1982

Fashions Four Corporation and Elgin Williams v. Fashion Place Associates : Brief of Appellant

Utah Supreme Court

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SUPREME COURT OF UTAH

STATE OF UTAH

FASHIONS FOUR CORPORATION, a Utah corporation, and ELGIN WILLIAMS, Plaintiff-Respondent,	)	Case No. 18194
-vs-	)	
FASHION PLACE ASSOCIATES, a limited partnership, and BOB GARWOOD, Defendant-Appellant.	)	

BRIEF OF APPELLANT

Appeal from a Judgment of the
Third Judicial District Court
Salt Lake County, State of Utah
Honorable Jay E. Banks, Presiding

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SUPREME COURT OF UTAH

STATE OF UTAH

* * * * * * * * * * * * *

FASHIONS FOUR CORPORATION, a Utah corporation and ELGIN WILLIAMS, Plaintiff-Respondent, -vs- FASHION PLACE ASSOCIATES, a limited partnership, and BOB GARWOOD, Defendant-Appellant.	)	Case No. 18164

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This action arises out of a dispute regarding the interpretation of a written lease agreement, and the parties' respective rights thereunder.

DISPOSITION IN LOWER COURT

The trial court found that under a lease agreement Plaintiff was entitled to possession of the premises in dispute. The lower Court awarded Plaintiff a permanent injunction prohibiting Defendant from interfering with Plaintiff's possession of the premises,

money damages, and an award of attorney's fees.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks reversal of the trial court judgment in favor of the Plaintiff, an entry of judgment in favor of Defendant on Defendant's Counter-claim, and the action to be remanded to the lower court for a determination of the amount of damages sustained by Defendant.

STATEMENT OF FACTS

Fashion Place Associates, the Defendant-appellant (hereinafter Fashion Place) is the lessor of the Fashion Place Mall which is situated in the County of Salt Lake, State of Utah. The corporate Plaintiff-respondent, Fashions Four Corporation (hereinafter Fashions Four) was the lessee of certain commercial premises at the Fashion Place Mall under a written lease agreement dated May 6, 1974. (R. 8).

From 1974 through September of 1978 Fashions Four operated a commercial women's ready-to-wear store under the trade name "Charlie's" in the leased premises.

(T. 28) In September 1978 Fashions Four sold that business to Norsal Development Corporation (hereinafter Norsal), subject to Fashion Place Associates' approval of the assignment of the lease to Norsal. (T. 32) Article 15 of the written lease agreement required the lessor's consent for any assignment or transfer of the lease. (R. 20)

Fashion Place Associates consented to the assignment of the lease to Norsal and a written assignment was prepared by Fashion Place reflecting that consent, as well as the agreement of Fashions Four as assignor and Norsal as assignee to be bound by the terms of the lease agreement, with specific reference to the "consent to assignment" provisions of the original lease agreement. (T. 31, R. 60, 61)

The written assignment was circulated for signature. (T. 32) It was signed by Fashions Four as assignor. (T. 32, R. 61) However, the original document was apparently lost in transit and was not signed by either Fashion Place Associates or Norsal. (R. 61) Despite the failure to complete the execution process, Fashion Place Associates, Fashions Four Corporation, and Norsal all respected the assignment, and no challenge was raised to Norsal's right to

possession of the premises. (R. 72)

In November of 1979, without the knowledge of Fashion Place Associates, all the stock of Norsal was conveyed to Neil Davidson, who prior to that time had been a minor shareholder of the corporation. (T. 93) The business known as "Charlie's was the sole asset of Norsal. (T. 93)

"Charlie's" under Neil Davidson and Norsal was not a profitable operation. (T. 100) On a number of occasions rent was not paid in a timely fashion. (T. 100) Between October 1980 and June of 1981, three separate actions were initiated by the lessor Fashion Place Associates seeking rental arrearages and/or recovery of the premises. (T. 110, 115, 127)

By early June of 1981, the inventory of "Charlie's" had been attached by judgment creditors and a sheriff's sale of the inventory had been scheduled. (T. 43)

On June 10, 1981, Norsal and Neil Davidson agreed to assign the lease back to Fashions Four Corporation. (T. 99) On June 11, 1981, Neil Davidson on behalf of Norsal signed two documents prepared by Elgin Williams on behalf of Fashions Four Corporation, a repossession agreement (R. 149), and an assignment of lease. (R. 150) Fashion Place Associates had no knowledge of this agreement. (T. 155) Apparently the keys to the premises

were delivered to Elgin Williams for Fashions Four Corporation on June 11. (T. 90) However, the store remained closed.

