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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. 18194

REPLY 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

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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

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

REPLY BRIEF OF APPELLANT

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

NATURE OF THE CASE

Respondent's (hereafter Fashions Four) brief description of the nature of the case is misleading in light of their four count complaint, which pled equitable and injunctive causes of action, breach of the lease agreement, and violation of Section 78-36-2, U.C.A. (1953) as amended. (R. 2-6).

DISPOSITION IN LOWER COURT

Fashions Four's review of the disposition in the

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lower court is substantially correct; however, it should be noted that the finding seized upon by Fashions Four is but one of 22 separate findings made by the lower court. (R. 199-204).

STATEMENT OF FACTS

Appellant, (hereafter Fashion Place) disputes Fashions Four's version of the facts in a number of areas. For purposes of clarity, factual disputes are discussed in the context of the specific legal issues raised by the allegations. Statutory citations are to the Utah Code Annotated as amended.

ARGUMENT

POINT I

THE JUDGMENT BEING APPEALED DOES NOT ARISE FROM STATUTORY FORCIBLE ENTRY AND DETAINER WITH THE RESULT THAT THE TIME FOR APPEAL IS NOT CONTROLLED BY SECTION 78-36-11.

Fashions Four asserts that this Court lacks jurisdiction to hear this appeal on the grounds that Fashion Place did not file a notice of appeal within 10 days within the entry of judgment. Fashions Four's argument rests on Section 78-36-11:

> "78-36-11. Time for appeal. --Either party may, within 10 days, appeal from the judgment rendered."

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Fashions Four's contention is totally without merit for the simple reason that the judgment appealed from does not arise under Section 78-36-2, the statutory provision relating to forcible entry and detainer.

First, the complaint filed by Fashions Four pled at least four causes of action, only one of which alleged a breach of Section 78-36-2. Second, the action lacks the essential identifying characteristic of forcible entry and detainer actions as determined by previous decisions of this Court. Third, the judgment under review does not contain the critical element of relief which the forcible entry and detainer statute mandates must be present in judgments arising under the statute. Finally, the judgment contains elements of relief that are clearly impermissible under the forcible entry and detainer statute.

At the outset, it should be noted that Plaintiff's four count complaint pled equitable and injunctive causes of action, breach of contract, and a claim for forcible entry and detainer. The findings of fact, conclusions of law and judgment entered herein make no specific reference to the counts pled. Thus it is not clear from which count(s) the judgment arose.

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This Court has previously held that a plaintiff must comply with the provisions of Section 78-36-8 in order to avail itself of the forcible entry and detainer statute. That section requires that the Court endorse upon the summons the number of days within which the defendant shall be required to appear and defend the action which shall not be less than three days or more than 20 days from the date of service. _Gerard vs. Young_, 20 Ut.2d 30, 432 P. 2d 343 (1967), is the controlling case. On appeal, the lessor contended that it was error for the trial court not to award the lessor treble damages under the forcible entry and detainer statute. This Court affirmed, stating:

> "In the first place, for a plaintiff to bring his case under the forcible entry and detainer statute, he _must_ have the Court endorse upon the summons the number of days within which the defendant shall be required to appear and defend the action, which shall be not less than three or more than 20 days from date of service." (Emphasis added). (Section 78-36-8) id. at 348.

Gerard stands for the proposition that compliance with Section 78-36-8 is an essential element of any action genuinely arising under the forcible entry and detainer statute. Subsequent decisions have affirmed _Gerard_ and held that compliance with Section 78-36-8 is determinative in deciding in whether an action arises

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under the forcible entry and detainer statute. Vickery vs. Kiser, 556 P.2d 502 (Utah 1976); Pingree vs. Continental Group of Utah Inc., 558 P.2d 1317 (Utah 1976).

It is undisputed that Fashions Four failed to comply with the shortening of time provision of Section 78-36-8. (R. 42). Having failed to comply with that provision, Fashions Four's judgment does not arise under the forcible entry and detainer statute, thus precluding application of the 10 day time limit for filing the notice of appeal. Fashions Four, having itself failed to strictly comply with the statute, should not be allowed to use the same statute to defeat Fashion Place's constitutionally recognized right of appeal.

