1970

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

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

RESPONDENT'S BRIEF

Appeal from the Judgment of the Fifth District Court
for Washington County,
Honorable C. Nelson Day, Judge

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RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff and appellant by its Complaint sought to have the court concel and terminate an Agreement TO Lease, a copy of which is attached to the Complaint and is made a part thereoff by reference, on three alleged grounds: (A) Failure of lessees to pay rent called for by the Agreement To Lease; (B) Failure to pay, before delinquency, utility bills incurred by lessees at the leased premises; and (C) Failure of lessees to pay, before delinquency, taxes levied on lessees' personal property situated in the leased premises, through proceedings

initiated after defendants had paid all utility bills and all taxes levied on lessees' personal property, to date, and after defendants had tendered payment of all arrearages in rent, and without the plaintiff and appellant, assignee of the original lessor, taking any steps or doing anything towards compliance with the requirements of Utah's "Unlawful Detainer" statute 78-36-3 U.C.A. 1953, and in particular with subdivisions (3) and (5) thereof.

DISPOSITION IN LOWER COURT

Plaintiff and appellant filed, served and argued a Motion For Summary Judgment as prayed for in the plaintiff's Complaint, and the defendants and respondents filed, served and argued a Motion For Summary Judgement of No Cause of Action in favor of the defendants. The lower court thereafter and on June 28, 1969, made an Order Granting Defendants' Motion for Summary Judgment and found, concluded and ordered as follows: "From the pleadings, depositions, affidavits and other documents on file herein and received in evidence, the court finds and concludes that there is no genuine issue as to the material facts of this matter and that the defendants are entitled to judgment of no cause of action as a matter of law. Accordingly, it is so ORDERED, and the defendants' motion for summary judgment is granted."

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant seeks reversal of the Order of the lower Court granting defendants' and respondents' Motion For Summary Judgment.

STATEMENT OF FACTS

Defendants and respondents are lessees of the premises described in the Complaint under and by virtue of a

document entitled Agreement To Lease, dated 10th day of April, 1961, a copy of which is attached to the Complaint and is made a part thereof by reference. The lease is for a term of ten years beginning on the 30th day of May, 1961.

On December 11, 1968, an instrument called NOTICE OF TERMINATION AND TO QUIT, signed by the plaintiff's attorney, a photostatic copy of which is attached to defendants' Motion For Summary Judgment, was served on each of the defendants (Deposition of Parker G. Hanson pages 21 and 25). This instrument stated in substance that the Agreement To Lease and Agreement To Option therein referred to "is terminated and cancelled on the grounds that you (the defendants) have failed to pay the lease payments as called for therein, have failed to pay utility bills as called for therein, and for other grounds." The instrument demanded that the defendants within 15 days quit said premises and deliver possessions of the same to American Holding Company or its authorized representative, or action would be taken for their removal.

Prior to the time when said Notice Of Termination And To Quit was served upon the defendants, and on December 4, 1968, the defendants mailed to the plaintiff by U. S. certified mail in a sealed envelope addressed to the plaintiff at its address in St. George, Utah, and deposited in the mail box at the post office in St. George, Utah, a check made by the defendants to the plaintiff for all rentals which had become due from the defendants to the plaintiff under the Agreement To Lease, which had not theretofore been paid by the defendants to the plaintiff, namely, a check for all rentals for the period from March 1, 1968, to November 30, 1968, a period of eight months. (Parker G. Hanson's Deposition P. 6, 7, 20, 21 — and Defendants' Affidavit in Support of Defendant's Motion for Summary Judgment Par. 7). Plaintiff

was given notice by the St. George postal authorities that the certified letter from the Parkers addressed to the plaintiff was at the post office being held for the plaintiff. The president of the plaintiff corporation, Maeser W. Terry, knew the certified letter was at the St. George post office and testified he had reason to believe and did believe that the envelope contained payment of the back rent owed by the Parkers to the plaintiff, and that he and the assistant secretary for the plaintiff, who usually called at the post office for plaintiff's mail, refused to take such certified letter out of the post office. (Maeser W. Terry's Deposition pages 9 and 10, and Parker G. Hanson's Deposition pages 20, 21 and 22).

All rental which accrued prior to March 1, 1968, had been previously paid by the defendants and accepted by the plaintiff (Maeser Terry's Affidavit attached to plaintiff's Motion For Summary Judgment).

On December 21, 1968, the certified letter, which had been mailed by defendants to plaintiff on December 4, 1968, was returned "unclaimed" to the defendants. On December 24, 1968, the defendants approached the president of the plaintiff corporation, Maeser W. Terry, at American Holding Company's office in St. George and offered to pay to him all past due rent owed by the defendants to American Holding Company, either by check or by cash, which cash was exhibited and offered to him, providing he had any objection to taking defendants' check. The president of the plaintiff corporation refused to accept the same. Defendants made several other tenders of past due rent, and tenders of current monthly rentals as they became due for several months after December, 1968, both in the form of checks and currency, to the president of the plaintiff corporation, all of which said president of the plaintiff corporation refused to accept. (Parker G. Hanson's Deposition Pages 22, 23 and

first 9 lines of Page 24. Also last 16 lines of Page 7 and first 16 lines of Page 8 of Deposition of Maeser W. Terry). Defendants in paragraph 4 of their Affidavit attached to defendants' Motion For Summary Judgment made a continuing offer to pay into court for the plaintiff all back rental and all current rentals to become due under said Agreement To Lease.

