1983

SCM Land Company v. Watkins & Faber and Walter P. Faber, Jr. : Appellant's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

SCM LAND COMPANY,

Plaintiff-Respondent,

vs.

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

Defendant-Appellant.

Case No. 19172

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY,
THE HONORABLE PHILIP R. FISHLER, JUDGE

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Defendant-Appellant.	

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE KIND OF CASE

This case involves the legal effect of an oral promise for additional office space given by a lessor in July, 1959 to induce a long-time tenant (Appellant) to sign a three year written renewal lease for Appellant's regular office space in the Newhouse Building. The regular office space had been continuously leased by Appellant for many years prior thereto. After the written renewal lease for the regular office space was signed by Appellant, the [illegible] sold the building and assigned the written lease to [illegible]. Respondent then immediately leased under a [illegible] written lease the promised additional space to IML

thereby making it impossible [illegible] the original lessor's promise to Appellant. After learning of SCM's purchase of the building and the lease to IML, Appellant notified SCM of the promise. SCM refused to fulfill the promise and therefore Appellant terminated the written renewal lease and moved from the building as of April 1, 1981. Respondent SCM then commenced this action against Appellant for rent for the remainder of the term of the written renewal lease.

DISPOSITION IN LOWER COURT

The lower court required the jury to find specific elements of an oral contract or it could not return a verdict for Appellant. Because of the instructions, the jury could not find those specific elements of an oral contract and returned a verdict for Respondent. The lower court entered its judgment against Appellant requiring Appellant to pay the rent for the remainder of the lease term together with interest and attorney fees.

RELIEF SOUGHT ON APPEAL

Appellant requests this Court to reverse the lower court and hold that the lessor's original promise was the consideration for the [illegible] written renewal

... and that Appellant was entitled to rescind ... failure of the promise.

STATEMENT OF FACTS

The facts pertinent to the issues of this case are undisputed. For convenience they have been divided into numbered paragraphs.

1. In June, 1979, Appellant Watkins & Faber had been a tenant of the Newhouse Building with office space on the sixth floor for twelve years under a succession of written leases. (R-290; see Exhibit 2-P).

2. In June, 1979, the owner of the Newhouse Building was Mr. Richard W. Fischer. (R-263, 290). Mr. Kenneth P. Swinton was Mr. Fischer's resident building manager and agent for negotiating leases. (R-263, 264, 290).

3. The Watkins & Faber lease then in effect was due to terminate on June 30, 1979 (R-265, 290), and Mr. Swinton contacted Mr. Walter P. Faber, Jr. several times ... later part of June, 1979 in regard to signing ... (R-265, 291).

4. Mr. Faber told Mr. Swinton that Watkins & ... additional adjacent space on the sixth floor ... a renewal lease unless the additional

space was promised. (R-266, 268, 296, also see R-232-33).

5. At that time, IML was a month-to-month tenant of the adjacent space on the sixth floor and was planning to move from the adjacent space to the eleventh floor in the building. (R-267, 270, 292).

6. Mr. Swinton told Mr. Faber that he didn't think there would be any problem in getting the adjacent space but that Mr. Fischer, the owner of the building, was out of town and would have to make the promise when he returned. (R-268, 294, also see R-232).

7. Mr. Swinton then talked to Mr. Fischer about Watkins & Faber's request, and Mr. Fischer's reaction was favorable. (R-269-70).

8. A week or so prior to the end of June, 1979, Mr. Swinton delivered the proposed renewal lease for Watkins & Faber's regular office space to Watkins & Faber's office. (R-293, 265-66).

9. The lease remained in the office of Watkins & Faber and was not signed by Watkins & Faber until July 9, 1979 when Mr. Fischer returned and discussed with Mr. Faber Watkins & Faber's position that the firm would not renew the lease unless the additional space was promised. (R-297-98). Mr. Fischer and Mr. Swinton came to Mr. Faber's

[illegible] that date and after discussing the situation Mr. Fischer said he was informed that IML was planning to move within two or three months and would be moved from the sixth floor by the end of December, 1979. (R-295-98). Mr. Fischer then stated that if Watkins & Faber would sign the renewal lease for the regular office space, the adjacent space would be made available to Watkins & Faber not later than December 31, 1979. (R-298).

