1990

Century Park Offices v. William R. Bireley : Reply Brief

Utah Court of Appeals

Robert L. Moody; Taylor, Moody and Thorne; Attorneys for Appellee.
George A. Hunt; Elizabeth King; Snow, Christensen and Martineau; Attorneys for Appellant.

COURT OF APPEALS

STATE OF UTAH

CENTURY PARK OFFICES, LTD.,

Plaintiff and Appellee,

vs.

WILLIAM R. BIRELEY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Case No. 900~~292~~467-CA

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT OF UTAH

George A. Hunt, Esq.
Elizabeth King, Esq.
Camille N. Johnson, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Defendant and Appellant

ROBERT L. MOODY, for:
TAYLOR, MOODY & THORNE
2525 North Canyon Road
Provo, Utah 84604

Attorneys for Plaintiff and Appellee

COURT OF APPEALS

STATE OF UTAH

CENTURY PARK OFFICES, LTD.,

Plaintiff and Appellee,

vs.

WILLIAM R. BIRELEY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Case No. 900292-CA

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT OF UTAH

George A. Hunt, Esq.
Elizabeth King, Esq.
Camille N. Johnson, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Defendant and Appellant

ROBERT L. MOODY, for:
TAYLOR, MOODY & THORNE
2525 North Canyon Road
Provo, Utah 84604

Attorneys for Plaintiff and Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT OF APPEALS

STATE OF UTAH

CENTURY PARK OFFICES, LTD.,

Plaintiff and Appellee,

vs.

WILLIAM R. BIRELEY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Case No. 900292-CA

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT OF UTAH

SUMMARY OF ARGUMENT

The trial court specifically acknowledged in its Memorandum Decision that it relied on an examination of the default provision in the lease and the Notice itself in reaching its conclusion that the Notice did not constitute an election of remedies. The trial court did not resort to extrinsic evidence as to Century Park's intent because there was none presented at trial. The question before the court was one of document interpretation. Therefore, the court's decision was a conclusion of law rather than a finding of fact. It should be reviewed for correctness. It is a question of law for this Court to determine whether the Notice to Pay or Quit constituted an election of remedies and a termination of the lease absent any testimony whatsoever regarding either party's intent.

The distinctions Century Park has drawn between the unlawful detainer statutes of Utah and Colorado, in an attempt to distinguish Colorado case law directly on point, are meaningless. There is little basis for the proposition that the Colorado court formulated its rule solely on the basis of the unlawful detainer statute. Furthermore, both Utah and Colorado statutes speak in terms of a "forfeiture." Utah should follow other jurisdictions which have considered the issue now before this Court and hold that a Notice to Pay Rent or Quit constitutes an election by the landlord to terminate the lease. Bireley should be held liable for rent only through the date he quit the premises upon receipt of said notice. Clear language is required to preserve the right of the landlord to continue to recover rent under a lease after a Notice to Pay Rent or Quit has been served upon the tenant.

Finally, if a landlord is to continue to hold a tenant liable under the lease, he must do so essentially as the tenant's agent. The tenant retains a possessory right subject only to the landlord's reasonable mitigation efforts. Here, Century Park simply took back the premises and relet them directly without regard to any rights of Bireley. Further, Century Park gave Bireley no written indication whatever, including the pleadings in this case, that it intended to continue to hold Bireley responsible for rent after he vacated the premises pursuant to the Notice to Pay or Quit. Consequently, any discussion regarding mitigation efforts are misplaced under the facts of

this case. Because the evidence at trial indicates Century Park never gave any consideration to Bireley in exchange for a promise to continue to pay rent for the duration of the lease term, there is no basis for any finding that the lease was enforceable beyond the election to terminate in November 1987.

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION, WITH RESPECT TO CENTURY PARK'S INTENT IN SERVING THE NOTICE TO PAY RENT OR QUIT, WAS A CONCLUSION OF LAW TO BE REVIEWED UNDER A CORRECTION OF ERROR STANDARD.

