

1990

International Recovery Systems v. Nancy Kinzer, Nancy Gortsema, Gordon Kinzer : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

INTERNATIONAL RECOVERY)	BRIEF OF APPELLANTS
SYSTEMS, a Utah corporation,)	
)	Appellate No. 900486-CA
Plaintiff - appellee,)	
)	Circuit Ct. No. 893011804CV
vs.)	
)	Priority No. 16
NANCY KINZER f/k/a NANCY)	
GORTSEMA and GORDON KINZER,)	
)	
Defendants - appellants.)	

APPEAL FROM AN ORDER AND JUDGMENT ENTERED IN
THE THIRD CIRCUIT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, BY THE HONORABLE LeROY H. GRIFFITHS

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FILED

MAR 1 1991

COURT OF APPEAL

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STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

This case is before the court on appeal from a judgment and order of the Third Circuit Court of Salt Lake County, Murray Department, entered by the Honorable LeRoy H. Griffiths, in which judgment for rental payments, costs and attorney's fees was granted to plaintiff-appellee against defendants-appellants for breach of a rental agreement.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW
AND SUMMARY OF THE ARGUMENT

Whether the Third Circuit Court's refusal to admit as evidence a notarized statement defendants obtained from plaintiff during the course of discovery on the ground the notarized statement was hearsay when it was not offered to prove the truth of the matters asserted therein, but rather to demonstrate that plaintiff had received notice of defendants' transfer as required by the rental agreement of the parties.

PERTINENT RULE

Rule 801(c), Utah Rules of Evidence, provides:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

STATEMENT OF THE CASE

This case arises out of a dispute over whether the provisions of a rental agreement were complied with by the defendants. The provisions in questions provide as follows:

TRANSFER: Resident shall be released from the obligations of this lease if Resident receives a job transfer of 25 miles or more and furnishes owner with ... (a) ... a statement in the form of an affidavit sworn to before a notary public from employer evidencing such transfer; (b) 30-day written notice of termination; (c) all rents and charges paid through the date of termination.

The defendants attempted to introduce as evidence a notarized statement for the purpose of proving they had complied with provision (a). The notarized statement had been obtained by the defendants from the plaintiff during the course of the discovery process, demonstrating plaintiff had received a copy of the notarized statement. The notarized statement was excluded from evidence by the trial court as inadmissible hearsay.

The pivotal question on appeal is whether the trial court properly excluded the notarized statement as hearsay when it was not offered to prove the truth of the matters asserted therein, but rather to demonstrate that plaintiff had been provided with a notarized statement in compliance with provision (a).

STATEMENT OF RELEVANT FACTS

1. Nancy Gortsema Kinzer and Property Management Systems executed a Uniform Residential Real Estate Agreement on the 27th day of February of 1989.

2. Under the terms of the Agreement, Kinzer agreed to lease the premises located at 9386 South Grouse Circle in Sandy, Utah for a term of 5 months for a rental rate of \$525.00.

3. At the commencement of the lease, Gortsema paid to Property Management Systems a \$200.00 security deposit and a \$25.00 non-refundable application.

4. Paragraph 8 of the Uniform Residential Real Estate Agreement provided as follows:

TRANSFER: Resident shall be released from the obligations of this lease if Resident receives a job transfer of 25 miles or more and furnishes owner with ... (a) ... a statement in the form of an affidavit sworn to before a notary public from employer evidencing such transfer; (b) 30-day written notice of termination; (c) all rents and charges paid through the date of termination.

5. Gortsema was notified by her employer, D'Alessandro's, Inc., that she was being transferred to Elko, Nevada. She contacted Property Management Systems by telephone immediately thereafter at the end of February or the first part of March of 1989 and informed them verbally of the transfer and her intent to terminate the lease, effective April 30 of 1989.

6. Accordingly, Gortsema obtained a notarized statement from her employer that she was being transferred to Elko, Nevada and mailed the same to Property Management Systems on or about March 25

of 1989 in compliance with Paragraph 8 of the lease agreement.