The utility bill which the plaintiff complains about. as not havingg been paid when due, is a bill of $97.34 for electric power used by the defendants at the leased premises during the months of October and November, 1968. These utility bills become due on the 15th day of the month next following the month during which they were incurred. This entire amount was paid by the defendants to St. George City during the forenoon of December 11, 1968, before defendants were served with said "Notice of Termination and To Quit" which service was made on the afternoon of December 11, 1968. (Parker G. Hanson's Deposition beginning at line 21 of Page 25 and ending with line 15 Page 26). This entire amount was paid about one month before plaintiff's Complaint was filed on January 10, 1969.

The bill for taxes for the year 1968 in the amount of $97.56, levied on personal property owned by the defendants situated on the leased premises, complained about by the plaintiff, became delinquent on November 30, 1968. These taxes were paid in full on or about December 5, 1968, by defendants' check dated November 30, 1968, but not mailed to the County Treasurer of Washington County until December 4, 1968. (Parker G. Hanson's Deposition beginning with line 10, Page 9 and ending with line 22, Page 9). This was some six days before plaintiff served said "Notice of Termination and To Quit" on the defendants, and more than a month prior to the filing of plaintiff's Complaint on January 10, 1969.

No notice in writing was ever given by the plaintiff to the defendants as required by Section 78-36-3(3) U.C.A. 1953, pertaining to alleged failure of defendants to pay rent when due, and no notice in writing was ever given by the plaintiff to the defendants as required by Section 78-36-3(5) U.C.A. 1953, pertaining to the alleged failure of the defendants to pay utility bills incurred by them at the leased premises when due, or pertaining to the claimed failure of the defendants to pay taxes on defendants' personal property situated on the leased premises when due (Paragraphs 3, 4 and 5 of defendants' Affidavit attached to defendants' Motion For Summary Judgment). These statements were sworn to by the defendants under oath and stand uncontradicted.

ARGUMENT

It is the position of the defendants and respondents that when the facts above set forth had been established of record by the pleadings, the depositions, affidavits and other documents on file herein, that the defendants were entitled to an Order granting their Motion For a Summary Judgment of No Cause of Action, as was made by the lower court.

It is the law in Utah that unless a lessee for a definite term specifically waives in the lease his right to the same, that the landlord must give the tenant written notice and make written demand for the payment of alleged past due rent, specifying the rental which the landlord claims is in default, and demand in the alternative that the tenant pay the past due rent or surrender the demised premises within three days, and that such demand remain uncomplied with for three days after service of such notice and demand, before the landlord can maintain an action for cancellation of the lease and for an order ousting the tenant from the premises. 78-36-3(3) U.C.A. 1953.

King v. Firm. - 285 P 2d 1114; 3 U. 2d 419

4. A landlord may not, without express consent of tenant, repossess property without resorting to remedies provided in forcible entry and detainer statute.

Black v. McLendon - 308 P 2d 300 (Okl. 1957)

4. Right to elect to forfeits for nonpayment of rent does not arise until demand for rent has been made and payment refused, unless waiver of demand for payment of rent is provided for by lease.

5. Under lease providing that tenant waived notice of election to forfeit and demand of possession, landlord had no right to declare lease forfeited for nonpayment of rent, without demanding payment of rent due.

Note: By the terms of the least in this Oklahoma case, the lessee waived notice of almost everything (see wording of the Lease), but did not expressly waive demand for payment of delinquent rent, and the court held that without such demand having been made and having not been complied with for the statutory period, that a suit for cancellation of the lease and for an order ousting the tenant from the property could not be maintained.

The Lease in our case contained no provision wherein or whereby the tenants (defendants herein) waived the requirements of the Utah statute above cited (78-36-3(3) U.C.A. 1953. In fact the provision of this Lease relating to the termination for nonpayment of rent expressly provides for termination of the Lease only by proper notice of such breach. Proper notice means the notice required by the Utah statute. The full provision of the Lease in our case relating to termination for nonpayment of rent in Paragraph 6 as follows' "6. In the event the 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, or may consider the lease in full force and effect and proceed by legal means to collect the same, and any costs incurred in so doing, including reasonable attorney's fee, shall be paid by Hansons." Clearly there is no waiver of the notice aid demand required by the Utah Statute above quoted, contained in said Agreement To Lease. The Lease in our case expressly requires proper notice be given, and nowhere therein did the lessees waive the demand in the alternative required by the Utah statute.

