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IN THE SUPREME COURT
OF THE STATE OF UTAH

SCM LAND COMPANY,

Plaintiff-Respondent-
Cross Appellant,

vs. Case No. 19172

WATKINS & FABER, and WALTER P.
FABER, JR.,

Defendants-Appellants.

RESPONDENT-CROSS APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT
FOR THE THIRD JUDICIAL DISTRICT
FOR SALT LAKE COUNTY

HONORABLE PHILIP R. FISHLER, DISTRICT JUDGE

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FILED

SEP 7 - 1983

Clerk, Supreme Court, Utah

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APPEAL FROM THE DISTRICT COURT
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HONORABLE PHILIP R. FISHLER, DISTRICT JUDGE

STATEMENT OF THE NATURE OF THE CASE

SCM Land sued Watkins & Faber for its breach of a written real property lease agreement. Watkins & Faber claims its breach is excused by an unperformed oral promise made by SCM Land's predecessor-in-interest.

DISPOSITION IN LOWER COURT

The trial court ruled that Watkins & Faber breached its written lease agreement. It also ruled that this breach

would not be excused unless Watkins & Faber established a breached oral contract which was a condition precedent to the written lease agreement. The factual issues relating to this defense and the damage issues were submitted to the jury.

The jury returned a special verdict for SCM Land finding that there was no oral contract. The jury also determined that if there was such an oral contract, it was not a condition precedent to the written lease agreement, it was not breached, and Watkins & Faber did not act within a reasonable time after the alleged breach of the oral contract.

Judgment was entered against Watkins & Faber for $15,000 damages, together with prejudgment interest of $2,309.86 and attorney's fees and costs of $7,034.47.

RELIEF SOUGHT ON APPEAL

SCM Land requests that the judgment based upon the jury verdict be affirmed.

STATEMENT OF THE FACTS

SCM Land controverts Watkins & Faber's Statement of Facts and submits its own statement for the following reasons:

(a) Watkins & Faber has selected evidence in derogation of the jury verdict on liability and damages. As the prevailing party, SCM Land is entitled to have the evidence viewed by this Court in support of the jury verdict.

(b) Material facts have been omitted.

(c) Facts have been mischaracterized.

Watkins & Faber began leasing office space in the Newhouse Building in 1967. (R. 290) On June 30, 1979, Watkins & Faber's written lease agreement for Suite 606 on the 6th floor expired. (R. 290-291) On July 9, 1979, Watkins & Faber executed a renewal lease agreement for Suite 606 with Richard Fischer, the owner of the Newhouse Building at that time. (Exhibit 2-P, R. 290-298)

Fifteen months later in September 1980, SCM Land purchased the Newhouse Building from Mr. Fischer. (R. 187) At that time, Watkins & Faber occupied Suite 606 under their written lease agreement. (R. 238-239) SCM Land was not aware of any claim by Watkins & Faber to space on the 6th floor other than Suite 606. (R. 190, 192, 193)

After SCM Land purchased the Newhouse Building, it entered into a long-term written lease agreement with I.M.L. for the 6th floor excluding Suite 606. (R. 304, 305) Subsequently, Watkins & Faber told SCM Land that Fischer had orally promised them some of I.M.L.'s space on the 6th floor. (R. 305) Since I.M.L. already had that space, SCM Land offered Watkins & Faber the entire 4th floor in place of Suite 606 or the option of keeping Suite 606 and taking additional space on another floor. (R. 307-308) Watkins & Faber

rejected both of these offers and vacated Suite 606 in March 1981, fifteen months before their lease expired. (Exhibit "2-P", R. 307-312).

