1968

Doris White Bagley v. Socony Mobile Oil Company, · Inc., A New York Corporation : Brief of Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS WHITE BAGLEY,
Plaintiff-Respondent,

— vs. —

SOCONY MOBILE OIL COMPANY, INC., a New York corporation,
Defendant-Appellant.

Case No.

Brief of Defendant and A

Appeal From the Judgment of the Third
Court for Salt Lake C
HONORABLE STEWART M. HA

GEORGE E. B
351 South Sta
Salt Lake City,
Attorney fo
Appellant

LOWELL V. SUMMERHAYS
Boston Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-Respondent

F

C

CONTENTS

Cases Cited

CONTENTS — (Continued)

Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS WHITE BAGLEY,
Plaintiff-Respondent,
— vs. —
SOCONY MOBILE OIL COMPANY, INC., a New York corporation,
Defendant-Appellant.

Case No. 11444

Brief of Defendant and Appellant

STATEMENT OF NATURE OF CASE

This is an action based upon an alleged breach of a service station lease held by Defendant covering certain real property owned by Plaintiff.

DISPOSITION OF LOWER COURT

Summary Judgment was granted the Defendant dismissing with prejudice certain of the Plaintiff's claims for relief and concluding the lease was valid and in full force and effect. Defendant's Motion for Summary Judgment was denied as to Plaintiff's remaining claims for relief and the motion of Plaintiff for Summary Judgment as to the remaining claims was granted declaring Defendant breached the said lease. Defendant was en-

joined from use and possession of the subject property and a determination of damages was reserved for trial. After trial on damages, judgment was entered in favor of Plaintiff in the amount of $7,535.60.

RELIEF SOUGHT

Defendant seeks reversal of the judgment denying Defendant's Motion for Summary Judgment, reversal of the Summary Judgment and the Judgment for damages granted Plaintiff, and an order of this Court that this case be remanded with proper instructions to grant Defendant's Motion for Summary Judgment, or such other proceedings as the Court deems necessary and proper.

STATEMENT OF FACTS

On August 17, 1954, Plaintiff's predecessor in interest, Lavine White, mother of Plaintiff, entered into two written lease agreements, one covering real property, and the other a service station and improvements (hereinafter collectively referred to as "the Lease") with Defendant's predecessor in interest, General Petroleum Corporation (General Petroleum Corporation was a wholly owned subsidiary of Defendant and has since merged into defendant, the latter assuming all rights and obligations of General Petroleum Corporation, and hereinafter reference will only be made to Defendant). The lease provided that Defendant, for a rental of $300.00 per month, shall have the use and possession of certain described premises, together with improvements and personal property thereon, for a period of 120 months com-

mencing with the date of completion and possession of the improvements necessary to operate a gas and oil service station (R. 116). The improvements on the said property were completed May 1, 1955, and the initial period of 120 months commenced on that date. As further consideration the lease provided that Defendant contribute $7,500.00 to the construction of a service station and improvements on the property. The lease granted to Defendant options to renew for three successive periods of five years each following the initial term. It was further provided in the lease that Defendant could terminate the lease if it determined that the operation of the service station was not feasible by giving Plaintiff thirty days written notice and paying one month's rent. The other provisions of the lease set forth numerous other rights, duties and obligations of the parties (R. 116-121).

Lavine White by Warranty Deed dated July 20, 1959, granted to Plaintiff the property embraced by the lease. On May 4, 1964, the lease was assigned to Plaintiff by Lavine White.

By letter dated February 25, 1965, Plaintiff advised Defendant that it was her contention the options to renew in the lease were "continuing offers" which she was withdrawing (R. 58). Defendant replied stating that this was erroneous and exercised its first option to renew the lease for five years by letter dated March 16, 1965 (R. 60, 61).

Plaintiff has refused to acknowledge Defendant's renewal of the lease pursuant to the option granted therein and commenced this action on June 3, 1965.

POINT I

THERE IS NO EVIDENCE OF A CONTRACT, IMPLIED OR OTHERWISE, BETWEEN PLAINTIFF AND DEFENDANT TO THE EFFECT THAT DEFENDANT WOULD NOT RENEW AND EXTEND THE LEASE, NOR IS THERE EVIDENCE OF ANY CONDUCT ON THE PART OF DEFENDANT WHICH WOULD ESTOP IT FROM RENEWING AND EXTENDING THE SAME.