10. Also at the time of the promise, Mr. Fischer, Mr. Swinton and Mr. Faber went into the adjacent space occupied by IML, discussed Watkins & Faber's need for several additional offices, the locations of the dividing partitions for the additional space, and agreed that the additional space would be rented at the "going rate". (R-272-73, 296, also see R-233-36). Mr. Faber then signed the written renewal lease. (R-298). Both Mr. Swinton and Mr. Faber testified to the above facts. Mr. Fischer was not present at trial and did not testify.

11. The written renewal lease does not contain [illegible] provision. (Exhibit 2-P).

12. In October, 1979, Mr. Faber was seriously [illegible] was hospitalized until sometime in January,

1980. (R-300). He was [illegible] chair and did not [illegible] 1980. (R-301).

13. In 1980, Watkins & Faber periodically checked the progress of IML's remodelling of the eleventh floor. (R-284-86, 300, 302).

14. IML continued its work on the remodelling of the eleventh floor but had not completed the same and therefore had not moved by September, 1980 when Mr. Fischer sold the building to SCM. (R-303).

15. When SCM purchased the building, SCM gave IML a written long-term lease for the adjacent space on the sixth floor, and SCM took over the eleventh floor that IML had been remodelling. (R-305-06). The purchase by SCM and long-term lease to IML were done without notice to or the knowledge of Watkins & Faber. (R-192-93, 303-04).

16. In September, 1980 when Watkins & Faber learned of the sale of the building to SCM and of the long-term lease for the adjacent space on the sixth floor between SCM and IML, Watkins & Faber contacted SCM and informed SCM [illegible] (R-303-06).

17. [illegible] SCM sale

[illegible] Faber could not have the adjacent space on [illegible] but that SCM would lease to Watkins & Faber [illegible] additional office space on another floor. SCM [illegible] that if Watkins & Faber still wanted to have all [illegible] offices on one floor then SCM would lease the entire fourth floor to Watkins & Faber, and then Watkins & Faber would be responsible for the excess space which SCM suggested Watkins & Faber might be able to sublease to others. (R-307-08).

18. Watkins & Faber notified SCM that such proposals were not acceptable because Watkins & Faber's prior experience with the separation of offices had been unsatisfactory and because of Mr. Faber's physical condition. (R-307). Watkins & Faber moved from the building on April 1, 1981. (R-308-10).

19. In the fall of 1981, SCM commenced an action against Watkins & Faber for unpaid rent from and after April 1, 1981 when Watkins & Faber moved from the building.

20. The trial court refused to allow the jury to consider whether the oral promise was consideration for the execution of the written lease of July 9, 1979. The lower court stated to counsel at R-329-30:

> . . . And as I pointed out in chambers, the record ought to reflect that throughout the litigation and through a good portion of this trial the defendants have referred to their defense

as a failure [illegible] not view this [illegible] case, but, [illegible] ance of which was a [illegible]

21. The trial court [illegible] to find certain definite elements of a [illegible] for the additional space or it could not return a verdict for Watkins & Faber. Instructions 16 (R-140) and 17 (R-141) state as follows:

INSTRUCTION NO. 16.

You must return a verdict for the plaintiff unless the defendants establish by a preponderance of the evidence the truth of all of the following propositions:

1. Richard Fisher and Watkins & Faber entered into an oral contract to enter into a written lease for additional space on the sixth floor in the Newhouse Build

2. If there was such an oral contract, the oral contract was intended by the parties to the contract to be a condition precedent to the written lease agreement for Suite 606 becoming effective.

3. If there was such an oral contract, it was breached.

4. If there was such an oral contract and it was breached, the defendants acted within a reasonable time after it was breached to rescind the written lease.

INSTRUCTION NO. 17.