In addition to compliance with Section 78-36-8, another test exists for determining if a particular judgment is controlled by Section 78-36-11. The elements of a judgment arising under the forcible entry and detainer statute are controlled by a specific statutory section, Section 78-36-10. A judgment arising under the statute must contain the elements of relief specified in Section 78-36-10, the relevant part of which reads:

> "78-36-10. Judgment -- of restitution; for damages and rent. -- If upon the trial the verdict of the jury, or if the case is tried without a jury, the finding of the Court, is in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; . . ."(Emphasis added)

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The emphasis of the entire forcible entry and detainer action, including Section 78-36-10 is on restitution, putting a dispossessed tenant back into possession. 78-36-10 mandates that a judgment in favor of a plaintiff award restitution. A judgment not awarding restitution falls outside the parameters of the statute according to previous decisions of this Court. Belnap vs. Fox 251 P. 1073 (Utah 1927) is the controlling case in this jurisdiction. In that action the Court noted that the defendant had surrendered possession of the premises in issue to the plaintiff prior to trial. The opinion holds that because restitution of the premises was not an issue at trial, the 10 day appeal filing period was not applicable, and the time for appeal was in fact controlled by the general appeal statute.

The judgment obtained in the instant action does not award restitution of the premises to plaintiff. (R: 207-2(Restitution was not ordered because Fashions Four had been in actual possession of the premises for more than two months prior to trial and for more than four months prior to the entry of judgment. (R. 201, Finding 13). The issue of restitution was thus moot at the time of trial and entry of judgment. Under Belnap, the omission of restitution from the judgment places that judgment outside the class of statutory judgments controlled by the shortened notice of appeal provisions. Belnap stands for the principle that

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fairness is best served by requiring that both parties meet the same standard of strict statutory compliance before applying the special appeal provisions of Section 78-36-11. That conclusion is further supported by the fact that the judgment below includes elements of relief clearly impermissible under Section 78-36-10.

In addition to money damages, the lower court's judgment awarded Fashions Four injunctive relief, in the form of a permanent injunction prohibiting Fashion Place from interfering with their occupancy and possession of the premises in dispute, and declaratory relief in the form of a finding that Plaintiff was entitled to possession under the terms of the original lease agreement. (R.208).

The relief thus awarded appears to be equitable and declaratory in nature. Both elements are legitimate items of relief under the U.R.C.P., but judgments arising under the Utah Forcible Entry and Detainer Act are controlled by Section 78-36-10. The full text of Section 78-36-10 is attached hereto as Appendix A. A review of Section 78-36-10 reveals no provision for the award of general equitable or declaratory relief in statutory actions. Thus, the judgment awarded Fashions Four could not arise under the forcible entry and detainer statute, and thus the shortened time for appeal provisions do not apply.

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The controlling case in this jurisdiction is Ottenheimer vs. Mountain States Supply Co., 55 Ut. 190, 188 P. 1117 (1920). The applicability of the shortened time provision of Section 78-36-11 was the issue before the Court. The Court held that the shortened time provisions did not apply, stating that the relief sought and obtained by the plaintiffs under their second cause of action was purely equitable, and could not be obtained in a forcible entry and detainer under the statute. Ottenheimer was affirmed by this Court in Brandley vs. Lewis, 92 P.2d 338, (Utah 1939).

In summary, the action pursued by the Plaintiff and the judgment in fact obtained failed in every important respect to contain the prerequisite elements of statutory forcible entry or detainer cases. First, the complaint itself pled four causes of action, only one of which involved the statutory claim. Second, the Plaintiff failed to comply with the mandatory provisions of Section 78-36-8 in regard to shortening the time to appear and defend forcible entry and/or detainer actions.

Third, the judgment itself as entered lacks an essential element which the statute itself mandates must be present in any judgment arising under the statute, restition of the premises. Finally, the relief in fact obtained could not be properly awarded under the provisions of the statute.

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These deficiencies put the judgment under appeal clearly outside the statutory parameters of forcible entry and detainer actions, and thus outside the application of Section 78-36-11 as regards the shortened time for appeal. The assertion of jurisdiction by this Court over this appeal is entirely consistent with prior Utah case law.

POINT II

THE JUNE 11 REASSIGNMENT OF THE LEASE AGREEMENT FROM NORSAL TO FASHIONS FOUR IS VOID BECAUSE THE CONSENT OF THE LESSOR AS REQUIRED BY THE LEASE WAS NOT OBTAINED. THE LOWER COURT ERRED IN FINDING THAT CONSENT WAS NOT REQUIRED AS A MATTER OF LAW.

On June 11, 1981 Norsal reassigned the lease agreement to the prior tenant, Fashions Four. (R.201, Finding Nos. 12 and 13). That reassignment was made without the knowledge or consent of Fashion Place, (R. 204, Conclusion No. 2), in apparent violation of Article 15 of the lease agreement, which requires lessor's consent to any assignment. (R. 20).

The crux of the lower court decision is the conclusion that the consent of the lessor, Fashion Place, was not required for the June 11 reassignment. (R. 204, Conclusion No. 3). The finding that Fashions Four had a possessory interest in the lease which was violated by

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Fashion Place (R. 201, Finding Nos. 12 and 13), rests entirely on the validity of the reassignment.

