1972

Louis J. Monter v. Kratzer's Specialty Bread Company, A Corporation : Respondents 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. 12340

RESPONDENT'S BRIEF

Appeal from the District Court of Salt [illegible]
Honorable Joseph G. Jeppson, Ju[illegible]

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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

RESPONDENT'S BRIEF

NATURE OF CASE

This was an action by a landlord for restitution of leased property and a counterclaim by the tenant for damages resulting from wrongful eviction of the tenant by the landlord.

DISPOSITION OF CASE IN TRIAL COURT

The Court entered a 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, plus $3,000.00 punitive damages.

STATEMENT OF FACTS

Defendant-Respondent does not agree with Plaintiff-Appellant's Statement of Facts, since it alleges some facts not in the record and mistates and omits other relevant facts. Therefore, the following Statement of Facts is presented by Defendant-Respondent:

On February 28, 1970, the Plaintiff-Appellant, LOUIS J. MONTER, leased the property at 1241 Major Street, Salt Lake City, Utah, to Defendant-Respondent, KRATZER'S SPECIALTY BREAD COMPANY, for five years, by a written agreement (Exhibit 2-D). This lease agreement was amended by the execution of an addendum to the lease on December 10, 1970 (Exhibit 3-D), which provided for a forty-five day grace period for the payment of the monthly lease payments of $475.00.

Monthly lease payments were paid by KRATZER'S to MONTER until August of 1971. On September 28, 1971, MONTER caused a "Three Day Notice to Pay Rent or Vacate" (R. 51) to be delivered to KRATZER'S place of business. On October 1, 1971, a check drawn by Donna Poulson, an employee of KRATZER'S was delivered to MONTER's attorneys in payment of the August lease payment. Mrs. Poulson had made arrangements with her bank to cover this check (R. 179), but when it was presented to the bank, it was returned marked "refer to maker."

On October 18, 1971, MONTER's attorneys filed a Complaint asking for restitution of the property and

"following restitution for leave to amend this Complaint to include a prayer for damages resulting from waste caused by the Defendant, rent lost by Plaintiff until a new tenant is obtained . . ." (R. 84-87). A three-day Summons was delivered to the Sheriff on October 28, 1971, and served upon KRATZER'S on October 29, 1971, a Friday. (R. 52-53). Jerome Yeck, President of KRATZER'S, contacted MONTER's attorney on November 3, 1971, and told him he had records showing the rent had been paid. He was instructed to bring his records in and was led to believe that no default would be taken in the meantime (R. 78a). These records were instead taken to KRATZER'S attorneys' office and an answer to the Complaint was prepared and filed on Friday, November 5, 1971. (R. 79, 80). It was later discovered that MONTER's attorney had filed a default judgment on the morning of November 5, 1971, providing for the issuance of a Writ of Restitution (R. 73). A Writ of Restitution was issued and placed in the hands of the Sheriff for service on the same day by MONTER's attorney (R. 43-45).

On Monday, November 8, 1971, the sheriff and MONTER's attorney entered the premises of KRATZER'S at 1241 Major Street, Salt Lake City, Utah, between 12:30 and 12:45 o'clock P.M., stopped work at the premises, ordered all employees out, changed the locks on the doors, and closed down the operation of KRATZER'S business. Between 1:15 and 2:00 o'clock P.M., KRATZER'S attorney had a telephone conversation with MONTER's attorney, who was still at the

bakery with the Sheriff. In that conversation, KRATZER'S attorney quoted Section 78-36-10 U.C.A. to MONTER's attorney, and further told him they had no right to close down the bakery on that day and if the actions of MONTER, through his attorney and the Sheriff, caused any loss of business or damage, a lawsuit would be commenced against MONTER. In spite of this warning, MONTER's attorney instructed the Sheriff to go ahead with the eviction and the Sheriff did so. (R. 39-40, 148-149).

After several more telephone conversations that day, MONTER's attorneys decided they were acting wrongfully in closing down the business and later gave the Sheriff a release to allow KRATZER'S employees back in the premises. It was approximately 5:30 o'clock P.M. before they were back to work. (R. 149-150). In the meantime, while the bakery was closed, Continental Baking Company, a customer of KRATZER'S for more than sixteen years (R. 158), had been unable to call their orders into KRATZER'S. Continental Bread Sales Manager, Jack Hart, thereupon personally went to KRATZER'S Bakery, found the premises locked and nobody present and then placed their orders with another bakery. From that day on, in spite of KRATZER'S attempts to regain its business, Continental has refused to buy from KRATZER'S because, in view of the closing of the business, it had no assurance that it would continue to get products from KRATZER'S. Although Continental had experienced some quality and delivery problems with KRATZER'S, Mr. Hart testi-

fied that these were considered normal and typical of other bakers as well. He further testified that Continental would not have terminated the long-standing relationship with KRATZER'S except for their inability to obtain products on November 8, 1971, and that had this incident on November 8, 1971, been the only incident to occur, Continental would still have terminated the account. (R. 125-129).

