

1992

Lori Waters v. Garth T. Howard, Jean Howard : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Garth Howard, Afton Jean Howard; Appellees Pro Se.

Bruce Plenk; Utah Legal Services; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Waters v. Howard*, No. 920662 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3648

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U

50

.A10

920662

IN THE UTAH COURT OF APPEALS

DOCKET NO. _____

LORI WATERS,

Plaintiff/Appellant,

vs.

GARTH T. HOWARD and AFTON
JEAN HOWARD,

Defendants/Appellees.

*
*
*
*
*
*
*
*
*
*

Case No. 920662-CA

Priority No. 15

Trial Case No. 893001449 CV

BRIEF OF APPELLANT

APPEAL FROM THE THIRD CIRCUIT COURT
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT
HONORABLE PAUL G. GRANT, PRESIDING

UTAH LEGAL SERVICES, INC.
Attorneys for Appellant
BY: BRUCE PLENK #2613
124 South 400 East #400
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

Garth Howard
Afton Jean Howard
Appellees
Pro Se
4125 South 430 East, Apt. 103
Murray, Utah 84107

FILED
Utah Court of Appeals

JAN 22 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

LORI WATERS,	*
	*
Plaintiff/Appellant,	*
	*
vs.	* Case No. 920662-CA
	*
GARTH T. HOWARD and AFTON	*
JEAN HOWARD,	*
	*
Defendants/Appellees.	* Trial Case No.893001449 CV
	*

BRIEF OF APPELLANT

APPEAL FROM THE THIRD CIRCUIT COURT
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT
HONORABLE PAUL G. GRANT, PRESIDING

UTAH LEGAL SERVICES, INC.
Attorneys for Appellant
BY: BRUCE PLENK #2613
124 South 400 East #400
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

Garth Howard
Afton Jean Howard
Appellees
Pro Se
4125 South 430 East, Apt. 103
Murray, Utah 84107

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
JURISDICTION AND NATURE OF PROCEEDING.....	1
STATEMENT OF THE ISSUES AND STANDARD OF REVIEW.....	1
DETERMINATIVE STATUTES AND RULES.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	
I. AFTER HOWARD COMMITTED FORCIBLE ENTRY AND DETAINER BY PHYSICALLY EXCLUDING WATERS FROM THE PREMISES, THE TRIAL COURT ERRED IN DISMISSING WATERS' COMPLAINT.....	4
II. THE TRIAL COURT ERRED IN SANCTIONING HOWARD'S SELF-HELP EVICTION	5
III. HOWARD'S EVICTION OF WATERS WITHOUT NAMING HER IN THE UNLAWFUL DETAINER CASE OR IN THE WRIT OF RESTITUTION VIOLATED HER RIGHT OF PROCEDURAL DUE PROCESS AS GUARANTEED BY THE UTAH AND U.S. CONSTITUTIONS	6
IV. THE WRIT OF RESTITUTION WAS VOID AS TO WATERS SINCE THE COURT HAD NO JURISDICTION OVER WATERS BECAUSE SHE WAS NOT A NAMED PARTY	11
CONCLUSION	15

ADDENDUM

1. Utah Code §78-36-1	1-1
2. Utah Code §78-36-7	2-1
3. Utah Code §78-36-10	3-1
4. Utah Code §78-36-12	4-1
5. Utah Code §78-36-12.3	5-1
6. Minute Entry	6-1

7.	Findings of Fact and Conclusions of Law	7-1
8.	Judgment	8-1
9.	Order and Final Judgment	9-1

TABLE OF AUTHORITIES

CASES

<u>Arrieta v. Mahon</u> , 644 P.2d 1249 (Cal. 1982)	8,9
<u>Buchanan v. Crites</u> , 150 P.2d 100 (Utah 1944)	5,9
<u>Canfield v. Albertson's, Inc.</u> , 200 U.A.R. 61 (Utah App. 1992)..	2
<u>Carlson v. Bos</u> , 740 P.2d 1269 (Utah 1987)	13
<u>Fowler v. Seiter</u> , 838 P.2d 675 (Utah App.1992)	5
<u>Fults v. Munro</u> , 95 N.E. 23 (N.Y.App. 1911)	14,15
<u>Graham v. Sawaya</u> , 632 P.2d 851 (Utah 1981)	13
<u>Greene v. Lindsey</u> , 456 U.S. 444 (1982)	6,7
<u>King v. Firm</u> , 285 P.2d 1114 (Utah 1955)	5
<u>Mendoza v. Small Claims Court of Los Angeles Judicial District</u> , 321 P.2d 9 (Cal. 1958)	8
<u>Mullane v. Central Hanover B. & T. Co.</u> , 339 U.S. 306 (1949)	7,8 11
<u>Nelson v. Jacobsen</u> , 669 P.2d 1207 (Utah 1983)	10,11
<u>Paxton v. Fisher</u> , 45 P.2d 903 (Utah 1935)	5
<u>Pease v. Industrial Commission of Utah</u> , 694 P.2d 613 (Utah 1984)	13
<u>Pentecost v. Harward</u> , 699 P.2d 696 (Utah 1985)	5,6
<u>Perkins v. Spencer</u> , 243 P.2d 446 (Utah 1952)	12
<u>State in the Interest of L.G.W.</u> , 638 P.2d 527 (Utah 1981)	10
<u>State v. Gibbs</u> , 500 P.2d 209 (Idaho 1972)	10
<u>W. & G. Co. v. Redevelopment Agency</u> , 802 P.2d 755 (Utah App. 1990)	11