On or about June 19, 1981, after consultation with counsel, Fashion Place Associates put its own lock on the premises on the grounds that the store had been closed for more than 15 days and that Norsal had failed to pay any rent for several months, including the June rental payment. Norsal had not notified Fashion Place Associates that it intended to be absent from the premises, and except for the personal property in the premises, there was no evidence that Norsal was occupying the premises. (T. 165) The conditions mandated by statute for a presumption of abandonment entitling a lessor to re-enter lease premises appeared to have been met. Section 78-36-12.3(3), U.C.A. (1953, as amended).

On June 18, 1982, Mr. Williams on behalf of Fashions Four returned to "Charlie's" for the first time since June 11 and allegedly discovered the Fashion Place lock on the premises. (T. 44) On June 19, 1982 Mr. Williams met with the managers of the Fashion Place Mall, Tom Estes and Bob Garwood. (T. 45) Mr. Williams told them that he wanted to operate "Charlie's"

and that he had retaken possession of the premises from Norsal. (T. 46, 47) Mr. Estes responded by saying that Fashions Four could not retake possession because the store had been abandoned by Norsal and that the lessor had possession of the premises. (T.46) The managers also indicated that Fashions Four could not take possession of the premises without the Lessor's consent under the written lease agreement. (T. 47) Thereafter Fashion Place Associates continued to deny that Fashions Four had a right to possession of the premises.

The instant action was filed more than a month later on July 23, 1982. (R. 2) On that same day, the lower court issued a temporary restraining order directing that Fashions Four be put in possession of the premises. (R. 39) Fashion Place Associates complied with the Court order putting Fashions Four in possession no later than July 31, 1981. (T. 72)

On or about August 1, 1981, Fashions Four Corporation finalized their purchase of the attached inventory which allowed Fashions Four to begin operating the store. (T. 72)

The lessor Fashion Place Associates counter-claimed asserting that the temporary restraining order had been wrongfully issued and that Fashions Four could not have any possessory interest in the premises without the lessor's consent. (R. 55)

Trial was held on October 6 and 7, 1981 before the Honorable Jay E. Banks. On October 23, 1981 the lower court by minute order found for the Plaintiff Fashions Four Corporation against the Defendant Fashion Place Associates. (R. 180) Fashions Four Corporation was awarded a permanent injunction prohibiting Fashion Place Associates from interfering with Fashions Four's possession of the premises, general damages in the amount of $3,500, and $7,000 in attorney's fees. (R. 207)

Findings of fact and conclusions of law, judgment and permanent injunction were duly entered by the Court on November 24, 1981. (R. 208)

The trial court entered an order on December 7, 1981 denying Fashion Place Associates' motion for amendment of the judgment or a new trial. (R. 216) Defendant's notice of appeal was filed on January 5, 1982. (R. 222)

ARGUMENT

POINT I

AS A MATTER OF LAW THE JUNE 11, "ASSIGNMENT BACK" OF THE LEASE DID NOT TRANSFER ANY INTEREST IN THE LEASE TO FASHIONS FOUR CORPORATION BECAUSE THE CONSENT OF THE LESSOR FASHION PLACE ASSOCIATES WAS NOT OBTAINED AS REQUIRED BY THE LEASE AGREEMENT.

On June 11, 1981 as judgment creditors of Norsal and Neil Davidson were arranging the liquidation of the "Charlie's" inventory, Norsal and Neil Davidson attempted to assign the lease "back" to the original tenant, Fashions Four Corporation. Fashions Four Corporation's claim to any interest in the lease stands or falls on the validity of that June 11 transfer.

It is undisputed that the lease agreement which Norsal was attempting to assign to Fashions Four Corporation provides in clear and unambiguous language that no interest can be transfered without the lessor's written consent. (R. 20) It is also undisputed that the June 11 conveyance from Norsal to Fashions Four Corporation was made without the lessor's consent. Despite the failure of Norsal and/or Fashions Four Corporation to obtain the lessor's consent, the trial court found that the June 11 transfer was effective. (R. 204) From the

standpoint of well-established contract law, as well as public policy, that finding was erroneous.

Modern commercial leases, particularly those involving enclosed shopping malls, tend to be both long and complex. By way of example, the body of the lease involved in the instant action is 31 pages in length and contains 35 separate articles. The parties to such leases are sophisticated participants in the commercial arena. The leases adopted by such parties attempt to address in detail every possible question or potential problem that could arise between the lessor and the lessee. Specific references to the circumstances under which assignment or conveyance of the lease will be allowed are standard.