7. Property Management Systems advised Gortsema that she had failed to comply with the requirements of Paragraph 8 of the lease agreement despite her transmission of the subject notarized statement from her employer and that she was indebted to Property Management Systems in an amount in excess of \$1,800.00 for unpaid rent.

8. Property Management Systems refused to refund to Gortsema any portion of the security deposit transferred to Property Management Systems at the commencement of the lease.

9. Property Management Systems transferred collection of the alleged lease obligation to International Recovery Systems.

10. International Recovery Systems filed suit against Nancy Gortsema and Gordon Kinzer for sums allegedly due under the lease agreement.

11. The matter was tried before the Honorable L.H. Griffiths on July 31 of 1990.

12. A copy of the Findings, Order and Judgment issued and entered pursuant to the Circuit Court trial proceedings were submitted with the Docketing Statement, as Exhibit "A" thereto.

ARGUMENT

- I. THE COURT ERRED, AS A MATTER OF LAW, IN HOLDING THAT THE NOTARIZED STATEMENT OFFERED BY APPELLANTS DURING TRIAL WAS INADMISSIBLE HEARSAY.

During the trial of this matter, the key issue was whether defendants had complied with the requirement in the rental agreement that they provide plaintiff with a notarized statement that they had been transferred by their employer. At trial, defendant Nancy Kinzer testified she had notified the landlord, in writing, that defendants would be moving out (Trial Transcript, pg. 28, lines 15-28, pg. 29, lines 1-15). Plaintiff's attorney objected to the admission of that document, solely on grounds that it constituted hearsay. (Trial Transcript, pg. 29, lines 23-25, pg. 40, lines 19-20). Defendants repeatedly attempted to refer to the notarized statement and have it introduced as evidence, but each time the trial court sustained the objection and refused to admit the notarized statement solely on grounds that it constituted hearsay. (Trial Transcript, pg. 30, line 25, pg. 31, line 1; pg. 40, line 21; pg. 42, lines 18-22).

- A. The notarized statement was not offered to prove the truth of the matters asserted therein, but rather to show proper notice had been given. Therefore, the notarized statement did not constitute hearsay.

The position taken by plaintiff's counsel and the court with respect to the notarized statement was incorrect because the document did not constitute hearsay; it was not offered to prove the truth of the matters asserted therein, but for the purpose of

demonstrating that proper notice had been given to plaintiff. Defendant was asked "Did you notify the landlord you'd be moving out?" (Trial Transcript, pg. 28, line 15). When she responded in the affirmative she was asked, "Do you have a copy of that [notice] with you today?" (Id., line 19). Her response was to attempt to identify the notarized statement which the defendants then attempted to introduce into evidence as Exhibit "D-5".

The clear, unambiguous language of Rule 801, Utah Rules of evidence, provide that hearsay is a statement "offered in evidence to prove the truth of the matter asserted." The case law is myriad on the point that statements and documents offered for another purpose should not be excluded as hearsay. In Rutledge v. Arizona Bd. of Regents, it was claimed that statements made at trial regarding notification of football players and their families was hearsay. 711 P.2d 1207, 1219 (Ariz.App 1985). The trial judge had excluded the statements as hearsay, but the Arizona Court of Appeals overruled holding, "The statements were not admitted to prove the truth of matters asserted but to substantiate Kush's claim that he was discussing disruptive activities ...". Id.