STATUTES AND RULES

Utah Code §78-2a-3(2)(d)	1
Utah Code §78-4-11	1
Utah Code §78-36-1	4
Utah Code §78-36-3	9
Utah Code §78-36-7	2,12
Utah Code §78-36-8	9
Utah Code §78-36-8.5.....	9
Utah Code §78-36-9	9
Utah Code §78-36-10	2,9
Utah Code §78-36-12	2,5,6
Utah Code §78-36-12.3	2,5,6

IN THE UTAH COURT OF APPEALS

LORI WATERS,	*	
	*	
Plaintiff/Appellant,	*	
	*	
vs.	*	Case No. 920662-CA
	*	
GARTH T. HOWARD and AFTON	*	
JEAN HOWARD,	*	
	*	
Defendants/Appellees.	*	Trial Case No.893001449 CV
	*	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDING

This court has jurisdiction of this appeal pursuant to Utah Code §§78-2a-3(2)(d) and 78-4-11.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1) May a tenant who was known to the landlord but not named as a defendant to an unlawful detainer action and never served in that action be evicted pursuant to a writ of restitution issued against a former tenant without violating the due process clause of the Utah or United States Constitutions?

2) Is a landlord guilty of forcible entry or forcible detainer or wrongful eviction of a tenant when he files an eviction action against a former tenant only, obtains a writ of restitution against that former tenant only but does not have the writ executed, then nails shut the doors to the rented dwelling and chains off the driveway while aware of the tenancy of the current tenant?

The trial court granted summary judgment finding no due

process violation, no jurisdictional defect, no forcible entry or detainer and no wrongful eviction. This court should review the facts and inferences in the light most favorable to Waters, the losing party below and resolve doubts or uncertainties about the facts in Waters' favor. The trial court's legal conclusions are reviewed for correctness. Canfield v. Albertson's, Inc., 200 U.A.R. 61, 62 (Utah Ct. of App., filed Nov.13, 1992).

DETERMINATIVE STATUTES AND RULES

Utah Code §§ 78-36-1, 7, 10, 12, and 12.3.

STATEMENT OF THE CASE

This action for conversion, forcible entry and detainer, wrongful eviction, and other claims was filed by Waters against her former landlord, Howard.[R.1-6] The action was set for trial. [R.31] On the court's own motion, the landlord's trial brief was deemed a motion for summary judgment on the issues of forcible entry and detainer and wrongful eviction and granted without testimony or affidavits being presented. [R.63-4, 71-75]

The trial court found that the facts were not in dispute. In October, 1988, Waters rented the premises at 1067 East Diamond Way, Sandy, Utah, from Krukowskis, who had previously purchased the property from Howard on a Uniform Real Estate Contract. [R.51, 53] Krukowskis defaulted on their contract with Howard. [R.23-27] Howard served an eviction notice on Krukowskis and had them served with an unlawful detainer complaint filed in Murray Circuit Court [R.44]. Both the eviction notice and the summons and complaint were served on Krukowskis at an address different

than the Diamond Way address. [R.44]

Howard spoke with Waters at the premises in early December, when she informed him that she had paid rent to Krukowskis.

[R.72, para.5] Howard and Waters were unable to agree on rental terms. [R.49, 72, para.2] Howard obtained a default judgment against Krukowskis. [R.72, para.6] Howard also obtained a writ of restitution directed against Krukowskis and ordering the removal from the premises of "any and all persons claiming an interest in the premises through Krukowskis." [R.45] A constable posted the writ on the premises.[R.45] Subsequently, Howard attempted to remove Waters from the premises as a trespasser.[R.58] When that failed, Howard nailed the entrances to the premises shut and chained shut the gate to the driveway, denying Waters access to the premises [R.59]

The trial court found that Howard had acted properly in excluding Waters from the premises without judicial process because she was a mere trespasser not a tenant since her rights as a tenant were derivative through Krukowskis [R.73]. The trial court further found that not naming Waters as a party in the eviction action against Krukowskis was proper and that posting the writ of restitution rather than personally serving it was proper [R.73-74]. Judgment against Waters dismissing her complaint no cause of action on these issues was entered on September 23, 1991 [R.76-77]. A notice of appeal was filed but subsequently withdrawn.[78-79,81-82]. The remaining issues were resolved at a hearing on May 21, 1992 and a final judgment was

entered on September 20, 1992 [R.83] The notice of appeal was filed on September 29, 1992 [R85].

SUMMARY OF ARGUMENT

Howard wrongfully evicted Waters by failing to name her in an eviction action he filed against a former tenant or in the writ of restitution he obtained even though he knew she was the tenant in possession. He then forcibly excluded her from the premises, committing forcible entry. The trial court erroneously granted Howard summary judgment dismissing Waters' claims. Since the writ of restitution procedure was without jurisdiction over Waters and since her right to due process under both the state and federal constitutions was violated, the trial court erred in dismissing her claims.

