1972

Mariani Air Products Company v. Gill's Tire Market : Appellant's Brief

Utah Supreme Court

IN THE SUPREME
OF THE STATE

MARIANI AIR PRODUCTS
COMPANY,

Plaintiff and
Respondent,

vs.

GILL'S TIRE MARKET,

Defendant and
Appellant.

APPELL

Appeal from the
In and
Honorable

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIANI AIR PRODUCTS COMPANY,
Plaintiff and Respondent,

vs.

GILL'S TIRE MARKET,
Defendant and Appellant.

Case No. 12992

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This case was tried to the Court before the Honorable Stewart M. Hanson and involves a claim by plaintiff against defendant for unpaid rent. Defendant's answer was that the premises had been repossessed by plaintiff, that the repossession was not objected to by defendant but effectively terminated the lease and obligation of defendant to pay rent. Defendant also defended upon the ground that the plaintiff violated the lease agreement in failing to keep the roof in a reasonable state of repair, permitting the premises to become uninhabitable as a result of roof leakage into the retail section of the store.

Following trial, Court entered judgment against the defendant, rejecting its defenses, and ordered rent to be paid for the full lease term, with judgment in the amount of $1,800.00 together with attorney's fees in the amount of $468.33.

From this judgment the defendant prosecuted its appeal.

DISPOSITION IN LOWER COURT

Judgment ordered in favor of plaintiff and against defendant following trial in the amount of $1,800.00 back rent, $468.33 attorney's fees, and $45.50 costs were entered by the Trial Court.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Trial Court judgment upon the ground and for the reason that as a matter of law on the uncontradicted evidence no rent was owing by defendant and no attorney's fees were proper.

STATEMENT OF FACTS

The agreement between the parties is in writing and is Exhibit 1-P, a lease dated the 16th day of March, 1970.

It covers the premises located at 648 South First West in Salt Lake City, Utah, and provided for rent at the rate of $300.00 per month.

The lease anticipated the operation on the premises by the lessee of a tire business and was

actually used for wholesale and retail operations during the time when the premises were fully used.

The provision of the lease which, it is defendant's claim, was violated by plaintiff is the replacement paragraph for paragraph 4 in writing and attached to the lease which provides as follows:

> "Lessor agrees to maintain the roof of the building located on said premises during the term of this lease, except for any repairs as may be required as a result of improvements or remodeling of said premises by Lessee or damage to the roof resulting from the acts and conduct of Lessee or others in connection with Lessee's occupancy of the premises." See Exhibit 1-P attachment.

On the roof of the premises, the Lessor had installed a swamp cooler prior to the time of the lease. Exhibit 10-P shows the swamp cooler sitting on the roof of the building.

Prior to the 28th of January, defendant's employees discovered that there was a leak in the roof and water had run down on the inside of the building and had caused substantial damage to the section occupied by defendant for its retail outlet. (R. page 40) On January 28, 1971 the manager of plaintiff and an employee of defendant met on the premises and examined the damage done by the leak in the roof. Witnesses Alvey for defendant and Mohr for plaintiff both agree that as a result of said conference Mohr, representing plaintiff, agreed to repair the roof and to do the repairs necessary to replace the

damaged wallpaper and paint in the room used by defendant for a retail outlet. This basic understanding is shown by the testimony of Mohr, pages 40 through 42 of the record. Attempts were made by plaintiff to do the repair work on occasions when the premises were not open for business and after hours, but Alvey, representing defendant, would not permit this since there was valuable tires stored on the premises and security could not be maintained if after hours work was accomplished (R. 42). No repair work was ever done by the plaintiff other than the leak in the roof was repaired and the water which apparently was leaking from the swamp cooler down through the roof was stopped. When the premises were re-rented, plaintiff then allowed the new tenant $700.00 against the cost of repairing the area damaged by the water. (R.43).

It appeared clear that the water leaked out of the swamp cooler on to the roof of the building, and then through the roof of the building into the area occupied by defendant (R. 47, R. 50, R. 93). Defendant's testimony, which is uncontradicted, from witness Alvey was that the damage to the interior of the building from the leak through the roof made the sales office unusable (R. 52). After the discussion with Mohr, manager of plaintiff, defendant did not attempt to make the repairs but waited for these to be accomplished by plaintiff's organization (R. 52). The only attempt to do the repairs was to arrange for after hour workers to be in the premises, which the defendant could not permit since security could not be main-

tained (R. 53). Jay Gill, president of defendant, described the damage done and testified that the damage was so extensive that the area could not be used as a retail tire outlet (R. 57). This testimony by defendant's witnesses was uncontradicted, as was the testimony that $700.00 was the reasonable appraisal for the damages allowed by plaintiff.

