

1991

James N. Fowler and Sherril Fowler v. Terry R. Seiter : Brief of Appellant

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT

STATE OF UTAH

* * * * *

JAMES N. FOWLER and
SHERRIL FOWLER,

Plaintiffs/Appellants,

vs.

TERRY R. SEITER,

Defendant/Appellee.

: **91-0698-CA**

:

:

: District Court No.
880906180CV

:

* * * * *

APPELLANTS' BRIEF

On Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable John A. Rokich Presiding

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FILED

AUG 22 1991

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

* * * * *

JAMES N. FOWLER and	:	
SHERRIL FOWLER,	:	
	:	Supreme Court No.
Plaintiffs/Appellants,	:	910360
	:	
vs.	:	
	:	District Court No.
TERRY R. SEITER,	:	880906180CV
	:	
Defendant/Appellee.	:	

* * * * *

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LIST OF PARTIES

James N. Fowler and Sherril Fowler, Plaintiffs

Terry W. Seiter, Defendant

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDING

The Supreme Court has jurisdiction pursuant to 78-2-2(3)(j) UCA (1989).

The nature of the proceeding is an appeal from a final order and a final judgment of the District Court deciding that treble damages should not be awarded.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The issues presented by the appeal are whether or not treble damages should be awarded pursuant to the Forcible Entry and Detainer statute. The standard of review is the refusal of the trial court to give effect to the waiver of objection to insufficiency of process provided in Rules 12(b) and (h) URCP.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Utah Code Annotated, 38-8-3 SELF-SERVICE STORAGE FACILITIES:

38-8-3. Enforcement of lien - Notice requirements - Sale procedure and effect.

A claim of an owner which has become due against an occupant and which is secured by the owner's lien may be satisfied as follows:

(1) No enforcement action may be taken by the owner until the occupant has been in default continuously for a period of 30 days.

(2) After the occupant has been in default continuously for a period of 30 days, the owner may begin enforcement action if the occupant has been given notice in writing. The notice shall be delivered in person or sent by certified mail to the last known address of the occupant, and a copy of the notice shall, at the same time, be sent to the sheriff of the county where the self-service storage facility is located. Any lien holder with an interest in the property to be sold or otherwise disposed of, of whom the owner has knowledge either through the disclosure provision on the rental agreement or through the existence of a validly filed and perfected UCC-1 financing statement with the Division of Corporations and Commercial Code, or through other written notification, shall be included in the notice process as set forth in this section.

(3) This notice shall include:

(a) an itemized statement of the owner's claim showing the sum due at the time of the notice and

the date when the sum became due;

(b) a brief and general description of the personal property subject to the lien, which description shall be reasonably adequate to permit the person notified to identify the property; except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents;

(c) a notification of denial of access to the personal property, if such denial is permitted under the terms of the rental agreement, which notification shall provide the name, street address, and telephone number of the owner or his designated agent whom the occupant may contact to respond to the notification;

(d) a demand for payment within a specified time not less than 15 days after delivery of the notice; and

(e) a conspicuous statement that, unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of at a specified time and place.

(4) Any notice made under this section shall be presumed delivered when it is deposited with the United States postal service and properly addressed with postage prepaid.

(5) (a) After the expiration of the time given in the notice, an advertisement of the sale or other disposition shall be published once a week for two consecutive weeks in a newspaper of general circulation in the county where the self-service storage facility is located. The advertisement shall include:

(i) a brief and general description of the personal property reasonably adequate to permit its identification as provided for in Subsection (3)(b); the address of the self-service storage facility and the number, if any, of the space where the personal property is located; and the name of the occupant and his last known address; and

(ii) the time, place, and manner of the sale or other disposition shall take place not sooner than 15 days after the first publication.

(b) If there is no newspaper of general circulation in the county where the self-service storage facility is located, the

advertisement shall be posted at least ten days before the date of the sale or other disposition in not less than six conspicuous places in the neighborhood where the self-service storage facility is located.

(6) Any sale or other disposition of the personal property shall conform to the terms of the notice provided for in this section.

(7) Any sale or other disposition of the personal property shall be held at the self-service storage facility or at the nearest suitable place to where the personal property is held or stored.

(8) Before any sale or other disposition of personal property under this section, the occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section and thereby redeem the personal property; upon receipt of this payment, the owner shall return the personal property, and thereafter the owner shall have no liability to any person with respect to that personal property.

(9) A purchaser in good faith of the personal property sold to satisfy a lien as provided for in this chapter takes the property free of any rights of persons against whom the lien was valid and free of any rights of a secured creditor, despite noncompliance by the owner with the requirements of this section.

(10) In the event of a sale under this section, the owner may satisfy his lien for the proceeds of the sale, subject to the rights of any prior lienholder; the lien rights of the prior lienholder are automatically transferred to the proceeds of the sale; if the sale is made in good faith and is conducted in a reasonable manner, the owner shall not be subject to any surcharge for a deficiency in the amount of a prior secured lien, but shall hold the balance, if any, for delivery to the occupant, lienholder, or other person in interest; if the occupant, lienholder, or other person in interest does not claim the balance of the proceeds within one year of the date of sale, it shall become the property of the Utah state treasurer as unclaimed property with no further claim against the owner.

(11) If the requirements of this chapter are not satisfied, if the sale of the personal property is not in conformity with the notice of sale, or if there is a willful violation of this chapter, nothing in this section affects the rights and liabilities of the owner, occupant, or any other person.

Utah Code Annotated, 78-2-2(3)(j) Supreme Court jurisdiction:

78-2-2. Supreme Court jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

Utah Code Annotated, 78-36-1 Forcible Entry and Detainer:

78-36-1. "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 and kind of violence or circumstances of terror, enters upon or into real property, . . .

Utah Code Annotated, 78-36-8 Forcible Entry and Detainer:

78-36-8. Allegations permitted in complaint - Time for appearance - Service of summons.