ARGUMENT

I. AFTER HOWARD COMMITTED FORCIBLE ENTRY AND DETAINER BY PHYSICALLY EXCLUDING WATERS FROM THE PREMISES, THE TRIAL COURT ERRED IN DISMISSING WATERS' COMPLAINT

Howard never served an eviction notice upon Waters, never served her in an eviction action nor caused her to be removed from the premises by a sheriff or constable executing a writ of restitution, despite his knowledge of her tenancy [R. 63, 72 paras. 4 and 5]. Instead, Howard "evicted" Waters by nailing the doors shut and chaining the driveway [R.68 para.8]. Howard's self-help actions excluded Waters from the premises without judicial process and constituted forcible entry and detainer.

Utah Code §78-36-1 prevents landlords from using violence or force to retake property rather than proceeding with an eviction

action. In Pentecost v. Harward, 699 P.2d 696 (Utah 1985), the Utah Supreme Court found an action for forcible entry existed where an apartment manager removed a tenant's property from the premises without judicial process. This case is similar in that Waters was locked out and prevented from using her apartment and her property by Howard's actions.

Old Utah cases reach the same conclusion and are still good law: self-help evictions of any sort by a landlord are unlawful and subject the offending owner to liability both pursuant to the forcible entry statute for possession and incidental damages and in tort for additional damages. King v. Firm, 285 P.2d 1114, 1118 (Utah 1955); Buchanan v. Crites, 150 P.2d 100,102 (Utah 1944);and Paxton v. Fisher, 45 P.2d 903,906 (Utah 1935). See also, Fowler v. Seiter, 838 P.2d 675 (Utah App.1992). The trial court's conclusions of law [R. 63-64, 73-4, paras. 1, 4, 5,and 6] and judgment sanctioning the forcible entry [R.76,para. 2] are in error and should be reversed.

II. THE TRIAL COURT ERRED IN SANCTIONING HOWARD'S SELF-HELP EVICTION

Under Utah law "[i]t is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process . . ." Utah Code § 78-36-12. Section 78-36-12.3(1) defines willful exclusion as "preventing the tenant from entering into the premises with intent to deprive the tenant of such entry." Here Howard has clearly violated this statute yet the trial court explicitly found that plaintiff had no remedy against Howard [R. 64, 73, para.5]. This conclusion is erroneous.

The rationale behind Utah's law mandating judicial process before eviction lies in preventing breaches of the peace brought about through self-help. Pentecost v. Harward at 700. Here again, the trial court's conclusion that Waters was a trespasser and that Howard had some right to physically prevent her from entering the premises she had rented is in error [R.64, 73, para. 4], sanctions just such breaches of the peace and is a serious distortion of this frequently articulated state public policy. This court should reverse.

III. HOWARD'S EVICTION OF WATERS WITHOUT NAMING HER IN THE UNLAWFUL DETAINER CASE OR IN THE WRIT OF RESTITUTION VIOLATED HER RIGHT OF PROCEDURAL DUE PROCESS AS GUARANTEED BY THE UTAH AND U.S. CONSTITUTIONS.

Tenants in possession have a due process right to receive legal notice before eviction. In Greene v. Lindsey, 456 U.S. 444 (1982), the U.S. Supreme Court held that by failing to give tenants adequate notice of the proceedings against them before issuing final orders of eviction, the Kentucky statute deprived them of property without due process of law as required by the Fourteenth Amendment to the U.S. Constitution. The Greene court stated:

[i]n this case, appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes. . . . The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of the proceedings that affect their interests. In arriving at this constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in light of its practical application'

456 U.S. at 451. (emphasis added). In Greene, the summons and complaint were posted on the door and never received. Waters did not receive notice, but for a different reason - she was not a named party. But like the tenants in Greene, Waters was deprived of a significant interest in property - the right to continued residence in her home - without due process of law.

The Greene court applied principles of due process established in Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 313-315 (1949), the landmark case mandating proper notice before deprivation of property. The Mullane court stated:

[t]here can be no doubt that at a minimum [the Due Process Clause] requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane established federal due process notice standards. Waters was not given any such notice. While the trial court found that she was aware of the eviction proceeding against Krukowski, [R.63, 73 para.3], that court also found that not including her in the eviction case or even naming her in the writ of restitution was proper [R.74, para.5]. It would have been simple for Howard to include her as a party or to amend the complaint and add her name since he was surely aware of her identity after he met with her but was unable to agree on rental terms [R.72,

paras.4, 5]. Instead of taking either of these simple steps, Howard proceeded with the eviction suit that named only Krukowskis as parties. The trial court erroneously ratified this action [R.74, para.5].

State courts such as California have applied a similar due process analysis to notice, relying on their state constitution's clauses as well as the fourteenth amendment. "Possession of a tenant is a substantial right....[N]o one, consistent with constitutional safeguards, can be deprived of the possession or title to property, or any other substantial right, without reasonable notice and opportunity to be heard." Mendoza v. Small Claims Court of Los Angeles Judicial District, 321 P.2d 9, 12 (Cal. 1958).