In a similar case, Wilson v. State, a document was attempted to be introduced at trial, not to prove the truth of the matters contained therein, but rather to show that "management was aware of a pressurization problem" 669 P.2d 1293, 1298 (Alaska 1983). The trial court excluded the evidence, just as the trial court in the instant case excluded the defendants' notarized document, on grounds of hearsay. Regarding that decision, the Alaska Supreme

Court stated:

In our opinion, the trial court erred in refusing to admit exhibit 30 on hearsay grounds. Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. Evidence Rule 801(c). Exhibit 30 was offered to prove solely that management was aware of a pressurization problem

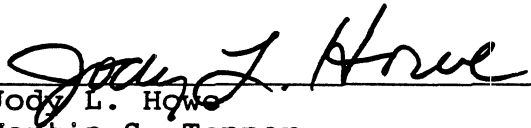
Id. at 1298, (emphasis added). In Hill v. Merrimac Cattle Co., Inc., a letter written by an attorney to be "a recap of what had taken place during the trial [of a 1929 case]" was offered as evidence and objection was made on the ground of hearsay. 687 P.2d 59, 72-73 (Mont. 1984). The court concluded, "The letter did not contain inadmissible hearsay." Id.

Thus in cases interpreting the common law and statutory hearsay rule it is consistently held that if a statement or document is not offered to prove the truth of matters contained therein, but to prove notice, the document or statement is not hearsay. Had the trial judge in this matter admitted the notarized statement as evidence defendants had complied with the rental agreement, judgment would not have been awarded in favor of plaintiff.

CONCLUSION

For the foregoing reasons, the trial courts judgment and order should be reversed and judgment entered in favor of defendants or this action should be remanded for a new trial to determine whether defendants were in compliance with the rental agreement.

Respectfully submitted this 1st day of March, 1991.



Jody L. Howe
Martin S. Tanner
POTTER & BERRY
Attorneys for Defendants

MAILING CERTIFICATE

I certify that I mailed, postage prepaid, four true and correct copy of the foregoing BRIEF OF APPELLANTS, on this the 1st day of March, 1991, to the following:

Joseph N. Nemelka (A5326)
Attorney at Law
7001 South 900 East, Suite 210A
Midvale, Utah 84047

Joey L. Howe

1 A Yes. It was.

2 Q And you stayed for two months; correct?

3 A Yes.

4 Q Or paid two months' worth of rent and then stayed
5 over a little bit after that; is that correct?

6 A Excuse me?

7 Q You paid two months' worth of rent on this lease;
8 is that correct?

9 A Yes.

10 Q Okay. And you resided there longer than two
11 months?

12 A No.

13 Q Then when did you say you moved out?

14 A We moved out on April 18th.

15 Q Did you notify the landlord you'd be moving out?

16 A Yes. I did.

17 Q In writing?

18 A Yes. I did.

19 Q Do you have a copy of that with you today?

20 A Yes. I do.

21 THE WITNESS: It's underneath the checks, Gordon.

22 THE COURT: Did you wish to step down and get it?

23 Watch your step as you step down.

24 Q (By Mr. Nemelka) And this is the document you
25 claim you sent to them?

1 A Yes. It is.

2 THE COURT: Do you want that marked as an exhibit?

3 Then that would be--

4 MR. NEMELKA: I guess we'd better,

5 THE COURT: That would be Defendants', D-5 then.

6 MR. NEMELKA: D-5.

7 Q (By Mr. Nemelka) With respect to--

8 THE COURT: She should identify that. Would you
9 tell us what that is?

10 Q (By Mr. Nemelka) Yeah. Identify that document,
11 please.

12 A This is a letter that I had Taft draft, I asked
13 him to do it March 23rd, stating that we were being
14 transferred to Elko because the Dealasandros Corporation
15 was ceasing business in the Utah area.

16 Q Where's your signature on that document?

17 A It's not on this document.

18 Q Pardon?

19 A It's not on this document.

20 Q Your signature is not on that document? That's
21 correct?

22 A Correct.

23 MR. NEMELKA: Well, I'm going to object to that
24 one being admitted. I have nothing further of this witness.
25 That's hearsay.

