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Marvin Young and Stella Young, his Wife v. George Bridwell : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN YOUNG and
STELLA YOUNG, his wife,
Plaintiffs-Appellants,

vs.

GEORGE BRIDWELL,
Defendant-Respondent.

Case No.
10774

BRIEF OF APPELLANTS

Appeal from the Judgment dismissing Plaintiffs' Complaint in the Third Judicial District Court in and for Salt Lake County. Hon. Stewart M. Hanson, Judge.

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64 ALR 316n 6

45 ALR 2d 55n 5

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STATEMENT OF THE CASE

The appellants brought an action against the respondent for breach of contract and negligence in the handling of a case for the appellants, and now appeal from a judgment dismissing their complaint in the District Court of the Third Judicial District.

DISPOSITION IN LOWER COURT

The District Court for Salt Lake County heard argument of counsel for both the appellants and respondent and then ruled as a matter of law that

plaintiffs' complaint should be dismissed, no cause of action.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the District Court judgment as it relates to matters of law and for remand of the case for trial by a jury.

STATEMENT OF FACTS

Originally, the respondent in this matter was retained by the appellants for the purpose of pursuing an action in the District Court of Salt Lake County, upon the Complaint which is marked "Exhibit B", attached to Plaintiffs'-Appellants' Complaint which is a part of the record on file in this action. It is basically because of Respondent's breach of his fiduciary contractual duty to the appellants and his negligence in the handling of the case above mentioned that gave rise to the present controversy.

Respondents' wrongful conduct of which Appellants complained is specifically set out in detail in Plaintiffs'-Appellants' Complaint in a series of five (5) alternative causes of action, and the Appellants rely upon the Complaint to fully set forth an accurate statement of facts as it relates to this matter.

Specifically, however, Appellants assert that the Respondent breached his contract and was negligent because of his: (1) inattention to the case in having Alan D. Frandsen try the case when he was not sufficiently acquainted with the case, and, therefore, allowing the Judge to err in certain specific

orders, (a) the Court's pretrial order, which is attached as "Exhibit A" to Plaintiffs'-Appellants' Complaint in holding as a matter of law that acceptance of payment amounted to renewal of the lease, and (b) entry of its findings of fact, wherein it stated that the Lease had been extended for a period of five (5) years, because of the acceptance of rental payments. (2) Failing to notify Plaintiffs-Appellants of their Rights of Appeal and the time in which they could appeal.

Because the Court decided that the results would not have been different on appeal in the original case it dismissed the present case now before the Court and from such decision relief is sought.

ARGUMENT

POINT I

THE COURT ERRED IN ITS PRE-TRIAL ORDER IN ELIMINATING AS AN ISSUE; IS THE HIRING OF ANOTHER ATTORNEY WITHOUT THE CONSENT OF THE CLIENT ACTIONABLE AS A BREACH OF CONTRACT?

In its pre-trial order the Court discussed whether it was an act of negligence on the part of the Respondent to hire another attorney without the consent of the client and in so doing stated:

> "The Court finds no negligence that can be proved . . ."

and further:

> ". . . the conduct of the Defendant in employing Mr. Frandsen would only be material in that it caused another attorney to be at the

> trial, and possibly Mr. Bridwell was not fully informed as to the Court's action at the Pre-trial and the Trial, in giving the Plaintiff the advice that Plaintiff claims she received." (Page 3, Pre-trial Order.)

In making the above order the pre-trial Court completely overlooked the appellants contention that the hiring of another attorney without their consent amounted to a breach of contract.

The Court may have been correct in ruling as a matter of law that such conduct was not actionable when founded upon negligence but the Court erred when it eliminated this issue as it relates to breach of contract.

The Appellants contend that they hired the Respondent to perform certain legal services for them and that, without their consent, the Respondent hired another attorney to represent them. The Appellants further assert that they were not aware of this fact until the day of the trial when they were met by Mr. Frandsen at the Court room shortly before trial time. (Marvin C. Young Deposition, page 15, lines 19-21.) At this time apparently even Mr. Frandsen was uncertain that he would be trying the case because he was still expecting the Respondent to appear at the trial. (Marvin C. Young Deposition, page 17, lines 20-26, and Alan D. Frandsen Deposition, page 22, lines 9-12).

When a person is retained for the purpose of performing some personal service, as the respondent was, (Marvin C. Young Deposition, page 10, lines 1-17) to hire someone else to perform the services is clearly a breach of contract. *Meyer v. Washington Times Co.*, (1935) 64 App D. C. 218, 76 F 2d 988.

The Court should not have eliminated this matter at pre-trial under the single theory of negligence, but should have allowed as an issue for trial, the question of breach of contract.

POINT II

THE COURT ERRED IN RULING THAT THE RESULTS WOULD NOT HAVE BEEN DIFFERENT ON APPEAL IN THE ORIGINAL CASE AND THEREFORE AN APPEAL WOULD HAVE BEEN OF NO AVAIL.

It is the general rule of law with which the appellants have no argument, that to hold an attorney liable for negligence in not advising a client of his rights of appeal, you must prove that if the appeal or new trial had been obtained, a judgment more favorable to the Plaintiff, would have resulted. There are numerous cases in connection with this matter, and they are annotated in 45 ALR 2d 55, also cited in 7 Am Jur. 2d, 149 Attorney section 172. Therefore, it is the obligation of the Appellants to first prove that the results of the appeal would have been favorable to them, thus reversing the trial Court's decision. The Appellants will therefore address their remarks to the law relating to leases and lease renewal which was the subject of the original case and is the subject matter which is claimed to have been ruled in err upon by the trial Court in the original case which Respondent was hired to litigate. It is upon this legal concept that the Appellants claim the results would have been different had Respondent advised Appellants of their right of Appeal and had an appeal been taken.