KRATZER'S thereupon filed a motion to set aside the default judgment, stay execution and allow the filing of a counterclaim (R. 74), and tendered into Court $1,425.00, representing the lease payments for August, September, and October of 1971, all of which was not yet past due. (R. 57). This motion was granted on November 19, 1971, (R. 69), and trial set for December 10, 1971, at the request of MONTER's attorney. KRATZER'S counterclaim was filed November 22, praying for damages for lost business in an unknown amount, but in excess of $5,000.00 and also $5,000.00 punitive damages. (R. 62).

Priar to the trial, statements were presented to MONTER's attorney showing the volume of business done by KRATZER'S with Continental prior to Continental's termination of the account. These statements were verified to MONTER's attorney by Jack Hart of Continental. Statements were also presented as to the relative costs to and profits realized by KRATZER'S on this account. Based on this information, it was stipulated at the trial, that KRATZER'S received an av-

erage gross income from Continental of $2,000.00 per month and that 53% of this, or $1,060.00 per month, was profit. (R. 153-154). There was no evidence that the relationship with Continental would not continue indefinitely into the future and, of course, Mr. Hart of Continental testified that the acocunt would not have been terminated except for the actions of MONTER. (R. 128).

Based upon present value tables in evidence and the testimony of an expert witness, the Court determined the present value of the lost profits of KRATZER'S of $1,060.00 per month over ten years into the future to be $102,278.56, and entered judgment therefor. The actions of MONTER, by and through his attorneys, were found to be wrongful and because done with full knowledge of the law and in spite of warnings, were intentional and malicious. Therefore, punitive damages of $3,000.00 were also awarded.

MONTER thereafter filed a motion for a new trial claiming surprise and newly discovered evidence. This motion was denied by the Court because it was obvious from the pleadings and transcript that there was no surprise (R. 14-15). The so-called new evidence was known to MONTER and had been available to his attorneys prior to trial, from the same sources from which they subsequently obtained the inofrmation. Furthermore, in spite of the actions of the Internal Revenue Service, KRATZER'S business is still in operation and has every prospect of continuing.

ARGUMENT

I.

The court property held that the eviction of Defendant-Respondent and closure of its business was wrongful and in violation of the provisions of Section 78-36-10 *U.C.A. The judgment was invalid and execution on its was untimely.*

The pertinent provisions of Forcible Entry and Detainer statute define unlawful detainer (§ 78-36-3), prescribe the manner of service (§ 78-36-6), set out the allegations required in the Complaint (§ 78-36-8), and describe the matters for which judgment may be taken and when it may be enformed (§ 78-36-10). The following language from these provisions is important to a determination of the propriety of MONTER's actions in this case:

> "78-36-8. Allegations permitted in complaint . . . . In case the unlawful detainer charged is after default in the payment of rent, the complaint *must* state the amount of such rent. . . ." (emphasis added).

> "78-36-10. Judgment — of restitution; for damages and rent. . . . When the proceeding is for an unlawful detainer *after default in the payment of the 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 tenant or any sub-tenant, or any mortgagee 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 the five days, the judgment may be enforced for its full amount, *and* for the possession of the premises. In all other cases the judgment may be enforced immediately." (emphasis added)

It should be noted that MONTER failed to comply with these provisions from the time his Complaint was filed, the result of which was to deny KRATZER'S right to pay rent into court and be restored to its estate. The Complaint did not ask for any judgment for rent, but only for restitution and for leave to amend following restitution to pray for rent lost and for waste. This was done in spite of the statutory requirement that the Complaint *must* state the amount of rent in default. The unlawful detainer claimed by MONTER was after an alleged default in the payment of rent and the proceeding was brought specifically for failure to pay that rent, and for no other reason, as appears from the "Three Day Notice to Pay Rent or Va-

cate" (R. 51) served upon KRATZER'S. This notice states that action would be commenced ". . . to take judgment against you for the rent accrued . . . ." This notice must be the basis of any unlawful detainer proceeding brought by MONTER and any proceeding for waste or breach of covenants would be improper. It should also be noted that MONTER made no attempt to prove any waste or breach of covenant at the trial, but only non-payment of rent. Since the alleged unlawful detainer was based solely upon non-payment of rent, it was wholly improper for Monter to ask only for restitution in his Complaint and not for a judgment for unpaid rent. The effect of this is to deprive the tenant of the substantive right, granted by the statute, to pay the rent into court and be restored to his estate. Based upon this fact alone, the judgment for restitution was invalid. *Voyles v. Straka,* 77 Utah 171, 292 Pac. 913, at 914 (1930). Therefore, any action taken on that judgment was wrongful.