1 THE COURT: Okay. Any other questions?
2 MR. NEMELKA: Not of this witness, no.
3 THE COURT: Do you wish to make a statement now
4 as to your side of this?
5 Do you have any other witnesses after this?
6 MR. NEMELKA: Yeah. I was going to call
7 Mr. Kinzer.
8 THE COURT: I see. Do you wish to make a
9 statement now, or you can take the stand later, it's up to
10 you.
11 THE WITNESS: I can take the stand later.
12 THE COURT: The--I don't know that--you haven't
13 really offered D-5. Did you wish that to be offered as an
14 exhibit?
15 MS. GORTSEMA: It was submitted to the Court.
16 MR. KINZER: It was submitted as a response to
17 interrogatory.
18 THE COURT: But--
19 MR. KINZER: Yes, we'd like--
20 THE COURT: But that's not the question, whether
21 or not you want it--are you offering it as an exhibit here
22 today?
23 MR. KINZER: I will be, yes, if it's not accepted
24 at this time, I'll try again.
25 THE COURT: I would refuse to accept it at this

1 time if she did not sign it. Be refused.

2 MR. NEMELKA: I call William Gordon Kinzer to the
3 stand, your Honor.

4 WILLIAM GORDON KINZER,
5 one of the defendants herein, called as a witness by and on
6 behalf of the plaintiff herein, after having been first duly
7 sworn, assumed the witness stand, and was examined and
8 testified as follows:

9 THE COURT: Have a chair.

10 You may proceed.

11 DIRECT EXAMINATION

12 BY MR. NEMELKA:

13 Q Would you spell your last name for the record,
14 please?

15 A K-i-n-z-e-r.

16 Q And your current address?

17 A 777 Oak Street, Elko, Nevada.

18 Q Are you currently employed?

19 A Yes, sir.

20 Q By who?

21 A Deasandros.(?)

22 Q Have you ever resided at 9386 South Grouse Circle?

23 A No, sir.

24 Q Did you ever reside at that--

25 THE COURT: Did you say "No, sir"?

1 A Yes. I did.

2 MR. NEMELKA: I'm going to object, your Honor.
3 He's leading the witness.

4 THE COURT: Sustained. You're suggesting the
5 answer to her. I'll sustain the objection.

6 Q (By Mr. Kinzer) Why did you go to Chad to have
7 the transfer prepared?

8 MR. NEMELKA: Objection. Lack of foundation.

9 THE COURT: What do you mean by your lack of
10 foundation?

11 MR. NEMELKA: Pardon?

12 THE COURT: You say--

13 MR. NEMELKA: I don't understand, I mean there's
14 no foundation with respect to the transfer by somebody at
15 Dealasandros. There's no foundation for that in the
16 record from this witness.

17 MR. KINZER: There's a foundation that Chad
18 Dealasandro prepared this document, your Honor.

19 MR. NEMELKA: Well, I'm sorry. Your Honor, that's
20 not been admitted, and that's hearsay.

21 THE COURT: I'll sustain the objection. There's
22 been no evidence of any notification that's received by the
23 Court, I refused that.

24 MR. KINZER: This document was sent in through
25 their interrogatories, your Honor.

1 Q Okay. Did you contact or call Property Management
2 at that time?

3 A Yes. I did.

4 Q For the purpose of?

5 A Telling them that we were being transferred.

6 Q At that time, you made arrangements to receive or
7 provide for written notice?

8 A Yes. I did.

9 Q And that written notice which you achieved or
10 received was from Chad Dealasandro?

11 A Yes, it was.

12 MR. NEMELKA: Objection, your Honor. There's been
13 nothing, there's no foundation for any record being received
14 by the plaintiff, or the assignor of the debt.

15 THE COURT: Sustained.

16 MR. KINZER: Can you--can I--a little bit more
17 better--

18 THE COURT: That letter there is not signed by
19 either you or the witness here. It's a hearsay statement,
20 the person who signed that has to be here so they can be
21 subject to cross-examination. Without them being here, it's
22 a hearsay statement and would not be entered.

23 MR. KINZER: Can I take just a moment and speak
24 with Nancy, your Honor?

25 THE COURT: Okay. I'll take a five-minute recess.