The plaintiff in his complaint, in addition to setting forth the facts on which he seeks to recover, may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor or compensation for the occupation of the premises, or both. If the unlawful detainer charged is after default in the payment of rent, the complaint shall state the amount of rent due. The court shall indorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than three or more than 20 days from the date of service. The court may authorize service by publication or mail for cause shown. Service by publication is complete one week after publication. Service by mail is complete three days after mailing. The summons shall be changed in form to conform to the time of service as ordered, and shall be served as in other cases.

Utah Code Annotated, 78-36-10 Forcible Entry and Detainer:

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; and
- (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsection (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. (Emphasis added).

Utah Rules of Civil Procedure, Rule 1:

Rule 1. General provisions.

(a) **Scope of rules.** These rules shall govern the procedure in the Supreme Court, the district courts, the circuit courts, and the justice courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) **Effective date.** These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Utah Rules of Civil Procedure, Rule 12(b) and (h):

Rule 12. Defenses and Objections

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is

required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleadings after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received. (Emphasis added).

STATEMENT OF THE CASE

The Defendant owned a storage unit which he rented to Plaintiffs. Plaintiffs stored furniture and equipment in the unit and placed a lock thereon. Defendant, without authority from Plaintiffs, broke the lock and sold the contents to a third party. Plaintiffs brought an action to recover the items or, in lieu

thereof, to recover damages and later amended the complaint alleging, among other claims, a claim for Forcible Entry and Detainer. Defendant answered, generally denying Plaintiffs' allegations. Defendant failed to allege any defense based on insufficiency of process. The jury by special verdict determined Plaintiffs' damages to be \$7,000. Plaintiffs moved to have the damages trebled pursuant to the Forcible Entry and Detainer statute. The court ruled that Plaintiffs were not entitled to treble damages because Plaintiffs did not have an endorsement by the court upon the summons stating the number of days within which the Defendant shall be required to appear and defend the action, which shall not be less than three or more than twenty days from date of service, as provided by 78-36-8 UCA 1953 and therefor the action cannot be deemed to be an action under the Forcible Entry and Detainer statute.

Plaintiffs assert that under Rule 12(b) and (h) that insufficiency of process is an affirmative defense which was waived by the Defendant by failure to assert that defense. The issue for review is whether or not the court erred in ruling that the Defendant had not waived his right to assert the insufficiency of process pursuant to Rule 12(b) and (h) and in ruling that the \$7,000 verdict should not be trebled.

STATEMENT OF FACTS

Plaintiffs stored household furnishings in a storage unit owned by Defendant. Defendant admitted in paragraph 15 of his answer:

Defendants removed or caused to be removed all of Plaintiffs' property that was stored in the storage unit without any notice or claim under the provisions of Exhibit A or as required by the Utah Self Storage Facilities Act . . . as then in effect.

The jury in a special verdict determined that Plaintiffs' damage from the unlawful entry was in the amount of \$7,000 based upon the value of the items taken by Defendant. The court refused to treble that amount upon the premise that in order to have an unlawful detainer action, there must be an endorsement upon the summons setting forth the time for answer, which had not been done.

The original complaint was not one in unlawful detainer. The complaint alleged negligence, breach of contract, breach of warranty and breach of fiduciary duty. Defendant was served with a usual twenty-day summons. Defendant failed to answer and a default judgment was entered. Defendant then moved to set aside the default judgment on the grounds of excusable neglect. The judgment was set aside. Plaintiffs then amended their complaint to add several causes of action including an action in forcible entry seeking treble damages (paragraph 28 of the amended complaint). Defendant simply denied said allegations (paragraph 25 of his answer). Defendant, by his answer, raised no issue as to the sufficiency of process.

Plaintiffs asserted that by failing to present the defense of insufficiency of process either by motion or in his answer he had waived said defense as provided in Rule 12(b) and (h) URCP. The court refused to so rule.

SUMMARY OF ARGUMENTS

78-36-10 UCA provides that judgment shall be entered against the Defendant for three times the amount of damages assessed by the jury in the event of unlawful entry. The entry was unlawful. It violated the terms of the storage agreement and of the Utah Self Storage Facilities Act because the entry was without notice and because of the violence in cutting the lock to gain entry.

The forcible entry and detainer statute applies to commercial buildings as well as to residences.

The damages resulting from forcible entry include the value of household goods and personal effects removed.

Trebling is mandatory.

Defendant failed to set forth any objection to the sufficiency of process by motion or in his answer. By failing to do so and by going to trial, he has waived that defense pursuant to Rules 12(b) and (h) URCP.

ARGUMENT

Unlawful Entry

Defendant admitted in paragraph 15 of his answer that he entered Plaintiffs' storage unit and removed their possessions without any required notice. He stated:

Defendants removed or caused to be removed all of Plaintiffs' property that was stored in the storage unit without any notice or claim under the provisions of Exhibit A or as required by the Utah Self Storage Facilities Act . . . as then in effect.

The Exhibit "A" referred to above with which Defendant admits he did not comply is the rental agreement, Plaintiffs' Exhibit 1. It provides when the Defendant may remove the lock. It states:

Occupant or Owner may terminate the Occupancy created by this Rental Agreement by delivering written notice to the other party of its intention to do so at least 15 days prior to the last day of the calendar month in which Occupancy will terminate. Any property left in the Storage Space after the date for which Occupant (sic) has given notice to terminate will be deemed abandoned by the Occupant. After said date, Owner may remove any lock from the Storage Space and dispose of the contents thereof without notice or liability to the Occupant.

Defendants therefore violated the provisions of the rental agreement, as well as the provisions of the Self Storage Act.

The court recognized the wrongful entry in its Instruction Number 16, which states:

Defendant's acts in cutting or causing to be cut Plaintiffs' lock on the door and removing all items of personal property of Plaintiffs were wrongful.

Forcible Entry

The acts of Defendant in cutting Plaintiffs' lock and entering their storage unit constituted forcible entry. 78-36-1 defines forcible entry as follows:

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; . . .