Having obtained an improper judgment, however, MONTER failed again to comply with the statute when he attempted to enforce his judgment for restitution by causing a Writ of Restitution to be issued on Friday, November 5, 1971, the same day judgment was entered, and then causing the Sheriff to wrongfully evict KRATZER'S from the premises and close down KRATZER'S business on Monday, November 8, 1971. Section 78-36-10 U.C.A. requires execution upon a judgment to wait five days after entry of the judgment "when the proceeding is for unlawful detainer

after default in the payment of rent, and the lease . . . has not by its terms expired." This was precisely the case before the court. KRATZER'S had a long-term lease which had more than three years to run. It is perhaps important to note that this five-day waiting period does not apply to the majority of unlawful detainer cases which are brought for holding over after termination of month-to-month tenancies, tenancies-at-will or expired leases. This important statutory right to be restored to the estate is given only to those who have a substantial investment in a longterm lease and perhaps related leasehold improvements, trade fixtures and equipment.

A landlord may not repossess his property without resorting to the remedies provided in the Forcible Entry and Detainer statute, regardless of his legal right to the property, and the failure to follow the provisions of the statute gives the tenant a cause of action for the invasion of his rights under the statute and he should be awarded any damages proved. *King v. Firm*, 3 Utah 2d 419, 285 P.2d 1114 (1955). The facts in the case now before the court are almost identical to those in the case of *Freeway Park Building, Inc. v. Western States Wholesale Supply*, 22 Utah 2d 266, 451 P.2d 778 (1969). In that case an action was commenced to collect past due rentals under a long-term written lease. A Writ of Attachment was obtained and the attorney for the landlord accompanied the officer executing the Writ and directed him to attach the inventory and to remove the tenant's employees and change the locks on all

of the doors. The tenant counterclaimed for wrongful attachment and wrongful eviction. The court held that, even if the attachment was lawful, the eviction was unlawful for failure to follow the requirements of the unlawful detainer statute and the landlord was liable for such damages as it caused including possible punitive damages. That case governs the instant case and the eviction of KRATZER'S by MONTER was accordingly wrongful and in violation of the rights of tenants granted by § 78-36-10 U.C.A.

The foregoing conclusion applies whether judgment is taken by default or after a trial. The attempt by appellant in his Brief to apply the five-day waiting period in § 78-36-10 only to judgments after a trial and not to default judgments is strained and far-fetched. A tenant should not be deprived of a substantive right expressly granted by statute by strained implication from former statutes. There is certainly no express indication in the former or present statute, nor any suggestion, that default judgments were to be treated differently than judgments upon a trial. In fact, it is just as reasonable to imply that the failure to re-enact the old provision with respect to default judgments was for the purpose of bringing all judgments, default and otherwise, under § 78-36-10. The heading of that section is not entitled "Trials" or anything similar. It is entitled "Judgments." And no other section deals with defaults. The particular provision containing the five-day waiting period is not limited by the necessity for a trial. It is only qualified by the words "When the proceeding is

for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired." Neither the original nor the present statute has been construed in the manner appellant is now suggesting. The right granted by § 78-36-10 is a matter of importance and if it did not apply in certain cases one would expect the legislature to expressly say so.

Furthermore, why could not a tenant decide, in the interest of saving time, trouble and expense, to give up his right to contest the disputed amount of rent, allow a default to be entered and then tender the rent into court and be restored to his estate as the statute provides. Moreover, the statute grants the same right to pay the rent into court during the five-day waiting period to "any sub-tenant, or any mortgagee of the term, or other party interested in (the lease's) continuance." These are parties who might not be, and probably are not, parties to the action and they should not be deprived of their statutory right because judgment is taken by default. The suggested distinction between defaults and trials does not make sense when viewed in this light. The only reasonable interpretation is that the five-day waiting period applies to all judgments based on default in rent due under unexpired leases.

