1972

Louis J. Monter v. Kratzer's Specialty Bread Company, A Corporation : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS J. MONTER,
Plaintiff-Appellant,

vs.

KRATZER'S SPECIALTY BREAD COMPANY, a Corporation,
Defendant-Respondent.

Case No. 12810

APPELLANT'S BRIEF

Appeal from the District Court of Salt Lake County
Honorable Joseph G. Jeppson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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APPELLANT'S BRIEF

NATURE OF CASE

This was an action by a landlord for unlawful detainer, and a counterclaim by his tenant for damages resulting from a temporary eviction.

DISPOSITION OF CASE IN TRIAL COURT

The court, without a jury, entered judgment for plaintiff-appellant in the amount of $2,166.99, and for

defendant-respondent on its counterclaim in the amount of $102,278.56 general damages, and $3,000.00 punitive damages.

RELIEF SOUGHT ON APPEAL

The judgment should be reversed and remanded with directions to enter judgment for plaintiff-appellant in the amount of $2,166.99 together with a reasonable attorney's fee, and for restitution of the premises; and to dismiss the counterclaim; or, in the alternative, remanded with directions to grant a new trial.

STATEMENT OF FACTS

Plaintiff-Appellant, Louis J. Monter, a retired Utah businessman now living in California, owns a lot and building at 1241 Major Street, Salt Lake City. Defendant-Respondent, Kratzer's Specialty Bread Company (hereinafter called "Kratzer's") is a corporation engaged in the operation of a bakery.

On February 28, 1970, Mr. Monter and Kratzer's entered into a lease agreement by the terms of which Mr. Monter's building was let to Kratzer's for use as a bakery for five years at $475.00 per month payable the first of each month (Exhibit 2-D). At the time the lease was entered into the corporation was managed by Elsa K. Glissmeyer, but in about April, 1970, Jerome W. Yeck took control of the corporation and there commenced a series of defaults in payment of rentals. Mr. Monter filed an

action following which, in late 1970, the rentals were brought current and a security agreement executed by Kratzer's (R. 33-34). At the same time the parties executed an addendum to the lease (Exhibit 3-D) which contained the following provision:

> "Should tenant fail to pay any moneys due hereunder within forty-five (45) days after due date, landlord may at his option re-enter upon the leased premises and take possession of same and remove all persons from the leased premises, or may exercise any other remedy available to him by law resulting from the failure of the tenant to pay rent. In addition thereto landlord may, at his option, exercise all rights and remedies available to him under that certain security agreement covering the personal property and equipment upon said premises of even date herewith."

After execution of the addendum Kratzer's paid the monthly rentals, though late, through July, 1971. It defaulted in the August, 1971, payment, and has made no rental payments since (except for a sum deposited in court in connection with this proceeding and later returned to Kratzer's).

When the August 1, 1971, payment had not been made by September 15, Mr. Monter's counsel commenced proceedings to obtain possession of the premises. A "notice to quit or pay rent" was served on Kratzer's on September 28, 1971 (R. 110). In early October, 1971, a check drawn by Donna Poulsen, a friend of Mr. Yeck's, was tendered to Mr. Monter's attorneys in payment of the August rental. Mrs. Poulsen had expected Mr. Yeck

to cover it but he did not (R. 181), and when presented to the bank for payment it was dishonored because there were insufficient funds in the account (R. 131).

The August payment (as well as the September and October payments) not having been made, on October 18, 1971, a complaint was filed in which Mr. Monter sought a writ restoring him to the premises, with the judgment to provide that he would have leave to amend his complaint after issuance of the writ of restitution in order to include a prayer for damages for waste and rent (R. 84-87). A shortened summons directing the defendant Kratzer's to answer the complaint within three days was served upon Kratzer's on October 29, 1971 (R. 84, 117), and the answer to the complaint became due on November 4, 1971.[1] No answer was filed, and on November 5, a default (R. 81) and a default judgment (R. 73) were entered, the judgment directing issuance of a writ of restitution (R. 73).

On November 8, 1971, three days after entry of the judgment, writs of attachment (R. 65) and restitution (R. 43) were served upon Kratzer's. Pursuant to the writ of restitution, the sheriff entered the premises and took possession. On the same day, a short time prior to execution on the writ, Kratzer's attorney called to the attention of Mr. Monter's attorney the provisions of 78-36-10 U.C.A. 1953, claiming that Mr. Monter was not entitled to return of the premises until five days after entry of judgment. The sheriff nevertheless proceeded

[1]If the Utah Rules of Civil Procedure do not apply, the answer became due on November 1, 1971.

with execution of the writ of restitution and the bakery was closed about 2:00 o'clock p.m. After some discussions, Mr. Monter's attorneys voluntarily released the premises about 4:00 o'clock p.m., and the bakery was reopened and the employees back at work by approximately 5:30 o'clock p.m. (R. 150).