Violence

In Buchanan v. Crites, 150 P.2d 100, 103, 104, (Utah 1944) the Utah Court, in considering an action for damages, construed the forcible entry provision. The court stated:

Under our statute any entry by force is prohibited. Being prohibited, such entry was wrongful and the aggrieved party has his remedy. The Forcible Entry Statute expressed a policy that no person should enter by force, stealth, fraud or intimidation, premises of which another had peaceable possession. . .

It is contended by the appellant that this was not an entry by "force" within the meaning of the statute. The Utah Act was copied from the California Code of Civil Procedure, Section 1159. In Winchester v. Becker, 4 Cal.App. 382, 88 P. 296, 297, the defendant had entered the premises by means of a key on two different occasions while the plaintiff was absent. The court, construing the California Act, stated in holding that there had been a forcible entry:

"The question is presented whether the defendant's entry made in the manner stated comes within the provisions of the first subdivision of section 1159 of the Code of Civil Procedure, by which every person is to be held to be guilty of a forcible entry who 'by breaking open doors, windows, or other parts of a house * * * enters upon or into any real property.' This question we think must be answered in the affirmative. The meaning of the provision is that any * * * force is to be regarded as 'breaking open' the door or window or house. This was the construction given to the term 'break' as entering into the common-law definition of burglary, and we see no reason why a different construction should be given to it in the provision now under consideration."

Here it is alleged that the defendant entered upon the premises in plaintiff's absence by unlocking the doors and removing the doors from their hinges. Under the authorities construing acts similar to the Utah Act, and under the acts similar to the Utah Act, and under the Utah statutes making it a forcible entry to enter by stealth, these facts sufficiently show a forcible entry.

In discussing the requisite force in order to come under the Forcible Entry Statutes, it is stated in 21 Proof of Facts 2d § 607:

Forcible entry is that made with actual physical force directed against the premises. . .

21 POF 2d § 607 ¶ 2

Perhaps the clearest indication of a forcible entry, or of a forcible detainer following a peaceable entry,

is a showing of some physical damage to the persons or premises resulting from the entry or detainer. Where the property in question is enclosed by a fence or other barrier, it has been held that the breaking of such a barrier and the entry onto the property will constitute a forcible entry, regardless of whether there has been any further violence or threatened breach of the public peace.

21 POF 2d § 607 ¶ 3

With even less force, where the defendant entered the property with the aid of a locksmith and changed all the locks on the building, it has been held that there was a forcible entry, even though there was no damage to the building. Karp v. Margolis, 323 P.2d 557 (Cal.App. 1958); Jordan v. Talbot, 361 P.2d 20 (Cal.1961).

Commercial Building

Although a frequent application of the Forcible Entry and Detainer Statute involves residential leases, the express language of 78-36-1 makes it applicable to "any real property".

The extension of the act to any real property was clearly recognized in the early Utah case of Eccles v. Union Pacific Coal Company, 48 P. 148 (Utah 1897), which involved fenced land.

The California Court has held that the California Act upon which the Utah Act was based applies to forcible entry to a commercial building. The court held that where owners of certain premises entered such premises, which were in possession of plaintiffs, without legal process with the help of a locksmith, while plaintiffs were not physically in the building, and thereafter retained physical possession of the building, they were guilty of forcible entry, even though the building was a commercial building, and even though there was no violence or circumstances of terror.

In Karp v. Margolis, 323 P.2d 557, 559 (Cal.App. 1958). The court stated:

Defendants break Subdivision 1 of Section 1159 into two parts, reading it as if it applied to two kinds of structures, the first to a house, and the second to any other kind of building. They liken the word "house" to home, and say as the place entered is admittedly a commercial building, there was no forcible entry because there was no "breaking open doors, windows, or other parts of a house". The argument is not without some logical basis, and may be a reasonable interpretation of the section. However, courts have always before now read this section as a whole without making any division of affected subjects as suggested by defendants. In each of the following cases there was no "breaking open doors, windows, or other parts", each involved a commercial building and forcible entry was found to exist in each instance. San Francisco & Suburban Home Bldg. Soc. v. Leonard, 17 Cal.App. 254, 119 P. 405 (business office); Rutledge v. Barger, 82 Cal.App. 356, 255 P. 537 (store building); Pacific States Auxiliary Corp. v. Farris, 118 Cal.App. 522, 5 P.2d 452 (apartment house); Calidino Hotel Co. of San Bernardino v. Bank of America, etc., 31 Cal.App.2d 295, 87 P.2d 923 (hotel) and Pickens v. Johnson, 107 Cal.App.2d 778, 238 P.2d 40 (tavern).

Damages

Damages resulting from forcible entry include the value of household goods and personal effects removed from the premises. Black Mountain Corp. v. Jowdy, 268 S.W. 794 (Ky. 1925). See also 36A CJS Forcible Entry & Detainer § 109.

In the leading Utah case of Forrester v. Cook, 292 P. 206, 214, (Utah 1930) the court, in determining what should be trebled, stated:

The Plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer.

That such is the general rule is stated in 36A C.J.S. Forcible Entry & Detainer § 109:

The damages recoverable for wrongful dispossession of the defendant in a forcible entry and detainer proceeding are such a sum as will fairly and reasonably compensate him for the losses he has sustained as a result of the dispossession.

The natural and proximate consequences of the forcible entry were the disposal by the Defendant of the contents of the storage unit.

Trebling Is Mandatory

In Eccles v. Union Pacific Coal Company, supra, 48 P. 148, 150 (Utah 1897), the Utah court long ago held that it was error for the trial court not to treble damages. The syllabus by the court stated:

Appellant obtained judgment against the respondent, a corporation, for possession, and for damages resulting from an unlawful and forcible entry and detainer of lands he had obtained from the United States under the homestead laws; and the respondent still continued the unlawful and forcible detention of the premises after demand, and for about two years after judgment. In an action brought by the appellant, under sections 3787 and 3801, Comp. Laws 1888, to recover damages for forcible and unlawful detention of the lands, subsequent to the judgment, and for treble damages, as provided for by statute, the jury found damages for appellant in the sum of \$800. The court, on motion, declined to treble the damages. Held error, and that the court should have trebled the damages.

