,)
 and GRACE BJARNSON,)
)
)
 Defendants, Appellants,)
 and Cross Respondents.)
)

OBJECTION TO
APPELLANT'S PETITION
FOR REHEARING

Case No. 17662


OBJECTION TO PETITION FOR REHEARING

COME NOW the Plaintiffs, Respondents, and Cross Appellants, by and through their attorney, John L. Miles, and object to Appellants' Petition For Rehearing, pursuant to Rule 76(c) (2), URCP, on the following grounds:

1. The petition presents nothing new or important for consideration.
2. The Supreme Court has considered and decided all of the material questions involved, including the issue of attorney fees.
3. Appellants' Petition For Rehearing is nothing more than an attempt to rewrite the opinion to their complete satisfaction.
4. The appellants have failed to challenge on appeal the trial court's findings denying an award of attorney fees to them.

5. The appellants have failed to appeal the trial court's decision granting judgment to respondents on appellants' counterclaims.

RESPECTFULLY SUBMITTED this 7th day of April, 1983



John L. Miles
Attorney For Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

SALLI SMITH GIRARD,)	
)	
Plaintiff, Respondent,)	
and Cross Appellant,)	REPOENDENT'S BRIEF
)	OPPOSING PETITION
vs.)	FOR REHEARING
)	
CHARLES L. APPLEBY, JR.,)	
CATHERINE APPLEBY, DON BJARNSON,)	
and GRACE BJARNSON,)	Case No. 17662
)	
Defendants, Appellants,)	
and Cross Respondents.)	

BRIEF OPPOSING PETITION FOR REHEARING

Nature of Case

The nature of the case was accurately recited by Chief Justice Hall in his opinion dated March 11, 1983.

Disposition in the Trial Court

As it pertains to appellants' petition for rehearing, the trial court denied appellants' attorney's fees at trial, and that denial was affirmed by this court.

Relief Sought

Respondents seek a denial of Petition For Rehearing. Alternatively, if the Petition For Rehearing is granted, respondents seek an affirmance of the trial court's ruling denying the attorney fees sought by appellants.

STATEMENT OF MATERIAL FACTS

Plaintiffs brought this action seeking a forfeiture of license on certain heated mineral waters operated by defendants

as a recreational and therapeutic spa. Plaintiffs gave defendants a "Notice To Cure Defaults" which specified defaults regarding insurance, health code violations, and waste (including health code and building code violations). Plaintiffs filed suit after defendants failed to cure the defaults within 30 days. Plaintiffs attached to their complaint as Exhibit "B" a copy of the "Notice To Cure Defaults".

When the case finally came on for trial, defendants objected to the presentation of evidence relating to building and health code violations although these issues had been discussed frequently by the parties prior to trial and had been the subject of lengthy interrogatories. Defendants' objection was that the complaint did not allege with sufficient particularity these violations. Plaintiffs maintained that the complaint was sufficient, particularly since the "Notice To Cure Defaults" was attached as an exhibit for all purposes. The trial court reserved its ruling on this issue and allowed both parties to introduce testimony and evidence on the building and health code violations.

The trial court took the matter under advisement and then made its "Findings And Order" on March 6, 1981 (R 302-306), finding that a claim for relief was stated only with respect to the insurance issue; denying plaintiff's motion to amend; excluding all testimony and evidence on the building and health code violations; finding a breach of the lease with respect to the insurance issue, which breach was not timely cured by defendant; finding that the insurance breach was not substantial

enough to justify a forfeiture of the lease; and finding that forfeiture of the lease was waived in any event by acceptance of rents after the breach. With respect to defendants' counterclaim, the trial court found (R 305-306) that:

"COUNTERCLAIM

11. Since damages were not sought nor proven under the First Cause of Action (cosmetic formulas) and a basis for specific performance was not adequately shown, judgment is awarded to plaintiffs on this cause of action but without prejudice.

12. Since damages were not sought nor proven under the Second Cause of Action (Rock House) and defendants now have full possession, rendering specific performance unnecessary, judgment is awarded to plaintiffs on this cause of action.

13. Under the language of paragraph 12 of the lease, defendants would not be entitled to attorneys fees for defending the allegations of plaintiffs complaint. The Court assumes that most or all of the \$2,000 in attorneys fees claimed related to this area, and not to the counterclaim, since it did not consume much time, nor did it appear to be seriously pressed. Accordingly, no attorneys fees are awarded to defendants."

Defendants moved on March 13, 1981 to amend the findings of fact and judgment to award defendants attorney fees for defending their right to quiet enjoyment of the leased premises (P 325-334).