Fischer's alleged oral promise which Watkins & Faber brought to SCM Land's attention after the space was leased to I.M.L. on a long-term basis, was made shortly before the renewal lease was executed. (R. 297, 298) Fischer promised that "when I.M.L. moved" from the 6th Floor, he would enter into a written lease agreement with Watkins & Faber for additional space on the 6th Floor. (R. 274, 276, 314) I.M.L. never moved. (R. 304, 305) Nor did Fischer ever promise to evict I.M.L. to give Wakins & Faber additional space. (R. 275) Furthermore, Fischer never agreed on what additional space would be leased, the lease term, the price, other than the going rate, or who would pay for necessary remodeling. (R. 275, 276)

When Watkins & Faber executed the renewal lease, no mention was made that the alleged oral promise was a prerequisite to the execution of the written lease agreement. (R. 278) The written lease agreement not only fails to show that Fischer's alleged oral promise was a prerequisite to executing the lease, but is devoid of any reference to the alleged promise. (Exhibit 2-P) The lease agreement was a pre-printed form which had blanks filled in with negotiated

terms. In addition, there were three initialed handwritten changes concerning annual rent increases, the lease term, and real property tax obligations. (Exhibit ("2-P", R. 314-316) In the space provided for additional terms, no mention was made of this "critical" alleged oral promise. (Exhibit "2-P", R. 314-316)

Although Watkins & Faber claims that Fischer promised to "enter into a written lease agreement for additional space on the sixth floor by at least December 1979," December passed without the execution of the written agreement for additional space. (R. 314) Watkins & Faber never made a demand on Fischer to perform. (R. 238) Instead they waited nine months before making a demand and then made it on a purchaser that knew nothing of the alleged oral promise and that had already leased the space to its longstanding occupant. (R. 305)

After Watkins & Faber vacated Suite 606 in March 1981, SCM Land made substantial efforts to relet the space. (R. 200, 207-208) By October 1981, SCM Land had not succeeded in reletting Suite 606. To minimize its rental loss, SCM Land allowed an existing tenant, Norwest Resource Consultants, out of its lease for Suite 305 so that it could occupy a portion of Suite 606 at a higher rental. (R. 208-211) This

decreased the net rental loss by $495 per month and left Suite 305 and a part of Suite 606 vacant. (R. 211)

SCM Land continued its efforts to lease this space, still without success. (R. 211) In March 1982, Norwest leased all but one room of Suite 606, further reducing SCM Land's net rental loss by $371 per month. (R. 212) In April 1982, Vesta Corporation leased the last room of Suite 606 again reducing the rental, this time by $190 per month. (R. 218) When Watkins & Faber's lease term ended in June 1982, only Suite 305 was vacant. (R. 208-218) Through its efforts and by moving Norwest from Suite 305 to a portion of Suite 606, SCM Land was able to cut its rental loss from $21,546 to $15,037, a $6,509 savings. (Exhibit 7-P)

In addition to this $15,037 rental loss, SCM Land spent $400 to partition Suite 606 for its new tenants. (R. 219)

ARGUMENT

POINT I

WATKINS & FABER'S EVIDENCE OF AN ALLEGED ORAL PROMISE TO MAKE A WRITTEN LEASE FOR ADDITIONAL SPACE SHOULD NOT HAVE BEEN ADMITTED. INSTEAD THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT ON LIABILITY FOR SCM LAND.

Construing the evidence in derogation of the jury verdict, Watkins & Faber argues that Fischer orally "agreed that he would enter into a written lease for additional space on

the Sixth Floor by at least December, 1979." (R. 314) Although it was never discussed, Watkins & Faber presumed that the term of this written lease for additional space would be at least two and one-half years. (R. 314; Exhibit 2-P, ¶ 1C). Simply put, Watkins & Faber claims an oral promise to make a written lease for at least a two and one-half year period. Whether characterized as consideration or a condition precedent, the alleged oral promise is the same and must be cognizable at law for Watkins & Faber to pursue a defense of either failure of consideration or the non-performance of a condition precedent.