The Eccles court stated:

These damages are to be ascertained, or, in other words, assessed, by the jury, or by the court acting without a jury, according to the truth of case; and, when this is done, it is made the duty of the court to treble them. . . . This action was properly brought under section 3787, which deals with the subject of forcible entry and detainer; and we see no valid reason why the damages found for forcible detainer should not be trebled by the court, as provided by the act. Under the authorities, there seems to be no escape from this result. The plaintiff is entitled to have the damages for forcible and unlawful detainer trebled by the court, with costs.

Eccles was cited with approval Forrester v. Cook, supra, 292 P. 206, 214 (Utah 1930), wherein the Utah court stated:

The wording of the statute is "judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for the rent and for three times the amount of the damages thus assessed." This language has been held to require the entry of judgment for three times the amount of the damages, after a finding of damages by the jury. Eccles v. Union Pacific Coal Co., 15 Utah 14, 48 P. 148. That action was one for forcible and unlawful detainer, but the statute applies as well to unlawful detainer. The statute as construed in Eccles v. U.P. Coal Co., supra, makes it mandatory upon the court to render judgment for three times the amount of damages thus assessed.

These cases were followed in the Utah Court of Appeals decision in Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1025 (Utah 1989), wherein the Court stated it was mandatory to treble the damages found.

**All Elements of Forcible Entry
And Detainer Are Present**

The court, in its order of July 12, 1991, stated:

The court recognized the wrongful entry in its Instruction Number 16, which states:

Defendant's acts in cutting or causing to be cut Plaintiffs' lock on the door and removing all items of personal property of Plaintiffs were wrongful.

The court finds however that because Plaintiffs did not have an endorsement by the court upon the summons stating the number of days within which the Defendant shall be required to appear and defend the action, which shall not be less than three or more than twenty days from date of service, as required by 78-36-8 UCA 1953, that this cannot be deemed to be an action under the Forcible Entry and Detainer statute.

The motion to treble damages is therefor denied.

Plaintiffs argued unsuccessfully to the trial court that treble damages must be awarded because Defendant waived his objection to the sufficiency of process; because obtaining the court's endorsement on the summons would have been a useless act; and because the two cases relied upon by Defendant are not controlling.

**Defendant Waived Any Objection
To The Sufficiency Of Process**

The original complaint was not one in unlawful detainer. The complaint alleged negligence, breach of contract, breach of warranty and breach of fiduciary duty. Defendant was served with a usual twenty-day summons. Defendant failed to answer and a default judgment was entered. Defendant then moved to set aside the default judgment on the grounds of excusable neglect. The judgment was set aside. Plaintiffs then amended their complaint to add several causes of action including an action in forcible entry, seeking treble damages (paragraph 28 of the amended complaint). Defendant simply denied said allegations (paragraph 25 of his answer) and raised no issue as to the sufficiency of process.

Rule 12(b) and (h) Utah Rules of Civil Procedure provide as follows:

Defenses and Objections

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5)

insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . .

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. . . .

Rule 1(b) Utah Rules of Civil Procedure provides:

These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. . . .

That provision in Rule 1(b) leaves no doubt that if there is a conflict between it and the provisions of the unlawful detainer statute that the Rule prevails. In fact, however, there is no conflict because the unlawful detainer provision for endorsement on the summons is compatible with Rule 1. All the Defendant had to do was to raise the objection timely by motion or by answer. He raised no objection to sufficiency of process until after the trial and verdict.

**Obtaining The Court's Endorsement On The
Summons Would Have Been A Useless Act**

The purpose of the statutory provision for the court's endorsement on the summons of the time within which Defendant should plead is to give Plaintiffs the opportunity to have a speedy remedy. The court can order that an answer be filed within three to twenty days under 78-36-8 UCA. Here Plaintiffs did not seek a shortening of the usual twenty-day time period and so the full amount of time was given by the summons. Having the court endorse a twenty-day time period would have been superfluous.

A Second Summons Is Not Contemplated By The Rules

The summons issued before the addition of the forcible entry claim was adequate. Defendant appeared in the action after the amendment of the complaint added the forcible entry claim. Issuance of a second summons was uncalled for.

**The Two Cases Relied Upon By Defendant
Are Not Controlling**

Defendant cites Gerard v. Young, 432 P2d 343 (Utah 1967) and Pingree v. Continental Group of Utah, Inc., 558 P2d 1317 (Utah 1976), both stating that in a forcible entry and detainer action there must be an endorsement by the court on the summons of the time within which to answer. In neither of those cases was the issue raised by the parties in either the lower court or the supreme court of whether or not there must be such an endorsement. Consequently, in neither case was the waiver of defense provided by Rule 12 discussed nor was it ruled upon. This is disclosed by the briefs on appeal of both parties on file in the supreme court library, pertinent excerpts of which are attached.

In Gerard, there actually was no pleading even alleging forcible entry and detainer. The complaint was merely for cancellation of lease and for restitution. There was an answer denying the right of cancellation and restitution. On a motion for summary judgment, the Defendant argued there were issues of fact precluding summary judgment. Notwithstanding the fact that the action was not one in forcible entry and detainer, the trial court not only cancelled the lease but determined the amount of damages

and trebled them. On appeal the supreme court ruled that there was an issue of fact as to damages and that any award thereof on a summary judgment was improper. The supreme court necessarily ruled that if there was no determination of damage, there of course, could be no trebling. Only as an additional reason for its decision did the court state that there was no endorsement upon the summons. Not only was this not a forcible entry action, but also no one raised or considered the rule that a defense of insufficiency of process was waived pursuant to Rule 12.