Assignment or transfer of a lease interest by a tenant is critically important to the lessor of an enclosed shopping mall. The lessor has commonly made contractual promises to other mall tenants regarding the kinds of tenants that will be allowed to lease space. By controlling the tenant mix, the lessor seeks to optimize retail opportunities for all mall tenants. Without that control, the lessor loses its ability to meet its contractual obligations to specific tenants, and its ability to optimize the commercial environment

for all tenants. A lessor without the power to pass muster on a particular tenant may be faced with a poorly operated store that will hurt the business of all the adjoining tenants.

The "consent to assignment" provisions of the standard retail lease play an essential role in protecting the interests of other tenants as well as the interests of the lessor. The "consent to assignment" provisions are contractual in nature and are intended to express a "meeting of the minds" of the leasing parties as regards the circumstances under which assignment, subletting, or any other conveyance or transfer will be allowed.

A lease is a contract. Zeese vs. Estate of Siegel, 535 P.2d 85 (Utah, 1975). A written contract duly entered into should be regarded with some sanctity, and its commitments can only be overcome by clear and convincing evidence. Otteson vs. Malone, 584 P.2d 878 (Utah, 1978). Parties are free to contract according to their desires in whatever terms they can agree upon. The contract should be enforced according to its terms unless the result is so unconscionable that a court of equity will refuse to enforce it. Russell vs. Park City Utah Corporation, 548 P.2d 889 (Utah, 1976).

Despite these basic principles of contract law, the trial court refused to enforce the "consent to assignment" provisions of the lease agreement, and instead recognized the validity of the June 11 assignment from Norsal to Fashions Four Corporation, regardless of the fact that Fashion Place Associates did not consent to the transfer.

The rationale of the trial court in arriving at that decision is apparently based on a rule announced in Coulos vs. Desimone, 208 P.2d 105, (Wash. 1949), which follows an even older case, McCormick vs. Stowell, 138 Mass. 431, (Mass. 1885). These two cases adopt the rule that there exists a single hidden exception to the "consent to assignment" provisions of written lease agreements. It is the holding of these cases that despite specific language in a lease that assignment is prohibited without written consent of the lessor, an assignee may always assign back to the original tenant without the consent of the lessor. Following that principle, the trial court found that the consent of Fashion Place Associates to the June 11 assignment back to Fashions Four Corporation was not required.

The only rationale for this hidden exception to specific contract language offered by the Massachusetts case is that the lessor has consented to take the original lessee as his tenant for the full term mentioned in the lease. That consent remains available for any reassignment to the original lease during the term. The 1949 Washington case adopts that language without any analysis whatsoever.

Because this is an issue of first impression in Utah, this Court should carefully consider the wisdom of adopting the Massachusetts position. The following considerations are important.

The "consent to assignment" provisions of modern leases have two purposes. First, they are intended to reject by contract the common law rule that leaseholds are freely assignable. Second, and perhaps more importantly, such provisions are designed to insure that the lessor has a responsible tenant to look to for performance of the lease. Adoption of the Massachusetts rule would make the attainment of these two goals impossible.

A modern commercial lessor has no guarantee, and no reason to expect, that a responsible corporate

tenant will still be responsible eight years after the execution of a 10 year lease. Assume the original corporate tenant, ABC Inc., assigns a lease after three years to XYZ Corporation. XYZ performs for five years and then wants to assign back to ABC Inc. ABC by that point may well have new officers, new shareholders, perhaps an entirely different business. Does the fact that the corporation was a responsible tenant eight years before have any bearing or relevance whatsoever to its current qualifications?

The straightforwardanswer to that question is no. For all practical purposes, from the lessor's perspective, the original corporate tenant is no different than any other potential tenant. If the lessor's contractual right to a responsible tenant is to be protected, it must have an opportunity to pass on the qualifications of all potential tenants, including those of an original corporate tenant.

The rule announced in the Massachusetts case in 1885 may well have made sense under the commercial conditions existing at the time, when the corporate form of business activity was less common than at present. It is equally clear that the adoption of this 19th century principle would not serve the needs of modern commerce. Given the opportunity, this Court should

reject the adoption of a rule that has the effect of writing a hidden exception into the clear and unambiguous language agreed to by both parties to the lease contract.

Instead this Court should enforce the lease contract as it was written by the contracting parties, and refuse to recognize the June 11 "assignment back" to Fashions Four Corporation from Norsal on the ground that Fashion Place Associates' consent was not obtained to that transfer.

POINT II

THE "CONSENT TO ASSIGNMENT" PROVISIONS OF THE LEASE AGREEMENT ARE APPLICABLE TO THE JUNE 11 "ASSIGNMENT BACK" FROM NORSAL TO FASHIONS FOUR CORPORATION.

