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W. Daniel English v. Standard Optical Co. : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
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DOCKET NO.

900422-CA

COURT OF APPEALS

STATE OF UTAH

W. DANIEL ENGLISH,

Plaintiff/Respondent,

vs.

STANDARD OPTICAL CO., a Utah
corporation,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT
Priority No. 16

Case No. 900422-CA

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Defendant/Appellant Standard Optical Company ("Standard") submits the following brief in reply to the Brief of Plaintiff/Respondent W. Daniel English ("English") and in support of its appeal.

ARGUMENT

POINT I

**STANDARD IS NOT BARRED FROM
RAISING A STATUTE OF FRAUDS DEFENSE.**

The first issue English raises in his brief is whether Standard waived

its right to interpose the statute of frauds as a defense to the oral agreement to pay \$1,000 per month for the third 36-month period of the written lease as a result of Standard's admission in its pleadings and at trial that it agreed to pay \$1,000 per month.

English Brief, p. 1. English then devotes POINT II of his Brief to the argument that Standard admitted at trial and in its Trial

Brief the existence and all the essential terms of an agreement to extend the Lease for another 36 months and is therefore barred from asserting the statute of frauds defense. English Brief, pp. 16-20. Standard expressly denies the premise of this argument.

A. Standard did not waive the statute of frauds defense.

English has conveniently failed to reveal to the Court that, in his Complaint, he did not allege an oral agreement on an extension or on any of the terms of the lease. After presenting his case at trial, and over the express objection of appellant, English moved to amend his complaint to include a claim that on November 2, 1988 the parties orally agreed on a rental amount for the next 36 months. Trial Transcript, Vol. II, p. 42, lines 5-7. Despite Standard's opposition to English's motion to amend, the trial court granted the motion. Id. at pp. 42-44. Standard then made a timely motion to amend its Answer to include the statute of frauds defense. That motion was granted without opposition from English. Id. at pp. 44-45.

Prior to the trial court granting English's motion to amend, there was no reason for Standard to assert a statute of frauds defense as no oral agreement had been alleged. Standard therefore could not have waived the defense. Indeed, the only conceivable waiver under these facts, is English's waiver of the right to assert an oral agreement. Despite the fact that English knew the facts upon which he based his claim prior to his commencing this action, he failed to plead an oral agreement

until halfway through the trial. His motion to amend was untimely and granting it was clearly prejudicial to Standard.

B. English waived the issues it raises for the first time on appeal.

This is the first time English has raised the issue of a waiver of the statute of frauds defense in this lawsuit. The issue was not raised below, in argument at trial, or in English's Memorandum in Response to Standard's Motion to Amend the Judgment.

The Utah Supreme Court has forcefully and consistently held that an appeals court will not consider issues raised before it for the first time. Sorenson v. Larsen, 740 P.2d 1336 (Utah 1987); Topik v. Thurber, 739 P.2d 1101, 1103 (Utah 1987); Insley Mfg. Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986). In Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1045 (Utah 1983), the court stated that the record must clearly show that an issue was "timely presented to the trial court in a manner sufficient to obtain a ruling thereon; we cannot assume that it was properly raised." If a party fails to present an issue to the trial court, it will have "waived the right to raise it" on appeal. Utah County v. Brouwn, 62 P.2d 83, 85 (Utah 1983). "It is axiomatic that defenses and claims not raised by the parties in a trial [court] cannot be considered for the first time on appeal." Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983).

Because English did not raise the issue of a waiver of the Statute of Frauds defense in the trial court, he has waived the right to raise that issue on appeal. Consequently, POINT II of plaintiff's brief should not be considered by this Court.

POINT II

THE STATUTE OF FRAUDS PRECLUDES ENFORCEMENT OF THE LEASE AFTER AUGUST 1988.

Standard acknowledges that the writing necessary to satisfy the statute of frauds may be comprised of several memoranda which, taken together, contain the terms of the agreement. In the instant case, however, the "memoranda" relied upon by English and the trial court do not contain the terms of the alleged agreement.

English had the burden of proving an agreement on the essential terms of a lease renewal. In this case, those terms included agreement upon a 36-month duration. English asks this Court to supply the essential 36-month term of duration by implication. Such a critical and material term, however, cannot be implied.

English relies upon the proposition that the statute of frauds may be satisfied by looking at the implied references in the various writings and the surrounding circumstances. English Brief, p. 23. The evidence adduced at trial, however, is of written references and surrounding circumstances directly contrary to finding an agreement to renew the lease.

The evidence in the record suggests that no agreement was reached as to rental for a renewal term of 36 months. The undisputed evidence is that both parties knew a writing specifying the amount of rent to be paid, the term of the extension and signed by the parties was required to renew the lease. Trial Transcript, Vol. II, pp. 11-13. Nonetheless, no attempt was made by either party to draft such a writing after August 1988.