In Pingree, as shown by the briefs of both parties on appeal, no issue was raised concerning the endorsement on the summons of the number of days for appearance. The cross-appellant argued that the trial court's refusal to treble damages was error. Appellant argued that the refusal was correct because the notice to vacate the premises was deficient, the rentals had been paid and no damages had been shown for refusal to vacate. There was no reference by either party to the sufficiency of process. The parties, the lower court and the supreme court therefor did not reach the issue of waiver of defense set forth in Rule 12. That defense was not just untimely, it was never raised.

CONCLUSION

Damages must be trebled because:

(a) All elements of forcible entry and detainer are present.

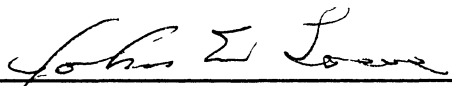
(b) The Defendant entered his appearance which does away with the necessity for any summons and any endorsement thereon.

(c) Having the court endorse on the summons that an answer must be filed within twenty days would have been superfluous since that was what it already provided. Shortening of time to answer was not sought nor obtained.

(d) By not timely raising the issue, pursuant to Rule 12, Defendant has waived the issue of sufficiency of process.

(e) The Gerard and Pingree cases are not controlling, principally because the issue of waiver was not seen nor raised by the parties nor the courts.

Respectfully submitted this 14 day of August, 1991.



John W. Lowe, Attorney for
Plaintiffs/Appellants
1624 Orchard Drive
P. O. Box 520003
Salt Lake City, UT 84152-0003

A D D E N D A

JUDGEMENT

FILED 0000000000
Third Judicial District

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Salt Lake City, Utah 84152-0003
Telephone: (801) 486-5287

JUL 2 1991

By 
Judge John A. Rokich

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES N. FOWLER and	:	
SHERRIL FOWLER,	:	ORDER AWARDING PRE-JUDGMENT
	:	INTEREST AND DENYING
Plaintiffs,	:	TREBLE DAMAGES
	:	
vs.	:	2166262
	:	Civil No. 880906180CV
TERRY R. SEITER,	:	
	:	Judge John A. Rokich
Defendant.	:	

This matter came on for trial. The jury awarded Plaintiffs the sum of \$7,000 as damages. Plaintiffs then moved to have pre-judgment interest awarded and to treble the \$7,000 awarded by the jury as damages, the trebling to be pursuant to Forcible Entry and Detainer statute 78-36-10 UCA.

Plaintiffs filed a memorandum in support of their motions. Defendant filed a memorandum objecting to the motions and Plaintiffs filed a reply memorandum. The court considered the memoranda and filed a minute entry awarding interest at the rate of \$1.91 per day but denying the trebling of damages.

PRIOR ORDERS SET ASIDE

IT IS ORDERED that the orders awarding pre-judgment interest and denying treble damages, signed by the court on June 12, 1991 are both set aside.

PRE-JUDGMENT INTEREST

IT IS ORDERED that Plaintiffs are awarded pre-judgment interest at the rate of \$1.91 per day from the date of the damages June 22, 1988 to the date of judgment.

TREBLE DAMAGES

The court recognized the wrongful entry in its Instruction Number 16, which states:

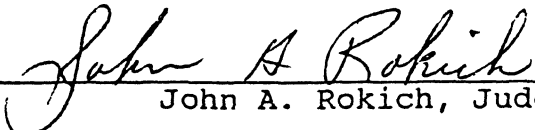
Defendant's acts in cutting or causing to be cut Plaintiffs' lock on the door and removing all items of personal property of Plaintiffs were wrongful.

The court finds however that because Plaintiffs did not have an endorsement by the court upon the summons stating the number of days within which the Defendant shall be required to appear and defend the action, which shall not be less than three or more than twenty days from date of service, as required by 78-36-8 UCA 1953, that this cannot be deemed to be an action under the Forcible Entry and Detainer statute.

The motion to treble damages is therefor denied.

The court makes the express determination that there is no just reason for delay and the court expressly directs entry of judgment on these orders.

Dated this 2 day of July, 1991.


John A. Rokich, Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH

DATE: July 31, 1991

DEPUTY COURT CLERK

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing ORDER
AWARDING PRE-JUDGMENT INTEREST AND DENYING TREBLE DAMAGES was hand
delivered to Defendant's counsel, Charles W. Hanna, SMITH & HANNA,
311 South State Street, Suite #450, Salt Lake City, Utah 84111 on
this 2nd day of July, 1991.



JUL 26 1991

John W. Lowe, No. 2001
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Telephone: (801) 486-5287

SALT LAKE COUNTY
By W. E. Burs
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES N. FOWLER and
SHERRIL FOWLER,

Plaintiffs,

vs.

TERRY R. SEITER,

Defendant.

:
:
:
:
:
:

J U D G M E N T

2167280

7-30-91-8:15am.

Civil No. 880906180CV

Judge John A. Rokich

This action came on for trial before the court and a jury, Honorable John A. Rokich, District Judge presiding, and the issues having been duly tried and the jury having duly entered its verdict.

IT IS ORDERED AND ADJUDGED that Plaintiffs James N. Fowler and Sherril Fowler recover of the Defendant Terry R. Seiter the sum of \$7,000 together with pre-judgment interest at the rate of 10% per annum from June 22, 1988 to date of judgment in the amount \$1.91 per diem, which pre-judgment interest is in the amount of \$2,154.48 which principal and pre-judgment interest are in the amount of \$9,154.48, together with interest from date of judgment at the rate of 12% per annum as provided by law and their costs of action.

Inasmuch as an appeal is pending on the court's order denying the trebling of damages, the amount of costs shall abide the final determination of the cause.

Dated this 26 day of July, 1991.