In the meantime, on Friday, November 5, after the default judgment had been entered, an answer was mailed to the plaintiff's attorneys (R. 80). A motion to set aside the default was mailed to Mr. Monter's attorneys on November 10 and filed with the court on November 12 (R. 77). On November 19 an order was entered setting aside the default (R. 69) and permitting Kratzer's to file a counterclaim seeking $5,000.00 for lost business and $5,000.00 punitive damages (R. 62-64). Trial was set for December 10, 1971, approximately three weeks after the default was set aside.

At the trial is was established that there was not any genuine issue of fact as to the amount of the rentals owed by Kratzer's, the amount included in the judgment being the exact amount claimed by Mr. Monter's counsel during his opening statement (R. 39, 41, 118).

It was established that Mr. Yeck had been the manager of Kratzer's for about 1½ years (R. 158) and that under his and prior management Kratzer's had sold bakery products to Continental Baking Company for approximately 16 years (R. 152).

Jack Hart, the bread sales manager for Continental Baking, testified that his company had been a customer

of Kratzer's during the five years of his employment (R. 120). On November 8, because of the inability of some of the employees of Continental to reach Kratzer's by telephone, he went to the bakery building and found it locked (R. 124, 125), and thereupon decided to transfer orders for the following day to another company (R. 125). After he had made this decision Mr. Yeck, Kratzer's managing officer, called and asked for a return of the business but this was refused because Mr. Hart didn't feel that he had any assurance of getting products from Kratzer's (R. 125). Continental had had previous difficulty with Kratzer's. About two or three weeks earlier there had been a problem arising out of the fact that Continental could not get products and had quality problems with products it did obtain (R. 126). There had been numerous occasions in the past where a product furnished by Kratzer's had been stale, and Continental had received complaints from its customers about Kratzer's products as far back as a year (R. 127). The number of complaints would vary from week to week, but Mr. Hart said he would not have terminated the contract "then" except for inability to place the order on November 8 (R. 128). At the time of the trial he did not intend to give Kratzer's further orders (R. 129), and testified that the prior difficulties had entered into his decision to withdraw business from Kratzer's (R. 129).

Mr. Yeck testified that Kratzer's was able to produce the next day's product (R. 151), but that Kratzer's had received no business from Continental since November 8. The counterclaim was based entirely on loss of the Continental account.

At the trial it was stipulated that Kratzer's received an average gross income from its Continental Baking account in the amount of $2,000.00 a month, and that of this 53% or $1,060.00 would go towards profit (R. 153-154). No evidence was introduced as to the length of time the Continental account might have been expected to continue, or as to the length of time it would take Kratzer's to mitigate its damages by obtaining other customers. At the trial the attorney for Kratzer's suggested to the court that the length of time in the future was probably "a legal question" (R. 154).

On this evidence the trial court found that the actions of Mr. Monter (though he was in California throughout the proceedings and did not personally participate in the actions complained of except through counsel) were intentional and malicious and resulted in the loss of the Continental Baking Company account; that Kratzer's would have received $1,060.00 per month as profit from the Continental Baking Company account "indefinitely into the future"; and that the present value of $1,060.00 per month for ten years was $102,278.56 (R. 40-41). The court entered judgment in favor of Mr. Monter for his rentals of $997.49 and damages of $1,169.20; and it entered judgment on Kratzer's counterclaim in the amount of $102,278.56 for loss of business and $3,000.00 punitive damages, or a total $105,278.56.

The $1,425.00 deposited in court by Kratzer's was ordered returned to it, and the judgment provided that payments due under the lease agreement between Mr.

Monter and Kratzer's for the month of December, 1971, and subsequent months, should be paid by deduction from Kratzer's unpaid judgment. The net result was confiscation of Mr. Monter's property.

Shortly after the trial, Mr. Monter's counsel learned that, notwithstanding representations and suggestions to the court that the Continental Baking business would likely continue into the indefinite future, Kratzer's was and had been in serious financial difficulties. It was discovered that on January 10, 1972, one month after the trial, the United States Internal Revenue Service filed a Notice of Federal Tax Lien in the amount of $18,793.52 (R. 30) for taxes due as early as March, 1971, which subsequently resulted in the sale of Kratzer's bakery equipment and other property on the leased premises. It was also discovered that there were in existence against Kratzer's at the time of trial, approximately 12 unsatisfied judgments, totaling approximately $14,000.00. These matters were called to the attention of the court in a motion for new trial filed on January 13, 1972 (R. 22), but after argument, and a request on the record that the court take judicial notice of the judgments, the court denied the motion and permitted the judgment to stand. This appeal resulted.

ARGUMENT

I

The court erred in holding that eviction of defendant-respondent violated stay provisions of 78-36-10 Utah Code Annotated 1953.

The trial court interpreted 78-36-10 U.C.A. 1953 as providing for an automatic 5-day stay of execution, and held that eviction of Kratzer's pursuant to the writ of restitution was a willful and malicious wrong on the part of Mr. Monter. The section provides, in part:

> *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. The jury, or the court *if the proceeding is tried* without a jury, shall also assess the damages * * * 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 forcible entry * * * for the rent and for the three times the amount of the damages thus assessed. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the defendant tenant or any sub-tenant, or any mort-

> gagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant shall be restored to his estate; but if payment as herein provided is not made within five days, the judgment may be enforced for the full amount, and for the possession of the premises. In all other cases, the judgment may be enforced immediately. (Emphasis added.)