For there to be an oral contract, the parties must express their mutual assent and understanding to the terms of the contract. This means that the parties must have had [illegible] as to the terms so that they knew what they were

... and to do. These terms include the additional space to be leased, the price for the additional space, the term for the additional space, and the remodeling costs for the additional space.

22. The parties stipulated and the court ruled that exceptions could be taken after the jury retired to deliberate. (R-326).

23. Appellant objected to the lower court's refusal to use Appellant's requested Special Interrogatories 5, 6 and 9 generally for the reason that Appellant only needed to prove that there was a promise to provide the additional space and not that there was an enforceable contract. (R-331). Appellant's exceptions to Instructions 16 and 17 go to the issues whether the promise was consideration and whether the lower court in substance improperly directed the verdict.

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN REFUSING TO CONSIDER THE LESSOR'S ORAL PROMISE FOR ADDITIONAL SPACE AS CONSIDERATION PAID TO INDUCE APPELLANT TO SIGN THE WRITTEN RENEWAL LEASE FOR APPELLANT'S REGULAR OFFICE SPACE.

The written renewal lease would not have been ... for the lessor's oral promise. Without

notice to or the knowledge of Appellant, Respondent made it impossible to keep the promise by entering into a long-term lease of the adjacent space to IML.

The lower court concluded that the lessor's oral promise was not consideration for the written lease and that the promise itself was of no independent legal benefit to Appellant unless it was determined to be an enforceable oral contract containing certain specific elements; if those elements were established, then the resulting oral contract was a condition precedent. In Jury Instruction 18 (R-142), the lower court stated:

> For an oral contract, if any, to be a condition precedent to a written lease agreement, the oral contract must have been intended by the parties to be fully performed before the written lease agreement was to become effective and binding.

In this case, however, the performance of the written lease was begun solely because of the promise and was begun months prior to any anticipated performance of the promise. Thus, the promise itself had independent legal significance and was the condition under which Appellant signed the lease.

Even though several legal doctrines might be applicable in some degree to the oral promise in this case, it seems clear that the promise itself was a condition and

[illegible] qualify as consideration under Utah law and provable [illegible] evidence. Several recent Utah cases appear to be [illegible]. In FMA Financial Corporation v. Hansen [illegible], Inc., et al., 617 P.2d 327 (Utah 1980), FMA sued Hansen for an alleged breach of a written lease of a silo and farm equipment. Hansen asserted the defense that the silo was not installed by harvest time as orally agreed. In FMA the lower court determined there was a complete failure of consideration because of failure to keep the oral agreement. As a result, the lessee, Hansen, did not have to continue the written lease. FMA appealed on the ground that the written lease agreement was integrated and did not provide when the construction of the silo was to be completed. FMA urged that the parol evidence rule prevented Hansen from proving that the silo was to be installed by harvest time. FMA also argued that Hansen knew that the silo had not been timely installed but thereafter acknowledged in writing that the silo was complete. In response to FMA's assertion of the parol evidence rule and FMA's objection to the oral agreement, this court stated as follows:

> The standard parol evidence rule is that extraneous evidence may not be used to

> contradict or [illegible] instrument. That rule has a useful purpose in appropriate circumstances in safeguarding the integrity of such documents. However, it should not be applied with any such unreasonable rigidity as to defeat what may be shown to be the actual purpose and intent of the parties, but should be applied in the light of reason to serve the ends of justice. It does not preclude proof of agreements as to collateral matters relating to the contract or its performance, so long as they are not inconsistent with nor in repudiation of the terms of the written agreement. Nor does it prevent proof that a party did not perform an obligation which it was understood and agreed by the parties was a condition precedent to the contract becoming effective. That applies to the circumstances here, where the court found that the parties had an understanding and agreement that in order for the silo to be useful to the defendants it was to be installed by harvest time, and that this was an essential to the contract becoming effective. 617 P.2d 329.

This court also found no basis to upset the lower court's holding that:

> . . . there had been a failure to furnish the agreed consideration by the plaintiff [FMA] and that therefore, the defendants [Hansen] were not bound to continue making payments on the contract. 617 P.2d 330.