The trial court's conclusion that Fashion Place's consent was not required as a matter of law is derived from a line of three cases apparently holding that the consent provisions of written lease agreements do not apply to reassignments to an original lessee. The first case in that series is McCormick vs. Stowell, 138 Mass. 431 (Mass. 1885).

At the outset, it should be noted that McCormick did not involve a dispute over possession. In McCormick, the lessee brought an action against the lessor based on a claim that the lessor had failed to heat the premises as agreed. The lessor raised the claim of an assignment without consent as an affirmative defense barring the introduction of evidence that would support the lessee's claim that the lessor had failed to heat the premises.

The opinion holds that it was proper for the trial court to allow evidence regarding the lessor's failure to heat the premises. In arriving at that holding, the Massachusetts court noted that the assignment back was not a breach, because lease provisions requiring the written consent of the lessor for assignment do not apply to a reassignment to the lessee.

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The source then of Fashions Four's contention that the consent to assignment provisions of written lease agreements do not apply to reassignments to an original lessee lies in the unsupported dicta of an 1885 Massachusetts' action which did not raise the issue of possession.

The McCormick dicta was repeated with approval 64 years later in the next case relied upon by Plaintiff, Coulos vs. Desimone, 208 P. 2d 105 (Wash. 1949). Again, it should be noted at the outset that Coulos does not raise an issue of possession.

Coulos was an action for money damages arising out of a claim of constructive eviction brought by the original lessee, Coulos, against the lessor's predecessor in interest, Desimone. Desimone raised the issue of a reassignment without consent as an affirmative defense to the constructive eviction claim. The Washington court, relying on McCormick, held that the reassignment was not a defense to the constructive eviction claim.

The final case in this series relied upon by Plaintiff is Shoemaker vs. Shaug, 490 P.2d 439 (Wash. App. 1971). Unlike McCormick and Coulos, Shoemaker does involve a possession issue. Shoemaker, an assignee of the original lessee, bought the action seeking to avoid a termination of the lease by lessor Shaug on the grounds that there had been an assignment without the lessor's consent. Specifically,

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Shoemaker as part of an anticipated sale of the business operated on the leasehold premises, had assigned the lease to a corporation created by himself and the proposed purchaser. When the purchase fell through, Shoemaker had the corporation reassign the lease back to himself.

Lessor Shaug sought to terminate the lease on the grounds that there had been as assignment without the lessor's consent as required by the lease agreement. The trial court, with substantial misgivings as noted in the opinion, declared a forfeiture and terminated the lease.

The appellate court reversed, pointing out that forfeitures are not favored as a matter of law, and that equity will step in to prevent an inequitable forfeiture. The court sites McCormick and Coulos in support of those general propositions. Because neither Coulos nor McCormick involved a possession dispute, the Court's reliance on those two cases seems misplaced.

In addition to the analytical weaknesses of the cases described above, those cases are readily distinguishable from the facts before this Court. First and most important, the right to possession, which is the gravamen of this litigation, was simply not at issue in McCormick nor Coulos.

Second, the instant action involves premises located in a large regional shopping center where the lessor has contractual relationships with a large number of tenants, and

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is obligated to operate the entire facility in such a way as to provide the maximum benefit to all tenants. In contrast, all of Fashions Four's cases involve simple bilateral relationships between a single lessor and a single lessee.

The primary issue in the instant action is whether the explicit language of Article 15 of the lease agreement will be enforced. That clause states in part:

> "Any attempted transfer, assignment, subletting, license or concession agreement, change of ownership or hypothecation without the landlord's written consent shall be void and confer no rights upon any third person. . ." (R. 20).

The contract language could hardly be more straightforward. Applied to the facts of the instant action, it simply means that Norsal's June 11 reassignment of the lease agreement to Fashions Four, the lynchpin of Fashions Four's entire case, fails to transfer any rights, possessory or otherwise, back to Fashions Four because the consent of the landlord to the assignment was not obtained.

As indicated in Appellant's Brief on Appeal, freely negotiated contracts between sophisticated commercial parties should not be ignored or set aside, absent fraud or unconscionability, neither of which are present in this action. Fashions Four has simply argued that because the contract does not meet their needs after the fact, it must be modified by Court fiat. In support of that contention, Fashions Four relies upon case law that is analytically defective, in contravention of good public policy, and

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distinguishable from the case herein.

POINT III

FASHION PLACE DID NOT WAIVE THE APPLICATION OF THE CONSENT TO ASSIGNMENT PROVISIONS OF ARTICLE 15 AS REGARDS THE JUNE 11 REASSIGNMENT.

Fashions Four contends that as regards the June 11 reassignment back to Fashions Four, Fashion Place waived application of the consent to assignment provisions of Article 15 because those provisions were not followed in two earlier transactions involving the lease. That contention is without merit.