Even a cursory reading suggests that 78-36-10 deals only with *trials*, and that the stay provision applies where there is a genuine issue as to the amount of rent due, and a *trial* of that issue. The legislative history of the forcible entry and detainer statute makes it clear that if there is no such issue, or if there is no trial, the defendant tenant can be evicted immediately upon entry of the judgment.

The statute was enacted before statehood as Chapter IV, Laws of Utah 1884, "Summary Proceedings for Obtaining Possession of Real Property in Certain Cases." As originally enacted, it consisted of 18 sections, 1033 to 1051. The first nine sections defined forcible entry and unlawful detainer; provided for notices; circumscribed the jurisdiction of the courts; limited the persons who needed to be made parties; set out the requirements for the complaint and summons; and provided for arrest in some cases. Commencing with Section 1043, the statute dealt with default and with trials. Section 1043 provided:

> "If at the time appointed, the defendants do not appear and defend, the court must enter his de-

> fault and render judgment in favor of the plaintiff as prayed for in the complaint."

Section 1044 provided that the defendant might appear and answer or demur. Section 1045 provided:

> "Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending."

Section 1046 set out what the plaintiff was required to show *on the trial.* Section 1047 provided for amendment of the complaint if *upon the trial* the evidence established a forcible entry or detainer other than that pleaded the one charged. Section 1048, substantially the same as the present 78-36-10, set out the remedies and the procedures. Then, as now, the entire section was preceded by the words *if upon the trial.* The last three sections related to verification of pleadings, stays on appeal, and the applicability of the provisions of the Code of Civil Procedure relative to civil actions, appeals and new trials.

In 1898, following admission of Utah to statehood, it became necessary to re-enact provisions of the Utah statutes. The forcible entry and detainer statute appeared as Title 73, Chapter 64, Revised Statutes of Utah 1898. It continued in substantially the same form, except that the provisions relating to answers and demurrers, arrest, and entry of default were omitted. The omissions, however, can hardly show an intention to change the meaning of the retained sections inasmuch as the chapter was part of the Code of Civil Procedure and generally

subject to its provisions under §3587 R.S.U. 1898. Permissible pleadings were governed by §2958, and defaults for failure to answer were dealt with in §3179. The amendments indicated a legislative intent to utilize general provisions of the Code of Civil Procedure, not to give defendants greater rights in event of default.

To draw a distinction between default judgments and those entered after trials of issues relating to rent due makes eminent good sense. To apply the section's stay provisions to trials protects those tenants who have a genuine question as to the amount of rent they owe. They are permitted to litigate the matter without risking immediate loss of the leasehold in event the triers of fact determine the issue against them. Without such a provision, tenants would be tempted to pay whatever amount was demanded by the landlord for fear that the trial might result in an adverse verdict or finding, and that even though they were contesting the rental claim in good faith they would have the estate forfeited without the opportunity to pay the amount found to be due. This view of the statute seems to have been adopted by this court in *Commercial Block Realty Co. v. Merchants Protective Assn.*, 71 Utah 505, 267 Pac. 1009 (1928), which discussed the remedies provided by the section and indicated that where the amount of rent is "in dispute" the tenant may await the judicial determination of the amount and after judgment pay it and costs and be restored to his estate.

Inasmuch as the section refers to "trial," the meaning of that word is of some importance.

A default judgment is not a trial.

In *Farrell v. DeClue et al.* 365 S.W.2d 68 (Mo. App. 1963), the Missouri Court of Appeals in considering the question of what amounted to granting a "new trial" had occasion to discuss what was meant by trial. Referring to an earlier case, the court said:

> "The court construed the word 'trial' to mean a formal examination of contested issues before a competent tribunal in which both parties are present and participate, and said that 'A mere inquiry of damages after a judgment by default is not a "trial," within the meaning of the statute.' They quoted with approval Black's definition of a 'new trial' as 'a re-examination, in the same court, of an issue of fact, or some part or portion thereof, after a verdict by a jury, report of a referee, or a decision by a court.'"

With respect to defaults, a similar position was taken by the appellate court of Indiana in *Greenwell v. Cunningham, et al.* 70 N.E.2d 684 (1948) the court said:

> "It has long been settled in this state that a final judgment entered on a failure of a party to appear does not involve a trial within the meaning of the statute providing for new trials through timely motion."

The arrangement of the 1884 statute and the emphasis on trial demonstrate a legislative intent not to grant the "stay" privilege in default cases. Changes in other sections of the statute do not show an intent to change the meaning of present 78-36-10. The presumption is that the original meaning continues.