Appellant's reliance on *Commercial Block Realty Co. v. Merchants' Protective Ass'n,* 71 Utah 505, 267 Pac 1009 (1928), appears to be misplaced. There the court is emphasizing the fact that the statute was designed to provide the tenant with safeguards. The case

states that even if the tenant fails to tender the rent to the landlord, "he is not deprived of his lease. He may await the judicial determination of the amount of rent, and after judgment pay the rent and costs and be restored to his estate." The court does not suggest that the tenant must dispute the amount of rent or that a triable issue must be involved. Rather, it indicates that the tenant may wait until after judgment to pay the rent and costs.

Again, the suggestion of appellant that the statute doesn't apply in this case is untenable in view of the fact that no judgment for rent was sought. The Complaint asked only for restitution and did not yet bring the matter of rent before the ocurt. KRATZER'S protected its position anyway by tendering $1,425.00 into court within the five-day period. This amount represented the rent claimed to be in default and also rent for additional months which was not yet delinquent. However sincerely appellant now urges a different interpretation, he was apparently convinced of the wrongfulness of his actions on November 8, 1971, when he decided to allow KRATZER'S back in the premises. Of course, the damage had already been done by then, but after the warning issued by KRATZER'S attorney and a full afternoon to consider the matter, appellant and his attorneys obviously realized that KRATZER'S rights had been violated and damages might result. Otherwise, there would have been no reason to allow KRATZER'S back in the premises.

II.

The Forcible Entry and Detainer statute is a special statutory proceeding and the Rules of Civil Procedure covering execution do not apply in this case.

Section 78-36-10 U.C.A. grants to a tenant a substantive right to pay a judgment for rent and be restored to his estate under an unexpired lease. That section sets forth the time after which execution may issue. The required five-day waiting period is automatic and requires no action by the tenant to make it effective. The argument by appellant that Rule 62(a) of the Utah Rules of Civil Procedure supercedes or replaces the tenant's rights under § 78-36-10 flies in the face of the express conditions as to applicability of the rules. Rule 81 provides as follows:

> "APPLICABILITY OF RULES IN GENERAL
>
> (a) Special Statutory Proceedings. These rules shall apply to all special statutory proceedings, *except* insofar as such rules are by their nature clearly inapplicable. . . ." (emphasis added)

It would appear that no rule could be more clearly inapplicable to proceedings upon execution under §78-36-10 than Rule 62(a) providing for immediate execution upon a judgment. Unlawful detainer is a special

statutory proceeding providing particular rights and remedies and prescribing the means of enforcing them. Where the Rules of Civil Procedure are in conflict with this statute, the Rules do not apply. The Rules are clearly inapplicable where they deprive a tenant of a substantive right granted by statute. Appellant might just as well argue that the manner of service of unlawful detainer notices prescribed by § 78-36-6, or that the shortening of the time for appearance to three days prescribed by § 78-36-8, or that the ten-day time for appeal prescribed by § 78-36-11, do not apply in unlawful detainer proceedings because the Rules of Civil Procedure provide a different manner or time for these matters. The Forcible Entry and Detainer statute is obviously a special statutory proceeding to which the Rules of Civil Procedure are in many respects clearly inapplicable.

Even if the Forcible Entry and Detainer statute is not a special statutory proceeding, the Rules of Civil Procedure "may not abridge, enlarge or modify the substantive rights of any litigant." § 78-2-4 U.C.A. In this case, the legislature has prescribed that a tenant has a right to be restored to his estate and the procedural rules cannot abridge or modify that right. Only the legislature can do so. Appellant argues that requiring a court order for a stay of execution is not clearly inapplicable, citing as authority the fact that the California statute, upon which Utah's statute was based, has been amended to do exactly that (Appellant's Brief, p. 16). The point is that Utah's statute has *not*

been amended and only the legislature can do so. Therefore, in Utah, the automatic five-day waiting period is still the law.

Appellant claims that 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. In doing so, he overlooks the fact that § 78-36-10 was designed to prevent an immediate execution and that it may take the losing party more than five days to obtain a stay of execution, especially if he must prepare and file a motion for a stay and set it for hearing before the court. By that time, the five-day period will have expired and the motion for a stay is a useless gesture. Furthermore, Rule 62(a) leaves the granting of a stay within the discretion of the court and upon such security as the court may require. This is in direct conflict with § 78-36-10, which makes the stay automatic, not discretionary, and requires no security to obtain the stay. In fact, the payment of the rent and costs into court within the five days is all the security the landlord needs. It should not be necessary to state that if the judgment for restitution is taken by default or if another party interested in the continuance of the lease, but not a party to the action, desires to pay the rent into court to preserve the lease, the execution will have been served and the damages done before it is known that a judgment has been entered. This is precisely what happened in the case now before the court. The appellant's interpretation therefore emasculates

the rights of the tenant and other parties as granted by the legislature.