In Nielsen, et al. v. MFT Leasing, et al., 656 P.2d 454 (Utah 1982), Nielsen sued MFT to rescind a written equipment lease for failure of consideration. MFT counterclaimed for rental arrearages. The lower court granted a rescission on the [illegible] complete failure

[illegible] because MFT did not provide the exact equipment described in the lease. MFT had apparently purchased the equipment from Pursinger and leased the equipment to Nielsen. The equipment was delivered by Pursinger and Nielsen acknowledged delivery. MFT argued that Nielsen should not have been allowed to adduce parol evidence of failure of consideration because it contradicted the terms of the written lease. This court stated that:

> Evidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable. 656 P.2d 456.

Consideration may be found in many forms and under a wide variety of circumstances. In Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980), this court stated:

> No completely satisfactory and comprehensive definition of "consideration" has ever been devised. It is generally agreed, however, that where a promise is supported by the incurrence, on the part of the promisee, of a legal detriment in order to confer a benefit on the promisor, such is sufficient to serve as consideration, the two rendering the promise legally enforceable. 610 P.2d 1369, 1372.

Certainly, anything of value may be deemed consideration. For something to be consideration, it need not have the elements of an oral contract.

In another case, General Insurance Company of America v. Carnicero Dynasty Corporation, 545 P.2d 502, 504 (Utah 1976), this court stated:

> There is a distinction between lack of consideration and failure of consideration. Where consideration is lacking, there can be no contract. Where consideration fails, there was a contract when the agreement was made, but because of some supervening cause, the promised performance fails. 545 P.2d 502, 504.

Under the facts of this case, the promise itself must be considered as having legal significance and identity apart from its later performance, if any. It is submitted that the Lessor's oral promise given in July, 1979 was the condition and consideration for the signing of the written renewal lease. Without the promise, there would have been no written lease. It would be clearly unfair to compel performance of the lease and yet deny the promise which brought the lease into being.

POINT II.

THE LOWER COURT ERRED IN INSTRUCTING THE [illegible] WHICH IS NOW AN ENFORCEABLE

ORAL CONTRACT, IT COULD NOT RETURN A VERDICT FOR APPELLANT.

The lower court erroneously refused to even allow the concept of consideration and did not even use the word "promise" or the word "consideration" in its instructions.

In Instruction 16 (R-140), the lower court stated that the jury could not return a verdict for Appellant unless the jury found the following four propositions to be true: (1) that there was an oral contract for the additional space; (2) that the oral contract was a condition precedent to the written lease; (3) that the oral contract was breached; and (4) that Appellant acted to rescind the lease within a reasonable time.

Instruction 17 (R-141) provides that there could not be an oral contract unless four specific elements were established; i.e., the additional space to be leased, the price, the term, and the remodeling costs.

The lower court then stated in Instruction 18 (R-142), that the oral contract, if any, could not be a condition precedent unless it was intended "to be fully [illegible] before the written lease agreement was to become [illegible] and binding."

It is submitted that under the above instructions the jury could not return a verdict for Appellant regardless that the written renewal lease would never have existed if the promise had not been made. The lessor's agent confirmed that the promise was made to induce the signing of the written lease. Instead, the lower court required a specific oral contract as a condition precedent. The lower court's instructions thus nullified the promise and essentially directed the jury to return a verdict for SCM. Such a result is contrary to the legal principles set forth in the FMA and Nielsen cases cited above.

POINT III.

THE LOWER COURT ERRED IN NOT ALLOWING APPELLANT THE ALTERNATIVE REMEDY TO TERMINATE THE WRITTEN LEASE FOR FAILURE OF CONSIDERATION EVEN IF THE COURT DETERMINED THAT APPELLANT COULD NOT SPECIFICALLY ENFORCE THE ORAL PROMISE.

Through its Instructions 16 and 17 (R-140, 141) and Special Interrogatories (R-153-54) the lower court determined that unless there was an enforceable oral contract, Appellant could not prevail. After the jury determined there was no oral contract, Special Interrogatories B, C and D were irrelevant. The lower court rejected the argument

that the promise itself was consideration and therefore refused to allow Appellant the alternative remedy of rescinding the lease upon repudiation of the promise.