In *Tyson v. United States*, 285 F.2d 19 (10 Cir. 1960), the Court of Appeals was called upon to construe the meaning of words in an act of 1951, particularly whether the words "by law made current" referred to coins made current by the laws of the United States or by a foreign government. The Court of Appeals examined the original statute of 1806 and found that the term referred to coins made current by the laws of the United States. It rejected the contention that a reenactment of the statute in 1951 changed the meaning of the phrase. The court said:

> "A general rule of construction is that provisions of an original act or section reenacted or substantially repeated in an amendment are construed as a continuation of the original law. Such provisions are generally held to have been the law since they were first enacted."

Re-enactment of the section in 1898 and subsequently should be construed as a continuation of the meaning in the original statute, and the section should not be construed as applying to judgments entered after a default by the tenant.

Moreover, 78-36-10 provides for a stay only where the unlawful detainer action is based solely on the non-payment of rent. There is to be no stay if the lease has "by its terms expired," or if the action is based upon waste or breach of covenants relating to matters other than rent. The section provides that "In all other cases [than simple non-payment of rent], the judgment may be enforced immediately."

In the present case the complaint was based on waste as well as failure to pay rent; in addition, the lease contained a provision permitting termination of the tenant's rights and repossession for failure to pay rent. In either such case a tenant is not entitled to a stay.

II

A stay of execution must be obtained in the manner provided by the Utah Rules of Civil Procedure.

Even if the portion of Section 78-36-10 which provides for a stay of execution is deemed to apply to the facts in this case, such a stay is not automatic.

Rule 62(a), U.R.C.P., provides:

> Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

The Rules of Civil Procedure govern the procedures in all actions, suits and proceedings "of a civil nature" (Rule 1, U.R.C.P.), and all "special statutory proceedings" except insofar as they are "by their nature clearly inapplicable" (Rule 81, U.R.C.P.).

Admittedly the rules may not abridge, enlarge or modify substantive rights (78-2-4 U.C.A. 1953), but assuming that a stay of execution in an unlawful detainer action for the nonpayment of rent is interpreted to be a substantive right, a rule of procedure may establish how

that right is to be exercised without thereby abridging, enlarging or modifying it.

For example, the right to an appeal from a judgment may be viewed as a substantive right. Such a right may be lost if a party fails to exercise that right in the form and manner prescribed by the rules of procedure. It has been held that rules prescribing the manner and conditions to enforce the right to an appeal do not abridge, enlarge or modify a substantive right of a party. See, for example, *State v. Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964). Likewise, a rule requiring an affirmative act by the party seeking a stay of execution, would not abridge, modify or enlarge his right to such a stay.

The forcible entry and detainer proceeding has been part of the Code of Civil Procedure since its first enactment; it is a proceeding of a civil nature. But even if it be regarded as a special statutory proceeding it cannot be said that requiring a court order for the stay is "clearly inapplicable." The California statute upon which Utah's was based has been amended to do exactly that (§1174, California Code of Civil Procedure).

It follows that if Kratzer's had wanted to have execution of the judgment stayed, it should have applied to the court for the stay. Having failed to do so, it is in no position to complain.

III

The Court's findings as to damages were not supported by the evidence, were contrary to law, and were patently excessive.

The evidence produced by Kratzer's in this case was insufficient to establish either the fact of damage or the amount of damages.

The evidence most favorable to support the finding of the trial court consists of the following:

For approximately sixteen years Kratzer's had sold bakery products to Continental Baking Company. On November 8, 1971, by virtue of execution on the writ of restitution, Kratzer's was closed down for a period of approximately three hours, although the possessory writ had been released within approximately two hours. On that afternoon Mr. Hart of Continental Baking Company came to the Kratzer's bakery to attempt to talk to someone about the next day's production, but finding the building locked decided to order the next day's production elsewhere. Shortly thereafter Mr. Yeck, Kratzer's general manager, contacted Continental but the company would not change its mind, and since that time Continental Baking Company has not purchased bakery products from Kratzer's. Kratzer's did gross business with Continental of approximately $2,000 per month, $1,060 of which represented "profits."

There was no evidence that Kratzer's had a contract with Continental or anything more than the expec-

tation of some additional business; that Continental's refusal to resume business with Kratzer's was because of the fact that the company had been shut down for a short period; that the relationship between Kratzer's and Continental would have continued for any particular period of time; that loss of the Continental account resulted in a loss of profits for the total business; that it would in the future; or that the company would be unable to mitigate its damages by obtaining other customers to replace Continental. There was no evidence of the type of product, the demand for it, or the state of competition.

In connection with the damages issue, it was established through Kratzer's own witnesses that although Kratzer's had done business with Continental for approximately sixteen years, only the last 1½ years were under Kratzer's current management; that for approximately one year Continental had been having difficulties with Kratzer's, both from the standpoint of obtaining necessary products and the quality of the products obtained; that Continental did not resume purchasing products from Kratzer's because Mr. Hart felt he did not have any assurance that he would be able to continue getting the production; and that prior to initiation of the action by Mr. Monter, Kratzer's had fallen three months behind in the payment of rentals under its lease.

On this state of the evidence the trial court made the following findings of fact:

> "15. That during the time that the defendant's business was closed down one of the defendant's customers, Continental Baking Company, was un-

able to contact defendant and place its orders for that day, and sent a representative down to the premises of defendant and saw that the place was closed and no one working and decided that they would no longer do business with defendant.