A. Fischer's Alleged Oral Promise to Make a Written Lease Is Void Under the Statute of Frauds.

The Statute of Frauds governing realty leases states:

> Every contract for the leasing [of any land] for a period longer than one year, . . . shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party to whom the lease . . . is to be made . . . .

Utah Code Ann., § 25-5-3. In Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 103 Utah 249, 134 P.2d 1094, 1096 (1953), this court ruled:

> [An] oral agreement to make a written lease is governed by the Statute of Frauds the same as if an oral lease was made. An oral agreement to make a contract which must itself be in writing is itself within the Statute of Frauds.

Thus the court there held that an oral contract to renew a lease for a five year term was void.

The jury has already found that there was no agreement. Thus, the most Watkins & Faber can argue is that Fischer made an oral promise to make a written lease for additional space. This written lease was to be for a period longer than one year. Under Utah Mercur Gold this alleged oral promise must satisfy the Statute of Frauds or it is void. Since there was no writing evidencing this alleged oral promise, it is void. Being void, evidence of the alleged oral promise was inadmissible. Having admitted it, the trial court committed error. Instead of submitting Watkins & Faber's defense to the jury, the trial court should have granted SCM Land's motion for partial summary judgment and motion for a directed verdict on liability. Since the jury reached the proper result by rejecting Watkins & Faber's defense, the error was harmless and the judgment should be affirmed.

Watkins & Faber's reliance on FMA Financial Corporation v. Hanson Dairy, Inc., 617 P.2d 327 (Utah 1980) and Nielson v. MFT Leasing, 656 P.2d 454 (Utah 1982), for the admissibility of the alleged oral promise is misplaced. Both are parol evidence cases. Even assuming the alleged oral promise is admissible as parol evidence, it still violates the Statute of Frauds. The test is not either the parol evidence rule or

the Statute of Frauds, but both. Having failed to satisfy the Statute of Frauds, Watkins & Faber's argument fails.

B. Fischer's Alleged Oral Promise Was Not Recorded and Is Therefore Unenforceable Against SCM Land, a Bona Fide Purchaser.

As defined in Utah Code Ann., § 57-1-1, a conveyance of an interest in realty includes a lease for a period longer than one year. Pursuant to Utah Code Ann., § 57-3-3, such a lease is unenforceable against a subsequent good faith purchaser for valuable consideration unless the lease is recorded. Fischer's alleged oral promise was to make a lease for a period longer than one year. Consequently, it must have been recorded to be enforceable against a subsequent purchaser in good faith and for valuable consideration. Since there was no writing, Watkins & Faber did not record their alleged interest. Thus, if SCM Land was a subsequent good faith purchaser for valuable consideration, the alleged oral promise is unenforceable against it.

SCM Land purchased the Newhouse Building for $3,200,000 subsequent to the alleged oral promise. (R. 187) Thus SCM Land was a subsequent purchaser for valuable consideration. When SCM Land purchased the Newhouse Building, Watkins & Faber only occupied Suite 606 as provided in the July 1979 written lease agreement. Neither the written lease agreement, Suite 606 or Watkins & Faber's possession of Suite 606

gave SCM Land inquiry notice of an alleged oral promise to enter into a written lease agreement for space then occupied by another tenant. Thus, SCM Land purchased in good faith.

Being a subsequent good faith purchaser for valuable consideration, the unrecorded alleged interest of Watkins & Faber is not enforceable against SCM Land. Being unenforceable, evidence of the alleged oral promise was inadmissible. Having admitted it, the trial court committed error. Instead of submitting Watkins & Faber's defense to the jury, the trial court should have granted SCM Land's motion for partial summary judgment and motion for directed verdict on liability. Since the jury reached the proper result by rejecting Watkins & Faber's defense, the error was harmless and the judgment should be affirmed.