English acknowledges that the parties had been negotiating for a "settlement" or "buyout" (English Brief, pp. 26-27), but nevertheless asserts that Schubach's November 2, 1988 statement that Standard would pay \$1,000 a month constituted an agreement to renew the lease for an additional 36 months rather than an agreement on a buyout or settlement. Such an interpretation is not supported by the record.¹

Furthermore, it is undisputed that English changed the locks on the premises on October 18, 1988. The natural consequence of changing the locks on a building is to deprive the persons with keys to the original locks of access and possession. As a matter of law, it is assumed that one intends the natural consequences of his acts. In the instant case, there is no evidence that

¹ It should be noted that, since the trial and less than 36 months after the alleged lease renewal, English sold the building at 3525 Market Street to the West Valley RDA and the building has been torn down. Thus, prior to expiration of the alleged renewed lease, English has rendered his performance impossible.

anyone other than Standard and English had a key to the original locks on the premises. The only permissible implication of English changing the locks is that he intended to deprive Standard of access to and possession of the premises. Such an intent is clearly inconsistent with English's argument that the parties intended to renew the lease.

Even English's letter of December 2, 1988, which the trial court relied upon to satisfy the statute of frauds, indicates that English's intent was directly contrary to a lease renewal. See Trial Exhibit 13P (included in Addendum to Standard's opening Brief). He indicates an intent to rent the premises to another tenant and to complete "settlement" with Standard. Id. It is inconceivable how such a memorandum could be sufficient to evidence an agreement to renew the lease with Standard.

Rhetorically, one is compelled to ask: Why 36 months? Why not one year or four years? The base lease provided that it would run for 10 years but the rent had to be renegotiated every three years. It did not provide that renewals had to be in three-year increments -- that would make no sense because 10 is not equally divisible by three. The fact is that there is no evidence in the record before this Court evidencing an intent by either party to renew the lease for three years.

To conclude that the statute of frauds requirements are satisfied by the writings and testimony in evidence in this case would require such a tortured interpretation of the statute that

it would, in effect, be stripped of all practical meaning. The burden of proof in this case is on English. He had to prove that the parties agreed to renew the lease for an additional 36 months and he has simply failed to do so.

POINT III

ENGLISH HAS FAILED TO SHOW THAT HE GAVE ANY CONSIDERATION FOR A LEASE RENEWAL.

As Standard explained more fully in its opening brief, a lease contract must necessarily include the landlord's conveyance of a right of exclusive possession to the tenant. See Standard Brief, p. 22. English does not dispute that this is the law. English's position continues to be that, in November 1988, Standard promised to pay rent under the 1982 lease for an additional 36 months in exchange for nothing from English. Such a promise, even if made, is not an enforceable contract.

English's argument that Standard was never deprived of possession of the premises is unsupported by the evidence and incorrect as a matter of law. First, he takes the untenable position that "Standard effectively gave English permission to change the lock" by "declar[ing] that it was not in the leasing business and that it was English who was in the leasing business." English Brief, p. 31. English argues that this "instruction" implied that English could change the locks before

finding another tenant. Id. Acceptance of this argument requires an incredible stretch of the imagination.²

English further confuses the issue of possession. His argument is essentially two-pronged. While he admits he changed the locks without notifying Standard, he argues that because he did not intend to deprive Standard of possession, and because Standard was able to gain access to the premises each time it tried, Standard was never deprived of possession.

Whether English deprived Standard of possession of the premises is clearly not a question of English's subjective intent, especially where it relates to the issue of consideration. Furthermore, English's argument that Standard continued in possession because it was never denied access is like arguing that because a customer has never been denied access to a 7-Eleven, he has possession of the store. The flaw in such an argument is apparent.

English's uncontradicted testimony at trial was that after October 18, 1988 Standard had to demand a key from English to gain access to the premises. Trial Transcript, Vol. I, pp. 136-137, lines 18-1 and p. 139, lines 4-7; and See Dore Testimony, Trial Transcript, Vol. 2, p. 36, lines 7-12. The Utah

² In connection with this argument, English for the first time raises an estoppel and waiver argument. See English Brief, pp. 32-33. English never raised estoppel and waiver in the trial court and is precluded from now raising these issues on appeal. See Point I, B., infra.

Supreme Court has unequivocally stated as a matter of law that where a landlord has changed the locks on a leased premises, he has deprived the tenant of possession, even where the tenant is able to obtain access upon demand. Bass v. Planned Management Services, 761 P.2d 566 (Utah 1988). On this issue, Bass is indistinguishable from the instant case.

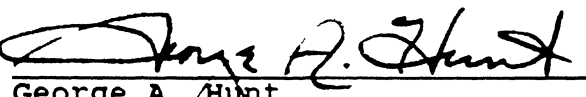
English has failed to establish that he gave any consideration to Standard for the alleged promise of Standard to pay rent for an additional 36 months. Under these circumstances there could be no enforceable lease after August 1988.

CONCLUSION

For the foregoing reasons, Standard Optical Company respectfully requests that the judgment below be reversed and judgment entered in favor of Standard Optical Company.

DATED this 2nd day of January, 1991.

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CERTIFICATE OF MAILING
Priority No. 16

Case No. 900422-CA

Counsel for Defendant/Appellant Standard Optical Company,
hereby certifies that four true and correct copies of the Reply
Brief of Appellant was mailed by first-class mail, postage
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