"16. That Continental Baking Company was a customer of defendants for some seventeen (17) years prior to the 8th day of November, 1971, and would have continued its business relationship with defendant except for the fact that it was unable to fill its orders on that day.

"17. That the average gross business done by defendant with the Continental Baking Company prior to the 8th day of November, 1971 was $2,000 per month of which was 53% or $1,060 per month represented profit to defendant.

"18. That defendant would have received $1,060 per month profit from the Continental Baking Company account indefinitely into the future.

"19. That the present value of $1,060 per month for ten (10) years is $102,278.56."

Although the cases do not always separate the problems, it is recognized generally that proof of damages involves two separate aspects: (1) proof that plaintiff was in fact damaged, and (2) the amount of the damage. The *fact* of damage must be proved with the same degree of proof as other damages, and when so proved, the *amount* may be proved with a lesser degree of certainty. But both must be proved with "reasonable certainty," and in no event may lost profits be awarded if they are "uncertain, contingent, conjectural, or speculative."

They must be based upon facts from which a reasonably accurate conclusion can be logically and rationally drawn. See *22 Am.Jur.2d., Damages*, §§171, 172, 177.

With respect to the *fact* of damage, plaintiff's evidence was unsatisfactory. In the first place, the question of causation was a haunting one. Continental's man, Mr. Hart, testified about a year's poor performance on the part of Kratzer's. And although he said he had ordered the *next day's* product elsewhere because of the inability to contact Kratzer's, it was also established that Mr. Yeck contacted him almost immediately about the next day's product but Continental wouldn't give the business back. With respect to future business, Mr. Hart testified that he had no assurance that Kratzer's would be able to perform. This "lack of assurance" cannot be attributed to Mr. Monter. From the evidence the only damage reasonably attributable to the 3-hour closing was the loss of one day's sales.

But even with respect to the loss of one day's sales to Continental, there was no proof as to the effect of such loss on the business as a whole. An injured party may not isolate one aspect of his business and base damages solely on that aspect. He must prove the total effect.

In *Guttinger v. Calaveras Cement Company*, 105 Cal.App.2d 382, 233 P.2d 914 (1951), plaintiff, a rancher sought damages for loss of income, based upon destruction of grazing land by emissions from defendant's plant. The trial court instructed the jury that it could apply either a loss of income method or a loss of rental

value method in determining damages. The jury awarded damages based on the loss of rental value, and the plaintiff appealed.

With respect to recovery of lost profits the California District Court of Appeal stated:

> "... The case, therefore, is one which would warrant recovery of damages measured by loss of profits. But when we speak of loss of profits caused by injury to an established business we are speaking of the *business as an operating unit.* It appears without conflict that each of the appellants operated a cattle business upon land areas owned or rented by them greatly exceeding in total the acreage affected by defendant's tort. Therefore it would not necessarily follow that because through that tort they had been deprived of the full pasturage use of a portion of the area used in conducting their business that they would have suffered any loss of gross income. They may have been put to greater cost to produce the gross income, in which event they would have been damaged by the amount of that greater cost. Notwithstanding the diminished pasturage value of the affected lands, *their gross production of cattle for market may have been equally great and none of the appellants proved anything to the contrary.* What they proved was that upon the affected areas they were able before the same was injured to pasture for portions of the year a certain number of range cows and that these cows so partially maintained upon the affected lands would have produced a certain number of calves which would have become available for the market, but they did not prove that this loss of gross income actually occurred. To allow loss of profits

> from injury to an established business, there must not only have been 'operating experience sufficient to permit a reasonable estimate of probable income and expense,' but *evidence must be introduced which proves the probable income and expense and this showing must be made in respect to the business as a whole.* Such a showing the appellants did not make." 233 P.2d 914 at 918. (Emphasis added.)

The court held that there was insufficient evidence to instruct the jury to apply the loss of profit measure of damages.

This court has adopted the view that damages may not be based on speculative or conjectural evidence. In *Bunnell v. Bills*, 13 Utah 2d. 83, 368 P.2d 597 (1962), the trial court had found damages to be the difference between the sales price of land in a breached contract and the price at which the same land sold under a subsequent contract. Recognizing that a subsequent sale may be evidence of market value, the court noted that in the case before it there was a considerable difference in terms between the contract which was breached and the subsequent contract. With reference to other evidence relating to value, this court said:

> "The other supporting evidence for a $180,000 dollar market value that the plaintiff claims to exist, such as plaintiff's opinion that the value of the [motel] would increase, and implications from the entire record, does not contain the degree of certainty which a reasonable ascertainment of market value would require. This is especially true where additional evidence was readily avail-

able for a more accurate valuation. Damages cannot be found from mere speculative and conjectural evidence. . . ." 368 P.2d 597 at 602.

The rule stated applies to damages generally. It applies even more strongly to damages based on lost profits, because profits are of necessity greatly influenced by the normal and abnormal contingencies of commercial life.

