1982

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

Utah Supreme Court

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SUPREME COURT OF UTAH

STATE OF UTAH

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

BRIEF OF RESPONDENT

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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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES CITED

STATUTES CITED (CONT'D)

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****

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Defendant-Appellant.

Case No. 18164

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

An action for forceable entry and detainer by Fashion Four Corporation and Elgin Williams, as Lessee (Respondents herein), against Fashion Place Associates, as Lessor (Appellant herein), pursuant to the provisions of Title 78-36-2, Utah Code Annotated, 1953, as amended.

DISPOSITION IN LOWER COURT

The Lower Court found that the "locking out" of the Plaintiffs from the leased premises by Fashion Place Associates constituted forceable entry and detainer in violation of Title 78-36-2, U.C.A. 1953 as amended and awarded Plaintiffs money damages, attorney's fees and a permanent injunction restraining

Defendant, Fashion Place Associates from interfering with Plaintiffs peaceable possession and occupancy of the leased premises in accordance with the terms and conditions of the Lease Agreement between Plaintiffs and Defendant.

RELIEF SOUGHT ON APPEAL

Respondents, Fashion Four Corporation and Elgin Williams (Plaintiffs below) ask the Court to dismiss the appeal and affirm the judgment of the trial Court.

STATEMENT OF FACTS

On or about May 6, 1974, Fashion Four Corporation and Elgin Williams, the Plaintiff-Respondents (hereinafter Fashion Four) entered into a Lease Agreement (hereinafter Lease Agreement) with Defendant-Appellant, Fashion Place Associates, (hereinafter Fashion Place) of certain premises located at the Fashion Place Mall in Salt Lake County, State of Utah. (T. 27) (R. 8)(Findings No. 1) From May 6, 1974 to June 11, 1981, transfers of this Lease Agreement were made, concluding with an assignment back to Fashion Four on June 11, 1981. Eight days later, on or about June 19, 1981, without any statutory formality or compliance, Fashion Place, through its assistant manager, Bob Garwood, locked the premises and thereby locked Fashion Four out from their actual and peaceable possession. (T. 43) (Findings, No. 11, 13, 17) (Conclusions No. 4, 5)

Specifically, the above referred transfers occured chronologically as follows:

"Charley's", a women's ready to wear business, which had been operated in conformance with the Lease Agreement from the outset by Fashion Four, was sold by Fashion Four, by written Agreement, to Norsal Development Corporation (hereinafter Norsal) during September, 1978 (T. 4,28) (Findings No. 3) Concurrent with this sale, Fashion Four assigned the Lease Agreement to Norsal, subject to Fashion Place's written consent to said assignment. (T. 30) (Findings No. 4) Fashion Place never did give written consent to this assignment, (T. 30-32) (R. 20) (Findings No. 7) (Conclusions No. 3) but has throughout this action admitted that consent to the assignment had been given. (T. 149)(Findings No. 9)

Article 15, paragraph 3, of the Lease Agreement reads:

> "If the tenant hereunder is a corporation ... the transfer, assignment or hypothecation of any stock or interest in such corporation ... in the aggregate in excess of twenty-five percent (25%) shall be deemed an assignment within the meaning of Article 15." (R. 20)

Norsal entered into possession of the subject premises and operated "Charley's" to June 11, 1981. (T. 35-38,86-87) During the third quarter of 1979 shareholders of Norsal, including Hugh Gardner, transferred all of Norsal stock, being more than 25% of same to Neil Davidson, previously a small shareholder. This transfer was consummated in November, 1979. (T. 91-93) (Findings, No. 6) There was no assignment or consent for assignment by Fashion Place of the Lease Agreement pursuant to this transfer, as defined by Article 15 of the Lease Agreement.

At trial, Fashion Place argued that they had no knowledge of this stock transfer. Yet, Fashion Place's attorney, Raymond Berry, admitted that he examined a file as early as August, 1980, that indicated Neil Davidson (hereinafter Davidson) was operating "Charley's". (T. 109) Further, law suits for back rent were brought by Fashion Place against Norsal Development Corporation, Neil Davidson as an individual dba "Charley's", and others, including the suit of C 80-7830, noted in Findings of Fact No. 21. (R. 203) Finally, Davidson was not involved in "Charley's" operation until November, 1979. Up to that time Norsal operated "Charley's" with a manager by the name of Nancy Love under the direction of Hugh Gardner. (T. 208) It was only after November, 1979 that Davidson paid Fashion Place the rent for "Charley's". (T. 34, 11-20) (T. 208, 2-12) (Findings No. 8) Fashion Place accepted rents from Norsal and Davidson and recognized Norsal and Davidson to be the tenant in possession under the Lease. (T. 38-39, 41) In October, 1980, one (1) year after Davidson acquired the stock ownership of Norsal, "Charley's", the sole asset of Norsal, begain to experience financial difficulty. Consequently, Norsal became delinquent in rents due to Fashion Place and in payments due to Fashion Four under Agreement of Sale between Fashion Four and Norsal. (T. 100-103)