The document entitled "Notice of Termination and to Quit" which was served on the defendants in our case clearly did not comply with the requirements of the Utah Statute 78-36-3(3) U. C. A. 1953 pertaining to the cancellation of the Lease for nonpayment of rentals when due. In substance it stated, your Lease is terminated and cancelled and you are given 15 days to quit and deliver possession of the leased premises to American Holding Company or court action will be taken for your removal.

It is odvious why the plaintiff and appellant did not wish to comply with the requirements of the Utah statute above cited, by giving the defendants notice in writing of the rent which plaintiff claimed was past due and remained unpaid, and demanding in the alternative that the defendants either pay the rent or surrender the leased premises within three days. The president and assistant secretary of the plaintiff had received a written notice from the post office at St. George that it had a certified letter from the Parkers addressd to American Holding Company which they had refused on advice of plaintiff's counsel to take out of the post office, and which the president of the plaintiff corporation testified he had reason to believe and did believe contained the past due rent money. (Maeser W. Terry's Deposition Pages 9 and 10). The officers of the plaintiff

knew that if the plaintiff served the notice and demand required by the Utah Statute on the defendants that they would have immediately inquired why the plaintiff had not received the check covering full payment of all past due rent, which had been mailed to the plaintiff by certified mail, and upon learning of their refusal to accept the certified mail, they would have again tendered to the plaintiff the entire past due rent, both in the form of defendants' check and in cash, as the defendants did promptly after the postal authorities had informed the defendants that American Holding Company had refushed to accept the certified letter and had returned the same to the defendants.

The Agreement To Lease is silent pertaining to any right of the lessor to cancel and terminate the Lease for nonpayment of utility bills incurred by the lessee, promptly when due, or for nonpayment of taxes on the lessees' personal property situated on the leased premises, promptly when due. The Lease most certainly contains no waiver, by the lessees, of the necessity of complience by the lessor, or its assigns, with the requirements of Utah's unlawful detainer statute applicable thereto, before an action could be maintained by the lessor on either of these grounds. The applicable provision of our statute is 78-36-3(5) which provides substantially that a landlord who wishes to cancel a lease for a term of years, on grounds other than those thereinbefore mentioned, that such landlord must give the tenant notice in writing specifying the default complained of and demanding in the alternative that the tenant correct the default or surrender possession of the premises within three days. That the tenant within three days after the service of such notice upon him, may perform such condition or covenant and thereby save the lease from forfeiture.

Obviously the "Notice of Termination and To Quit" which was served on the defendants did not meet the requirements of the applicable statute.

As heretofore pointed out all utility bills incurred by the lessees at the leased premises, and all taxes levied on the personal property of the lessees situated on the leased premises had all been paid, although a little late, before the document entitled "Notice of Termination and To Quit" was served upon the defendants, and approximately one month before the Complaint was filed on January 10, 1969.

Forfeitures of Leases or other contracts are not favored, either in law or in equity, and provisions relating thereto should be strictly construed against the party seeking to invoke such forfeitures. The following cases support this rule:

VAN ZYVERDEN v. FARRAR. - 393 P 2d 468; 15 UT 2d 367.

3. Unlawful detainer statutes provide severe remedy and must be strictly complied with before cause of action thereunder may be maintained. U.C.A. 1953, 78-36-3.

MURPHY v. TRAYNOR. - 135 P 2d 230; 110 Col. 466.

2. Provisions for forfeitures in contracts, such as leases, are not favored either in law or in equity and are to be strictly construed against party seeking to invoke the forfeitures.

HOWARD M. SWAIN et ux v. SALT LAKE REAL ESTATE AND INVESTMENT COMPANY - 279 P 2d 709; 3 Ut. 2d 121.

2. Contracts 318. Equity is loath to enforce a forfeiture, especially when refusal to do so gives all parties to agreement every right to which they are entitled, and thus works no hardship upon anyone.

The defendants still stand willing and ready to pay into court for the plaintiff, or to pay direct to the plaintiff all rents which have accrued under the Agreement To Lease and which remain unpaid, as soon as the plaintiff will accept the same. It would work a great hardship on the defendants to have this Lease cancelled, including their Option to Renew for an additional ten years, executed simultaneously therewith entitled "Agreement To Option" referred to in plaintiff's "Notice of Termination and To Quit" hereinabove referred to.

CONCLUSION

At the time plaintiff and appellant's Motion For Summary Judgment, and defendants and respondents' Motion For Summary Judgment, were argued and submitted to the lower court for its decision, it was established by the pleadings, depositions, affidavits and other documents on file and received in evidence, and now constituting the record on appeal, that there is no genuine issue as to any material fact of this case, and that the plaintiff had no legal right to maintain this action or to the relief demanded, and that the defendants were entitled to have a Summary Judgment of No Cause of Action entered in their favor, and defendants and respondents respectfully request that the decision of the Honorable District Judge in so finding, concluding, and granting Summary Judgment of No Cause of Action in favor of the defendants be affirmed.

Respectfully Submitted
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