III.

The damages found by the Court were proper and were supported by the evidence and stipulations of the parties.

The Court's findings as to the fact that damage had been caused to KRATZER'S by the wrongful actions of MONTER and as to the amount of those damages were fully supported by the evidence. In fact, the evidence was almost wholly in favor of the findings and it is difficult to see how the Court could have found otherwise. Of course, the findings of the Court are presumed to be correct and should not be disturbed if there is some support in the evidence. These are cardinal rules of review. *Charlton v. Hackett,* 11 Utah 2d 389, 360 P.2d 176 (1961).

The fact of damage was proved by the testimony of an impartial witness (R. 123 and 129) and there was no evidence introduced by MONTER to contradict his testimony. It was first established that Continental Baking Company had been a customer of KRATZER'S for seventeen years—a long-standing and obviously compatible and continuing relationship. Then Mr. Jack Hart, the Bread Sales Manager of Continental, testified that Continental's salesmen had been unable to reach KRATZER'S by telephone on November 8, 1971, to place orders for the next day, so he person-

ally went down to KRATZER'S place of business to determine the reason. After finding the bakery locked and closed up and nobody on the premises, he returned and placed their orders with another bakery. Continental has since refused to do further business with KRATZER'S because Mr. Hart felt he had no assurance that he could continue to get products from KRATZER'S in view of MONTER's actions. Although Continental had experienced some quality and delivery problems with KRATZER'S, Mr. Hart testified that these were considered normal and typical of other bakers as well. Then Mr. Hart responded to questions as follows:

> "Q In spite of those other problems you have mentioned, was your inability to get products on November the 8th the reason for your termination of your business with KRATZER'S?
>
> "A Yes, I'd say so.
>
> "Q Would it be fair to say that you would not have terminated that relationship then except for that inability?
>
> "A Yes." (R. 128)

On cross-examination, Mr. Hart further responded as follows:

> "Q Had this incident on November the 8th been the only incident to occur in your ex-

perience, would you have terminated the account?

"A I think, under the conditions that existed that day, yes." (R. 129)

Based upon the uncontroverted testimony, it was certainly reasonable for the Court to conclude that the long-standing relationship between KRATZER'S and Continental would have continued into the future except for the wrongful actions of MONTER in closing down KRATZER'S business. Appellant's attempt to bring this unchallenged testimony into question is based upon a recitation of the facts out of context with no reference to the record and the omission of other relevant facts. Mr. Hart's lack of assurance of getting products was not based on other problems, as claimed by appellant, but on the closing of the business on November 8, 1971, and the uncertainty as to what further action MONTER might take. The attempt to base the termination of KRATZER'S on the fact that it had new management is also out of context since the present manager had been with Continental during the entire relationship with KRATZER'S, starting as clean-up boy and progressing through delivery boy to baker and Manager. (R. 157-158).

As to the amount of damages, appellant has devoted a considerable portion of his Brief to citation of out-of-state cases to the effect that damges for lost profits must not be speculative or conjectural. None of these cases is directly in point, although some of them

may support respondent's position. It must be remembered that future profits, while allowable as damages, cannot be proved by any other means than projection from past profits. The general law as to proof of lost profits is found in 22 Am.Jur. 2d., Damages:

"§ 172.

> .... No recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative. Thus, no recovery can be had for loss of profits where it is uncertain whether any profit at all would have been made by the Plaintiff. But it must be borne in mind that prospective profits are to some extent uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract is not deprived of all remedy; uncertainty merely as to the amount of profits that would have been made does not prevent recovery....

"§ 173.

> A distinction is drawn between claims for profits derived from a new business venture and those derived from a going concern.... Accordingly, recovery for lost profits is not generally allowed for injury to a new business with no history of profits. The same prohibition does not apply to the established business

with an experience of profits. . . .
"§ 177.

. . . it is generally held that prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain that such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from the evidence introduced, with reasonable certainty. . . .

". . . Where the wrongful act of the defendant is of such a nature as to prevent determination of the exact amount of damages, the defendant is not allowed to insist on absolute certainty, but only that the evidence show the lost profits by reasonable inference. . . ."

