

1972

## Mariani Air Products Company v. Gill's Tire Market : Brief of Respondent

Utah Supreme Court

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### Recommended Citation

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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MARIANI AIR PRODUCTS  
COMPANY,

*Plaintiff and Respondent,*

vs.

GILL'S TIRE MARKET,

*Defendant and Appellant.*

Case No.  
12992

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BRIEF OF RESPONDENT

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Appeal from the Judgment  
of the Third District Court  
In and For Salt Lake County, State of Utah  
Honorable Stewart M. Hanson, Judge

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DEC 1 1972  
Clerk, Supreme Court, Utah

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MARIANI AIR PRODUCTS  
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Case No.  
12992

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BRIEF OF RESPONDENT

---

STATEMENT OF KIND OF CASE

This action was brought by plaintiff and respondent, Mariani Air Products Company, a Utah corporation, hereinafter called "Mapco," to recover rent and attorney's fees due from defendant and appellant, Gill's Tire Market, a Utah corporation, hereinafter called "Gill's," under the terms of a written lease.

DISPOSITION IN LOWER COURT

After a non-jury trial, the Trial Court made and entered its written Memorandum Decision (R. 11, 12) and Findings of Fact and Conclusions of Law (R. 16, 17) and awarded Judgment (R. 14, 15) in favor of Mapco and against Gill's in the sum of

\$1,800.00, plus \$468.33 attorney's fees and \$44.50 costs. Thereafter, Gill's filed its Notice of Appeal (R. 22).

### RELIEF SOUGHT ON APPEAL

On this appeal Mapco (plaintiff and respondent) seeks to affirm the Findings of Fact and Conclusions of Law and Judgment made and entered by the Trial Court.

### STATEMENT OF FACTS

Mapco cannot agree with the Statement of Facts contained in Gill's Brief because that statement is, for the most part, made in a light most favorable to Gill's who lost in the Trial Court, and accordingly violates the time honored rule that the facts on appeal must be reviewed in the light most favorable to the Findings and Judgment below. Accordingly, Mapco submits the following Statement of Facts.

The parties entered into a written lease (Exhibit 1-P) dated March 16, 1970, whereby Mapco leased certain real property located at 648 South First West in Salt Lake City, Utah, to Gill's for a term of eighteen (18) months, beginning March 20, 1970, for an agreed rental of \$300.00 per month. Although Gill's entered into possession as agreed, its active use of the premises substantially declined in the fall of 1970 (R. 53, lines 27, 28; R. 60, lines 11-17).

Early in 1971 Gill's discovered that a portion of the interior of the building had been damaged by water. Gill's representative, Ron Alvey, and Mapco's

manager, George Mohr visited the premises on January 28, 1971, at which time Mohr discovered that the water line leading to the evaporator-type air conditioner on the roof was running, and Mohr turned it off (R. 41, lines 25-29; R. 45, line 28 through R. 46, line 12). This water line should have been shut off and the air conditioner drained and secured for the winter, but Gill's had neglected to do so (R. 46, line 17 through R. 47, line 2).

Gill's failure to properly secure the air conditioner for the winter resulted in the water freezing, breaking the fittings and drain and allowing the water to *leak under the air conditioner* on the roof (R. 49). There was no leaking except under the air conditioner (R. 47).

Although Mohr offered to repair the damages to the interior, Gill's refused to cooperate in arranging a time for the repairs to be made (R. 42,48).

Gill's quit paying rent in March of 1971 and failed to pay the last six months rent under the lease, although it never did remove all of its personal property from the premises (R. 31, line 10,11; R. 36,37, 64).

When Gill's failure to pay the rent came to the attention of Mr. Mariani, the President of Mapco, he tried several times to get in touch with Mr. Gill (R. 83). He finally went to Mr. Gill's office on April 28, 1971, at which time they jointly visited the leased premises. At that time Mr. Mariani asked for the

key so that he could have the building inspected to determine the cause of the damage. He told Mr. Gill that if it was Mapco's fault, he would fix it, but if it was Gill's fault, Gill would have to fix it (R. 85, 86,87). Mr. Gill agreed to that procedure and did not say he was abandoning the premises and canceling the lease (R. 86).