During the trial, Watkins & Faber argued that SCM Land had a duty to inquire of Watkins & Faber whether they claimed an unrecorded interest in space occupied by another tenant. The trial court properly rejected this argument. (R. 331) As explained by this court in Tolend v. Corey, 6 Utah 392, 24 P. 190 (1890), a purchaser is only on inquiry notice of those facts about which a prudent man might inquire based upon what he knows. The facts known by SCM Land would not make a prudent man inquire whether Watkins & Faber had an oral promise to lease space then occupied by another tenant. Having

failed to satisfy the recording statute, Watkins & Faber's argument fails.

POINT II

THE TRIAL COURT PROPERLY REJECTED THE FAILURE OF CONSIDERATION DEFENSE SINCE A PROMISE TO AGREE IN THE FUTURE IS NUGATORY AND THEREFORE CANNOT BE CONSIDERATION FOR AN OTHERWISE ENFORCEABLE CONTRACT.

Watkins & Faber does not argue that the written lease agreement for Suite 606 is not binding on them. Rather they contend that under the parol evidence rule Fischer's promise to make a future agreement was an unwritten term of the written lease agreement, that this term represented part of the consideration for the written lease, and that this consideration failed. The trial court ruled that unless this oral term to agree in the future was an enforceable contract, the oral term was nugatory. Being nugatory, it cannot be consideration and therefore cannot fail.

The correctness of the trial court's ruling is elementary contract law.

> [U]nless an agreement to make a future contract is definite and certain upon all the subjects to be embraced, it is nugatory. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. . . . If any essential term is left open for future consideration, there is no binding contract, and an agreement to reach an agreement imposes no obligation on the parties thereto.

17 Am.Jur.2d Contracts § 26. This principle is so elementary that this court saw no need to "multiply authority" on the proposition and simply stated:

> Where the parties have left an essential part of the agreement for future determination, it is no doubt correct to say that the contract is not complete.

Hi-Way Motor Co. v. Service Motor Co., 68 Utah 65, 249 P.133, 135 (1926).

Consistent with this law, the trial court submitted a special interrogatory to the jury on whether there was an oral contract to enter into a written lease agreement. The jury was properly instructed on mutual assent and essential terms. (Jury Instruction No. 17) After considering Watkins & Faber's evidence, against which SCM Land offered no evidence, the jury concluded there was no oral contract. Thus the oral promise to make a future agreement was nugatory and not consideration.

Watkins & Faber suggests that FMA Financial Corporation and Nielsen mandate an opposite result. As already discussed, these are parol evidence cases. They do not address the issue of promises to agree in the future as consideration.

Watkins & Faber also argues that even if not specifically enforceable, the promise to agree in the future can still be the basis for rescission. This argument must fail. Hair-splitting between enforceability and excuse is a distinction

without a difference. Both depend upon an oral promise to agree in the future. In either event the promise to agree must be cognizable at law to enforce the contract or excuse performance. When the jury determined it was not, the matter was set to rest.

Even assuming the admissibility of the evidence supporting an oral promise to agree in the future, the promise was nugatory and not consideration.

POINT III

SINCE WATKINS & FABER RECEIVED WHAT THEY BARGAINED FOR IN THE WRITTEN LEASE AGREEMENT, THERE WAS NO FAILURE OF CONSIDERATION.

Assuming that an oral promise to make a future agreement can be consideration and that the parol evidence rule allows it to be a part of the written lease agreement for Suite 606, there was no failure of consideration. To have a failure of consideration, Watkins & Faber must have failed to receive what they bargained for. But what did they bargain for? First, they bargained for and received Suite 606. Second, they bargained for Fischer's promise, not for his performance of the promise. This they received as well.

As explained at trial:

> Mr. Fischer asked me if I was ready to sign the lease, and I said, "No, not unless we have a promise of the space next door." And he said that was no

problem, that he would promise the space next door. (R. 296) [Emphasis added]

Simply put, Faber said that if Fischer would give him a promise to make a future agreement, he would execute the written lease. Like many situations, the performance required was to give a promise. When the promise was given, Fischer's performance was executed. Watkins & Faber even argued at trial and in its Appellant's Brief that the "oral promise for additional space" should have been treated "as consideration paid." (Appellant's Brief, p. 9, emphasis added) With the "consideration paid", Watkins & Faber performed their obligation by signing the written lease. Only the written terms of the lease agreement remained executory. Since those terms were fulfilled by the Landlord, there was no failure of consideration.