In the case now before the Court, there is no problem of uncertainty or speculation as to the amount of damages. Respondent appeared in Court with a box full of records, prepared to prove the volume of business done by KRATZER'S with Continental prior to November 8, 1971. These records and a typed summary of them were presented to appellant prior to the trial and after examination of them and consultation with the representative of Continental, appellant voluntarily decided to shorten an otherwise lengthy trial and stipulate to certain facts which KRATZER'S could prove

and he could not controvert. It was therefore stipulated that, considering seasonal variations and other factors, the average monthly volume of business done with Continental by KRATZER'S was $2,000.00. Of this amount, 47% was overhead and 53% or $1,060.00 was profit. The Court was not required to speculate or conjecture as to damages, but could easily base its findings on the stipulation of the parties. The Court was then assisted by the testimony of an expert witness to determine the present value of this average monthly profit over various periods of time into the future based upon prevailing interest rates and present value tables in evidence.

The only question that could be raised is as to the length of time over which this monthly profit should be considered. The Court's finding here is also amply supported by the evidence that this business relationship had existed for seventeen years and would have continued except for the actions of MONTER, as Mr. Hart testified. The fact that Mr. Hart took the time and trouble to go down to KRATZER'S place of business, instead of just calling a competitor, indicates a desire to continue dealing with KRATZER'S and reinforces Mr. Hart's stated intent to deal with KRATZER'S, again, except for MONTER's actions. The only speculation in connection with this finding is that proposed in appellant's Brief, in his desperate search to find some way to attack the unquestioned continuation of a long-standing relationship. The Court could have justified a much longer period of time over which

to assess damages, but settled on ten years, since the present value of KRATZER'S damages began to level off after ten years.

In spite of the fact that the stipulated and uncontroverted facts of this case are more than sufficient to satisfy the requirements of the general law quoted above, the Utah law requires less certainty and allows more inference in the determination of lost profits. In *Freeway Park Building, Inc. v. Western States Wholesale Supply,* supra, the facts of which are cited above, this Court stated that "the landlord is in a poor position to insist that the damages he caused must be proved to a mathematical certainty." In that case, there was evidence that the tenant had made a profit during the five months immediately preceding the landlord's wrongful actions. The records were not complete and an accountant, doing the best he could with what he had, calculated the gross sales for the five-month period and the net profit. The Court stated, at pages 783-784:

> "The fact that a business has not been in operation long enough to have a history of profit or loss should not deprive one of the right to convince a jury, if he can do so, that he would have made a profit if his business had not been interfered with. . . .
>
> "Where no books are kept in a simple business enterprise, an estimate of profits may be given by one who is experienced in the business.

Graham Hotel Company vs. Garrett, 33 S.W. 2d 522 (Tex. Cir. App. 1930).

"In this case concrete data was given in evidence; and while the records were not sufficient to give the exact prior earnings, we think they were sufficient to enable the jury to infer the amount of damages, if any, which were occasioned by reason of the wrongful attachment and eviction, and thus to give a just verdict in the case. . . .

". . . we also think the jury should be permitted to determine whether the landlord acted maliciously in evicting the tenants so as to justify the imposition of punitive damages, and if so, the amount thereof."

In the case before the Court, the Trial Judge, sitting in place of a jury, should be permitted to make the same determination and the same inferences. Yet, the evidence is much stronger here since we are dealing with an established business with a long-standing relationship with a customer and stipulations as to both gross and net profits. The only inference made was with respect to the time that relationship might continue. This, of course, is impossible of proof as to the exact time, but the evidence is more than sufficient to support the inference made by the Trial Judge.

The *Freeway Park Building* case is also authority for the propriety of punitive damages. There the land-

lord, acting entirely through his attorney and the executing officer, removed the employees from the premises, changed the locks on the door and closed down the business. The Court stated that the jury would have been justified in finding punitive damages based on those facts. See also *Hargrave v. Leigh,* 73 Utah 178, 273 Pac. 298 (1928), where the court, on similar facts, held that malicious conduct could be *implied.* In the case of KRATZER'S bakery business, it is certainly obvious that even a temporary closure of the business would have an immediate detrimental effect on profits and customer relationships. Products must be produced and delivered on a daily basis and at precise times. The wrongful disruption of this kind of business should certainly be treated more seriously than the home-improvement business in *Freeway Park Building.* The landlord's complete lack of concern for this obvious fact should also make the inference of malicious intent much easier. Furthermore, the wrongfulness of MONTER's actions were made known to him and a warning given that suit would follow those actions prior to the time any serious damage had been done. MONTER's closure of the business in the face of this knowledge certainly constitutes an intentional and wreckless disregard of KRATZER'S rights. This is sufficient to constitute malice in law, if not in fact, and is easily the basis for the implication or inference of malice as is proper under both *Hargrave v. Leigh,* and *Freeway Park Building,* cited above.