When Mr. Mariani had determined that the damage was caused by the broken air conditioner and not a leak in the roof, he made numerous attempts to talk to Mr. Gill, but Gill failed to return his calls (R. 87-89). After about thirty days of such avoidance by Gill, Mr. Mariani told Mohr to institute legal action (R. 89).

There is no evidence in the record to even suggest that the damage to the leased premises was caused or contributed to by anything except the failure of Gill's to shut off, drain and secure the air conditioner for the winter. There was no leaking after the air conditioner was repaired (R. 38).

Written demand was made by Mapco's attorney on Gill's on May 26, 1971, for the delinquent rent and for repair of the damage (Exhibit 7-D). In response to that demand Mr. Gill telephoned Mapco's attorney and indicated a willingness to pay the rent if the damage was repaired and the key returned (R. 73,74). On June 17, 1971, Mr. Gill's attorney wrote to Mapco's attorney contending that the lease had been terminated (Exhibit 8-D). However, even then Gill's

failed to remove its personal property and signs remaining on the premises (R. 64).

Mapco commenced legal action by serving summons on June 29, 1971 (R. 4) seeking to recover the then delinquent rent, and additional rent as it became due, and attorney's fees, and for damages to the premises (R. 1,2). After a non-jury trial, the Trial Court made and entered its written Memorandum Decision (R. 11,12), Findings of Fact and Conclusions of Law (R. 16-18), and awarded Judgment (R. 14,15) in favor of Mapco and against Gill's for the full amount of the unpaid rent, plus attorney's fees and costs.

## ARGUMENT

### POINT I

UNDER TRADITIONAL RULES OF APPELLATE REVIEW THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT IN THIS CASE MUST BE AFFIRMED.

This Court has repeatedly announced and consistently followed the rule as stated in *Charlton v. Hackett*, 11 Utah 2d 389, 360 P. 2d 176 (1961), that in considering an attack on the Findings, Conclusions and Judgment of the Trial Court it is the duty of this Court:

- (1) To indulge them the presumption of validity and correctness;
- (2) to require the appellant to sustain the burden of showing error;



- (3) to review the record in the light most favorable to them; and
- (4) not to disturb them if they are substantially supported in the record.

It is submitted that the Findings, Conclusions and Judgment of the Trial Court in favor of Mapco and against Gill's are substantially supported by the evidence and should be affirmed by this Court.

## POINT II

MAPCO DID NOT TERMINATE THE LEASE AND RETAKE POSSESSION OF THE PREMISES, AND GILL'S WAS NOT JUSTIFIED IN ABANDONING THE PREMISES.

In the argument under Point I of its Brief, Gill's urges that the lease was terminated by the conduct of Mr. Mariani in taking the key from Mr. Gill on April 28, 1971. The difficulty with that argument is that it is not supported by the facts.

Mr. Mariani testified that he asked for the key so that he could make an investigation to establish the cause of the water damage and to determine who was at fault, and that Mr. Gill was agreeable to this procedure. There was no conversation about cancelling the lease (R. 85, 86). Mr. Mariani further testified that after the investigation he attempted to contact Mr. Gill several times, but after Mr. Gill had avoided him for thirty days, he directed Mohr to take legal action. The written demand (Exhibit 7-D) and also the complaint (R. 1,2), which was filed well before

the expiration of the lease, both show that Mapco treated the lease as still in effect and sought to enforce its provisions.

The Trial Court, in its written Memorandum Decision (R. 11) stated:

That the plaintiff [Mapco] did nothing to in any way terminate the lease in question, and that it appears clearly to the Court from the evidence that it was the clear intention of the *defendant* [Gill's] to abandon the premises in question, and that upon the giving of the key to the premises to the plaintiff and the acceptance by the plaintiff of the key, *it was not the plaintiff's intention by such acceptance to cancel and abandon the lease*, and that the plaintiff is therefore, entitled to a judgment for the balance claimed by and for the leased premises. (emphasis added)

In its Findings of Fact (R. 17) the Trial Court found:

4. The plaintiff, as Lessor, has not acted to terminate said Lease Agreement, nor has it failed to perform any obligation under said Lease Agreement so as to entitle the defendant Gill's Tire Market to terminate said Lease Agreement.