It was stipulated by counsel for the parties that defendant had paid 12 months rent which would be through the month of March, 1971, and that six months rent would be all that could be claimed for the period of April, 1971 through September, 1971. (R. 31). The following facts are established, defendant believes, as uncontradicted and undisputed. (1) That the plaintiff retained the responsibility for repairing the roof of the premises; (2) That the roof leaked and caused damage to the interior of the premises in December or early January of 1970 and 1971; (3) That the plaintiff ascertained the damage and agreed to repair the roof and the damage done to the interior of the building; (4) That the roof was not repaired nor the damage repaired to the interior of the building at any time while the defendant's lease was in effect; (5) That the cost of repair was $700.00; (6) That the damage made the premises uninhabitable for a retail sales outlet; (7) On April 28, 1971 Mariani, owner of plaintiff, picked up the key to the premises from Gill, owner of defendant, and retained the key from that time on, which was defendant's only means of access to the inside of the

building (R. 85, R. 78); (8) No use was made of the building by defendant after April 28, 1971.

Plaintiff testified that repeated efforts were made to contact Gill and promises were made to return the key to him, but neither one of these events occurred following the visit on April 28, 1971 by Mariani and Gill to the premises, at which time Mariani picked up Gill's key to the building.

ARGUMENT

POINT I

AS A MATTER OF LAW, THE LEASE TERMINATED ON APRIL 28, 1971.

It is defendant's position, based on the uncontradicted evidence and the undisputed stipulations and agreement as to what had occurred, that effective the 28th of April, 1971 defendant no longer owed rent to the plaintiff and plaintiff had repossessed and taken back the property which had been theretofore under lease to defendant.

The uncontradicted evidence is that Mariani picked up the key, which was the only means of access that defendant had to the premises, on April 28 and retained it from that time on. He testified he made efforts to return the key but was never successful.

The conduct of the parties as far as it relates to the interpretation of a contract has universely been held to be the highest evidence of their intentions.

This Court, in *Hodges Irrigation Co.* v. *Swan Creek Canal Co.*, 111 Utah 405, 181 P.2d 217, recited and followed this universal rule. Where a party, by his conduct, interprets the contract and the other party relies on the interpretation, the real meaning of the agreement is found.

Here there was independent practical construction by Mariani, accepted by Gill. The act of taking the key was intentionally and conclusively engaged in by Mariani and accepted by Gill.

Gill made no attempt to return to possession or repair the premises. The correspondence between the attorneys for Mariani and Gill shows that the key to the premises was a matter that all knew was important. Gill's testimony is not contradicted where he testified that if the key was returned and the premises fixed up so that they could be habitable, he would pay the rent. Neither one of these conditions was ever met.

In *Hodges Irrigation Co.* v. *Swan Creek Canal Co.*, *supra*, this Court stated the rule which defendant asserts is applicable:

> "Here appellant from the time of the removal of the flume controverted respondent's interpretation. True there were some acceptances by some of appellant's secretaries of the $6 proferred by respondent in its settlement of accounts but such acceptances are just as consistent with the theory that since respondent refused to pay more they took what they could get as it is with the contention that appellant interpreted the contract in the same

manner as respondent, and in view of the fact that appellant has since the removal of the flume tried to get respondent to pay an equal share of the expenses incurred, it is probable that the reason of such acceptances of the $6 was inability to collect more rather than an indication of a practical interpretation of the contract. As stated in 17 C.J.S., Contracts, Sec. 325, subdiv. b, page 764:

> 'To warrant the court in according great weight to, or adopting, a practical construction by the parties, it is necessary and sufficient that each party shall have placed the same construction on the contract. While the construction placed by one party on his own intention, the meaning of the contract cannot be established by the construction placed on it by one of the parties, unless such interpretation has been made to and relied on by the other party, or has been known to and acquiesced in by the other party, * * *.' "

The Tenth Circuit has also expressed itself on the rule of contract interpretation in *Broadhurst* v. *Whitelock*, 313 F. 2d 130 (C.A. Utah), it stated, page 316:

> "This contract was drafted by one of the parties and changed by the other; the trial court sought out the intent from the particular wording, from the whole document, from the general circumstances, and from the acts of the parties."
> * * * * * * * * *
> "Thus the action of the parties and their associates in the handling of the claims served to place an interpretation on the agreements by

the parties, and this interpretation is consistent with the trial court's findings and conclusions."

Defendant respectfully submits that the conduct of Mariani conclusively shows that he did not intend to fix up the premises so they would be habitable. The premises were not fixed up. Gill could not use the building in the way that it wished. Mariani's conduct, it is defendant's position, is, as a matter of law, a termination of the lease on April 28, 1971. No rent thereafter would be due and owing and the judgment of the Court should have been for one month's rent only for the period ending April 28, 1971, a sum of $300.00.

POINT II

MARIANI WAS NOT ENTITLED TO RENT UNTIL THE ROOF LEAK AND DAMAGE CAUSED BY IT WERE REPAIRED.