It is undisputed that Fashions Four Corporation's alleged possession of the lease premises arose from the June 11 "assignment back" of the lease from Norsal to Fashions Four Corporation. (R. 202) At trial, Fashions Four Corporation argued that Fashion Place Associates' consent to that transfer was not required under the Massachusetts rule described in Point I (supra). Fashions Four Corporation also contended that the consent provisions of the lease agreement were waived because Fashion Place Associates had not signed a written consent to the original 1978 assignment from Fashions Four Corporation

to Norsal. That proposition is defective, as a matter of both law and logic.

Throughout the trial court proceedings, Fashion Place Associates acknowledged that it had in fact consented to the 1978 assignment from Fashions Four Corporation to Norsal. The trial court in fact found that Fashion Place Associates had consented to that assignment. (R. 200, Finding of Fact No. 9) Fashion Place Associates has no dispute with that finding. How then can Fashions Four Corporation contend that Fashion Place Associates by its conduct at the time of the original assignment waived the application of the consent provisions?

Waiver would have to be based on a finding that Fashion Place Associates failed to enforce the consent provisions at the time of the 1978 assignment. The finding of the lower court is directly to the contrary. (R. 200) Clearly, because the "consent provision" was not waived in 1978 it remained applicable at the time of the attempted transfer of June 11, 1981.

However, for the purposes of argument only, assume that the consent provisions were waived at the time of the original assignment in 1978. Would such

a waiver have resulted in a waiver at the time of the second assignment? The answer to that question is found in the last paragraph of Article 22 of the lease agreement (R. 30), which reads:

> "The waiver by landlord of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term; covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by landlord shall not be deemed to be a waiver of any preceeding breach by tenant of any term, covenant or condition of this lease, other than the failure of tenant to pay the particular rental so accepted, regardless of landlord's knowledge of such preceeding breach at the time of acceptance of such rent. No covenant, term, or condition of this lease shall be deemed to have been waived by landlord unless such waiver be in writing by landlord." (R. 30) (Emphasis added).

Obviously, even if waiver occurred in 1978, under the express language of the contract, there would be no resulting waiver in 1981. In Nashville Record Prod. vs. Mr. Transmission, Tenn. App., 523 S.W.2d 281 (1981) a similar "no subsequent waiver" provision was found controlling where a defaulting tenant attempted to claim that a custom of accepting late payments waived the right of the lessor to demand timely payment.

Fashions Four Corporation's waiver contention is thus doubly defective. First, the exercise of the right to consent simply will not result in a waiver of that provision. Secondly, a single waiver of the consent provision, even assuming one occurred, would not result in the waiver of that provision in the future under the clear language of the contract.

CONCLUSION

THAT THE TRIAL COURT ERRORED IN SUBSTITUTING ITS OWN VERSION OF THE LEASE IN PLACE OF THE CLEAR AND SPECIFIC LANGUAGE OF THE WRITTEN CONTRACT.

The trial court, in refusing to enforce the "no assignment without consent" provisions of the lease substituted its own version of the contract in place of the clear and specific language agreed to by both parties. That substitution is damaging in two respects.

Modern courts recognize the right of individuals to contract "according to their desires," and generally hold that contracts should be enforced according to their terms unless the result is unconscionable. Russell vs. Park City Utah Corporation (supra). The decision of the lower court to substitute its own version of the lease, a version that inserts a hidden

exception to the clear language of the document, weakens the rights of contracting parties generally to conduct their commercial affairs as they see fit.

More specifically, the adoption by this Court of the Massachusetts rule, that reassignment to an original tenant does not require a lessor's consent despite express language to the contrary, jeopardizes the ability of lessors to meet their contractual obligations to other tenants, and reduces the lessor's ability to optimize the commercial environment for all tenants. The critical importance of tenant "mix" in shopping malls has been judicially recognized. Warmack vs. Merchant's Nat. Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981).

The waiver arguments raised by Fashions Four Corporation are totally without merit. The exercise of the right to consent by Fashion Place Associates in 1978 as regards the original assignment from Fashions Four Corporation to Norsal simply does not result in the waiver of that same right as regards the 1981 "assignment back" to Fashions Four Corporation. Assuming arguendo that the right was waived in 1978, the clear language of the contract prohibits any such waiver from applying to a future breach.

Fashion Place Associates has been wrongfully deprived of its right of possession of the lease premises since at least July 31, 1981. In the interest of justice, the lower court's ruling should be reversed, and the case remanded to the trial court with instructions to dismiss Fashions Four Corporation's Complaint and to enter judgment in favor of Fashion Place Associates on its Counterclaim, with further proceedings to be held on the amount of damages sustained by Fashion Place Associates. Such action would compensate Fashion Place Associates for the damage it has been forced to sustain, and reaffirm this Court's commitment to the rights of contract.

DATED this 26 day of August, 1982.

Respectfully submitted,

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