The first conclusion of law of the lower court states:

> "By defendant's representations not to renew the lease and plaintiff's detrimental reliance thereon there exists an implied contract to the effect that the defendant was bound to not renew its option and its renewal of said option constitutes a breach of that implied contract."

The record is without evidence to show Defendant made any representations not to renew the lease or that Plaintiff detrimentally relied upon any representations. But aside from the lack of evidence, research reveals no authority whatsoever to support the conclusion or one which even suggests that detrimental reliance on the part of one party is sufficient to create an implied contract. If the conclusion is to be construed literally, then we have no further argument than that already made. However, because of the use of the terms implied contract and detrimental reliance, the conclusion may be based upon either implied contract or estoppel, and therefore, a discussion of both principles will be made.

It is elementary that contracts implied in fact are exactly like expressed contracts in their elements and

must be supported by consideration. *Chandler* v. *Roach*, 319 P. 2d 776, Cal. App. (1968). The only distinction between expressed and implied contracts is that the former is supported by an actual promise and the latter by the unambiguous conduct of the parties. All other essential elements to a contract, such as consideration, consent and meeting of the minds, are requisite to the creation of both types of contract. 17 C.J.S. § 4, pp. 554 to 562.

Except for the lease, Defendant is at a loss as to how, when and where it entered into a contract expressed or implied with Plaintiff. Nothing in the record remotely implies that the Defendant by representations, conduct or otherwise agreed or inferred it would not renew the lease. There is not anything in the record to show the elements of contract were satisfied. Plaintiff approached Defendant and negotiated in an attempt to have Defendant firm up two of its five year options to renew and raise the rental under the lease. Defendant did not accept any proposal by Plaintiff and Plaintiff readily admits not only in her disposition but in her complaint that she did not accept the proposal made by Defendant, which was the result of her request and the negotiations conducted between her and Defendant (R. 2, 92-P. 18). No one could contend that such negotiations resulted in a meeting of the minds, and no one could contend that either party consented to anything other than to reject each other's proposal. Moreover, for Defendant to give up its right to renew the lease, it would certainly require some consideration from Plaintiff. The record is absolutely devoid of any facts which would even slightly infer

or suggest that Defendant received consideration of any kind to abandon its rights.

Detrimental reliance is most commonly an element of the doctrine of equitable estoppel. In 31 C.J.S. § 67, p. 402, it is stated that:

> "In order to constitute an equitable estoppel, estoppel by conduct, or estoppel of pais there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice."

Further in the same section at pages 406 and 407, it is stated that:

> "There can be no estoppel if any of the requisite elements thereof are wanting. They are each of equal importance."

In *Kelly* v. *Richards, et al.*, 83 P.2d 731, 95 Utah 560, (1938), at page 734, the court stated:

> "It is essential therefore that the representation, whether it arises by words, acts or conduct, must have been of a material fact; that it must have been wilfully intended to lead the party setting up the estoppel to act upon it or that there must have been a reasonable grounds and cause to think that because thereof he would change his position or do some act or take some course on faith in the conduct and that such action results to his detriment if the person sought to be estopped may not re-

pudiate the words of interpretation being placed upon such conduct."

A party raising estoppel must have relied to his loss, upon misrepresentation or conduct amounting to misrepresentation or concealment of material facts. *Cook* v. *Cook,* 174 Pac. 434, 110 Utah 406, 1946.

In *Petty* v. *Gindy Manufacturing Corporation,* 404 P.2d 30, 17 Utah 2d 32, 1965, this court in referring to requirements of promissory estoppel stated, at page 32:

> ". . . the promise or representation relied on must be sufficiently definite and certain that promissee acting as a reasonable and prudent person under circumstances would be justified in placing reliance upon it and, in case of an uncertainty or doubt, responsibility is upon a promissee to ascertain facts before acting upon it."

Plaintiff has not shown that she relied upon any particular conduct of the Defendant; nor has she shown that she has relied upon conduct of defendant to her loss. If, as Plaintiff claims, she relied upon Defendant not exercising its option to renew the lease, she would have had no need whatsoever to send a letter to Defendant advising it that the options to renew in the lease were nothing more than continuing offers which she was rescinding. The letter was silent as to any reliance by her upon any conduct or representation of Defendant or that she had a contract, implied or otherwise, with the Defendant whereby the latter had contracted away its right to renew. Obviously, there had been no meeting of the minds or consent.