Appellant complains that the trial court did not consider the effect of the loss of the Continental account on the total business of KRATZER'S nor that KRATZER'S might have mitigated the damages by obtaining other customers to replace Continental. This is not the type of case where mitigation of damges is required. To state that KRATZER'S must find other customers to replace the loss caused by MONTER is to deny KRATZER'S the right to grow. It has a right to the profit from all the customers it can obtain. Had MONTER not caused the termination of the Continental account, KRATZER'S business could have grown and become more profitable with each new customer obtained. If these new customers must replace Continental, KRATZER'S are denied the profits to which they are otherwise entitled. Appellant relies entirely upon *Guttinger v. Calaveras Cement Company,* 105 Cal. App. 2d 382, 233 P.2d 914 (1951), for his position that the total business must be considered. That case is wholly inapplicable. There suit was brought to enjoin a nuisance created by discharges from a cement company and for damages caused to nearby cattle businesses during the three years prior to the time of trial. An injunction was issued and there was no question in the case as to *future* damages. Only losses already incurred were in issue and those were not, but should have been, proved by the Plaintiffs from the actual effect on their business as a whole during the past three years. That case is also distinguishable from the instant case because it was based on the loss to the cattle businesses of

a portion of their production facilities (the land on which their cattle were pastured) which does not necessarily cause a loss in total production or total or net income. Had MONTER caused damage to some of KRATZER'S equipment, which might not have been in use or necessary to total production at the time, then this case would have been comparable. However, the loss caused to KRATZER'S was of a substantial *customer* which directly and obviously caused a loss of income. Fixed overhead remains the same, labor and materials may be saved, but income is lost whether or not the rest of the business is affected. In fact, the effect of this loss to KRATZER'S on the total business was stipulated to at the trial when the income from the Continental account was apportioned 47% to overhead and 53% to profit. The effect on the total business of KRATZER'S was a loss of profit in the amount of $1,060.00 per month. Appellant can not now complain about a fact which he has established by his own stipulation. It is also possible that the loss to KRATZER'S could have been established by proof as to total income before and after November 8, 1971, but the trial in this case was set on December 10, 1971, at the insistence of appellant. One month was not nearly enough time to establish the difference in income after MONTER's wrongful action, let alone compile the records of that business and present them to the Court. KRATZER'S established its damages "by the most accurate basis possible under the circumstances." It produced "the best evidence reasonably obtainable." Quoting from ap-

pellant's Brief, page 26, and *Mt. States Telephone & Telegraph Company v. Hinchcliffe,* 204 F. 2d 381, at 383 (10th Cir., 1953).

Appellant further relies on *Schoenberg v. Forrest,* 253 S.W. 2d 331 (Tex. Civ. App., 1952), a case involving breach of a twenty-year contract. Damages were based upon only eight months' experience under that contract which the court held to be insufficient upon which to speculate as to what might happen over the next twenty years. That case, too, does not help appellant since here we have seventeen years' experience which would have continued into the future except for the actions of MONTER, as Mr. Hart testified. Therefore, no speculation into the future is involved, only a reasonable inference based upon undisputed facts.

Appellant also claims that the trial court has assumed that there will be no changes in the business in the future—no increased competition, no increased costs, no depressed market, etc. It should be sufficient to point out that appellant produced no proof of the possibility of any of these matters. Furthermore, the trial court did not consider the possibility of an increase in business with Continental, nor of an increased profit margin based upon better equipment or efficiencies. Appellant has chosen to ignore the other side of the coin. KRATZER'S has met its burden of proof and the Court has made the findings based upon ample evidence. Having failed to produce any evidence to the

contrary, appellant has no reason to complain of the findings and judgment in KRATZER'S favor.

IV.

The Trial Court properly denied appellant's motion for a new trial.

After the court rendered its judgment in this case, appellant filed a motion for a new trial asserting as grounds therefor, surprise, newly discovered evidence, excessive damages, insufficient evidence and error in law. The court denied this motion for failure to establish any of these asserted grounds. The only ground upon which appellant now complains of the court's denial is that of claimed newly discovered evidence. This is based upon two alleged facts which are not true and there is nothing in the record to support them.