Relying on Mendoza and Mullane, the California Supreme Court found due process violated in a case much like the present one: the eviction of a tenant in possession without the inclusion of that tenant in the unlawful detainer suit. In Arrieta v. Mahon, 644 P.2d 1249 (Cal. 1982), the landlord filed an unlawful detainer action for nonpayment against only a former co-tenant even though the landlord had accepted rent from the other co-tenant, who remained in possession, for more than eighteen months. The first notice the tenant in possession had of the action was when the marshall posted the writ ordering her to vacate. That court held:

[n]otice 'reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' is, of course, an essential element of the right to a

hearing. Those who are evicted from their homes pursuant to a writ issued against another receive no notice or hearing whatever - unless by sheer good fortune they discover the pendency of the action and are able to block it through an extraordinary remedy. Even those that know of the action may not know that their own right to possession is in jeopardy if they are not named in the writ or accompanying papers. In either case, their eviction is manifestly contrary to the strictures of the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution.

644 P.2d at 1253-54 (citations omitted) (footnotes omitted) (emphasis added). This analysis is of more than passing significance given that Utah's eviction statute was copied from California. Buchanan v. Crites, 150 P.2d at 103.

The Arrieta court noted the danger of applying a writ to unnamed persons. The court stated:

[a]s the events which triggered this action prove, an unnamed occupant may not discover the existence of the unlawful detainer proceeding until the marshal appears to put her and her children on the street. Thus, it is quite possible that a tenant will be deprived of possession before receiving a hearing.

664 P.2d at 1255. In Utah, just as in California, the right to notice and a pre-eviction hearing is clearly established in unlawful detainer actions. See Utah Code §§ 78-36-3, 78-36-8, 78-36-8.5(2)(c), 78-36-9, and 78-36-10.

Waters was situated similarly to the tenants in Arrieta and, like those tenants, was deprived of possession before receiving a hearing. The procedural difference in the two cases is not significant. There the marshal posted the notice and would have carried out the eviction but for a restraining order. Here the constable posted the writ of restitution and the landlord

physically turned out the tenant. In both cases the tenant was removed from the premises by a landlord who knew they resided there and chose to ignore their presence and their right by invoking legal action solely against a non-resident former tenant. The California court found a due process violation. This court should also.

In non-eviction contexts, Utah courts have required adequate notice to comply with state constitutional due process requirements. For example, in Nelson v. Jacobsen, 669 P.2d 1207, 1214 (Utah 1983), a pro se litigant was advised only two days before trial that a "hearing" was actually to be a full trial, not advised of his right to request a jury, and not given adequate time to prepare a defense. A judgment against him of \$84,600 was entered. On appeal the Supreme Court reversed, finding a violation of due process which has been frequently cited.

The court focused on "basic fairness of procedure" and found that to comply with due process, there must be a "hearing" which must be "prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet." 669 P.2d at 1213, citing State v. Gibbs, 500 P.2d 209 (Idaho, 1972). This analysis was similar to that used earlier in State in the Interest of L.G.W., 638 P.2d 527, 528 (Utah 1981). Here the only "notice" to Waters of the eviction was the posted writ of restitution [R.45] and there never was a hearing which involved her. Certainly this is more egregious than the facts in Nelson.

Waters' due process rights were violated; the trial court erred.

This court followed Nelson and Mullane in W. & G. Co. v. Redevelopment Agency, 802 P.2d 755, 762 (Utah App. 1990) in analyzing the procedure used to condemn blighted buildings for redevelopment: "where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or her, a party is deprived of due process." There this court found that, although some hearings were apparently held to determine whether downtown property was blighted, the property owners were never advised that the hearings could affect them, were led to believe the contrary and thus the procedure violated due process.

In this case, not only was a potentially interested party not properly notified or given an opportunity for a hearing, as in W. & G. Co., but Waters, a subtenant in possession, was not even made a party to a proceeding that effectively extinguished her constitutionally protected possession rights.

**IV. THE WRIT OF RESTITUTION WAS VOID AS TO WATERS
SINCE THE COURT HAD NO JURISDICTION OVER WATERS
BECAUSE SHE WAS NOT A NAMED PARTY.**

The writ of restitution in this case, which the trial court upheld as proper, [R. 73-4, paras. 5-6] ordered the removal of Krukowskis "along with any and all persons claiming an interest in the premises through defendant" [R.45]. The trial court found Waters to be a trespasser and found that she held an interest only through Krukowskis [R.73, paras.1,2, 4]. The trial court dismissed Waters' unlawful eviction claim in its summary judgment order [R.76]. This decision was in error because there was no

jurisdiction over Waters in the eviction action, so applying the writ to her and sanctioning her eviction in the absence of jurisdiction is error.

The writ of restitution used in this case, [R.45], appears to be drafted in compliance with Utah Code §78-36-7(2) yet violates Waters' due process rights, both for the reasons discussed above and because it purports to extend the jurisdiction of the court over a person not served or a party to the action. This section states:

. . . All persons who enter under the tenant after the commencement of the action hereunder shall be bound by the judgment the same as if they had been made parties to the action.

While there may be a question as to when the action commenced, the trial court's conclusions that not naming Waters in the action or in the writ and evicting Waters as a tenant holding an interest only through Krukowski was proper [R.74] appear to be based on this statute. Yet in the absence of any claim of jurisdiction, the trial court's conclusions and judgment on this issue are erroneous and should be reversed.

