1970

American Holding Company v. Parker G Hanson and Garda P. Hanson : Brief of Appellant

IN THE SUPR

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[redacted]

AMERICAN [redacted]
Corporation,

[redacted]

vs.

[redacted]
HANSON, [redacted]

[redacted]

BRIEF OF

Appeal from the [redacted]

[redacted]

Honorable [redacted]

[redacted]

[redacted]

15 No[redacted]
St. [redacted]
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CASES CITED

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IN THE SUPREME COURT

of the

STATE OF UTAH

AMERICAN HOLDING COMPANY, a Utah Corporation,

Plaintiff and Appellant,

—vs—

PARKER G. HANSON and GARDA P. HANSON, his wife,

Defendants and Respondents.

Case No. 11743

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action brought by Appellant against Respondents to have declared terminated, because of certain breaches of lease, a certain Agreement to Lease entered into by and between Appellant's assignor and Respondents.

DISPOSITION IN LOWER COURT

Upon Motions for Summary Judgment filed by both the Appellant and Respondents herein, the District Court of the

Fifth Judicial District in and for the County of Washington, State of Utah, found that there were no genuine and material issues of fact involved in the matter and found as a matter of law that Respondents were entitled to judgment of no cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the ruling of the lower court granting Respondent's Motion for Summary Judgment and seeks judgment of this court granting Appellant's Motion for Summary Judgment.

STATEMENT OF FACTS

On April 10, 1961 B. & E. Securities, Inc., a Utah Corporation, as Lessor, entered into a certain Agreement to Lease with Respondents as Lessee, wherein Respondents did lease from said Lessor certain property located in Lot 5, Block 15, Plat A, St George City Survey as more particularly described in said Agreement to Lease. (Exhibit P-1) Subsequent to the execution of the Agreement to Lease, the original Lessor did assign all its right in said Agreement to Appellant and also conveyed its interest in the leased property to the Appellant. (R-2) Among other provisions, the Agreement to Lease in question contained the following statements:

A. "In the event that Hansons fail, neglect or refuse to pay the rentals as above set forth, the Company may terminate this Lease by proper notice of said breach . . ." (Exhibit P-1, Page 2)

B. "To pay all utility bills levied and assessedd against said building or the occupants thereof, in the amounts so assessed and before delinquency." (Exhibit P-1, Page 2)

C. "To pay all taxes that may be levied and assessed against the personal property belonging to Hansons that may be in said building, in the amounts so assessed and before delinquency." (Exhibit P-1, Page 2)

Subsequent to the execution of the said Agreement to Lease, the Respondents took possession of the leased premises and have held possession, use, and control of the same up to the present time. The Respondents made their monthly rental payments as called for by the Agreement to Lease until March of 1965 when they became delinquent. (R. 35) & 36). The delinquency continued up to September of 1966. (R. 35 & 36)

On September 9, 1966 the Appellant, acting through its attorney, caused to be mailed by U. S. Mail, Certified—Return Requested, letters advising the Respondents that they were delinquent in their payments. (R. 56, 57, 58 & 59). On October 4, 1966 an additional notice was mailed to the Respondents advising them that they were delinquent in their rental payments for the month of September, 1966. (R. 60 & 61) Thereafter, the Respondents made periodic payments on the lease rentals, but were continually delinquent up to and including the month of April, 1968 when a payment of $178.56 was made to Appellant, which payment was the rental for the months of December, 1967 and

January and February, 1968. (R. 35 & 36) No further rental payments were made or tendered to Appellant until December 4, 1968 when Respondents apparently mailed to Appellant a check, the exact amount of which is unknown to Appellant, claiming the check to be for back rental. (Deposition of Parker G. Hanson, Page 6) Appellant did not accept the letter and it was returned by the Post Office to Respondents. (Deposition of Parker G. Hanson, Page 6) On December 12, 1968 the Appellant caused to be served upon the Respondents a Notice of Termination of the Agreement to Lease and requested in the Notice that Respondents deliver the possession of the leased premises to Appellant. (Exhibit P-2) The Notice of Termination was based upon the rental payment delinquencies and upon delinquencies in the payment of personal property taxes and utility bills. (Exhibit P-2) Respondents were delinquent in the payment of personal property taxes on the leased premises and in the payment of utility bills on said premises from approximately the year 1965 to the date Appellant's notice was served upon them. (R. 37, 38, 47 to 55) In regards to the delinquent general property taxes, the Respondents had not conformed to the requirements of Title 59, Chapter 4, Section 10, Utah Code Annotated, 1953. (R. 38)

Subsequent to the serving of the Notice to Quit and of Termination upon Respondents as above set forth, and upon their refusal to deliver possession of the leased premises, the Appellant brought this action to have the Agreement to Lease above mentioned declared terminated and for an order delivering the possession of the premises to Appellant and for attorney fees and costs (R. 1 to 6)

POINT ON APPEAL

THE TRIAL COURT ERRED IN OVERRULING AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE MOTION FOR SUMMARY JUDGMENT FILED BY RESPONDENTS.

ARGUMENT

Both parties hereto, by filing Motions for Summary Judgment, in effect, admit that there are no material issues of fact to be decided by the court. The fact that the delinquencies of Respondents in carrying out the parties' Agreement to Lease occurred are uncontroverted and are fully set forth in the record. The only issue involved is whether or not such delinquencies or breaches in the Agreement to Lease were sufficient as a matter of law, to enable the Appellant to declare the Lease Agreement terminated.