Appellant implies that he could have produced evidence at the trial that KRATZER'S owed a debt to the Internal Revenue Service which might have affected the court's decision and that evidence of this debt was not available at the time of trial since no lien was filed until after trial. This fact is not true, as shown by the counter-affidavit in the record (R. 15). The I.R.S. filed a lien with the Salt Lake County Recorder on September 27, 1971. The only new evidence which justifies a new trial is that which could not have been discovered by the exercise of due diligence prior to trial. U.R.C.P. 59 (a) (4); *Universal Investment Co.*

vs. Carpets, Inc., 16 Utah 2d 336, 400 P.2d 564, 567-8 (1965). Furthermore, discovery after trial of matters of public record is not a ground for new trial unless on diligent search and inquiry in the proper office, such record is not discovered. *Drespel vs. Drespel,* 56 Nev. 368, 45 P.2d 792, *reh.,* 54 P.2d 226 (1935); *In re Hammer's Estate,* 145 Wash. 322, 260 Pac. 532. The so-called new evidence claimed by appellant was a matter of public record in the Salt Lake County Recorder's Office as well as the office of the Internal Revenue Service long prior to trial. No showing has been made that appellant made any effort to discover this evidence prior to trial. The same diligence exercised by appellant and his attorneys after trial, if exercised by them prior to trial, would have revealed this information and it is therefore not "newly discovered evidence. Moreover, the fact of this debt to the I.R.S. was known to MONTER personally prior to trial (R. 18) and he did not even bother to appear at the trial to tell the court what he knew (R. 26). The trial court did not consider this evidence sufficient to justify a different result. Decisions on new trial motions rest within the discretion of the trial court and since appellant has failed to show abuse, the trial court's decision should not be disturbed. *Universal Investment Co. v. Carpets, Inc.,* supra.

The further claim by appellant that respondent's business was closed within a month after trial and has remained closed, the latter being untrue, does not account for the fact that appellant substantially con-

tributed to the cause of this closure by denying cash flow to respondent out of which the taxes could have been paid. Nor does it account for the fact that respondent immediately arranged for the continuation of that business and that respondent is presently actively engaged in the same business though at a reduced profit because of MONTER's wrongful actions.

CONCLUSION

The Court's findings and judgment are fully supported by the evidence and the law. By failing to sue for rent, appellant did not follow the requirements of the unlawful detainer statute and thereby obtained an invalid judgment. The actions of appellant in attempting to enforce that invalid judgment caused damages for which he must respond. Appellant's further refusal to follow the requirements of § 78-36-10, U.C.A. by waiting five days before executing on his judgment deprived respondent of his statutory right to pay the rent into court and be restored to his estate. This substantive right granted by the legislature cannot be abridged by the procedural rules. Only the legislature can abridge or modify this right. This statute does not permit a tenant to "thumb his nose" at his landlord nor does it deprive him of his property without due process of law, as claimed by appellant. The statute only applies in the limited situations where rent is unpaid under an unexpired lease and it provides for full payment to the landlord of all rent, costs and fees. He receives everything for which he has bargained in his lease plus his

expenses. Any provision in the lease providing that the landlord may re-take possession of the premises without following the requirements of the Forcible Entry and Detainer Statute is void as against public policy. *Freeway Park Building, Inc. vs. Western States Wholesale Supply,* supra, at page 781.

The court's determination of damages was based not only upon the "the best evidence reasonably obtainable" by respondent, but also upon the most unquestionable basis possible, the stipulations of appellant and the uncontroverted testimony of two impartial witnesses—one of them an expert witness—all of which the trial court chose to believe. The damages were reduced to present value based upon prevailing interest rates. The punitive damages assessed were based upon the wreckless and intentional disregard by appellant of respondent's rights with full knowledge of those rights and of the consequences. That is sufficient to imply a malicious state of mind. The fact that appellant was acting through his chosen attorneys does not relieve him from the responsibility for their acts. He is liable for the acts of his agents, especially when he has specifically instructed them to take whatever action they determine necessary. The attorneys cannot ask for mercy because their actions have caused damage for which their principal is liable. This is not "punishment" but responsibility.

The appellant's assertions in this case are contrary to the law and the evidence and are based on some facts

not in the record nor proved at the trial. Since appellant has not shown that the trial court's findings have no support in the evidence, the trial court's decision should be affirmed.

Respectfully submitted,

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