This situation is similar to that in Perkins v. Spencer, 243 P.2d 446, 449 (Utah 1952). There the trial court found and the Utah Supreme Court affirmed that where an unlawful detainer action was brought against a husband and wife and only the wife was properly served with the notice to quit, the husband was not in unlawful detainer, and there was no right of the landlord to possession of the premises as against the husband. Howard here had no right of possession against Waters.

Another similar situation arose in Pease v. Industrial Commission of Utah, 694 P.2d 613, 615-6 (Utah 1984). There the Supreme Court reversed an award of worker's compensation benefits against one partner of an employer partnership because there had been no finding that that person was a partner nor had she been notified of the hearing. The court stated:

Corinne Pease did not receive any notice of the hearing to adjudicate Luther Sander's claim. She was not an addressee of the notice of hearing sent the Commission to Norco, Ray Pease, and Keith Norwood. Nor was she listed on Sander's application for a hearing either as a partner in Norco or as a statutory employer....The order as to Corrine Pease was not valid because she had not been personally served and there was no basis in the findings for imposing liability on her as a partner.

The decision was based on both the due process violation and the lack of jurisdiction. As here, there was simply no way that a valid order could be entered against a person never notified of the proceedings that would affect her, never served, and never even named in the lawsuit.

This same result is correct even if the argument be made that the tenancy is a res and that a lower jurisdictional standard is applicable to in rem proceedings. While this was discussed and impliedly endorsed in Graham v. Sawaya, 632 P.2d 851 (Utah 1981), it was disavowed in Carlson v. Bos, 740 P.2d 1269, 1273 n.9 (Utah 1987). In that case, which focused on when service on an out of state motorist could be accomplished by serving the Utah Secretary of State, the court imposed an obligation of making a "diligent effort" to locate an alleged nonresident or departed resident motorist defendant before

alternative means of service pursuant to the statute would become available. But even then, efforts to locate the person against whom a judgment was sought were required, they were to be named in the lawsuit, and notice attempted.

Here, by contrast, the procedure used and the statute which appears to authorize such action requires no such effort, but allows a landlord to merely sue a tenant who is no longer residing in the premises and end up with a judgment enforceable against another person, a non-party subtenant. Instead, this court should impose a similar "diligent effort" standard on landlords which would require them to identify and sue the actual tenant in possession as well as any other person contractually bound. Here Howard knew of Waters' presence in the apartment yet failed to name her.

Since the trial court adopted this logic and found the procedure valid and the judgment and writ of restitution enforceable against Waters [R. 63, 73-4, paras. 1, 2, 4, 5, and 6], a greater wrong has been perpetrated here. The trial court judgment should be reversed on both due process and jurisdictional grounds.

An old New York case, Fults v. Munro, 95 N.E. 23, 25 (N.Y.App. 1911), resulted in a finding that a tenant in a similar fact scenario had a cause of action against her landlord for failing to name her as a party to the proceeding when he knew she was in possession. The court found the tenant was not bound by the unlawful detainer action and the eviction order was not valid

against her. The court found the owner had unlawfully removed Fults and awarded Fults treble damages for forcible detainer as well as declaring the owner a trespasser. The Fults court stated:

She should have been joined as a party to the proceeding, and it was a trespass to dispossess her without giving her an opportunity to make her defense. . . . She might have paid the rent to protect her possession, or she might have taken a valid objection to some of the landlord's proceedings.

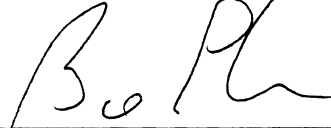
Waters similarly should have been joined as a party to the eviction proceeding and should have been given an opportunity to raise any defenses. Likewise, here the writ was invalid as the court had not acquired jurisdiction over Waters. Without adequate notice or jurisdiction, any judgment rendered against Waters was void and her claims for wrongful eviction and forcible entry should not have been dismissed on summary judgment [R.76, para. 2]. Rather they should have been granted summarily.

CONCLUSION

Waters was denied adequate notice and excluded from her premises by self-help and without judicial process. Eviction of anyone not named in the writ violates their rights to procedural due process and was beyond the jurisdiction of the court. When the trial court dismissed her forcible entry and wrongful eviction claims, it sanctioned these unlawful actions and committed error. The trial court's summary judgment dismissing Waters' claims should be reversed, summary judgment granted to her as to liability and the case remanded for a determination of her damages.

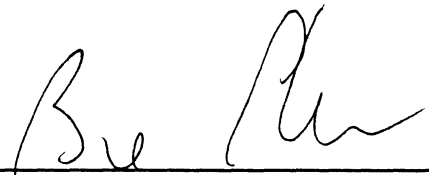
DATED this 22nd day of January, 1993.

UTAH LEGAL SERVICES, INC.
Attorneys for
Plaintiff/Appellant


BY: BRUCE PLENK

CERTIFICATE OF MAILING

I do hereby certify that I mailed two true and correct
copies of the foregoing Brief of Appellant to: Garth and Afton
Jean Howard, 4125 South 430 East, Apt. 103, Murray, Utah 84107 on
this 22nd day of January, 1993, postage prepaid.