It is uncontradicted in all of the evidence that the premises leased to Gill were damaged through a leak in the roof (R. 47-50-93).

It is uncontradicted that plaintiff accepted the responsibility for repairing the roof and the damage which the leak had caused to the interior of the building (R. 42).

It is further uncontradicted that the damage to the retail area in the building made it unfit for use by defendant. Defendant, however, continued to pay the rent up through the month of March, and it is

stated in the letter from Attorney Fullmer, first failed to pay additional rent April 20, 1971.

It has always been the rule of law that where a tenant is deprived of the use of the premises by the failure of the landlord to repair, the tenant is entitled to recover the rent paid for the period in question or to offset it against the balance of the rent owing. See *Timmons* v. *McKenzie*, 21 Ariz. 433, 189 P. 627; *Mayer* v. *Rothstein*, 167 N.Y.S. 503; 36 Corpus Juris, P. 167, Section 801, Note 15-16; 51 C.J.S., P. 997, Section 373 (5), Note 43.

Perhaps the best and most succinct exposition of the law is in *Mitchell* v. *Weiss*, Texas C.A., 26 S.W. 2d 699. There the Court stated the rule in the following language:

> "The proper measure of damages varies with the facts of the particular case. In some cases it is regarded that the tenant, being in possession, should make the repairs when the landlord fails to do so, and the measure of damages in such a case is the reasonable cost of the repairs. 1 Sedgwick on Damages (9th Ed.) Sec. 209.
>
> The usual measure applied is the reduced rental value; that is, the difference between the contract rental and the rental value in the unrepaired condition. 35 C.J. 1191.
>
> The present case is not one where the landlord has wholly breached his covenant to repair. At most the breach is but partial by failing to restore one of the buildings to as good condition as it was just before the fire. The tenant has not been disturbed in his

possession of the buildings except in one of them, and then only during the brief period the repairs were being made. This interruption was of course authorized. The proper measure of the tenant's damage in this case is the reduced rental value, if any, as indicated above."

In a case somewhat similar in legal significance to the case at bar, *Bostwich* v. *Losey*, 67 Mich. 554, 35 NW 246, the Michigan Supreme Court set down the rule which the defendant seeks to have this Court apply, namely that there is no rent due and owing after failure of the plaintiff to make the repairs which it covenanted to make and after failure to put the premises back in a usable and habitable condition. See 248 NW Rept.

"What the defendants contracted for was the use of the saw-mill, and the saw-mill was dependent in its use upon the water-power which propelled it. The plaintiff covenanted to keep the flumes, through which the water passed to the mill, in repair. If he neglected or refused to do this when notified, and on account of such neglect the water-power was destroyed, and the mill thereby rendered useless to the defendants, the consideration of the agreement or lease failed, and the defendants were justified in abandoning the premises, and the stipulated rent could not be recovered after such failure of consideration. Tyler v. Disbrow, 40 Mich. 415; Landl. & Ten. Sec. 377; Hinckley v. Beckwith, 13 Wis. 34. Nor were the defendants bound to make the repairs themselves. It was the duty of plaintiff, under the agreement, to make

> these repairs, without which the premises were of but little or no value for the use defendants required, and to which they were entitled under the contract. The defendants had the right to hold the plaintiff to the ordinary responsibility of a party failing to perform his agreement, to-wit, to pay the damages caused by such failure. We can see no difference in this respect between this and any other contract. Hinckley v. Beckwith, 13 Wis. 31, 17 Wis. 426; Myers v. Burns, 35 N.Y. 269; Hexter v. Knox, 63 N.Y. 561.

The conduct of the parties, defendant submits, is most important and conclusive on the Court in interpreting the meaning and responsibilities that each party undertook.

Plaintiff never did, even after it obtained the key and had free access to the building, repair the damage which had been caused by the leak in the roof. It never did place the premises back in a usable and habitable condition for the purposes which defendanted rented. No work was ever done to restore the premises by plaintiff. When it entered into an agreement to release them, it gave to the new tenant a $700.00 consideration and permitted the new tenant to make the repairs that were necessary to place the premises in a habitable condition. (R. 42, testimony of Mohr, manager of plaintiff).

The position of defendant is not based on contradictory evidence as the evidence was relatively free of conflict on the crucial issues which defendant submits are determinative of the parties' rights. It is

respectfully submitted as a matter of law that the Trial Court erred in granting judgment against the defendant for the rent for the whole term, including attorney's fees, and that this Court should reverse the Trial Court since the evidence is undisputed and order judgment in accordance with the legal rights of the parties as determined by the Court.

CONCLUSION

It is respectfully submitted that the decision of the Trial Court should be reversed and that this Court should determine the rights of the parties and order judgment entered in accordance with the law and as it pertains to landlord and tenant.

Respectfully submitted this ..... day of ....., 1972.

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Attorney for Defendant and Appellant