In mid April, 1981, Elgin Williams contacted Tom Estes, the Mall manager, in regard to taking back the business of "Charley's" by assignment. (T. 38,17) (Findings No. 10,12) It was Tom Estes response that the proposed use by Williams

would be very complimentary to the mall, the only apparent problem was the renegotiation of the Lease to a higher rent rate. (T. 39, 19-25; T. 40,1-10) In May, 1981, Fashion Place wrote a letter to Davidson offering to forgive all back rents if Davidson would give up the space occupied by "Charley's". (T. 41) This offer was never accepted by Davidson.

Negotiations between Davidson of Norsal and Williams of Fashion Four continued until an agreement was reached on June 10, 1981. (T.42, 17) On June 11, 1981, Davidson, the principal officer and sole stockholder of Norsal, assigned "Charley's" and the Lease Agreement back to Fashion Four by executing a Repossession Agreement (Exhibit 3) R. 149) and an Assignment of Lease (Exhibit 4) (R. 150) with Williams; Jan Nielson witnessed the transaction and delivered the keys to Williams. (T. 87, 20; T. 90,7) (Findings No. 12) During that day, both Davidson and Jan Nielsen told Tom Estes and Bob Garwood of the business transfer and the re-assignment of the Lease Agreement (T. 42-43) (T. 87,20; T. 88, 15-17) (T. 89, 96-98) (T. 208) No consent was given by Fashion Place for the above transaction.

Unfortunately, also on June 11, 1981, a Norsal judgment creditor levied against the inventory and fixtures of "Charley's". This delayed the opening of the store, but said attachment action and the fact that negotiations had begun between the creditor and Fashion Four to alleviate the debt were known by Fashion Place that day. (T. 46-48) (Findings No. 15) Davidson had talked with

the attorney handling the attachment into leaving the merchandise and fixtures on the premises until Williams could make an arrangement for disposition on the same. (T. 209) Williams finalized the purchase of the merchandise and fixtures on or about August 1, 1981. (T. 48; 58)

Fashion Four was in actual and proper possession from June 11, 1981 until June 19, 1981 when Fashion Place perpetrated forceable entry and detainer of said premises in violation of 78-36-2 U.C.A. (1953 as amended) against Plaintiffs-Respondents, Fashion Four. (T. 43) (Findings No. 13) (Conclusions Nos. 1,4,5) Inspite of Fashion Four's demands for return of the premises and attempts to tender all back rents on June 11th, 19th and at later times, Fashion Place refused to restore said premises until July 31, 1981 as ordered to do so by the Court, at which time Fashion Four paid the rent. (T. 44-48) (Findings No. 13,22).

Fashion Place claimed the premises had been abandoned pursuant to Title 78-36-12.3(3) U.C.A. (1953 as amended) (T. 49; 120; 135) The claim of abandonment was an assumption on the part of the Mall's assistant manager, Bob Garwood) (T.156) Notices were not served upon Fashion Four, Williams, Norsal or Davidson pursuant to 78-36-8.5 U.C.A. (1953 as amended) by Fashion Place at the time of the "locking out". (T. 50) (Findings No. 15) (R. 202) Little, if any, evidence of abandonment was presented at trial by Fashion Place. (Findings No. 16) (R. 202)

Trial was held on October 6th and 7th before the Honorable Jay E. Banks, and the Court made its Minute Entry in favor of

Plaintiff on October 23, 1981; after the parties had submitted Memorandums at the request and direction of the lower Court. (R. 180) The action of Fashion Four against Defendant, Bob Garwood was dismissed on motion at the conclusion of the case in that the Court determined that he was the agent of Fashion Place Associates and had no personal liability. (T. 213) Fashion Four was awarded $3,500.00 in damages and $7,000.00 in attorney's fees and a permanent injunction prohibiting Fashion Place from interfering with Fashion Four's possession of the premises under the terms of the Lease. (R. 207) Findings of Fact, Conclusions of Law, Judgment and Permanent Injunction were duly entered by the Court on November 24, 1981. (R. 198-209) On November 25, 1981, Fashion Place properly moved for an amendment of the Judgment, of the Findings of Fact and Conclusions of Law and for a new trial. (R. 211) This motion, after hearing, was denied by Court order on December 7, 1981. (R. 215, 219) Judge Banks, during the hearing on the motion of Fashion Place for a new trial commented that he had been conservative and restrictive in awarding damages to Plaintiff and that the award of damages was low. Fashion Place did not file their Notice of Appeal for the present matter until January 5, 1982. (R. 222)