There is ample substantial admissible evidence in the record to support these determinations by the Trial Court, and under the rule referred to in Point I of this Brief, such determinations should be affirmed by this Court.

The record will not support the argument that

Mapco actually or constructively evicted Gill's from the premises and thereby terminated the lease. To constitute an eviction there must be either a physical ouster or some act done by the landlord on the premises *with the intent to deprive the tenant of possession*. *Katz v. Duffy*, 261 Mass. 149, 158 NE 264, 58 ALR 1047.

A constructive eviction cannot be predicated upon a condition arising from a want of repairs which it is the duty of the tenant to make. (49 Am Jur 2d 333, Landlord and Tenant § 315, citing *Alger v. Kennedy*, 49 Vt 109). That the duty to repair was on Gill's rather than Mapco in this case will be argued more fully under Point III of this Brief.

For a tenant to rely upon constructive eviction as a basis for avoiding payment of the rent, he must surrender or abandon the leased premises. *Warm Springs Co. v. Salt Lake City*, 50 Utah 58, 165 Pac. 788. And the tenant is obligated to remove his personal property, including property of no value, trash, rubbish, etc. (49 Am Jur 2d 914, Landlord and Tenant § 940). Note that in the instant case Gill's failed to remove its tire racks, signs, junk tires and other property even as late as the time of trial.

The record just *does not* support Gill's argument that the conduct of the parties establishes a joint intent to terminate the lease. The record clearly *does* support the Trial Court's Findings to the contrary.

POINT III  
UNDER THE EXPRESS PROVISIONS OF THE  
LEASE MAPCO WAS NOT OBLIGATED TO RE-  
PAIR THE DAMAGE COMPLAINED OF.

In its argument under Point II of its Brief, Gill's asserts that it is uncontradicted that the damage resulted from a leak in the roof and that Mapco accepted the responsibility for repairing the roof and the damage. These assertions are neither fair nor accurate.

Although Mr. Mohr testified that on January 28, 1971, he stated that Mapco would repair the damage, this was before the service company had determined that the freezing and breaking of the air conditioner had caused the damage. Mr. Mariani told Gill on April 28, 1971, that whoever was responsible would have to make the repairs.

The applicable provisions of the lease (Exhibit 1-P) read as follows:

4.\*\*\*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.* Lessee agrees, at its expense, to maintain all of the remainder of said premises and the improvements thereon in a satisfactory state of repair, including but not limited to water and sewer pipes, electrical wiring and fixtures, heating fixtures, and glass. *Lessor shall not be liable for any damage occasioned by failure to keep*

said premises in repair and *particularly shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes, or sewage, or the bursting, leaking or running of any wash stand, tank, water closet or waste pipe in, above, upon or about said building or premises, or from any leakage of the roof or collapse thereof.*\*\*\* (emphasis added).

There is substantial evidence in the record to establish that the water damage to the interior of the building was the direct and proximate result of Gill's failure to properly secure the air conditioner for the winter. Indeed, *there is no evidence in the record to support any other conclusion.*

That Gill's has the obligation to maintain and secure the air conditioner is clear from the express language of the lease set forth above. The same obligation is imposed under applicable principles of law. A tenant must use the premises in a reasonable manner, and if, by the negligence or misfeasance of a tenant the property is materially damaged, the tenant is liable. (49 Am Jur 2d 902, Landlord and Tenant § 922). A tenant may be liable for damages from freezing due to his negligence in failing to drain plumbing (op. cit. § 933).

Since the duty to repair the damage complained of was on Gill's, not on Mapco, Gill's should not now be allowed to justify its failure to pay the rent by claiming that the damage rendered the premises untenable.

## CONCLUSION

The record is clear that as early as November of 1970, Gill's had little or no use for the leased premises and sought to avoid its obligations under the lease. Its claimed justification for non-payment of rent is based on damage to the premises resulting from its own negligence and misconduct, and not from any failure or breach on the part of Mapco. The Trial Court, upon substantial evidence, so found and determined. Under applicable rules of appellate review the Findings and Judgment of the Trial Court must be affirmed.

Respectfully submitted,  
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