

2002

Walter G. Slater v. Kevin Brady : Brief of Appellee

Utah Court of Appeals

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James H. Deans; Attorney for Appellee.

Walter Slater; Pro se.

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THE UTAH COURT OF APPEALS

KEVIN BRADY,

Plaintiff/Respondent

vs.

WALTER G. SLATER,

Defendant/Appellant

BRIEF OF APPELLEE

Case No.: 20020599CA

**Walter Slater
647 West Winchester Street
Murray, Utah 84123**

Defendant/Appellant

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Utah Court of Appeals
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- 1 -
Utah Court

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ADDENDUM

Addendum 1: Findings of Fact, Conclusions of Law, and Judgment

THE UTAH COURT OF APPEALS

KEVIN BRADY,

Plaintiff/Respondent

vs.

WALTER G. SLATER,

Defendant/Appellant

BRIEF OF APPELLEE

Case No.: 20020599CA

STATEMENT OF JURISDICTION

Jurisdiction over this appeal lies with the Utah Court of Appeals pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF ISSUES

Appellant's Statement of Issue does not in anyway conform to Utah Rules of Appellate Procedure 24 in that it does not give this Court what its standard of appellate review should be with supporting authorities. For each issue, there is no citation to the record, that any of the issues were preserved in the trial court.

STANDARDS OF REVIEW

The appropriate standard of review for challenging a finding of fact is a clearly erroneous standard. Jeffs v. Stubbs 970 p. 24 1234. The standard to review a court's award of damages is one of considerable discretion. The rulings will not be disturbed absent an abuse of discretion. Lysenko v. Sawaya 1999 UT App. 31, 9116, ars. P. 2d 44J.

STATEMENT OF THE CASE

Appellant's Statement of Facts and Statement of the Case is unsupported by any citations to the record. Appellee adopts as his Statement of Facts and Statement of the Case the trial court's Finding of Fact and Conclusion of Law attached as Addendum 1.

ARGUMENT

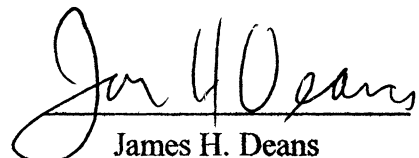
Defendant contends that the trial court erred in its findings concerning damages and its issuance of its order of restitution. Defendant does not directly address its challenged findings. Defendant offers no analysis or citation to the record to contravene any of the court's findings. Appellant gives the court no basis to conclude that any of its findings are clearly erroneous.

Second, defendant argues that the trial court failed to properly award damage. In Lysenko v. Sawaya 1999 UT App 31 9116, the court said, "We review the trial court's decision to award damages under a standard which gives the court considerable discretion, and will not disturb its ruling absent an abuse of discretion." The court pursuant to Rule 15 U.R.C.P allows plaintiff's eviction notice to be introduced without objection from defendant's counsel.

CONCLUSION

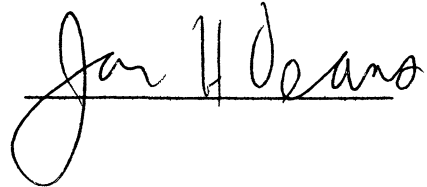
Defendant has attempted to win this appeal on his own. However, there has not been the barest compliance with any of the requirements of our rules to allow this Court to find that the trial court findings were clearly erroneous or that the trial court abused its discretion in computing damage.

Respectfully submitted, this 19th day of August, 2003.


James H. Deans
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Brief of Appellee to Walter Slater, defendant/appellant at 647 West Winchester Street, Murray, Utah 84123.

A handwritten signature in cursive script, reading "Jan H. Deans", is written over a horizontal line.

ADDENDUM 1

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
AND
JUDGMENT

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

02 JUN 26 PM 1:04
THIRD JUDICIAL DISTRICT COURT
MURRAY DEPT.

KEVIN BRADY, Plaintiff, vs. WALTER C. SLATER, Defendant	MINUTE ENTRY Case No. 020201195 Honorable BRUCE C. LUBECK Court Clerk: Linda Vance June 26, 2002
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The above matter came on before the court for a bench trial on June 25, 2002. Plaintiff was present with James H. Deans and defendant was present with Donald R. Schindler. Plaintiff filed a complaint for unlawful detainer, posted a possession bond and defendant posted a counter bond.

Plaintiff claimed that defendant breached the agreement they had by failing to pay full rent in February, 2002, and thus plaintiff gave a three day notice in early February and claims defendant was in unlawful detainer since that time. Defendant claims that plaintiff breached their agreement and so was justified in withholding partial rent in February, and thus was not in unlawful detainer.