Assuming arguendo that the consent provisions were actually not followed in the earlier transactions, no waiver would result under the express provisions of Article 22 of the lease agreement, the last paragraph of which reads as follows:

> "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 of 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 waiver of any preceding breach by tenant of any term, covenant or condition of this lease, other than the failure of tenant to pay the particular rentals so accepted, regardless of landlord's knowledge of such preceding 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).

In support of its waiver arguments, Fashions Four cites Hendrickson vs. Freericks, 620 P.2d 205, (Alaska 1980).

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In fact, that case supports Fashion Place's contention that no waiver occurred. In that case, the Alaska court rejects a claim of waiver as to a particular assignment in the following language:

> "Although we have found that Hendrickson did give notice of his intent to enforce the terms of the lease, this principle need not be applied in the instant case to support our holding. In Stevens vs. State, 501 P. 2d 759, 762 (Alaska 1972), we held that where a lease contains a non-waiver provision, previous failures to cancel for a breach of a covenant do not constitute a waiver, and the landlord may demand strict compliance with a lease provision without giving such prior notice. The Hall-Young lease contains such a non-waiver clause which provided that 'waiver by lessor of any breach of any term, covenant or condition . . . shall not be deemed to be a waiver of such term.' Hendrickson 211 footnote 6."

In view of the non-waiver clause cited above, it appears certain that the Alaska court would have enforced the contract language, which is exactly what Fashion Place contends the Court should do in the instant action.

It should also be noted that Fashions Four concedes in its brief that no waiver arises where a lessor puts an assignee on notice that strict compliance will be required.

At trial, it was the undisputed testimony of Mr. Elgin Williams, Plaintiff and chief executive officer of Fashions Four, that in April of 1981 he met with Tom Estes,

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the general manager of Fashion Place Mall, and was told that in order for Fashions Four to regain possession of the premises, a new lease would have to be renegotiated. (T. 40). Thus, Fashions Four had actual notice that the landlord would demand strict compliance with the lease provisions.

The transactions out of which the alleged waivers arise, also deserve brief examination. The first transfer was the assignment from Fashions Four to Norsal in 1978. As indicated in the findings on file herein, Fashion Place in fact consented to that assignment. (R.200, Finding No. 9). A waiver will not arise from the undisputed exercise of the consent requirement.

Fashions Four also claims that a waiver arose from a second transfer in November of 1979, at which time all the stock of Norsal Development Corporation was sold to Neil Davidson. Fashion Place was given no notice whatsoever of that transaction at the time it occurred. Fashion Place could not waive its right to consent to that transaction where it had no notice of the transfer and no opportunity to exercise its right to consent.

Fashions Four's contention that Fashion Place waived its right to consent to the June 11 reassignment will simply not stand where the written lease itself contains an explicit non-waiver provision; where Fashions Four had

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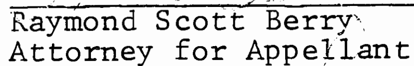
actual notice that the landlord would require strict compliance; and where the transaction supposedly raising the waiver were either consented to by Fashion Place, or kept from Fashion Place's knowledge.

CONCLUSION

In summary, the trial court erred in failing to apply and enforce the clear language of the lease agreement requiring the lessor's consent to any assignment of the lease. For that reason, Fashion Place respectfully requests that the trial court judgment be reversed, the case remanded, and that the trial court be directed to enter judgment in favor of Fashion Place, and to hold further proceedings on the amount of damages sustained by Fashion Place under its counterclaim.

DATED this 15 day of November, 1982.

GREEN, HIGGINS & BERRY



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APPENDIX A

"78-36-10. Judgment for restitution, damages and rent -- Immediate enforcement. If upon the trial the verdict of the jury, or if the case is tried without a jury, the finding of the court, is in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; andif the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement. The jury, or the court, if the proceeding is tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, and any amount found due the plaintiff by reason of waste of the premises by the defendant during the tenancy, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer is after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for the rent and for three times the amount of the damages thus assessed. When the proceeding is for an unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases the judgment may be enforced immediately."

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AFFIDAVIT OF HAND DELIVERY

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Phil Dyer, being duly sworn, says:

That he is employed in the offices of GREEN, HIGGINS & BERRY, attorney for Appellant, Defendant herein; that he served the attached Reply Brief of Appellant

upon E.H. Fankhauser

by placing a true and correct copy thereof in an envelope addressed to:

E.H. Fankhauser
Attorney at Law
660 South 200 East #105
Salt Lake City, Utah 84111

and hand delivering the same to the above address, on the 15th day of November, 1982.

[signature]

SUBSCRIBED AND SWORN to before me this 15th day of November, 1982.

[signature]
Notary Public
Residing at: Salt Lake County, Utah

My commission expires:
1-16-83

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