To establish estoppel, Defendant must have intended or, at least assumed, that Plaintiff would have acted in the way she claims to have. If such evidence appears in the record, Defendant would appreciate having its attention drawn to it.

Whatever inferences or acts Plaintiff claims to have relied upon are not apparent and obviously not definite and certain. It would thus seem only reasonable and prudent that prior to obligating herself, if she had, Plaintiff would have obtained assurances as to Defendant's intentions.

Thus, under any of the discussed theories, it is evident there is neither law nor fact supporting a conclusion that Defendant was bound by implied contract not to renew or was estopped from renewing the lease because of Defendant's representations or conduct or for any other reason.

POINT II

A PROVISION IN THE LEASE GRANTING DEFENDANT THE OPTION TO TERMINATE THE LEASE UPON GIVING 30 DAYS' NOTICE AND PAYMENT OF ONE MONTH'S RENT DOES NOT CONSTITUTE LACK OF CONSIDERATION OR MUTUALITY SO AS TO RENDER THE ENTIRE LEASE NULL AND VOID.

It is a well established rule that where a contract is supported by other than mutual promises of the parties the right to cancel or terminate the contract at any time

by only one party is valid and enforceable. This principle is clearly stated in 17 C.J.S., § 100 (6), page 807, as follows:

> "Where a contract is supported by a sufficient consideration the fact that, under its terms, a right to cancel or terminate is given to one or both parties does not render it invalid or unenforceable for lack of mutuality."

At page 808 of the same section it states:

> "A contract may be valid and not wanting in mutuality even though it gives a right to cancel where such right must be exercised by an affirmative act, regardless of whether cancellation must be for cause. So, a contract under which one or both parties reserves a right or option to terminate on giving reasonable notice, or a stated notice . . . has been held not illusory and without effect for lack of mutuality."

A recent case on this point is *Keck* v. *Brookfield,* 409 P.2d 583, 2 Ariz. App. 424 (1966). In that case, which is in point here, lessor argues that a lease was void for lack of mutuality because it provided that lessee had the right to terminate upon the giving of 30 days' notice. In reply to that contention the court at page 586 said:

> "Mutuality is absent when only one of the contracting parties is bound to perform. Where there are mutual promises between the parties, as there are here, it is not necessary to render a particular promise by one party not binding that there be a special promise on the part of the other party directed to that particular obligation. *Taylor* v. *Kingman Feldspar Co.,* 41 Ariz. 376, 381, 18 P. 2d 649 (1933). There being sufficient consideration, the validity of the lease is not af-

> fected by the fact that the lessees had an option to terminate while the lessors had no correlative right."

In the instant case, the position of Defendant is even stronger than that of the lessee in the *Keck* case. A reading of the lease readily shows the parties here not only had several mutual promises and consideration supporting the agreement, but also, with regard to the specific termination provision, Defendant had to give Plaintiff a 30 days' written notice and payment of one month's rent before termination could be effective. Additionally, Defendant could only terminate the operation of the service station if it became unfeasible. The fact that feasibility is a condition to Defendant's termination of the lease would require Defendant to act in good faith and, if necessary, prove that operation of the station was not feasible. This court has stated in *Allen* v. *Rose Park Pharmacy*, 237 P. 2d 823, Utah (1951), that a clause giving one party the right to terminate upon a stated notice does not make the contract unenforceable for lack of mutuality. The fact situation in that case differs in the instant case in that both parties had the right to terminate, but this Court recognized in discussion of the question of the right to terminate that it was not necessary to the validity of the contract to provide both parties with that right.

POINT III.

THERE IS NO EVIDENCE TO SUPPORT A FINDING OF AN IMPLIED COVENANT TO INCREASE RENTAL OR SHARE PROFITS UNDER THE LEASE.

The law governing implied covenants has long been established by the courts, and it may be stated generally that courts do not favor implied covenants and will declare them to exist only if necessary. *Cousins Investment Company* v. *Hasting Clothing Company,* 113 P.2d 878, 45 Ca. 2d 141 (1941). In the often cited *Cousins* case, the California Court said, at page 882, the rules controlling exercise of judicial authority to assert implied covenant may be stated as follows:

> "The implication must arise from the language or it must be indispensable to effectuate intention of parties; it must appear from language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; implied covenants can only be justified on grounds of legal necessity; a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; there can be no implied covenant where the subject is completely covered by contract."