The issue for the court revolves around credibility. Plaintiff claims that they reached an accord and satisfaction in December and defendant breached that agreement, and defendant claims plaintiff breached. Thus the decision for the court is based on credibility. The court watched carefully the parties, both while testifying and during trial. The court heard the testimony of six witnesses, received exhibits, and heard argument.

The court finds as follows:

FINDINGS OF FACT

1. Defendant signed a month to month tenancy agreement with plaintiff's predecessor owner in July, 2001. Rent was \$400 per month for the apartment, part of a four-plex, at 423 East 5600 South, #2, Murray, Utah. The agreement contained a provision that defendant would pay costs, including attorney fees, incurred by plaintiff in collecting rent or possession of the premises.

2. Rent was increased by plaintiff effective September 1,

2002, to \$425 per month. Defendant paid rent through November timely and fully.

3. In November, 2002, there was a plumbing problem in defendant's apartment. Plaintiff claims he was not notified until November 28, 2002, and defendant and his witnesses claim notice was given earlier. It is not necessary for the court to decide factually who is correct. The dispute basically revolved around timing, plaintiff claiming he tried to remedy it as soon as possible but with the Thanksgiving holiday could not get anyone there any sooner. Defendant claims it was an extended period and plaintiff ignored his requests and the problem was severe. In any event defendant hired and paid a plumber approximately \$140 to remedy the problem. No receipt was produced. Defendant paid rent for December, timely, but paid \$275, withholding the \$150 difference for the cost of the plumber.

4. Plaintiff spoke with defendant personally on December 2, 2001, about that issue and they agreed that they would split the difference for the cost of the plumber and defendant paid plaintiff \$75 on December 2. Plaintiff claims that was the entirety of the agreement and the matter was resolved. Defendant claims that the agreement, made principally with plaintiff's wife who was present also, was that in addition plaintiff would clean the apartment and the mess that had resulted from the plumbing problem. Defendant claims that the agreement was that if plaintiff did not do so, he would withhold the remaining \$75 rent he had given plaintiff that day. The court finds in favor of defendant on that issue, finding that the agreement was that if plaintiff did not clean the apartment as a result of the plumbing issue, defendant would withhold the remaining \$75 rent.

5. Plaintiff did not clean the apartment thereafter and defendant did. Defendant paid full and timely rent for January, 2002, but in February withheld \$75 based on the parties' agreement.

6. Plaintiff served a three day notice on defendant on February 6, 2002, claiming defendant was behind in the rent the sum of \$100, the result of a late fee under the month-to-month tenancy and the withheld \$75.

7. Defendant did not vacate and this action was filed February 12. A bond was posted by plaintiff and after a possession hearing on March 1, 2002, counter bonds posted by defendant. The amount of the counter bond was increased when this trial was postponed. Defendant remained in possession.

8. On March 13, 2002, defendant was served with a notice to terminate tenancy effective at the end of March, 2002. Defendant did not vacate and thereafter paid rent to his attorney, who is holding that rent in trust. In April defendant paid rent to plaintiff's agent, who accepted the money. Plaintiff deposited that month's rent with the court and did not retain it.

CONCLUSIONS OF LAW

1. Defendant did not fail to pay rent for February, 2002, and so was not in unlawful detainer at that point. He was not justified under Utah or local law in withholding rent because of the plumbing problem as proper procedures were not followed, but he was justified because of the agreement found by the court to be accurate that if plaintiff did not clean the apartment defendant would withhold the additional \$75. Plaintiff was thus not in unlawful detainer after being served with the three day notice.

2. After being served with the notice to terminate tenancy defendant was in unlawful detainer as of the end of March, 2002, under UCA 78-36-3(1)(b). Plaintiff is thus entitled to treble damages for the time between April 1, 2002, and the time defendant vacates the premises. Plaintiff did not waive any remedies because of the April payment of rent, plaintiff depositing that rent with the court.

3. Plaintiff is entitled to all rents not received, namely, for the months of March through June, inclusive, as well as the treble damages above in paragraph 2 of these conclusions.

4. Because plaintiff had to incur costs and attorney fees to dispossess defendant plaintiff is entitled to a reasonable attorney fee under the written agreement, the amount to be approved by the court and established by plaintiff by affidavit to be submitted with the judgment.