Century Park argues that this case should be reviewed under the "clearly erroneous" standard set out in Utah Rule of Civil Procedure 52(a). That rule provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." But the trial court's decision with respect to Century Park's intent in serving the Notice to Pay Rent or Quit was not a finding of fact, but rather, a conclusion of law based upon an interpretation of the documents involved, without resort to extrinsic evidence.

The Utah Supreme Court has made it clear that the labels attached to findings of fact or conclusions of law are not determinative. Specifically, in Zions First Nat'l Bank v. National

Am. Title Ins. Co., 749 P.2d 651 (Utah 1988), the Utah Supreme Court stated:

> Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness.
>
> [W]e have determined that the trial court's finding of an agreement to pay fees was, in fact, a legal conclusion based on its interpretation of a provision in the insurance policy. . . . It is fair to say that a finding of fact that is actually a conclusion of law will be treated as a conclusion of law . . . As noted above, a conclusion of law is reviewed for correctness.

Id. at 653, 656.

The only evidence of Century Park's intent in serving the Notice to Pay Rent or Quit is the Notice itself and the default provision in the lease. There was no testimonial evidence presented at trial on the issue and Judge Harding relied solely on the documentary evidence in reaching his conclusion. The Memorandum Decision (attached as Addendum "A" to Appellant's Brief) states: "After examination of the default provision in the lease and the notice served on defendant, the Court finds that plaintiff's intent in serving that notice was only an attempt to seek the rent due at that time . . . ." The trial court's finding was, in fact, a legal conclusion based on its interpretation of the Notice and the default provision on the lease without resort to extrinsic evidence. Accordingly, the trial court's conclusion of law should be reviewed for correctness.

But even if this Court finds that a "clearly erroneous" standard of review governs in this case, the trial court's finding must be reversed. This Court must look to the four corners of the two controlling documents, the Notice to Pay Rent or Quit and the default provision of the lease agreement, because the record contains no other evidence, to determine whether the Notice constituted an election of remedies. The documents speak for themselves and Bireley is confident that in the alternative this Court will conclude that the trial court's decision was clearly erroneous.

POINT II

THE DISTINCTIONS BETWEEN THE UTAH AND COLORADO UNLAWFUL DETAINER STATUTES ARE MEANINGLESS IN THIS CONTEXT.

This Court should adopt the general rule of Colorado that a "Notice to Pay or Quit" "constitutes an election by the landlord to terminate the lease unless the Notice is rendered ineffective by the tenant's payment of rent." Aigner v. Cowell Sales Co., 660 P.2d 907, 908 (Colo. 1983). Century Park attempts to distinguish Aigner on the basis that the Colorado unlawful detainer statute differs from its Utah counterpart.

The distinctions between the unlawful detainer statutes of Colorado and Utah are meaningless in this context. First, there is little basis for the proposition that, based solely on that state's unlawful detainer statute, the Colorado Supreme Court

came to the conclusion that a notice to pay or quit constitutes an election of remedies and thereby terminates a lease. Furthermore, both the Colorado and Utah statutes regarding unlawful detainer speak in terms of a "forfeiture."

The general rule recognized in Aigner was first laid out by the Colorado Supreme Court in Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938). The applicable lease provisions and demand to pay or quit were substantially identical in Aigner and Barlow. The Aigner court noted that in Barlow they held that "the lessor's notice was 'analogous to a notice which one who is a party to any terminable contract gives in order to rescind it at law, as distinguished from equity.'" Aigner, 660 P.2d at 909 (citing Barlow, 103 Colo. at 291, 86 P.2d at 241). The Aigner court relied on the rationale of Barlow, and in part, upon the unlawful detainer statute, in formulating the general rule Bireley asks this Court to adopt. This Court should not be dissuaded by the subtle differences between the Utah and Colorado statutes because the Aigner court based its decision upon other sound principles of law.

The Colorado unlawful detainer statute cited by the Aigner court provides that: "a failure to pay such rent, upon demand, whenever made, works a forfeiture." Colo. Rev. Stat. § 13-40-104(1)(d)(1973). The statute also provides for forfeiture of a lease under certain conditions.