POINT IV

SINCE FISCHER'S ORAL PROMISE WAS NOT BROKEN, THERE WAS NO FAILURE OF CONSIDERATION.

Assuming that the bargain not only required Fischer to give a promise, but also to perform the promise, only the failure to perform that promise gives rise to a failure of consideration defense. To this point, the argument has been premised on Watkins & Faber's characterization that the promise was to enter into a written lease for additional space

on the Sixth Floor by at least December, 1979. Since this written lease was never executed, Watkins & Faber argues failure of consideration. However, this view construes the evidence in derogation of the jury verdict. As the prevailing party, SCM Land is entitled to have the evidence viewed in support of the verdict. When viewed in this light, the promise was not as characterized by Watkins & Faber.

Watkins & Faber called as their first witness at trial Kenneth P. Swinton, Fischer's building manager. Swinton testified that Fischer promised that "when I.M.L. moved he would let Watkins & Faber have that [additional] space." (R. 274) He also testified that there was no promise to evict I.M.L. so that Watkins & Faber could have the additional space. (R. 275) Although Watkins & Faber claims that the written lease for this additional space was to have been executed by December 1979, December came and went without the written lease or a demand from Watkins & Faber. (R. 238) Watkins & Faber made no demand because I.M.L. had not moved. These facts, together with Watkins & Faber's failure to put this "critical" promise in the written lease for Suite 606 support the conclusion that Fischer's promise was to provide additional space when I.M.L. moved. Since I.M.L. did not move, the promise was not broken. Thus the jury's determina-

tion that if there was an oral contract, it was not breached, precludes a failure of consideration defense.

POINT V

SINCE WATKINS & FABER FAILED TO ACT WITHIN A REASONABLE TIME AFTER THE ALLEGED BREACH OF THE ORAL PROMISE, THERE WAS NO FAILURE OF CONSIDERATION.

Again assuming that the bargain required Fischer's performance of the promise and assuming that the promise was as characterized by Watkins & Faber, Watkins & Faber must show that they acted within a reasonable time after the alleged breach in order to have their performance excused.

When December 1979 passed without a written lease for the additional space, Watkins & Faber failed to make any demand on Fischer for performance. (R. 238) To the contrary, Watkins & Faber never demanded of Fischer that he perform. (R. 238) Instead, Watkins & Faber waited nine months before making a demand and then made it on a subsequent purchaser that knew nothing of the oral promise and that had already leased the space to its longstanding occupant. Thus the jury's determination that if there was an oral contract, Watkins & Faber did not act within a reasonable time to rescind the written lease precludes a failure of consideration defense.

POINT VI

THE EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT SCM LAND MITIGATED ITS DAMAGES BY MOVING NORWEST FROM SUITE 305 TO SUITE 606.

For seven months after Watkins & Faber vacated Suite 606, SCM Land tried unsuccessfully to relet their space. By October 1981 this accounted for a $1,458 monthly rental loss. To minimize this loss, SCM Land allowed an existing tenant out of its lease agreement for Suite 305 so that it could move to a portion of Suite 606. As a result of this move, SCM Land lost $717 monthly rentals for Suite 305 but gained $1,212 in rentals for that portion of Suite 606. This reduced SCM loss by $495 monthly. Five months later Norwest leased another portion of Suite 606 for $371 monthly, all of which reduced SCM Land's rental loss from Watkins & Faber's breach of the Lease Agreement. Had SCM Land not allowed Norwest to move, it would have suffered an additional rental loss of $5,939, all of which would have been damages. (Exhibit 7-P, R. 200-218)