5. Plaintiff is entitled to an immediate order of restitution.

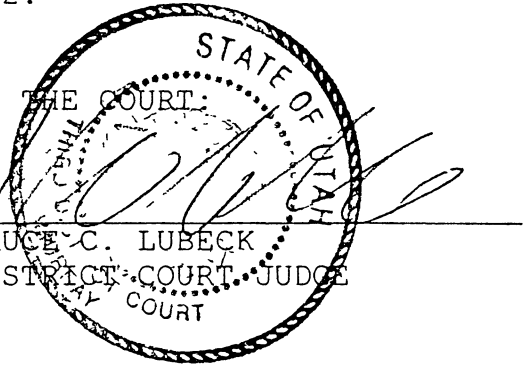
6. Upon defendant vacating the premises, each party is entitled to the return of any remaining posted bond after payment of the judgment by defendant.

7. Plaintiff is to prepare a judgment reflecting the above decision.

DATED this 26 day of June, 2002.

BY THE COURT:

BRUCE C. LUBECK
DISTRICT COURT JUDGE
DISTRICT COURT



JAMES H. DEANS, #846
Attorney for Plaintiff
440 South 700 East - #101
Salt Lake City, UT 84102
Telephone. 575-5005

THIRD DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT

KEVIN BRADY)	
)	
)	
Plaintiff(s))	JUDGMENT AND ORDER OF
)	RESTITUTION
vs.)	
)	
)	Civil No.: 020201195 EV
WALTER C. SLATER)	
)	
Defendant(s))	Judge: Lubeck

The above-entitled action came on regularly for trial the 25th day of June, 2002, the Honorable Bruce C. Lubeck presiding and plaintiff appearing in person and by counsel James H. Deans, and defendant appearing in person and by counsel Donald R. Schindler and the court having heard the testimony and arguments and entered its Findings of Fact and Conclusions of Law and good cause appearing, now, therefore,

IT IS HEREBY ORDERED:

1. That plaintiff, Kevin Brady, have Judgment against defendant Walter C. Slater for rent from March 1, 2002 to March 31, 2002 in the sum of \$425.00, treble rentals in the sum of \$3,780.72 from April 1, 2002 through June 28, 2002, together with treble rentals at the rate of \$42.48 per day until defendant vacates the premises together with costs of court of \$65.00 together with attorney's fees of \$1,215.00 for a total judgment of \$5,485.72.
2. That said judgment bear interest as provided by law.

3. That plaintiff may have an immediate Order of Restitution to the premises at 423 East 5600 South, Murray, Utah.

4. That the monies posted by defendant of \$2,925.00 may be released to plaintiff or plaintiff's counsel forthwith and is applied to defendant's judgment balance.

DATED this _____ day of July, 2002.

BRUCE C. LUBECK
DISTRICT COURT JUDGE

THE UTAH COURT OF APPEALS

FILED
Utah Court of Appeals
JUL 22 2003

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Kevin Brady,

Plaintiff and Appellee,

v.

Walter G. Slater,

Defendant and Appellant.

Paulette Sagg
ORDER Clerk of the Court

Case No. 20020599-CA

This matter is before the court on Appellee's motion to summarily affirm based upon inadequate briefing and motion to dismiss based upon failure to file a cost bond. See Utah R. App. P. 10(a).

IT IS HEREBY ORDERED that the motion to summarily affirm is denied, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the appeal. See State v. Gamblin, 2000 UT 44, ¶7, 1 P.3d 1108.

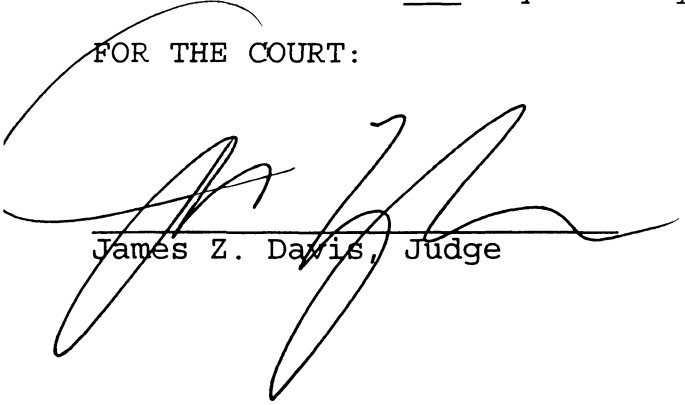
IT IS FURTHER ORDERED that Appellee's motion to dismiss is denied without prejudice.

IT IS FURTHER ORDERED that on or before August 6, 2003, Appellant shall submit a cost bond of at least \$300.00 or such greater amount as the trial court may order on motion of Appellee. See Utah R. App. P. 6. Failure to file a cost bond on or before August 6, 2003, may result in dismissal of the appeal.

IT IS FURTHER ORDERED that the deadline for Appellee's brief is extended to August 21, 2003.

Dated this 22 day of July, 2003

FOR THE COURT:


James Z. Davis, Judge