The California court went on to quote at great length from another noted case, *Freeport Sulphur Co.* v. *American Sulphur Royalty Co.,* 117 Tex. 439, 6 S.W.2d 1039, (1941) 60 A.L.R. 890. The quote is as follows:

> "The court cannot make contracts for parties, and can declare implied covenants to exist only when

there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties in the contracts made. Before a covenant will be implied in the express terms of a contract, and in some cases in view of the customers and practices of the business to which the contract relates, it must appear therefrom that it was so clearly in the contemplation of the parties as that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to imply such covenant in order to give effect to and effectuate the purpose of the contract as a whole. The Supreme Court of West Virginia, in the case of *Grass* v. *Big Creek Development Co.*, 75 W. Va. 719, 84 S.E. 750, L.R.A. (1915), 1057, states the rule as follows: 'Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity.' "

It certainly cannot be said that the language of the lease gives rise to the implication that Plaintiff is entitled to additional rentals or a sharing of profits. Not only does the lease provide that it embodies expressly all

agreements between the parties, but it is completely silent and without any reference to what Plaintiff contends, and silence on the point cannot be assumed to raise implications. We submit the lease was intentionally silent as to Plaintiff's claim because neither of the parties intended such a provision to be included. It can hardly be assumed that it was a point considered to be unnecessary to express. One would have to believe that a party entitled to share profits or adjust remuneration would include the point in an agreement. If the rental was to be increased or profits shared, what would be the basis to calculate the amounts to be paid? Plaintiff cannot deny that the lease received the scrutiny of the original parties. An examination of the document itself shows that many words, sentences and paragraphs were added to or deleted from the basic form used for the agreement.

Although implied covenants are raised by the language of a ontract and extraneous factors are not to be considered, Defendant contends that even the conduct of the parties opposes Plaintiff's position. It is significant that during ten years of the initial term of the lease, the stated monthly rental was paid by Defendant and neither Plaintiff nor her mother made the contention proposed here. In fact, until Plaintiff refused to recognize Defendant's exercise of its option to renew, the parties seem to have acted in accordance with the lease's clear and unambiguous language. Thus, it appears obvious the parties had expressed their understanding of the lease by their own conduct over a period of several years.

Defendant submits that Plaintiff's real contention is that she is no longer satisfied with her bargain and now is of the opinion that it is unfair to her. If this is true, Plaintiff is still without standing under the Law. As stated in the *Cousins Investment Company* case it is not enough to say covenants should be implied because a contract is unfair or no longer satisfactory to one party. It is hornbook law that a party cannot rescind or alter a contract on the grounds that he believes it to be a bad bargain or the consideration is no longer adequate. The courts have long held that parties suffering no disabilities are in a better position to determine the adequacies of their own contract, and the courts hesitate to interfere. 17 Am Jur 2d 102, § 102, p. 445 to 448.

CONCLUSION

The lower court has apparently entered Summary Judgment for Plaintiff only on the three points argued in this brief. The law is clear as to what facts must exist under point one to find for Plaintiff. However, Evidence to support Plaintiff's contention that Defendant by implied contract or estoppel was barred from renewing and extending the lease is completely absent from the records. We have often echoed that in our argument, but the only fact is that there are no facts. Nothing more can be said and we find no reason to elaborate further.

As to our points two and three the law is clear as to what facts must exist to support Plaintiff's claims. Defendant also believes that the record is complete and clear in that the lease itself is really all Plaintiff has

asked to have interpreted. The certainty of the language relating to Defendant's option to terminate is not in question. Plaintiff's contention that the lease lacks mutuality is met squarely in *Keck* v. *Brookfield* and is denied by this court in *Allen* v. *Rose Park Pharmacy*. Aside from numerous mutual promises between the parties and the rental paid by Defendant, there is separate consideration for that right and the necessity of Defendant to satisfy a condition before exercising it.

In regard to the finding of implied covenants, there is a stated rental and no inference to rental adjustment or profit sharing. The intention of the parties is expressed, as are their rights and duties. Nothing more is required of either party than can be reasonably determined from a reading of the plain language in the lease and nothing more should be granted.

Respectfully submitted,

GEORGE E. BOSS, ESQ.
351 South State Street
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant Socony Mobile Oil Company