1965

J. B. & R. E. Walker, Inc. v. J. Kenneth Thayn dba Thayn Construction Co. : Brief of Appellant

Utah Supreme Court

Clarence Jack Frost; Attorney for Appellant;
H. Arnold Rich; Leonard W. Elton; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

J. B. & R. E. WALKER, INC., a Utah Corporation and J. B. WALKER and GUDVOR W. BRABY, dba WALKER SAND & GRAVEL COMPANY, a partnership,
Plaintiff - Respondent,

— vs. —

J. KENNETH THAYN dba THAYN CONSTRUCTION COMPANY,
Defendant - Appellant.

Case No. 10224

BRIEF OF APPELLANT

Appeal From the Judgment of the Third District Court
For Salt Lake County, Utah
HONORABLE STEWART M. HANSON, *Judge*

CLARENCE JACK FROST
716 Newhouse Building
Salt Lake City, Utah
Attorney for Appellant

H. ARNOLD RICH and
LEONARD W. ELTON
Salt Lake City, Utah
Attorneys for Respondents

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STATEMENT OF THE KIND OF CASE

This is an action for an alleged breach of a leasehold agreement and a counterclaim for a similar breach. The Court over defendant's objection granted a hearing on parts of plaintiffs' first Cause of Action under Chapter 33, Title 78, Utah Code Annotated, relating to Declara-

tory Judgments. Defendants alleged that a Declaratory Judgment was not appropriate.

DISPOSITION IN LOWER COURT

The Case was tried to the Court sitting without a jury, the Court denying defendant's objections and granting judgment for plaintiffs that defendant's rights had been terminated, cancelled and annulled to the leasehold agreement (Tr. 43).

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor, or that failing a new trial.

STATEMENT OF FACTS

The parties entered into a leasehold agreement dated April 11, 1964, as represented by two agreements attached to the Complaint (Tr. 9 through 12). One of the instruments contained a prohibition against assignment without lessor's written consent (Tr. 10). Pursuant to this agreement defendant then entered into possession of the premises described in the leasehold agreement and oprated a hot asphalt plant until Novmber 12, 1963, when with the plaintiff's verbal permission (L. 16-L. 30 P. 69, L. 13-L. 30, P. 70) he entered into an agreement with James C. Sumsion (Exhibit P. 1). Sumsion immediately moved his equipment on premises and subsequently commenced operations without objection or incident from

plaintiff until April 9, 1964, when defendant was served with notice alleging termination and rescission of the leasehold agreement (Tr. 13-17). James C. Sumsion remained on premises and is presently operating the premises.

ARGUMENT

POINT I.

THE COURT ERRED IN FINDING THAT PARTS OF PLAINTIFFS' FIRST CAUSE OF ACTION WERE APPROPRIATE FOR A DECLARATORY JUDGMENT.

(a) On June 8, 1964, plaintiffs filed a Motion for immediate trial which was heard by Judge Alden Anderson on June 15, 1964 (Tr. 32 and Tr. 36). Because the argument appeared lengthy and because plaintiff did not have witness in Court Judge Anderson assigned the matter to Judge Ellett for hearing and disposition (Tr. 36).

Without giving defendant's counsel any notice and without a hearing plaintiff arranged with Judge Hansen to hear the cause of action without having its motion for immediate trial heard and without having plaintiffs' objections timely filed (Tr. 37 and Tr. 40-41). At the actual trial defendant advised the Court that plaintiffs' motion for an immediate trial and the objections thereto had not been heard. The Court then proceeded to try the case and indicated that it would take under advisement defendant's objections (L. 4-L. 18-P. 61). However, the motion and objections were were never heard and the Court in its order (Tr. 43) cursorily stated that the de-

fendant's objection should be denied. This action was patently arbitrary and denied defendant its right to be heard.

(b) There was no necessity that parts of the First Cause of Action be heard in advance of the entire case.

Mr. Sumsion, who was operating under the lease of the defendant Thayn, was a progressive contractor who was able and did use as much material as did the defendant when he was working alone. (L. 22, Tr. 70, to L. 2 Tr. 71). The plaintiff had a working agreement with Sumsion (L. 21-L. 25, Tr. 84) which is still currently in effect which negates the allegation in plaintiffs' affidavit that he will be irreparably damaged and that he would be deprived of sales opportunities (Tr. 25 and 26).