[a: waters.bri weber]

7S-36-1. "Forcible entry" defined.

Every person is guilty of a forcible entry, who either:

(1) by breaking open doors, windows or other parts of a house, or by fraud, intimidation or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,

(2) after entering peaceably upon real property, turns out by force, threats or menacing conduct the party in actual possession.

1953

78-36-7. Necessary parties defendant.

(1) No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

(2) If a person has become subtenant of the premises in controversy after the service of any notice as provided in this chapter, the fact that such notice was not served on the subtenant is not a defense to the action. All persons who enter under the tenant after the commencement of the action shall be bound by the judgment the same as if they had been made parties to the action.

(3) A landlord, owner, or designated agent is a necessary party defendant only in an abatement by eviction action for an unlawful drug house as provided in Section 78-38-13.

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

- (a) forcible entry;
- (b) forcible or unlawful detainer;
- (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
- (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and
- (e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorney's fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted.

It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under Subsection 78-36-12.6(2) and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises.

1981

78-36-12.3. Definitions.

(1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

Case.....: 893001449 CV Civil
Case Title:
WATERS, LORI VS HOWARD, GARTH T

3:35 P
Filing Date: 10/19/8
Judge: Paul G. Grant

Party...: ATP Atty for Plaintiff
Name....:

PLENCK, BRUCE

10/27/89 Case filed on 10/19/89. DCI
10/30/89 Suit amount changed to 800.00 DCI
FILED: AFFIDAVIT OF IMPECUNIOSITY DCI
12/19/89 FILED: SUMMONS ON RETURN DCI
I 02/08/90 FILED: DEFAULT CERTIFICATE DCI
02/16/90 FILED: MOTION FOR ENTRY OF JUDGMENT DCI
I 02/27/90 FILED: DEFAULT JUDGMENT-SIGNED BY JUDGE THORNE IN THE AMOUNT PAV
I \$9750.00 PAV
I Case judgment is Default - judge PAV
03/30/90 FILED: NOTICE OF ENTRY OF JUDGMENT DCI
I 04/11/90 FILED: AMENDED NOTICE OF ENTRY OF JUDGMENT PAV
I 05/07/90 FILED: STIPULATION AND ORDER- SIGNED BY JUDGE THORNE PAV
I Case judgment is Set aside PAV
05/16/90 **** FILED: ANSWER ***** DCF
08/31/90 FILED: CERTIFICATE OF READINESS FOR TRIAL DCF
09/13/90 TRL scheduled for 10/12/90 at 2:00 P in room 1 with PGG JFC
I 10/12/90 GRANT/BVO T8278 C2116 DPWOC, PLFT PRESENT AND REPRESENTED BY BVC
I ATTY BRUCE PLENKE BVC
I C/O DEFT TO HIGHLIGHT IN RED AND DISPUTES AND SEND TO THE COURT BVC
I IF LIABILITY WILL SCHEDULE FOR DAMAGES BVC
I PROFFER ATTY PLENK, PROFFER DEFT BVC
I C/O BRIEF IN 10 DAYS FROM ATTY PLENK BVC
I 10/22/90 FILED: PLAINTIFFS TRIAL MEMORANDUM (BROOKE) DCF
I 11/02/90 FILED: DEFENDANTS TRIAL MEMORANDUM AND ANSWER**(BROOKE) RLN
01/04/91 JUDGE GRANT ENTERS ORDER: THE FACTS SEEM REASONABLY CLEAR BVC
IN THIS MATTER. DEFT EXECUTED A CONTRACT OF SALE WITH A 3RD BVC
PARTY. THE 3RD PARTY DEFAULTED IN THE CONTRACT AND MOVED FROM BVO
THE PREMISES IN OCTOBER 1988 AND PLAINTIFF'S TOOK POSSESSION OF BVO
THE PREMISES BY AGREEMENT OF THE 3RD PARTY. BVO
IN NOVEMBER DEFENDANTS MOVED TO SET ASIDE THE CONTRACT OF BVO
SALE AND A WRIT OF RESTITUTION WAS GRANTED BY THE COURT. THAT BVO
WRIT FORECLOSED ANY RIGHTS THAT PLAINTIFF HELD IN THE PREMISES BVO
BECAUSE SHE WAS IN POSSESSION ONLY UNDER THE ASPECESS OF THE BVO
3RD PARTY. THERE WAS NO PRIVITY OF CONTRACT BETWEEN THE PARTIES BVO
EITHER BY WRITTEN OR ORAL LEASE. BVO
PLAINTIFF HAD NOTICE OF THE LEGAL PROCEEDINGS AND KNEW THAT BVO
SHE MUST MOVE FROM THE PREMISES BECAUSE HER RIGHTS OF POSSESSION BVO
WERE ONLY GOOD SO LONG AS THE THIRD PARTY HAD ANY LEGAL RIGHTS. BVO
IN DECEMBER A NEGOTIATION FOR A MONTH TO MONTH RENTAL WAS BVO
ATTEMPTED BUT NO AGREEMENT WAS REACHED. THEREFORE IN JANUARY BVO