John A. Rokich
Clerk of the Court

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: July 31, 1991
Sharon Blake
DEPUTY COURT CLERK

Excerpt From Appellant's Brief

Gerard v. Young
432 P2d 343 (Utah 1967)

3 U 2nd 251, 351 Pac 2nd 624	11
1 Pac. 2nd 24	12
, 108 Pac. 2nd 479	13
ing Company vs. Ernst, 291 Pac. 764	14
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HER PUBLICATIONS	
ictionary, 5th Edition, P. 137	12

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY LOUISE GERARD,
Plaintiff-Respondent,

vs.

PRESTON L. YOUNG and
UNICE YOUNG,
Defendants-Appellants.

Case No.
10712

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action brought by Plaintiff-Respondent seeking to forfeit a lease for a term of years based on Defendants-Appellants' alleged "payoffs" on pinball machines and punch boards. Delinquent rental is not an issue.

This action has been treated as if in unlawful detainer under 78-36-1, et seq., 1953 UCA, though not pleaded. The pleading theory of plaintiff is that a lease provision has been violated by defendants and the lease should be rescinded, (R2, Paragraph 6).

DISPOSITION IN LOWER COURT

The following hurried sequence of events took place:

1. Complaint for lease cancellation and for restitution of the leasehold was filed June 13, 1966 (R. 1). Time for answer was shortened to three days, arranged ex parte, with no reference to statutory authority, if any, to do it (R. 1, 2, 3). 78-36-8, 1953 UCA seems to require a rental delinquency in order for the court to shorten time of answer.

2. Answer was filed June 15, denying gambling or right to restitution of premises if there was gambling (R. 8).

3. Defendants-Appellants filed motion for summary judgment on June 15, 1966 (R. 12), noticed for argument July 5, 1966 (R. 11).

4. Counsel for plaintiff-respondent obtained special pretrial setting for 12 p.m., June 22, 1966, though notice of readiness for trial was not filed by plaintiff until July 1, 1966 (R. 22).

5. There was no judge for the special pretrial hearing on June 22, 1966, so plaintiff continued it to June 24, 1966. On June 24, the pretrial judge ordered a further pretrial to be held on September 30, 1966 and placed the case on the jury trial calendar for October 26, 1966.

6. On July 30, 1966, plaintiff-respondent filed motion for summary judgment, also to be heard on July 5, 1966 (R. 14).

7. Plaintiff-respondent's motion for summary judgment was supported by three affidavits alleging receipts of "payoffs" at the leasehold premises, (R. 16, 17, 19). Defendants-appellants filed an affidavit in opposition to plaintiff's affidavits stating there was no acquaintance with plaintiff's affiants and that defendants-appellants were entitled to examine those persons under oath and test their veracity and interest in the subject of the litigation to overcome the self-serving nature and hearsay characteristics in those affidavits submitted by plaintiff, (R. 23).

8. Both motions for summary judgment were argued July 5, 1966.

9. Memorandum decision granting plaintiff-respondent's motion for summary judgment was issued by the Trial Court July 6, 1966 (R. 25).

10. On July 8, 1966 defendants-appellants made motion for reconsideration of the memorandum decision (R. 29), which was supported by further affidavit of defendants-appellants stating that the affidavits pertaining to "payoffs" were, to the best knowledge and belief of affiant, false (R. 26).

11. Based upon the motion to reconsider, with supporting affidavit, the Court ordered both parties' motions for summary judgment denied and ordered that the matter remain on the pretrial calendar for Friday, September 30, 1966 and that Trial be held Wednesday, October 26, 1966, as previously scheduled. The Court in the order of July 8, affirmatively found that there were questions of fact to be determined at trial (R. 30).

12. On July 13, again ex parte, plaintiff's counsel obtained a trial setting for July 19, 1966 (R. 34), despite the July 8 order that trial would be October 26, 1966 (R. 30).

13. On July 13, 1966, defendants-appellants filed objection to the July 19 trial setting (R. 33), noticing hearing on objection for July 18, 1966 (R. 31). Hearing on the objection was had before the Honorable Albert H. Ellett, who refused to proceed with the matter since the special trial setting had been obtained before the Honorable Stewart M. Hanson. The court was on vacation on July 19, 1966, with no reporter and no jury was on hand, despite defendants-appellants demand for jury having been filed and a jury fee having been paid (R. 32).

Trial was not held July 19, 1966, though plaintiff's counsel offered to obtain a court reporter and pay for him. Plaintiff's counsel was not, however, successful in persuading the clerk of the court to summons a jury, in the face of appellant's objection.

14. July 19, 1966, defendants-appellants filed petition to the Supreme Court of Utah for an interlocutory appeal, which was denied by the court in Case 10692, July 27, 1966.

15. Under date of July 19, 1966, plaintiff-respondent noticed the taking of defendant's deposition for July 26, 1966. Notice was filed with the Court July 27, 1966 (R. 34).

16. The deposition of defendant, Preston L. Young, was taken July 29, 1966 (R. 60). He refused to answer

questions concerning pinballs and punch boards based on the self-incrimination provisions of the 5th amendment to the United States Constitution.

17. Under date of July 21, 1966 plaintiff-respondent again filed motion for summary judgment based upon previous allegations and affidavits set forth in the first motion for summary judgment heard on July 5, 1966. The motion was filed July 27. (R. 36).

18. The same matter having already been argued and ruled on by the Trial Court, was again heard and argued on August 9, 1966.

19. On August 9, 1966, the day of the second argument, the Trial Court made and entered its order granting plaintiff-respondent's latest motion for summary judgment, from which order this appeal is taken.

RELIEF SOUGHT ON APPEAL

1. Defendants-appellants seek decision that having pinballs and punch boards on cafe premises, even if "payoffs" are made, is not sufficient grounds to found an action in unlawful detainer.

2. Appellants seek ruling that if there were "payoffs" on pinball machines and punch boards then the Utah gambling statutes are unconstitutional and such conduct is not unlawful.

3. In the alternative, appellants seek ruling that the issue of gambling be decided by a jury; and that gambling, if any, as an "unlawful business" under 78-36-3(4), 1953 UCA, or as a "material breach" of lease be determined by a jury these questions being issues of fact,

not properly ruled on as a matter of law by the Trial Court.