At trial Watkins & Faber argued that SCM Land should not have allowed Norwest to move from Suite 305 to Suite 606. Since the move saved $5,939, the argument is difficult to understand. However, it is not difficult to understand what Watkins & Faber would have argued had SCM Land passed up the

opportunity to save nearly $6,000. In any event, the trial court allowed a special verdict on the issue:

> Under all the circumstances was it reasonable for plaintiff to allow Norwest Resource Consultants, Incorporated to vacate Suite 305 and move to Suite 606 and then charge the rent loss from Suite 305 as damages against defendants?

The jury answered "yes." (R. 336) Since the evidence supports this verdict, it should be upheld.

Watkins & Faber argues that since Norwest's lease for Suite 305 would have expired in April 1982, the rental loss from Suite 305 for May and June 1982 should not be allowed. This argument has already been made to the jury and rejected. It should be rejected again.

POINT VII

THE TRIAL COURT'S AWARD OF PREJUDGMENT INTEREST AT THE EXISTING LEGAL RATES WAS PROPER.

SCM Land submitted a proposed judgment with prejudgment interest at ten percent per annum, the rate in effect after May 13, 1981. Watkins & Faber argued that the rate should be six percent as existed before May 14, 1981. The trial court ruled that the prejudgment rate would be six percent through May 13, 1981 and ten percent thereafter. The trial court made the change which diminished prejudgment interest by $9. Although the bulk of SCM Land's damages arose after May 13,

1981, and the liability was affixed in 1983, Watkins & Faber argues that since the written lease was signed prior to May 13, 1981, the prejudgment rate is six percent.

This argument is premised on an unfounded assumption that Utah Code Ann. § 15-1-1 prohibits using a prejudgment interest rate not in effect when the agreement was entered. Rather the statute, with its predecessor, simply reads that prejudgment interest is six percent until May 14, 1981 and ten percent thereafter. This has nothing to do with when the agreement was signed especially since the agreement does not even cover prejudgment interest. As this court ruled in Lignell v. Berg, 593 P.2d 800, 809 (Utah 1979), the operative fact is when the amount became due. From then on SCM Land "is entitled to interest at the legal rate until payment is made." Scott v. Scott, 430 P.2d 580, 583 (Utah 1967).

CONCLUSION

In essence, this case presents a group of lawyers, who failed to protect their interests, trying to shift their losses to a good faith purchaser rather than to the person who allegedly caused them. As attorneys they could have easily put the alleged agreement in writing so that a good faith purchaser could have had notice of it. But they did not. As attorneys they could have then recorded the writing

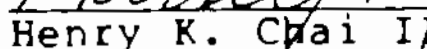
to give constructive notice to a good faith purchaser. But they did not. As a matter of long-established public policy reflected in the Statute of Frauds and the Bona Fide Purchaser Rule, they should have prevented the conflict. Having failed to do so, they should bear the loss, not a good faith purchaser. The law requires this and the jury has agreed.

Even so, there was no breach of the alleged promise to agree in the future. As lawyers should know, a promise to agree in the future cannot be consideration. Even if it could be, all that was asked prior to the execution of the written lease for Suite 606 was that a promise to agree be given--and it was. Furthermore, the promise was not breached since I.M.L. never moved. And even granting Watkins & Faber all of this, as the jury concluded, they did not act within a reasonable time after the alleged breach.

In all respects the jury verdict and judgment should be affirmed.

DATED this 7th day of September, 1983.

SNOW, CHRISTENSEN & MARTINEAU

By 
Henry K. Chai II

CERTIFICATE OF SERVICE

I certify that I served two copies of this Brief on Brian W. Burnett, Watkins & Faber, 2102 East 3300 South, Salt Lake City, Utah 84109, Attorneys for Defendants-Appellants, by causing the same to be hand-delivered this 7th day of September, 1983.

Henry K. Chai II