ARGUMENT

POINT I

PURSUANT TO RULE 73(a) U.R.C.P. AND 78-36-11 U.C.A. 1953 AS AMENDED, IN AN ACTION FOR FORCEABLE ENTRY AND DETAINER, FAILURE TO FILE NOTICE OF APPEAL WITHIN 10 DAYS FROM THE DATE OF THE LOWER COURT'S ORDER TO BE APPEALED, FAILS TO GIVE THIS COURT JURISDICTION FOR REVIEW.

In Coombs v. Johnson, 484, P.2d 155 (Ut., 1971) this Court very curtly denied review of a forceable detainer action when it became apparent that 15 days had passed from the lower Court's order to the filing of the Notice of Appeal.

In Brandley v. Lewis, 92 P.2d 338 (Ut., 1939) this Court determined that review would be denied for an untimely filing of the Notice of Appeal under the shorter statutory period, only if it was determined that the matter truly was an action in unlawful detainer, rather than "one for a declaratory judgment construing a contract."

A. THIS MATTER IS ONE OF FORCEABLE ENTRY AND DETAINER.

The action brought by Fashion Four against Fashion Place is for forceable entry and detainer, in that Fashion Place

> "(4) ... entered and took possession and occupancy (of the premises), and have locked out the Plaintiff's from said premises ...
>
> (5) ... contrary to the rights of Plaintiff pursuant to said Lease Agreement, and the provisions of 78-36-2 ..." (R. 3)

Further, this matter was tried and adjudicated as an action in forceable entry and detainer. (Findings Nos. 1,3,13, 14,17,18,22) (Conclusions Nos. 1,4,5) Peterson v. Platt, 400

p.2d 507 (Ut. 1965)

Finally, although the facts of this case are involved, they have been put forward to establish a simple fact pattern. Fashion Four was in actual peaceable possession of the premises for more than five (5) days before Fashion Place forceably entered and detained said premises, in violation of 78-36-2 U.C.A.

Brandley's (supra) analysis at 339, determined that an involved fact pattern did not necessarily mean the case is one in declaratory judgment:

> "To determine therefore whether Defendant was in unlawful detainer the Court must determine the meaning and effect of the paragraph (of the contract), but that does not change the action from one in unlawful detainer. It is merely deciding a question, the decision of which is necessary in making a determination as to whether the Defendant is in unlawful detainer."

Similarly, the examination of the enforceability of Article 15 here, does not transmute the character from being an action in forceable entry and detainer; further, the preliminary injunction requested and temporary restraining order was merely enforcement of the forceable entry and detainer remedy and consistent therewith. Anderson v. Granite School District, 413 P.2d 597 (Ut., 1966)

> B. 78-36-11 U.C.A., 1953 AS AMENDED, PROVIDES 10 DAYS TO APPEAL DECISIONS IN FORCEABLE ENTRY AND DETAINER."
>
> Rule 73(a) of the U.R.C.P. states:
>
> " ...the time within which an appeal may be taken shall be one month from the date of the entry in the Register of Actions of the judgment or order appealed from unless a shorter time is by law ..." (emphasis added)

With respect to actions within Chapter 36 of Title 78, including those pursuant to 78-36-2, 78-36-11 reads in its entirety:

> "Either party may, within 10 days, appeal from the judgment rendered."

This has been interpreted by Coombs:

> "The judgment was entered on July 1, 1970 and the Plaintiffs filed their Notice of Appeal from that judgment on July 15, 1970. It is apparent that the appeal was not taken within the time prescribed by Section 78-36-11 U.C.A. 1953, and this Court is without jurisdiction to entertain it." (emphasis added) Coombs, P. 155

Utah follows the rule of statutory interpretation expresse by the maxim "expressio unius est exclusio alterius," which interpreted means that a statute that mandates a thing to be done in a given manner and/or by certain entities shall not be done in any other manner. Accordingly, the appeal of Fashion Place should be dismissed and the lower Court decision should stand affirmed on the grounds that Appellants filed an untimely Notice of Appeal and this Court is without jurisdiction to entertain it.