Pursuant to Utah's unlawful detainer statute, a tenant of real property is liable for unlawful detainer:

> (e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, . . . may perform the condition or covenant and thereby save the lease from forfeiture except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

Utah Code Ann. § 78-36-3(1) (Supp. 1989) (emphasis added). According to the Utah statute, the only way to save a lease from forfeiture under certain circumstances is to pay the requested past-due rent. If the tenant vacates pursuant to a notice to perform or surrender the property, the lease agreement is forfeited.

Since the Colorado case law relied on here is not based exclusively on the statutory language of Colorado's unlawful detainer statute and since Utah's statute also speaks in terms of a "forfeiture," there is no reason why this Court should not follow the sound reasoning of the Colorado court and hold that the Notice to Pay Rent or Quit constituted an election by Century Park terminating the lease; and that Bireley is only liable for

rent through the date he quit the premises upon receipt of the Notice from Century Park.

POINT III

SINCE CENTURY PARK FAILED TO GIVE BIRELEY ANY INDICATION WHATEVER THAT IT INTENDED TO CONTINUE TO HOLD HIM RESPONSIBLE FOR RENT AFTER VACATION OF THE PREMISES, BIRELEY'S POSSESSORY RIGHT WAS EXTINGUISHED AND THE LEASE WAS TERMINATED.

Century Park gave Bireley no indication whatever that it intended to continue to hold him responsible for rent after he vacated the premises. The record is bereft of any evidence which would indicate Bireley had reason to know he was expected to continue to pay rent after being given the alternative to pay or quit the premises. He opted to quit and heard nothing from Century Park regarding the question of continuing rent until the pretrial order was prepared in this case in January of 1990. The pretrial order raised the question for the first time.

If Century Park intended to hold Bireley liable for the full term of the lease agreement, Bireley should have had a possessory right to the premises, subject only to Century Park's reasonable mitigation efforts. It would be patently unfair to hold that Bireley "lost all rights, but retained all obligations of the contract." Executive House Bldg., Inc. v. Optimum Systems, Inc., 311 So.2d 604, 607 (La. App. 1975). Here, Century Park simply took back the premises and relet them directly without regard to any of Bireley's rights.

Century Park had an affirmative responsibility to advise Bireley, in clear language, that in serving the Notice to Pay Rent or Quit it was only attempting to collect rent pursuant to notice and that electing to relinquish possession of the property did not terminate the lease. Century Park failed to do so.

The evidence is clear that on or about November 6, 1987, Century Park took possession of the leased premises and never again offered or conveyed possession to Bireley. Since Century Park never gave consideration to Bireley in exchange for his alleged obligation to pay rent for the duration of the lease term, there is no basis to find the lease was enforceable beyond the election to terminate in November, 1987.

CONCLUSION

The trial court's decision with respect to Century Park's intent in serving the Notice to Pay Rent or Quit, was a conclusion of law to be reviewed for correctness. Bireley contends that the trial court was incorrect when it concluded that the Notice was only an attempt to seek rent due and not an election of remedies. This Court should adopt the Colorado rule of Aigner, which Century Park has failed to meaningfully distinguish, and hold as a matter of law that once Century Park served Bireley with the Notice to Pay Rent or Quit, and once Bireley opted to quit and delivered up possession, the lease was terminated between the parties.

DATED this 28th day of January, 1991.

SNOW, CHRISTENSEN & MARTINEAU

By _____
George A. Hunt
Elizabeth King
Camille N. Johnson
Attorneys for Defendant and
Appellant

EK472

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January, 1991, I mailed four copies of the foregoing Reply Brief of Appellant to Robert L. Moody of Taylor, Moody & Thorne, attorneys for Plaintiff/Appellee at 2525 North Canyon Road, Provo, Utah 84604.

SNOW, CHRISTENSEN & MARTINEAU

By Camille N. Johnson