> "If it be stipulated in the Lease or Agreement under which a tenant holds the demised premises that if he be guilty of a breach of a particular covenant or stipulation, or generally, of any of the covenants in the Lease, or stipulation in the Agreement, on his part to be performed or observed, the landlord may re-enter and the tenant be guilty of any such breach the landlord may accordingly re-enter or bring ejectment". 1 McAdam on Landlord and tenant 815."

> "A clause in a Lease which provides for its termination at the election of the lessor, upon default in payment of rent, although in the form of a stipulation, is still a condition, since it provides for ending the term and

forfeiture of the estate in case of default." I McAdam on Landlord and tenant 821.

For other authority dealing with the validity of a provision for forfeiture in a Lease upon non-payment of rent, see 51 CJS Pages 332 and 350.

The law in Utah seems to be that ordinarily unless a Lease specifically so provides, failure to pay the rent does not automatically terminate it and there must be a proper demand for its payment. King v. Firm, 3 Ut. 2d 419, 285 P. 2d 1114 (1955). On the other hand, any demand for the payment of rent may be waived by an express provision in the Agreement to Lease. King v. Firm, 3 Ut. 2nd 419, 285 P. 2d 1114, 1118; (1955); Shoemaker v. Pioneer Investments, 14 Utah 2d, 250, 252, 381 P. 2d 735 (1963).

In this particular case, the Agreement to Lease provided, in effect, that in the event the Respondents failed to pay the rental as required therein, the Appellant could terminate the Lease by notice. (Exhibit P-1, Page 2, Paragraph 6). It is contended by Appellant therefore, that the provision of the Agreement to Lease providing for such termination places this case in the same situation as the King and Shoemaker cases mentioned above and the Appellant herein could terminate the Lease by giving notice without any demand that the rental delinquency be paid prior to such termination. The record in this case is clear that there was a delinquency in the rental payments from February of 1968 to December of 1968, a period of ten months. In December of that year the Appellant elected to declare a breach of the Agreement to Lease and served notice upon the Re-

spondents of such election. Under our law, as set forth in the King and Shoemaker cases, the Agreement to Lease between the parties hereto became terminated upon the giving of notice to the Respondents.

It is anticipated that Respondents, in their arguments to this court, will make some issue over the fact that they tendered by mail to Appellant any delinquent rental payment due on December 4, 1968 and that the notice to them of the termination of the Lease was not served upon them until December 12, 1968. In this regard, the court's attention is called to 51 CJS 352 wherein the following statement is contained:

> "It has been held that a landlord may rightfully refuse to accept payment of past due rent since to accept the belated payment would constitute a waiver."

Resopndens, in their arguments to the trial court at the hearing of the parties' Motions for Summary Judgment, made considerable issue over the fact that the provisions of Utah's Forcible Entry and Detainer statutes contained in Title 78, Chapter 36, Utah Code Annotated, 1953 were not followed by Appellant and therefore Appellant cannot claim a termination of the parties' Agreement to Lease. It is anticipated that such a defense will be presented to this court.

The Utah Forcible Entry and Detainer Statute was in part at least copied from the California Code of Civil Procedure, Section 1159. Buchanan v. Crites, 106 Utah 428, 150 P. 2d 100, 154 ALR 167 (1944). In the California case of Gilbert v. Peck (Calif). 162 C 54, 121 P. 315 (1912) the

California Court said as follows:

> "The Code (Section 1159) does not undertake to make the forcible entry proceeding the exclusive remedy where facts showing a cause of action independent of the Code provisions are alleged . . ."

> In 36A CJS 964 we find the following statement:
> "A forcible entry and detainer proceeding is not exclusive but is cumulative of any other remedy that a party may have."

In the case before the Court, no attempt has been made to remove the Respondents from the leased premises and, in fact, and while the record may not show it, they are still in possession of the leased premises. Rather this proceeding is one to have declared terminated the Agreement to Lease between the parties and thereafter to obtain an order removing them from the leased premises. None of the evils for which our forcible entry and detainer statutes were enacted are present in this case and there is no reason for Appellant to be forced to rely upon the remedies contained therein to the exclusion of all other remedies. It is submitted by Appellant therefore, that it did not forfeit its other remedies allowed it by law for failure to conform to the above-mentioned statutes.

The courts have shown some reluctance to declare forfeitures of Lease Agreements and in many cases have found, upon principals of equity, that breaches have been waived. In such cases, however, the party claimed the operation of equity must come into court with "clean hands."

In this case, the record shows a long series of defaults and delinquencies on the part of the Respondents. It also shows wherein the Respondents were given adequate notice that the Appellant would not allow the delinquencies to continue. After the receipt of such notice, the Respondents still allowed their rental payments to go delinquent for a period of 10 months as well as being continually late in making what rental payments they did make. Certainly a lessor cannot be expected to continue to allow such activities to continue indefinitely nor should the courts sanction such actions.

It is submitted by Appellant that the record before the court shows more than sufficient delinquency to allow Appellant to declare a breach of the parties' Agreement to Lease, that the Appellant did elect to make such declaration and that the Agreement to Lease is now terminated and of no further force and effect. It is further submitted that the trial court erred in finding no cause of action on the part of Appellant and the decision of that court should be reversed and Appellant's Motion for Summary Judgment granted herein.

CONCLUSION

The election of Appellant to terminate the parties' Agreement to Lease was proper and based upon sufficient grounds. The court should reserve the trial court's decision and grant judgment in favor of Appellant.

Respectfully submitted,
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