An often cited case dealing in some detail with the rule respecting lost profits and reasons for requiring evidence of a particular type is *Central Coal and Coke Co. v. Hartman*, 111 Fed. 96 (8 Cir., 1901), an anti-trust action in which plaintiff claimed defendant had inflicted injury on his business, and the jury had awarded damages by way of lost profits. In holding the evidence with respect to lost profits insufficient the court of appeals stated:

> "* * * Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. * * *
>
> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. * * *
>
> "One, however, who would avail himself of this exception to the general rule, must bring his proof

within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. * * *

"And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. * * *

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the pay-

ments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from which the jury could reasonably infer that the business was profitable before, less profitable or profitless after, the plaintiff's withdrawal from the club. * * *"

In *Western Union Telegraph Co. v. Trinidad Bean and Elevator Co.*, 84 Colo.93, 267 Pac. 1068 (1928), plaintiff alleged that defendant failed to deliver the last of a series of telegrams between plaintiff and its broker and as a result of this failure a sale of beans was not consummated, resulting in lost profits to plaintiff in the amount of $480.00. From a verdict and judgment for plaintiff, defendant appealed.

After holding that there was no contract existing between plaintiff and the potential purchaser, the Supreme Court of Colorado, reversing, stated:

"Obviously, the greater number of contingencies brought into the transaction, correspondingly the more remote becomes defendant's liability. We are struck with the predominance of the intervening 'ifs' between plaintiff and the contract claimed to have been lost: [naming twelve con-

> tingencies]. And now, and if, the substantial or material parts of this combination of circumstances had been shown according to the facts of a given case, plaintiff might, or might not, have made a profit of $480.
>
> * * *
>
> "Whether plaintiff could have recovered if the proof had sustained the allegations, on a case that did not do violence to the above decisions, we do not say, for the evidence is plain that the judgment is based on damages, which, at best, were remote, conjectural, and speculative, and so cannot be upheld." 267 Pac. 1068 at 1069.

Although a party need not prove the amount of damages with a mathematical certainty, he must lay before the trier of fact the best evidence available under the circumstances, so as to enable that trier of fact to make the most reasonable estimate as to the amount of the loss.

In *Mt. States Telephone and Telegraph Company v. Hinchcliffe*, 204 F.2d 381 (10 Cir., 1953), plaintiff sought to recover lost profits for defendant's negligent failure to furnish proper telephone service.

After stating the general rules applicable to proof of lost profits, the Court of Appeals states:

> "However, the plaintiff must establish his damage by the most accurate basis possible under the circumstances. He must produce the best evidence reasonably obtainable." 204 F.2d 308 at 383.

The case was cited with approval and followed in *Garcia v. Mountain States Telephone and Telegraph Co.*, 315 F.2d 166 (10 Cir., 1963). See also *Gould v. Mountain States Telephone and Telegraph Co.*, 6 Utah 2d 187, 309 P.2d 802 (1957), wherein evidence of lost prospective profits was deemed insufficient to justify an award therefor; and *United States v. Griffith, Gornall and Carman, Inc.*, 210 F.2d 11 (10 Cir., 1954), in which testimony and estimates of a company president respecting future contracts were rejected as "pure guesswork."

A case involving the length of time over which lost profits might be recovered is *Schoenberg v. Forrest*, 253 S.W.2d 331 (Tex. Civ. App., 1952), brought by a sales agent for breach of a twenty year sales agency contract which had been in existence approximately eight months when it was wrongfully terminated by the principal. The sales agent put before the jury evidence of the amounts received upon sales commissions for the eight months; that smaller figures in two of the months were a result of development work in New York which was new territory; and an estimate of expenses. On the basis of figures it appeared that he received approximately $774.62 more per month from commissions than he paid out in expenses. The appeals court held that on this evidence a jury verdict awarding plaintiff $123,200.00 could not be permitted to stand. In its discussion of the measure of damages the court said:

> "The most serious defect in appellee's proof and one which is fatal to the judgment is the failure to establish facts from which it could reason-

ably be inferred that profits over the contractual period of twenty years would be realized. * * * in addition to showing of reasonable probability of profit during such term. In short term contracts such showing is generally apparent, and in numerous reported cases it appears that the term had expired prior to the time of the trial of the case. However, in case of long term contracts, probability of profits for periods of time in the future may present a more difficult problem of proof, but it must nevertheless be shown. * * *

"*Although the reasonable probability of continuing profits is a matter of proof, this factor was seemingly assumed rather than proved in this case.* This renders the verdict fatally defective as the speculations and conjectures of either witnesses or jurymen can not supply the deficiency of proof. * * * We do not believe it would be objectional, and it might prove of benefit to the members of the jury to further instruct them that in estimating the damages which have accrued since the breach of the contract, if any, including those which may result or accrue in the future, if any, they shall award as damages, if any they believe to exist, only such amount as is established by reasonable inference from the evidence adduced before them, and they should not consider nor include in their findings damages which are remote, speculative or based upon conjecture and guesswork. * * *

"It is incumbent upon the plaintiff under the 'rule of certainty' to bring forward the most convincing evidence available to support his theory of damages." 253 S.W.2d 331 at 335, 336. (Emphasis added.)