On March 18, 1981 the trial court made "Additional Findings Of Fact", stating in response to defendants' request for an award of their attorney fees, (R 340-341) that:

"15. Defendants are not entitled to recover fees for the following reasons:

- a. Prosecution of Counterclaim. (see Finding No. 13, date March 6, 1981).
- b. Defense of Complaint. Paragraph 12 of the Lease is so worded as to not permit recovery of attorneys fees expended in defense.
- c. Defense of Implied Covenant for Quiet Enjoyment. There are many difficulties with

this theory. Assuming there was such an implied covenant, there is no evidence that plaintiff breached it. The filing of her lawsuit did not interfere with defendant's possession. This theory, not having been timely plead nor proved, it cannot serve as a basis for attorney's fees. In contrast, the breach of the insurance covenant was clearly proven, although for other reasons the remedy of forfeiture was denied by the Court. Under the language of the Lease, the entitlement would rest on the breach, not the remedy being granted."

Appellants appealed to this Court the award of attorney fees to plaintiffs relating to the breach of the insurance requirements of the lease and sought, in their Point VI, an award of \$2,000 attorney fees for successfully resisting forfeiture of the lease, but did not address or brief the trial Court's reasons for denying such fees.

Plaintiffs cross appealed the trial court's determination that only the insurance issue was sufficiently plead; the denial of their motion to amend; and the ruling that acceptance of rent waived the forfeiture of the lease.

This Court filed its decision on March 11, 1983, concluding:

"The trial court's award of attorney fees is vacated and set aside. In all other respects, the judgment is affirmed. Each party to bear their own costs." (Emphasis Added.)

OBJECTIONS TO PETITION

POINT I

THE SUPREME COURT'S OPINION RESOLVED THE ISSUE OF APPELLANTS' ATTORNEY'S FEES.

Appellants did not appeal the trial court's award of judgment to plaintiffs on all of appellants' counterclaims. When

appellants' counterclaims fail, the trial court cannot award affirmative relief (whether attorney fees or other relief) to them, nor can appellants claim attorney's fees on theories, such as breach of an implied covenant of quiet enjoyment, that were neither timely pleaded or proved at trial (P 340-341). In this same case this Court has ruled that plaintiffs could not try the issues regarding building and health code violations where they were embodied in an exhibit to the complaint but not set forth clearly in the body of the complaint itself in compliance with Rule 8(a), URPCP. Clearly, then, appellants cannot recover attorney's fees when they have not pleaded nor submitted evidence on the theory of an implied covenant of quiet enjoyment, and judgment on their counterclaims was entered for plaintiffs and have not been appealed.

The language of this Court's opinion makes it clear that it intended to affirm the trial court's decision regarding this issue and all other issues that were not specifically addressed in the opinion. The statement that "In all other respects, the judgment is affirmed." can have no other meaning.

A petition for rehearing should not be granted where nothing new and important is offered for consideration. Jones v. House 4 U. 484, 11 P. 619. When all the material questions in a case have been considered and decided, a petition for rehearing should be denied. Cummings v. Nielsen 42 U. 157, 129 P. 619.

Appellants are suggesting that certain language be inserted into the opinion to allow them to recover attorney fees.

This is not a proper basis for granting a rehearing. (See Beaver,
County v. Home Indem. Co., 88 U. 1, 52 P.2d 435).

CONCLUSION

The petition for rehearing should be denied. The only error or oversight made by the Supreme Court was its ruling that acceptance of rents waived the forfeiture of the lease. That issue need not have been addressed by this Court since it upheld the trial court's determination that the breach of the insurance covenant was not of sufficient substance to justify a forfeiture of the lease. The discussion regarding acceptance of rent thereafter became unnecessary surplusage. It is bad law. Lessors will now have to bite the bullet, refusing all rent, in order to terminate a lease. A tenant will be able to refuse possession without paying any rent until the lessor can finally push his case to trial. A money judgment at that late date will be of no value in the case of many tenants. That part of the decision should be changed.

RESPECTFULLY SUBMITTED this 7th day of April, 1983.

John L. Miles
JOHN L. MILES
Attorney For Respondent

CERTIFICATE OF MAILING

I do hereby certify that on the 7th day of April, 1983, I mailed two copies of the above and foregoing OBJECTION TO APPELLANTS' PETITION FOR REHEARING TO Michael D. Hughes, Attorney for Appellants, 148 East Tabernacle, St. George, Utah 84770, postage prepaid.