Generally, it is held that where a Lessee, having a general privilege of extending the Lease, holds over even without any notice to the Lessor of his election to extend the Lease for the further term, his holding over constitutes an election so as to extend and he is entitled as against the Lessor to hold for a further term. This is the general rule of law as set forth in 64 ALR 316n., with numerous annotations supporting this proposition, with which general proposition the Appellants find no fault, however, as is the case with all general rules, there are numerous exceptions, and it is to one of these exceptions that the Appellants claim a contrary rule. In the case of *Carhart vs. White Mantel & Tile Company*, (1909) 122 Tenn. 455, 123 S. W. 747, wherein it was held:

> "The mere continuance of occupancy by the tenant or lessee after the expiration of the lease period is ordinarily accepted as the exercise of the option reserved in the lease to occupy the premises for an additional term. *This is the presumption* that ordinarily arises ~~from August 10, 1962 to August 10, 1967, or~~ *not conclusive* of the lessee's intention to accept the lease for an additional term. If the lease, as in this case, provides for an additional term at an increased rental, and after the expiration of the lease period the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term; *but where, under a lease like the present, the tenant holds over after the expiration of the original term, and does not pay the increased rental as provided by the lease, but continues to pay the original rental, which is*

> *accepted by the lessor, this negatives the idea of the acceptance of the privilege of an additional term.* Under such circumstances, the lessee holding over will occupy the status of a tenant at will." (Emphasis added.)

It would thus appear, that the Court below in the original case erred in two ways, First, in holding as a matter of law, that the tender of rent at the same amount, constituted a renewal because the option agreement in our present lease provides:

> "The lessees shall have the option to extend said lease for an additional five (5) years from August 10, 1962 to August 10, 1967, on the same terms and conditions as the original lease, *except the rental payment thereof.*" (Emphasis added.)

Therefore, the lease in the present case, like the Tennessee case, provided for a new term on the same terms, *except* as to payment, and therefore, a tender of payment in an amount the same as due under the prior lease did not renew the lease for a like amount, but created only a tenancy at will. Second, the Court erred in making a finding in this matter, as a matter of law. As the Tennessee case also points out, this is a factual matter only, and evidence should have been introduced relating to this matter, since there may have been circumstances which would have rebutted the acceptance of payments for a like amount as being acceptance of the renewal of the term for a like term and like amount. The Court should have looked at the circumstances and dealt with the facts specifically in this case, rather than attempting to apply a general rule of law.

In the case of *Alan v. Alan* (1922) 154 Ga. 581, 115 SE 17, the Court held that a landlord, by accepting rent from a holding over tenant for the period for which the landlord has prosecuted a Summary Proceeding to Eject the Tenant does not thereby consent to a continuation of the tenancy. These facts are extremely similar to the case at hand, in that, the Appellants herein were prosecuting an action for ejectment and for ~~recession~~ reversion of the lease at the time the payments in question were accepted, again the Court erred in ruling as a matter of law, that acceptance of the payment renewed the lease for a like term, and for a like sum, because to do so was contrary to the terms of the lease and because the law does not substantiate this ruling. Evidence should have been admitted to show the circumstances and explain the reason for acceptance.

The appellants would call the Court's attention to the case of *Colyear v. Tobriner*, et al. (1936) 62 P. 2d 741, a California Supreme Court Case. In this case, it is clearly established that when a party is leasing premises for a specified amount each month, and the lease contains an option for an increased rental payment for the renewal period, payment of the previously existing rental is not sufficient to establish a renewal for a like amount during the extended term. The intent of the parties must be determined, and therefore, it becomes a factual matter and not one of law, thus necessitating a trial of the case upon its merits rather than a determination being made as a matter of law. See also 32 Am Jur. 827 Landlord and Tenant Section 983, wherein it is stated:

> "A lessor's acceptance of rent at the old rate from a lessee continuing in possession after expiration of the original term does not create a renewal, but merely a tenancy from month to month, where the original lease giving the lessee an option to renew also gave the lessor the right to demand an increased rental, which the lessor had made a condition of renewal, offering at the same time to permit the lessee to continue to occupy from month to month at the old rental."

In further support of the Appellants contention that the Court erred in its determination of this issue as a matter of law, it is and was at that time, Appellants contention that negotiations were being carried on regarding the rate of payment for the next term of the lease, (See Marvin C. Young Deposition, page 25, lines 12-21, and George E. Bridwell Deposition, page 11, lines 8-21, and Alan D. Frandsen Deposition, page 1, lines 10-30 and page 15, lines 1-18) and had the Court acted properly, allowing this matter to be determined factually, rather than ruling as a matter of law, this evidence could have been presented to the Court for its determination, for it is uniformly held that where a tenant remains in possession of realty after the expiration of his term and during a period in which he and the landlord are negotiating for a new lease, and the landlord accepts rents for this period, such acceptance is not a manifestation of the landlord's consent to an extension or renewal of the lease. 45 ALR 2d, 841. In the case of *Southern Railroad Company v. Peple* 228 F. 853, the Court, although acknowledging that continuance in possession by a tenant with the payment of rent is usually regarded

as a renewal of the lease, said that this rule does not apply when the possession is retained and rent paid pending negotiations with respect to the renewal of the lease.

CONCLUSION

It is submitted that this case should be reversed and remanded for trial on its merits. A jury should be allowed to determine whether the Respondent breached his contract in allowing, without the consent of the Appellants, another attorney to handle the case. Appellants believe the results of the original case would have been different on appeal and therefore a jury should also be allowed to determine whether or not the Respondent notified the appellants of their right of appeal. This case should therefore be reversed and remanded for trial and Appellants awarded their costs of appeal.

Respectfully submitted,

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