(c) By hearing only part of the First Cause of Action, the Court prevented the defendant from presenting the plaintiff's breach of the lease and did not terminate the uncertainty or controversy.

Section 78-33-6 Utah Code Annotated, 1953, states:

> "The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding."

In the Utah case *Gray* v. *Defa,* 103 Ut. 339, the Court in commenting on the above statute observed:

> "Borchard in his work on Declaratory Judgments, says that the rule announced by this section

merely embodies the established Anglo-American practice in all urisdictions and indicates both the practical and remedial scope and limitations of the relief, yet the discretion granted, however, wide and unlimited in appearance is a udicial discretion hardened by experience into rule, and its exercise is subject to appellate review. He concludes that when the declaratory judgment will not serve a useful purpose in clarifying and settling the legal issues, or will not terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding the Court should decline to render the same.''

Granting for the sake of argument that the allegations of plaintiff have some substance, if the Court refuses to hear the defendant's allegations of breach and damages (Tr. 21-24) it cannot as a matter of law conclude that the controversy is terminated. By granting plaintiff udgment there has been little if any of the controversy terminated as it has not touched the main purpose of the contract.

POINT II.

THE COURT ERRED IN FINDING THAT DEFENDANTS' ACTION TERMINATED, CANCELLED AND ANNULLED THE RIGHTS OF DEFENDANT TO LEASEHOLD AGREEMENT.

The Court in rendering its finding was rather vague in that it did not specify whether all of the activity of defendant was objectionable or whether it was just one area (Tr. 43). However, plaintiffs' counsel did limit the

plaintiff in his presentation to three items of alleged breach:

> "The pertinent parts of the leasehold agreement are that it carries the definite statement in Paragraph 8 of non-assignability without a written consent. It also contains certain payments which should be made by the Lessor and is an agreement to designate the occupied area and fence it. Now simply it is upon those items of breach upon which we will predicate the problem and which would be the subect of the declaratory udgment." (L. 24 Tr. 61 to L. 2 Tr. 62)

First of all, in considering these items of breach, it should be noted that plaintiff's only witness was the defendant even though the plaintiff, J. B. Walker was in the courtroom. The defendant's testimony was never contradicted and therefore the plaintiff by failing to take the stand and testify contrary to the defendant, admits and affirms the latter's testimony.

In regard to paragraph 8 of non-assignability of the original lease (Tr. 10) it is obvious that this restriction was waived by the plaintiff. Defendant testified, while sitting in the presence of the plaintiff who did not in any way deny or object, that defendant discussed the idea of Sumsion operating the plant with plaintiff and that the plaintiff assented thereto. (L. 16, Tr. 69, to L. 14, Tr. 71) (L. 29, Tr. 78, to L. e, Tr. 79)

In addition the defendant Thayn, Richard Sumsion and an employee of Sumsion all testified that Sumsion went immediately into possession of the leased property after the agreement was signed November 12, 1963, and

that plaintiff made no objection until April 10, 1964 (L. 7, Tr. 73, to L. 20 Tr. 73), (L. 29, Tr. 73, to L. 26, Tr. 74), (L. 1, Tr. 83, to L. 1, Tr. 84) (L. 1, Tr. 87, to L. 19, Tr. 87). The plaintiff not only did not object to Sumsion being on the property and operating under the lease he received money from Sumsion prior to his serving notice on the defendant (L. 19-L. 30, Tr. 83).

The general law relating to waiver of covenants restricting assignment is found in American Jurisprudence as follows:

> "Covenants restricting the assignment of leases usually by their terms require the consent of the lessor to an assignment, but regardless of the wording of the covenenant, a breach will not result from an assignment made with the consent of the lessor. Covenants restricting assignments are for the benefit of the lessor and may be waived by him, and since he may waive the restriction entirely, he may waive compliance with particular terms and conditions of the restriction. Even though the covenant requires the written consent of the lessor to an assignment, his oral consent may nevertheless be deemed sufficient on the ground either of waiver or of estoppel. Parol testimony as to the assignor's representations that such consent has been obtained is not inadmissible as varying or contradicting a written instrument. So, if, with knowledge of the assignment, the lessor accepts from the assignee payment of the accruing rents, this is ordinarily, if unexplained, deemed conclusive evidence of a consent to the assignment, or waiver of the necessity for a prior consent, since it is a recognition of the assignee as a tenant." 32 Am. Jur. Sec. 341, Page 303.