Case.....: 893001449 CV Civil
Case Title:
WATERS, LORI VS HOWARD, GARTH T

3:33 PM
Filing Date: 10/19/8
Judge: Paul G. Grant

01/04/91 1989, THE PLAINTIFF WAS NOT A TENANT BUT A TRESPASSER. BV
DEFENDANT REQUESTED THE SERVICES OF A PEACE OFFICER TO REMOVE BV
THE TRESPASSER FROM THE PREMISES. WHEN THE PLAINTIFF WAS NOT BV
ON THE PREMISES, THE DEFENDANT SECURED THE BUILDING BY NAILING BV
THE ENTRANCES CLOSED. BV
IN DOING SO, HE HAD TO BE AWARE OF PERSONAL PROPERTY BELONGING BV
TO THE PLAINTIFF ON THE PREMISES. BY NOT PROVIDING A WAY FOR BV
THE PLAINTIFF TO TAKE POSSESSION OF THAT PERSONAL PROPERTY AND BV
AN ACTUAL CONVERSION WHEN REFUSING ACCESS TO THE PROPERTY ON A BV
SUBSEQUENT DATE BUT DID A FEW DAYS LATER ALLOW PLAINTIFF TO BV
RETRIEVE THE GOODS. BV
IF PLAINTIFF HAS A REMEDY FOR EXCLUSION FROM THE PREMISES, IT BV
IS AGAINST THE THIRD PARTY NOT DEFENDANT'S. BV
A REASONABLE DAMAGE FOR THE CONVERSION OF PLAINTIFF'S PERSONAL BV
PROPERTY WOULD NEED TO BE DETERMINED BY SEPARATE HEARING BUT BV
WOULD NOT EXCEED THE SUM OF \$150.00 UNDER THE CIRCUMSTANCES BV
STATED TO THE COURT. BV
COPY OF DOCKET PRINT MAILED TO BOTH PARTIES BV

End of the docket report for this case.

UTAH LEGAL SERVICES, INC.
Attorneys for Plaintiff
BY: BRUCE PLENK, #2613
124 South 400 East, 4th Floor
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

IN THE CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, WEST VALLEY DEPARTMENT
3636 Constitutional Blvd., West Valley City, Utah 84119

LORI WATERS,	*	
	*	
Plaintiff,	*	FINDINGS OF FACT AND
	*	CONCLUSIONS OF LAW
vs.	*	
	*	
GARTH T. HOWARD and AFTON	*	
HOWARD,	*	
	*	Civil No. 893001449CV
Defendants.	*	
	*	

This matter came on for trial on the 12th day of October, 1990 before the Hon. Paul G. Grant, judge of the above court. Plaintiff was present and represented by Bruce Plenk of Utah Legal Services, Inc. Defendants were present and represented themselves. The court reviewed the file in this matter, heard argument from counsel and defendant and requested briefs on the issues raised. Each party submitted a brief. The court deemed defendants' brief to be a motion for summary judgment on the issue of forcible entry and detainer and wrongful eviction. Having reviewed the file in this matter and the memoranda of the parties, the court now enters the following

FINDINGS OF FACT

1. On March 28, 1988, defendants, as sellers, entered into a Uniform Real Estate Contract with Randy and Brenda Krukowski as buyers to convey real property located at 1067 East Diamond Way, Sandy, Utah.

2. On September 26, 1988, defendants filed an unlawful detainer action against Krukowskis, alleging a default in payments under the Uniform Real Estate Contract.

3. In October of 1988, the Krukowskis vacated the premises and rented the property to plaintiff. Plaintiff moved into the premises and paid rent to the Krukowskis. The Krukowskis were served in the unlawful detainer action at another address on November 22, 1988.

4. Plaintiff and Defendant Garth Howard spoke in December but were unable to agree on terms for a month to month agreement.

5. In early December 1988, Defendant Garth Howard came to the premises to collect rent from Plaintiff. She stated that she had already paid rent for December to the Krukowskis.

6. On December 5, 1988, a hearing was held on defendants' unlawful detainer action against the Krukowskis in Murray Circuit Court. Judgment was entered in favor of Howards and against the Krukowskis.

7. On December 19, 1988, a writ of restitution was issued against the Krukowskis. On December 20, 1988, Deputy Constable Christian posted this writ on the premises. Plaintiff was not named in the writ and continued to reside in the premises. On or about

December 23, 1988, Defendant Garth Howard accused plaintiff of trespass because she continued to reside in the premises.

8. On January 5, 1989, defendants attempted to remove plaintiff from the premises with the aid of a police officer. When that failed, defendants denied plaintiff access to her property by nailing the building entrances shut and chained shut the gate to the driveway. Defendants also seized plaintiff's property.

9. Plaintiff recovered her property later in January 1989.

10. Plaintiff brought this action seeking damages for forcible entry and detainer, wrongful eviction, and infliction of emotional distress.

From the above FINDINGS OF FACT the Court now enters the following

CONCLUSIONS OF LAW

1. When defendants were granted a writ of restitution against Krukowskis, all of plaintiff's rights in the premises were terminated because she only held an interest through Krukowskis.

2. There was no privity of contract between the parties in this action either by written or oral lease.

3. Plaintiff had notice of the legal proceedings against Krukowskis.

4. In January, 1989, plaintiff was not a tenant but was a trespasser and was not entitled to any notice or opportunity for hearing before being excluded from the premises.