Excerpt From Respondent's Brief

Gerard v. Young
432 P2d 343 (Utah 1967)

As to the second point, 78-36-3, UCA, 1953, provides:

“UNLAWFUL DETAINER BY TENANT FOR TERM LESS THAN LIFE. — A Tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(4) When he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste thereon, or *when he sets up or carries on therein or thereon any unlawful business*, or when he suffers, permits or maintains on or about said premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or,

(5) *When he continues in possession, in person or by subtenant, after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those hereinbefore mentioned, and after notice in writing requiring in the alternative the performance of such conditions or covenant or the surrender of the property, served upon him, and, if there is a subtenant in actual occupation of the premises, also upon such subtenant, shall remain uncomplied with for five days after service thereof.* Within three days after the service of the notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the

term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from forfeiture; provided, that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice as last prescribed herein need be given." (Emphasis added)

It should be noted that while the unlawful detainer statutes have a number of precise conditions concerning due notice, that defendants have stated no point denying proper notice at any point in the proceedings before the trial court or this court.

Is the gambling of sufficient substance to justify lease termination? The facts show a continuous course of gambling. While the affidavits of the Hansons (R. 17-19) relate only isolated instances, the Complaint charges a course of gambling and of *maintaining machines for that purpose* at the cafe, as does the affidavit of Evan Holladay (R. 16). As stated in Point I, these allegations not having been denied are deemed admitted.

The gambling is substantial when viewed from plaintiff's eyes because, as lessor, she herself is liable to criminal prosecution if she allows gambling on the premises she has leased. 76-27-3 UCA, 1953, and 4-10-2, Salt Lake County Ordinances, Revised, 1953. The defendants having refused to desist, she has the duty of forcing them to, which this lawsuit hopes to do. The rule is stated in *Zotalis v. Cannellos et al.*, 164 NW 807 (Minn.), which held shaking dice for cigars was grounds for lease termination based on a lease term against gambling:

"The violation of a condition in the lease cannot be said to be trivial when the violation is of such a character that the lessor may be subjected to a criminal prosecution therefore."

Finally, 78-36-3(5) UCA, 1953, makes no distinction between great and small breaches of a lease, nor is there a Utah case on this point. To satisfy this statute what is required is only that a breach be proved and that after notice given pursuant to the statute, that the breach continue. On this there is no argument on the facts as evidenced by the unrebutted affidavits of Bryant and Larry A. Hanson as to payoffs, on May 21, 1966, and June 3, 1966 (R. 17-19), with notice under 78-36(4)&(5) UCA, 1953, previously served on April 12, 1966 (R. 4, 5). *Gilbert v. Peck*, 121 P. 315 (Calif.); 32 Am. Jur., Landlord and Tenant, §864, pp. 731; 100 ALR 2d 469 et seq.

CONCLUSION

It is respectfully submitted that the summary judgment is well supported by the facts and law and should be affirmed.

Respectfully submitted,

K. SAMUEL KING

Boston Building

Salt Lake City, Utah

Attorney for Respondent

*Reasonably handed 3 copies of this brief
to Gene Stone, secretary to George
Swell, at his office, Judge Building,
Salt Lake City, Utah, on November 18, 1966.*

Excerpt From Cross-Appellant's Brief

Pingree v. Continental Group of Utah, Inc.
558 P2d 1317 (Utah 1976)

graph 20 of the lease presently before the Court. These
ces informed the appellant that the respondents elected
eclare a forfeiture of the lease upon the failure of
llant to cure the defects and that appellant would, in
event of such a failure, become a tenant at will. They
ld be approved and confirmed in all respects.

POINT IV

THE LOWER COURT ERRED AS A MATTER OF LAW IN CON-
ING THAT THE RESPONDENTS WERE NOT ENTITLED TO TREBLE
GES PURSUANT TO UTAH CODE ANNOTATED 1953, §78-36-10.

The appellant admitted service of respondents'
er dated September 24, 1974, directing that certain
irs be undertaken within 30 days or the lease would be
eited (Amended Complaint para. 18 and Amended Answer
. 17); admitted service of respondents' notice dated
uary 12, 1975 (Amended Complaint para. 21 and 22,
ded Answer para. 20 and 21); and admitted his refusal to
te the premises pursuant to said notice (Amended Complaint
. 23, Amended Answer para. 22). The trial court found
the indicated repairs and maintenance had not been
leted (Findings of Fact Nos. 34 and 35 and Memorandum
sion at 5-6), found damages to be \$4,000 (Finding of

Fact No. 39 and Memorandum Decision at 6), found appellant's failure to vacate wrongful and an unlawful holdover (Finding of Fact No. 56 and Memorandum Decision at 6-7), and found damages in the nature of rent after forfeiture to be \$900 per month (Finding of Fact No. 57 and Memorandum Decision at 7).

The trial court considered but refused to find treble damages for the wrongful and unlawful holdover (Finding of Fact No. 59 and Memorandum Decision at 7). The respondents believe this finding of the trial court is incorrect. Utah Code Annotated 1953, §78-36-10 states in part

. . . judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for rent and for three times the amount of damages thus assessed.

This is the exact same language which the court had occasion to review in Forrester v. Cook, 77 U. 137, 292 P. 206, 213 (1930). The court states

This language has been held to require the entry of judgment for three times the amount of damages, after a finding of damages by the [court]. Eccles v. Union Pacific Coal Co., 15 Utah, 14, 48 P. 148. That action was one for forcible and unlawful detainer, but the statute applies as well to unlawful detainer. The statute as construed in Eccles v. U. P. Coal Co., supra, makes it mandatory upon the court to render

judgment for three times the amount of damages thus assessed. Id. at 214.