Even assuming that the promise might not have been specifically enforceable by Appellant for any reason such as the Statute of Frauds or absence of specific contract provisions, rescission is available if the promise was consideration for Appellant's signing of the lease. This court has discussed the definition and impact of failure or lack of consideration in the FMA, Nielsen, Sugarhouse Finance, and the General Insurance cases cited above, and is in accord with the decisions in other jurisdictions. In 17 C.J.S. Contracts §129, pages 849-50, there is a general discussion of lack or failure of consideration as follows:

> It is laid down in a number of cases that when the consideration for a promise wholly fails the promise is without consideration and unenforceable; but this must mean that in a contract with an executory consideration, the execution of the consideration is a condition precedent to the liability on the promise, and the failure to execute the consideration discharges the promisor. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action. . . .

Section 399 of the Restatement of the Law of Contracts sets forth the principle that a total failure to receive the agreed exchange for the performance of a promisor's contractual duty discharges that duty.

In the instant case, the promise for the additional space was clearly the consideration for the signing of the lease. Where the consideration was repudiated, the appropriate remedy was rescission.

POINT IV.

THE LOWER COURT ERRED IN ALLOWING THE JURY TO CONSIDER ON THE ISSUE OF MITIGATION OF DAMAGES LOST RENT ON ANOTHER FLOOR WHEN THERE WAS NO LEASE IN FORCE AND CHARGE THE SAME TO APPELLANT.

The Norwest lease for the third floor was to terminate on April 30, 1982 (Exhibit 3-P). Even assuming that SCM acted reasonably in allowing Norwest to vacate the area on the third floor and move to the area on the sixth floor, SCM would not be entitled to charge Appellant rent on the third floor for the months of May and June, 1982 because Norwest was not obligated to pay rent for those months. In Exhibit 7-P, SCM claims credit for Norwest rent for the months of May and June, 1982. Appellant objected to the admission of Exhibit 7-P in regard to the

August rent. (R-215). Under no circumstances is SCM entitled to credit for the $1,434.00 rent plus interest therein awarded for those months.

POINT V.

THE LOWER COURT ERRED IN ALLOWING STATUTORY INTEREST AT A RATE OF TEN PERCENT (10%) ON A LEASE MADE PRIOR TO MAY 14, 1981.

Section 15-1-1, U.C.A. 1953 (1981 Supp.) provides as follows:

> 15-1-1. LEGAL RATE. The legal rate of interest for the loan or forbearance of any money, goods, or things in action shall be 10% per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, 1981.

Any obligation by Appellant to pay rent originates in the 1979 lease. The above amended statute prohibits charging of interest above the prior statutory rate of six percent on contracts or obligations made before May 14, 1981. The lower court allowed interest of ten percent on rent due after May 14, 1981 as verified by letter of March 21, 1983 from SCM's counsel which letter is included in the record by stipulation between counsel. The letter was apparently inadvertently not included in the record compiled by the

District Court Clerk but is now located immediately following page 177 of the Record.

CONCLUSION

It is undisputed that Appellant would not have entered into the written lease without the promise of additional space. The promise was clearly the bargained for consideration given by the original lessor which induced Appellant to incur the obligation of renewing the written lease. It would be fundamentally unfair and contrary to law to allow SCM to compel performance and receive benefits under the written lease and ignore the failure of the promise which brought the lease into being. In this situation, the appropriate, fair and legal remedy is rescission of the lease.

Respectfully submitted this 30th day of June, 1983.

WATKINS & FABER

By _____
Brian W. Burnett
Attorney for Defendant-Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I hand delivered two (2) copies of the foregoing Brief of Appellant to HENRY K. CHAI II, Snow, Christensen & Martineau, Attorneys for Plaintiff-Respondent, 11th Floor, Newhouse Building, 10 Exchange Place, Salt Lake City, Utah, this 30th day of June, 1983.

Brian W. Burnett