In that case the plaintiff's proof was much stronger

than that presented in the instant case inasmuch as the plaintiff did prove a contract for a twenty year term, and put on some evidence about the character of the business and the income and expenses during the period the business was in operation. In the instant case we do not have a contract for a definite term, but only the fact that Continental Baking Company had been purchasing bakery products under an open account. There is no evidence with respect to the market or the period of time during which the business relationship might be expected to continue. At least in *Schoenberg* the jury had a twenty year term to speculate about, while in this case the court had no such thing.

To award damages to a commercial enterprise for lost profits ten years into the future is to assume that there will be no changes of circumstances in that business for a decade. Such an assumption takes no notice of the possibilities of increased competition, of increased costs of labor, material and other overhead expenses, of a depressed market, of the expiration and non-renewal of the lease under the terms of which respondent remained on the premises, of unforeseen injuries to the equipment and premises, of replacement of equipment necessitated by ordinary wear and tear and the expenses attendant thereto, of the continued financial success of the business which would preclude the necessity of incurring extraordinary obligations and the cost of discharging them. Moreover, there must be an additional assumption that nothing will happen to the operations of the customer whose business was allegedly lost.

To award damages while ignoring all of the possible contingencies that could occur in the course of ten years time is speculative and conjectural in the extreme.

In addition to awarding excessive "actual damages" the trial court awarded $3,000 punitive damages. But there was no evidence to justify such an award. The closing of the building in which Kratzer's operated its bakery was accomplished by the sheriff's execution on a writ regularly issued by the District Court, at the instance of Mr. Monter's attorneys.

Punitive damages are improper under the holding in *Calhoun v. Universal Credit Company*, 106 Utah 166, 146 P.2d 284 (1944), involving repossession of an automobile. Plaintiff had been continually late in his payments; when he was about to be inducted into the Army, plaintiff arranged with defendant for some time to dispose of the contract. Later, defendant made several attempts to contact plaintiff concerning the disposition of the automobile but was unable to reach him. Finally, the agent repossessed the automobile without process and it was subsequently resold. The trial court found that there had been a waiver of strict compliance with the terms of the contract and that the repossession was wrongful.

The trial court awarded actual damages in the amount of $247.00 and punitive damages in the amount of $200.00.

Holding that the trial court was correct in awarding actual damages, the court struck down the award of punitive damages:

"* * * the evidence comes within the rule laid down in *Hall v. St. Louis—San Francisco Ry. Co.*, 224 Mo. Ap. 431, 28 S.W.2d, 687, 691, cited by defendant as follows: 'The *party must know that the act is wrongful* and must do it intentionally without just cause or excuse. If he acts in good faith and in the honest belief that his act is lawful, he is not liable for punitive damages even though he may be mistaken as to the legality of his act. [citing cases]'

"To the same effect is *Rugg v. Tolman*, 39 Ut. 295, 117 P. 54, 57, where the court quoting from *Crymble v. Mulvaney*, 21 Colo. 203, 210, 40 P. 499, 501, says:

" 'To justify a recovery of exemplary damages, the act causing the injury must be done with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidences a wrongful motive.'

"* * * The trial court awarded punitive damages, after making a finding that the conversion was malicious. The evidence does not sustain such a finding. . . ." 146 P.2d 284 at 288. (Emphasis by court.)

The fact that appellant's attorney may have been told by respondent's attorney that a writ of restitution should not, under 78-36-10, issue until five days after the entry of the judgment is insufficient to justify an award of punitive damages. The fact that appellant released the premises to respondent within two hours after the closing indicates a lack of malice on the part of Mr. Monter and his attorneys.

IV

The trial court abused its discretion in refusing to grant plaintiff's motion for new trial.

It is well settled in Utah that while the trial court is given wide discretion in granting a motion for new trial, its decision may be reviewed on appeal to determine if that discretion has been abused. See, for example, *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (1952).

In the instant case, an indispensable determination to be made by the trial court was the length of time into the future that respondent would have continued doing business with Continental Baking Company. There was no substantial evidence as to the length of time the business might reasonably be expected to continue, and no evidence was introduced to show that the business would continue for another ten years. However, the trial court awarded damages based on lost profits for ten years from the date of the trial.

Thereafter, appellant discovered a substantial debt owed by respondent to the United States Internal Revenue Service, which debt existed at the time of trial, although the IRS lien was not recorded until a month after the trial. The trial court assumed that respondent's business with Continental Baking would continue for an additional ten years but, in fact, respondent's business was closed within a month after the trial, and has remained closed.

It is well settled that when newly discovered evi-

dence would produce a different result at trial or would materially reduce the amount of the recovery the trial court abuses its discretion in failing to grant a new trial grounded on the newly discovered evidence.