POINT II

CONSENT OF LANDLORD, FASHION PLACE, FOR THE REASSIGNMENT OF THE LEASE FROM NORSAL-DAVIDSON TO FASHION FOUR WAS NOT REQUIRED AS A MATTER OF LAW (Conclusion No. 2)

> "As pointed out in Coulos v. Desimone 208 P.2d 105 (Wash, 1949), it has been held that such a covenant is not broken where the assignment, executed without the lessor's consent, is made by the assignee back to the original lessee. The reason therefore is stated in McCormick v. Stowell, 138 Mass. 431 (Mass., 1885) as

follows: '... by the Lease, itself, the lessor consents to take the lessee as his tenant for the full term mentioned in the lease.' " (emphasis added)
Shoemaker v. Shaug, 490 P.2d 439, 442 (Wash., 1971)
See also Hendrickson v. Freericks, 620 P.2d 204, 212 (Alk., 1980)

Good law, like truth and equity, stands the test of time. McCormick, Coulos, Shoemaker and Hendrickson each had problems that required solutions in fairness, in face of a lease forfeiture. While only the first three cases involved an assignment back to a prior tenant, they each found their solution in equity after each Court considered the unfavored status of the lease-clause which restrained alienation by contractual negotiation.

"although forfeitures for breach by assignment have been approved if authorized by language in the Lease forfeitures are not favored and never enforced in equity unless the right is so clear as to permit no denial. Shoemaker v. Shag, 490 P.2d 439, 411 (Wash., 1971)" Hendrickson, 212.

"However, such covenants, being restraints upon alienation by lessee, are not favored in the law and are strictly construed." Coulos, 110.

In Hendrickson, after the leased property changed ownership, Hendrickson, the new owner, gave written notice that the lease would be strictly construed and specifically noted the consent for assignment clause. Six days later, the tenant in possession assigned the lease, without consent, to a third person. The Court had no choice but to forfeit the lease; strict compliance had been followed by the landlord and no equities favored the third party tenant.

However, McCormick, Coulos and Shoemaker each had non-consented lease assignments back to a prior party of the lease. When each of these parties entered the lease agreement, they did so with the consent of the landlord for the duration of the lease. Consequently, each of these Courts upheld the assignment and the lease back to the respective prior tenant.

Appellant argues that the landlord should not be required to predict the economic future of its tenants. This is erroneous, if there were such doubt, the lease term would be shorter. Further, this is a red herring, as noted in dicta by Judge Jay E. Banks, the real issue for Fashion Place withholding consent is that, as Fashion Four claimed, lease rents had gone up. The original lease calls for a rent-rate of $9.40 per square foot per year, while on June 11, 1981 Fashion Place claimed the market rate was $16.00 per square foot per year. (T. 162, 17-21; T. 40, 1-10; T. 161, 19-22; T. 162, 5-6)

The equities of the cases above speak directly to the matter of financial loss. Here, it is clear that withholding consent would cost Fashion Four the benefit of their bargain, their rent-rate, not to mention the loss of their leasehold improvements; while in the alternative, Fashion Place would lose nothing.

Fashion Place has a firm financial reason for breaking the lease, the prospect of higher rents. Clearly such a motivation would do violence to Article 33 of the subject Lease Agreement,

where the landlord is proscribed from unreasonably withholding consent. (R. 35) Pursuant to the argument above, it is a matter of law and equity that Fashion Four be allowed to re-enter the premises without further consent from Fashion Place. The decision and judgment of the lower Court should be affirmed.

POINT III

FAILURE OF FASHION PLACE TO PERFORM IN ACCORDANCE WITH ARTICLE 15 WAIVED ANY RIGHT OF FORFEITURE FOR BREACH OF CONDITION AGAINST ASSIGNMENT WITHOUT WRITTEN CONSENT.

It is undisputed that the subject Lease Agreement is a very sophicated document, with its 31 pages, 35 Articles and its 6 attached Exhibits, A through F. Especially when one considers the delineated procedures displayed in Article 15 which governs how written consent for lease assignments shall be given. (R. 20)

This procedure calls for written consent from the landlord to precede any assignment; secondly, it requires a writing satisfactory to the landlord between assignor and assignee in each instance; thirdly, it demands a written assumption of liability of the Lease Agreement by assignee, of Lessee's terms, for the benefit of the landlord; and finally, it requires the executed writing to be delivered to the landlord.

None of the assignors, nor any of the assignees to the transfers noted in the Statement of Facts herein, could compel Fashion Place to comply with the procedures of its own writing.

When Fashion Four asked for consent, by Fashion Place's own choice, they did not provide Fashion Four or Norsal with a written consent prior to the assignment. Instead, Fashion Place proffered a second document, by design, to be signed by Fashion Four, Norsal and Fashion Place, contrary to the procedures of Article 15. Since this document was not signed by Norsal as assignee or Fashion Place as the landlord it has no force or effect. (Conclusions No. 3) Consequently, no written consent exists for this assignment.