With reference to the provision for payments to be made, plaintiffs' counsel indicates in the transcript that lessor should make certain payment (L. 29, Tr. 61). This is apparently a mistake and probably should be interpreted to mean lessee should make payments. The only payments mentioned by plaintiff during the proceeding was an item for taxes in the amount of $1,054.00 (L. 9, Tr. 64, to L. 29, Tr. 64), (Exhibit P. 2).

From the face of the exhibit it is apparent that the plaintiff had not required payment of taxes as they accrued as his first and only statement dated January 1, 1964, covered a period of time of over three years. This is and of itself indicates that he was waiting for some event prior to submitting a bill. The defendant's unquestioned and unrebutted testimony gives the answer. Simply, that the parties had never agreed upon what part of the plaintiffs' property was necessary for the operation covered by the lease and that defendant had not been in possession of the lease for the period of time covered by the statement o ftaxes (L. 22, Tr. 76, to L. 25, Tr. 77). How could taxes be apportioned if the parties had not reached an agreement as to the amount of property to be used? The pertinent provision of the lease providing for payment of taxes specifically provides that lessee should only pay "the pro-rata property tax" (Paragraph 3, Tr. 9).

The third and concluding item of plaintiffs' allegation of breach centers around the failure to designate, survey, and fence area needed for the operation covered by the lease. Paragraph 1, Tr. 9, contains the pertinent

language covering this problem. "Lessor hereby leases —sufficient property located on the east side of Wasatch Boulevard — for the purpose set forth hereinabove with the further provision that the lessee taking into consideration the requirements necessary, will designate the area needed which area will then be surveyed and the description of said property will be attached hereto and made a part hereof as a supplemental agreement."

While it appears that the Lease requires the lessee to designate the area necessary it must be construed to be a mutual designation of property. However, this language is vague and uncertain as to who has the responsibility of surveying and fencing the property even though defendant has indicated he was willing to survey it. The only testimony offered regarding the drafting of the original leases indicates that plaintiff drafted the documents. (L. 1 to L. 10, Tr. 69)

It is usually the practice of the law to construe any ambiguity or uncertainty most strictly against that party who drew the agreement. However, wherever the responsibility lies, common sense and practice indicates that in order to use another person's property and fence it, there must be an assent and a designation by the owner to the property. It is uncontested that these paries operated for approximately three years without the question of taxes, fences and surveys being raised which certainly raises an inference that both parties assented to the situation until they could mutually designate the area; that is until plaintiff ascertained he could sell the lease (L. 24, Tr. 74).

If defendant had the sole responsibility for the performance of the items mentioned above, and the defendant denies that he does, still the plaintiff after three years of operation without obection is now estopped from precipitously terminating the lease. In any event this type of alleged breach is not of the nature to warrant or justify rescission as is set out in American Jurisprudence 2nd:

> "On the other hand, it is not every breach of a contract or failure exactly to perform—certainly not every partial failure to perform — that entitles the other party to rescind. Recission is not permitted for a slight, casual, trivial, or technical breach.
>
> "A breach, to warrant rescission, must be material; a failure to perform, to warrant rescission, must be substantial. In the absence of any specific provision in the contract to the contrary, a beach which goes to only a part of the consideration, which is incidental and subordinate to the main purpose of the contract, and which may be compensated in damages, does not warrant a recision of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom. A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement. Before partial failure of performance of one party will give the owner the right of rescission, the act failed to be performed must go to the root of the contract, or defeat the objects of the contract, or the failure to perform a part of the contract must be in regard to matters which would render the performance of the remainder a thing different in

substantance from that which was contracted for, or it must concern a matter of such importance that the contract would not have been made if the default in that particular had been contemplated or expected. Generally, where a contract is severable or divmisible and the consideration is justly apportioned to a part of the contract, a breach of that part does not destroy the contract in toto, but the other party is nelegated to damages. 17 Am. Jur. 2d Par. 504, Page 982-984."