For example, in *Bates v. Winkle*, 208 Okla. 199, 254 P.2d 361 (1953), plaintiff recovered a judgment, based on a jury verdict, for $20,000 as damages for permanent injuries sustained in an automobile accident. At trial, plaintiff introduced evidence to the effect that she had suffered permanent physical incapacity resulting from her injuries and as a result she would be unable to follow her usual occupation of paper hanging and interior decorating. Further corroborating testimony was introduced tending to establish her permanent disability. Thereafter, defendants filed separate motions for new trial grounded on newly discovered evidence to the effect that plaintiff, during the time of her alleged injury, had performed her usual occupation and had told individuals that she had been uninjured in the automobile accident. From the trial court's decision denying their motion for new trial, defendants appealed.

After stating the requirements for a new trial grounded on newly discovered evidence, the Supreme Court of Oklahoma stated, citing 39 Am.Jur., New Trial, §158:

> "The rule to be deduced from the cases is that where newly discovered evidence is of such conclusive nature, or of such decisive or preponderating character that it would with reasonable certainty have changed the verdict or materially re-

duced the recovery, a new trial should be granted if it is satisfactorily shown why the evidence was not discovered and produced at time of trial." 254 P.2d 261 at 363.

And further, citing 39 Am.Jur., New Trial, §165:

"The application for a new trial should be granted where it appears that the additional evidence, if it had been introduced at trial, would have caused the jury to reach a different conclusion, or where its effect would have been to reduce the recovery materially. A new trial is to be granted when the newly discovered evidence is of a conclusive nature or of such decisive preponderating character as would, with reasonable certainty, have changed the verdict or materially reduced or increased the recovery, . . ." 254 P.2d 361 at 364.

Commenting on the evidence, the court stated:

"Plaintiff sought damages for personal injuries which were claimed to be of a permanent nature. The evidence was conflicting in this respect. Her evidence was that she commenced to suffer from such injuries shortly after the accident, was unable to work and was wholly incapacitated to perform even household duties. The newly discovered evidence offered by defendants was not cumulative, but was of a direct and positive nature, tending to present defendants' theory of the case to the effect that plaintiff's disability was from a preexisting condition and was not the result of the accident; and that any injuries were not sufficiently serious to warrant so large a verdict based upon permanent, physical disability. Had a new trial been granted and this evidence presented to the jury, it most probably would

have caused the jury to reach a different conclusion or, in any event, would have materially reduced the recovery." 254 P.2d 361 at 364.

Had the evidence of the substantial debt owed by respondent to the I.R.S. been introduced at trial there is little doubt that that evidence would not only have shown Kratzer's business was not profitable, but would have affected the trial court's decision as to the length of time respondent would have retained Continental Baking Company as a customer. Evidence to the effect that respondent would have little likelihood of remaining in business would certainly have reduced the amount of recovery given by the trial court. Under the circumstances, the failure by the trial court to grant a new trial based on this newly discovered evidence must be deemed to be an abuse of discretion.

CONCLUSION

This case, if allowed to stand, will be a monumental miscarriage of justice. The trial court may have done a capable accounting job in "capitalizing" figures, but the figures used (10 years and a return of 4½%) were assumed, not proved (R. 154, 167, 174). There was no evidence of anticipated return on investments or that the business would continue for a period of at least ten years or that during that period it would continue to realize profits in accordance with the stipulation entered into by counsel. The fact of the continuance of the business and its continued profitability cannot be assumed; it must be

proved. There was no evidence as to the length of time the relationship between Kratzer's and Continental Baking Company might continue. Indeed in his comments to the court the counsel for Kratzer's virtually conceeded this when he suggested that the length of time for which damages should be awarded was probably "a legal matter."

The trial court should not have reached the damages issue in any event inasmuch as there was no wrong committed by Mr. Monter against Kratzer's. Under the provisions of 78-36-10 U.C.A. 1953 a plaintiff has a right to execute immediately on a writ of restitution issued against a defaulting tenant. To permit a tenant to ignore the statutory notices to quit given by a landlord, then to ignore the summons, and finally to come in and tender the amount of rent due, thus depriving a landlord of any effective remedy for the recovery of his premises, would amount to a virtual taking of the landlord's property without due process of law, contrary to Amendments V and XIV, U.S. Constitution. This is particularly true where the lease contains a provision that upon default of the payment of rent the leasehold interest may be terminated and the landlord may retake possession of the premises. The decision of the trial court in this case permits a defaulting tenant to thumb his nose at his landlord again and again.

The trial court's determination to punish Mr. Monter and his counsel became apparent when on the motion for a new trial, the court refused to consider facts which

would have made completely irrelevant its computation of ten years' profits. Kratzer's Bakery was not making a profit. The loss of the Continental Baking Company account could not have led to its demise since the maximum "cash flow" talked about in the case was $1,060.00. It would not go very far toward retiring debts including $18,000.00 in taxes and $14,000.00 in unsatisfied judgments.

The case should be reversed and remanded to the District Court of Salt Lake County with directions to enter judgment for the plaintiff, including judgment for reasonable attorneys fee, and to dismiss the counterclaim. At the very least, the court should be ordered to grant Mr. Monter a new trial.

Respectfully submitted,

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