5. Plaintiff has no cause of action against defendants for exclusion from the premises. Any such claims must be directed

against Krukowskis. Defendants' actions in not naming plaintiff as a party to the eviction action or to the writ of restitution were proper. Service of the writ of restitution by posting was also proper.

6. Defendants' actions of evicting plaintiff as a tenant holding interest through Krukowskis were proper.

7. Defendants' actions in preventing plaintiff from gaining access to her property constituted conversion.

8. Plaintiff is entitled to damages of up to \$150, the exact amount to be determined at a separate hearing.

9. This a final order for purposes of appeal under Rule 54(b), U.R.Civ.P. There is no just reason for further delay in this matter. Judgment shall be entered pursuant to these Findings of Fact and Conclusions of Law.

10. Each party to bear their own fees and costs.

DATED THIS _____ day of _____, 1991.

BY THE COURT:

PAUL G. GRANT
CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to: Garth Howard and Afton Jean Howard, 4125 South 430 East Apt 103, Murray, UT 84107 on this 6th day of Sept., 1991, postage prepaid.

Barbara Baker

[A:WATERS.FOF bp5]

UTAH LEGAL SERVICES, INC.
Attorneys for Plaintiff
BY: BRUCE PLENK, #2613
124 South 400 East, 4th Floor
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

FILED
SEP 23 1991

SEP 23 1991

Clerk of the Circuit Court

By R. Grant Deputy

IN THE CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, WEST VALLEY DEPARTMENT
3636 Constitutional Blvd., West Valley City, Utah 84119

LORI WATERS,

Plaintiff,

vs.

GARTH T. HOWARD and AFTON
HOWARD,

Defendants.

*
*
*
*
*
*
*
*
*
*
*

JUDGMENT

Civil No. 893001449CV

This matter came on for trial on the 12th day of October, 1990 before the Hon. Paul G. Grant, judge of the above court. Plaintiff was present and represented by Bruce Plenk of Utah Legal Services, Inc. Defendants were present and represented themselves.

The Court has previously entered its Findings of Fact and Conclusions of Law. The Court now enters the following

JUDGMENT

1. Plaintiff is awarded damages for defendant's conversion of her property, the amount to be determined at a later hearing.

2. In all other respects, plaintiff's complaint is dismissed no cause of action.

3. This is a final judgment pursuant to Rule 54(b), U.R.Civ.P.

4. Each party shall bear their own fees and costs.

DATED THIS 23 day of Sept.

1991.

BY THE COURT:


PAUL G. GRANT
CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT to: Garth Howard and Afton Jean Howard, 4125 South 430 East Apt 103, Murray, UT 84107 on this 24 day of Sept., 1991, postage prepaid.

Lubana Baker

a:waters.jud bp5

UTAH LEGAL SERVICES, INC.
Attorneys for Plaintiff
BY: BRUCE PLENK #2613
124 South Fourth East, #400
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

FILED
JUL 2 1992
CLERK OF COURT
BY _____

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, WEST VALLEY DEPARTMENT
3636 Constitutional Blvd., West Valley City, Utah 84119

LORI WATERS,	:	
	:	
Plaintiff,	:	ORDER AND FINAL JUDGMENT
	:	
vs.	:	
	:	
GARTH T. HOWARD and	:	
AFTON JEAN HOWARD,	:	Civil No. 893001449CV
	:	
Defendants.	:	Judge William A. Thorne

This matter came on for trial on October 12, 1990, before the Hon. Paul Grant. The Court entered Findings of Fact, Conclusions of Law and a Judgment on certain of the issues in this case on September 23, 1991. A further hearing to resolve the remaining issues was held on May 21, 1992, before the Honorable William A. Thorne. Plaintiff was present and represented by Eric Mittelstadt of Utah Legal Services. Defendants were present and represented themselves. The court reviewed the file in this matter, and based upon the stipulation of the parties, now enters the following:

ORDER

1. Defendants are to pay \$50.00 to plaintiff as damages for the conversion of plaintiff's property as follows: \$10.00 by July 5, 1992, and \$10.00 each month thereafter until the full amount is paid.

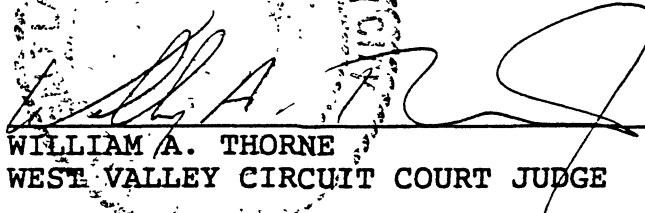
2. Payments are to be made to the West Valley Circuit Court.

3. If defendants fail to make the \$10.00 payments, a judgment in favor of plaintiff may be entered for \$150.00, less any payments already made.

4. The earlier judgment of September 23, 1991 and this Order resolve all issues between the parties in this matter and constitute a final judgment.

DATED this 20th day of Sept, 1992.

BY THE COURT:


WILLIAM A. THORNE
WEST VALLEY CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing ORDER to Garth and Afton Howard, 4125 South 430 East, Apt. 103, Murray, Utah 84107 on this 18th day of August, 1992, postage prepaid.

4th of June 1992

[bp\waters.ord]