No consent, written or otherwise, nor any assignment was made following the Norsal stock sale transfer to Davidson, as defined by paragraph 3 of Article 15. Nor was any objection raised by Fashion Place when the transfer-sale became apparent.

Fashion Place knew a change of ownership had occurred, as evidenced by their acceptance of rent from Hugh Gardner for the first year of Norsal's possession, and from Neil Davidson for the second year of Norsal's possession. (Findings No. 8) A presumption is raised that the lease has been assigned, when a person other than the prior tenant in possession begins to pay rent. Jensen v. O.K. Investment Corp. 507 P.2d 713 (Ut., 1973)

Further, Fashion Place brought two (2) suits for back rent collectively against the corporation, Norsal Development, and the individual, Neil Davidson, dba "Charley's" (Findings No. 21)

Finally, no notice was ever given other than the original Lease Agreement of 1974, that Article 15 would be strictly enforced

> "It is a well settled principle of law that where a landlord has led the tenant to believe that strict compliance of a covenant will not be required, the landlord cannot thereafter demand forfeiture of the lease without first giving the tenant notice that strict compliance of the lease will be demanded in the future." Hendrickson, 211 n.6, See also Duncan v. Malcomb, 351 S.W. 2d 419 (Ark., 1961)

The lessor is responsible for his conduct and dealings with his tenants and their assigns under the lease, especially when the lessor is in conflict with the lease. In Kinter v. Harr, 408 P.2d 487 (Mont., 1965), a tenant-assignee to a lease containing a "no assignment without consent" clause, was deemed responsible for the lease, even though, no consent for the assignment was ever given. The Court said, at 496,

> "That provision (the consent clause) is for the benefit of the lessor and may be waived by accepting rents from the assignee and permitting him to remain in possession." See also Trubowitch v. Riverbank Canning Co., 182 P.2d 182, 187 (Ca., 1947); Sun World Corp. v. Pennysavers, Inc., 637 P.2d 1088, 1092 (Ariz., 1981)

Appellant puts forward two (2) cases against waiver. Nashville Record Prod. v. Mr. Transmission, 623 S.W. 2d 281 (Tenn., 1981) and Warmack v. Merchant National Bank of Fort Smith, 612 S.W. 2d 733 (Ark., 1981)

Nashville involves rental payments; its legal status is not on the same plane as here, where alienation of property transfers are at issue. Warmack involves a controverted assignment to an operation in direct competition with a present

Mall tenant. Its fact pattern and law are not comparable here.

The contract is a continuing relationship between the parties, like the law it changes in accordance with the times, as exhibited by the parties course of dealings. Certainly, the lease assigned to the assignee should be the same as the lease the assignor operated under, including those terms modified or waived by the landlord unless notice of strict compliance is timely reiterated.

CONCLUSION

This case involves an unconsented re-assignment of a lease back to the original tenant of the Lease Agreement, and the subsequent forceable entry and detainer by the landlord. The first item to decide is whether Fashion Place, in locking out Fashion Four, violated 78-36-2. If this decision is in the affirmative, procedurally this Court is without jurisdiction to entertain the appeal due to the untimely filing of the Notice of Appeal by Fashion Place pursuant to Rule 73(a) U.R.C.P. and 78-36-11.

An item not discussed above, was the claim of abandonment of the premises by Fashion Place as justifying its acts. This position was factually unsupported at trial and the Court properly concluded that there was no abandonment. (Conclusions No. 8) Also see Kasson v. Stout, 507 P.2d 87 (Ca., 1973)

Appellant argues that the law of McCormick is archaic, that the practice of preserving the lessor's consent for each assignee of the lease for the duration of the lease, is out of date. Appellant further argues that it is a "single hidden excepti

when cited in Coulos. Respondent disagrees. The restriction on assignment without the consent of Fashion Place ceased to be operative under the facts and circumstances of this case and the general principals of law cited. Consent of Fashion Place to the re-assignment of the lease from Norsal-Davidson to Fashion Four as the original lessee was not required.

Good law, however old, withstands time. The equities of McCormick can be traced all the way to Hendrickson the 1980 case from Alaska. It is these equities that cry out against Fashion Place's unreasonable withholding of their consent from a prior tenant as leverage to raise rent, this case law must be reiterated in this jurisdiction.

Lease forfeitures are unfavored in the law. Typically, without strict compliance of the lease, equity will save the lease. The overall effect is that without the landlord's strict compliance of the lease terms, as was not the case here, the forfeiting clause is waived. Accordingly, the decision and judgment of the lower Court should be upheld.

Respectfully submitted,

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