The defendant has indicated a willingness to pay the taxes, survey the property and even fence the property if the plaintiff will sit down and discuss the area to be used, and apportion the taxes on a fair and equitable basis (L. 22, Tr. 75 to L. 25, Tr. 77).

This area certainly is not the main object of the agreement and even if the alleged breaches were unexplained still they would not defeat the main purpose of the agreement and would not justify rescission or termination of the contract. The object of the agreement between Thayn and plaintiff was the purchase and sale of aggregate for roadbase which is not even mentioned in the plaintiffs' grounds for Declaratory Judgment.

POINT III.

THE COURT ERRED IN NOT FINDING THAT THE AGREEMENT BETWEEN THE DEFENDANT AND SUMSION WAS A SUB LEASE AND NOT VIOLATIVE OF PARAGRAPH 8 OF THE LEASE.

Volume 32, Am. Jur., Section 330, states the applicable law as to the distinction between a sub lease and an assignment in reference to a covenant not to assign.

> "To establish a breach of a covenant in a lease not to assign the lessor must show that the transaction relied upon constitutes an assignment in law as defined above, . . . he must show that the lessee transferred his entire interest in the demised premises, or a part thereof, for the unexpired term of the original lease, parting with all reversionary interest in respect of the premises affected. An assignment of a lease is distinct from a subletting, and it is well settled that a covenant not to assign is not broken by a mere subletting of the premises. Covenants restricting the right of the lessee to assign his term are strictly construed, and in order to bring the transaction within the operation of such covenant, it must be shown that the thing done falls within its letter, as well as within its spirit and purpose."

Section 314 of 32 Am. Jur. Page 290, states the distinction between subleases and assignments:

> "The distinction between an assignment of a lease and the subletting of the premises lies in the quantity of interest that passes by the transfer and not upon the extent of the premises involved. Primarily the test is whether by the transaction the lessee conveys his entire term or retains a reversionary interest however small. If there remains a reversionary interest in the estate conveyed it is a sublease."

The fact that the word "assign" is used in the agreement between defendant Thawn (Exhibit P 1), is no more determinative of the legal effect than the fact that the word "lease" is used therein.

Bedgisoff v. *Morgan*, 23 Wash. 2d 737, 162 P. 2d 238, holds that whether a written instrument is an as-

signment or a lease must be determined by its legal effect not its form.

In examining paragraphs 1, 2, 3, and 4 of Exhibit P. 1, it is obvious that there is a reversionary interest in the defendant Thayne and that the agreement thus meets the qualification of the legal status of a lease even though the language states that Thayn assigns to Sumsion.

The whole tenor of the agreement is that Exhibit P. 1 is subject to the leasehold agreement which was made part of (Par. 1, Exhibit P. 1) the instrument. That upon failure to make payment, the necessity of ceasing operation by Court order in two years, or the termination of the agreement for any cause the lease would revert to the defendant Thayn.

CONCLUSION

Defendant submits to the Court that the three allegations of breach by the plaintiff have been countered and explained by the argument above. That provision 8 of the lease regarding assignment without written consent was waived. Waived expressly by the plaintiff by orally agreeing to the operation by Sumsion. Waived by passage of time with knowledge of Sumsion's presence and operation on plaintiffs' property and finally by the acceptance of money from Sumsion for the use and delivery of gravel.

In addition the legal form of the agreement is a sublease and not prohibited by the restriction against assignment.

The allegation of failure to pay taxes loses its effectiveness when it is found that there has been no designation of what ground is being covered nor pro-rating of taxes as required by the lease and especially when the first request for payment is made nearly three years after the agreement was commenced. This deficiency, together with the surveying and fencing problems, are joint failures or acquiescence by both parties. This action would certainly estop plaintiff from immediately demanding performance without giving notice and without complying himself.

Defendant further contends that it has been deprived of due process of law in that he not been allowed his day in Court on his objections to an immediate trial. That because of this omission the Court deprived itself of information which would have indicated that a declaratory judgment was not proper under the circumstances. That defendant has been prejudiced in a substantial manner.

The defendant therefore respectfully requests that the decision of the lower court be reversed or that the matter be returned to the lower court for a hearing on the necessity of a declaratory judgment and a trial of the entire matter at one hearing if necessary.

Respectfully submitted,

CLARENCE JACK FROST
716 Newhouse Building
Salt Lake City, Utah

Attorney for Appellant