The court goes on to define what is meant by the term "damages" which are trebled. The appellant correctly points out to the Court that such damages must be the natural and proximate consequence of the unlawful detainer (Brief of Appellant at 17), but he failed to point out to the Court what those consequences were. The court in Forrester said

The damages which may be recovered in an action such as this are measured by the rule that they must be the natural and proximate consequences of the acts complained of and nothing more. Rents and profits, or rental value of the premises, during detention are included in damages. (emphasis added), Id. at 211.

The second claim for relief in respondents' Amended Complaint deals strictly with the fact appellant refused to vacate the premises as directed. It is the unlawful detention of the premises which triggers the measure of damages. The court stated

Clearly the loss of the value of the use and occupation of the premises, or the rental value thereof, during the period when the premises were unlawfully withheld from plaintiff, is a damage suffered by her. While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of possession is the minimum of damages. Id. at 214.

In this case, appellant was in unlawful detention from and after five days of service of respondents' notice

on his legal counsel, or at the latest March 4, 1975. This unlawful detainer continued through January 15, 1976, when the sheriff served the Writ of Possession placing respondents in possession of the premises.

So there would be no misunderstanding regarding damages, the court went on to distinguish "rents which accrued before forfeiture" from "damages accruing after forfeiture" based on the rental value of the unlawfully detained premises. It stated

Rents, which may not be trebled, are such as accrue before termination of the tenancy. After the tenancy has been terminated by notice required by statute, the person in unlawful possession is not owing rent under the contract, but must respond in damages pursuant to law. Rental value or reasonable value of the use and occupation of the premises becomes an element of damages for retaining possession. This is not rent, it is damages. Id. at 214.

Respondents have suffered additional damages as a natural and proximate result of appellant's unlawful holdover in that the condition of the premises continued to decline. The building exterior was not painted and the bare wood continued to weather, the public restroom and kitchen floors were not repaired, the kitchen walls continued to deteriorate from the moisture put out by the ice machine as a result of appellant's refusal to relocate it, and the blocked off

restrooms continued to be exposed to the effects of inclement weather. Respondents were unable to correct these deficiencies as a result of appellant's refusal to vacate and had no opportunity so to do prior to January 15, 1975.

The portion of the trial court's Findings of Fact, Conclusions of Law, and Judgment and Decree denying treble damages for unlawful detainer should be reversed and the matter remanded to the trial court for the entry of appropriate Findings of Fact, Conclusions of Law, and Judgment and Decree awarding respondents the treble damages to which they were properly entitled. The respondents should be awarded their costs and a reasonable attorney's fee in conjunction with this appeal.

CONCLUSION

It is submitted:

(a) The trial court erred as a matter of law in not concluding that the lease renewal option was void for vagueness and uncertainty.

(b) The trial court erred as a matter of law in not awarding treble damages for unlawful detainer.

(c) In all other respects, the trial court's

Excerpt From Appellant's Brief

Pingree v. Continental Group of Utah, Inc.
558 P2d 1317 (Utah 1976)

All of these cases involve a renewal option with rentals to be renegotiated by agreement of the parties. None of the cases had the benefit of having specified factors to be used in considering the basis for the rental negotiation. As was stated in Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, options to renew granted to the lessee are obviously for his benefit and, it is presumed, are part of the consideration which induced him to execute the lease.

It has also been held that where an agreement to renew contained in a lease is independent from other covenants such as to keep the premises in repair, it does not release the lessor from his obligation to renew or extend, even if the covenant to keep premises in repair is breached. See Parsons v. Ball, 205 Ky. 793, 266 S. W. 649. Therefore, the respondents could not use their complaints concerning maintenance of the premises as grounds for failure to reasonably renegotiate the new rentals.

POINT III

THE TRIAL COURT WAS CORRECT IN NOT AWARDING TREBLE DAMAGES TO RESPONDENTS.

The respondents, in the statement of points in their cross-appeal, have stated that the lower court --

errored in concluding that they were not entitled to treble damages pursuant to Utah Code Annotated, 1953, 78-36-10.

First, the Notice to vacate is deficient on its face in not requiring, in the alternative, the performance of the conditions of which they complain or surrender of the property.

Second, respondents' Notice to vacate was only premised upon appellant's failure to make certain repairs. That would be the only claim which would be within the provisions of the unlawful detainer statute. The appellant had continued to pay the monthly rentals of \$500.00 per month and was not in an unlawful detainer situation by refusing to pay the higher rental demanded by respondents.

There has never been any claim by respondents that appellant was unlawfully detaining the premises by his failure to pay the increased rentals as demanded.

It has been held that the damages which are contemplated by the treble damages provision of the statute must be the natural and proximate consequences of the unlawful detainer and nothing more. See Forrester v. Cook, 77 U. 137, 292 P. 206.

Since the respondents' claim under the unlawful

detainer statute is based upon allegations of disrepair, they must show that additional damages occurred as a result of appellant's failure to remove himself from the premises. This was not done.

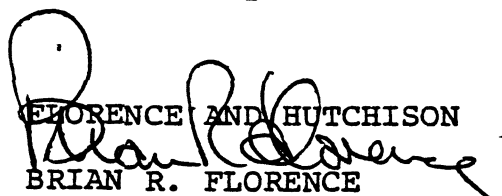
CONCLUSION

It is submitted that the damages awarded for delayed maintenance were excessive in light of the evidence and many of them should have been awarded against the defendant, the Continental Group of Utah, Inc.

The Court failed to consider the factors specified in the Lease in determining increased rentals for the renewal period and erred in holding that the rentals should have been \$900.00 per month.

Treble damages are not applicable to the facts of this case since there is no evidence to show that respondents were damaged by appellant's holdover in the specific area of delayed maintenance.

Respectfully submitted,


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CERTIFICATE OF SERVICE

It is hereby certified by the undersigned that four copies of the foregoing **APPELLANTS' BRIEF** were mailed, postage prepaid, on this 20th day of August, 1991 to the following:

Charles W. Hanna
SMITH & HANNA
311 South State Street, #450
Salt Lake City, UT 84111

/s/ John W. Lowe
