

2004

Ken Brailsford v. Blaine P. Fetter : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Brailsford v. Fetter*, No. 20040307 (Utah Court of Appeals, 2004).

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IN THE UTAH COURT OF APPEALS

KEN BRAILSFORD, Plaintiff/Appellee, v. BLAINE P. FETTER, Defendant/Appellant.	APPELLANT'S REPLY BRIEF Court of Appeals Case No. 20040307-CA
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Appeal from the Third Judicial District Court
In and For Salt Lake County, State of Utah
Judge Sandra Peuler

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UTAH APPELLATE COURTS
SEP 07 2004

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellee,

v.

BLAINE P. FETTER,

Defendant/Appellant.

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INTRODUCTION

Brailsford uses an overly simplistic analysis to support his contention that Fetter, as a guarantor of certain tenant obligations under the subject Lease Agreement (“the lease”), is liable for the restaurant exhaust system at issue in this case. The mere fact the tenant had certain obligations under the lease does not mean Fetter, as a guarantor, is automatically liable for all of those obligations.

The tenant obligations Fetter guaranteed are not as broad as Brailsford has argued. The guaranteed obligations are clearly defined and do not include the alleged obligation that is the subject matter of this action. The lease clearly delineates the improvements that were to be paid for by the landlord and the improvements that were to be paid for by the tenant. Fetter only guaranteed the items on the “Paid by Tenant” list set forth in Exhibit “B” to the lease. The “Paid by Tenant” list does not include payment for the exhaust system’s equipment and installation expense.

The fact Fetter did not guaranty the payment of rent is an additional defense against liability. The lease was written to include an increase in the monthly rental payments so that the landlord could cover the expense it incurred in installing the exhaust system. Payment for the exhaust system was characterized as rent under the lease and Fetter clearly did not guarantee the tenant’s rental obligations. Even Brailsford has not argued that Fetter guaranteed the tenants’ obligation to pay rent.

Brailsford's brief also ignores the strict rules of construction applicable to guaranty agreements. In the present matter, in order for Fetter to be held liable for the exhaust system, those strict rules of construction would have to be utterly disregarded.

Brailsford also incorrectly argues that Fetter's argument regarding offsets is being raised for the first time on appeal. Offsets is listed as an affirmative defense in Fetter's answer to the amended complaint. R. at p. 113. The issue of offsets was also raised in connection with Brailsford's motion for summary judgment in the trial court. *See id.* at pp. 231-239, 241-242, 273-280.

Finally, Fetter has not waived his right to argue the application of the surrender and acceptance doctrine in this matter. Although surrender and acceptance is not specifically raised as an affirmative defense in Fetter's answer to the amended complaint, Brailsford never objected to the defense until now. *See id.* at pp. 273-280. Furthermore, the monthly payments for the exhaust system were specifically defined as rent. Therefore, the doctrine of surrender and acceptance applies even under Brailsford's argument that the doctrine is applicable only to rental obligations. In any event, the fact of the matter is that the premises, including the subject exhaust system, were returned to the landlord. The exhaust system has been used by subsequent restaurant businesses. Under basic legal principles such as the duty to mitigate and the prohibition against double recovery,

Fetter should not be required to pay the balance for the exhaust system, even if the court determines Fetter guaranteed payment for the exhaust system.

ARGUMENT

POINT 1.

IF ANYTHING, FETTER ONLY GUARANTEED THE “PAID BY TENANT” ITEMS OF EXHIBIT “B” TO THE LEASE

The express provisions of the subject Guaranty of Certain Lease Obligations (“the guaranty”) provides that Fetter and his co-guarantor were only guaranteeing “all improvements to the leased premises to be *paid by Tenant*.” R. at 198 (emphasis added).¹ The fact that the guaranty refers to improvements “to be paid by Tenant” is critical to the analysis of this case because the parties specifically defined in the lease which obligations belonged to the landlord and which obligations belonged to the tenant.

Clearly, the language of the guaranty relates back to Exhibit “B” to the lease which contains two separate lists itemizing the improvements to be paid by the landlord and the improvements to be paid by the *tenant*. The “PAID BY

¹ Specifically, the guaranty states: “the undersigned Guarantors hereby guarantee to Landlord the full and prompt payment of all costs and expenses incurred in connection with the design, construction and installation to all improvements to the Leased premises *to be paid by Tenant*, and the performance of all of Tenant’s other duties and obligations set forth in Sections 12 and 14 of the Lease.” R. at 198. The guaranty is limited. It is not unconditional as argued by Brailsford.

TENANT” portion of Exhibit “B” lists eleven separate items that were to be paid for by the tenant. *Id.* at 196. With respect to the subject exhaust system, Exhibit “B” states that the tenant was only obligated to pay for the “*design of make up air and exhaust system.*” *Id.* (emphasis added). The tenant list *does not* include the cost of the exhaust system equipment and/or installation. That expense is specifically included on the landlord’s list. *Id.* at 195. Yet, this is the amount Brailsford attempts to recover from Fetter as a guarantor. Simply stated, because the “PAID BY TENANT” list itself does not include the obligation for payment of the exhaust system, it is axiomatic that Fetter did not personally guarantee it. This is clear if the lease and the guaranty are read in context with each other.

Ignoring the relationship between the guaranty and the subject lease agreement, Brailsford argues broadly that because the exhaust system was an improvement benefiting the tenant, Fetter guaranteed it. Not only does this argument disregard the clear language of the lease and the guaranty, it is also contrary to the authorities cited by Fetter in its opening brief that a guaranty agreement must be strictly construed. *See Carrier Brokers, Inc. v. Spanish Trail*, 761 P. 2d 258, 261 (Utah App. 1998) (citing *Valley Bank & Trust v. Rite Way Concrete Forming, Inc.*, 742 P.2d 105, 110 (Utah App. 1997)). In fact, Brailsford’s

brief does not challenge the application of the principle that guaranty contracts must be construed strictly.²

The guaranty also states that Fetter and his co-guarantor were guaranteeing the tenant's obligations under Section 12 of the lease. R. at p. 198.³ Brailsford, rather than acknowledging the limitations of this obligation, argues that the obligations under Section 12 of the lease broadly cover any and all tenant obligations – not just those obligations referenced in and limited by Exhibit “B” to the lease. Brailsford's position is inaccurate. The only logical way to read Section 12 is that it refers back to Exhibit “B” to the lease which, as stated above, contains two separate lists: one for improvements to be paid for by the landlord and one for improvements to be paid for by the tenant. To quote the language in Section 12 directly: “Tenant shall be responsible, and shall pay the full cost for all other improvements to the premises, *as shown and described on attached Exhibit “B”*”

² Even in a case relied upon by Brailsford, the court stated that the guaranty “depends upon the nature of the guarantor's promise.” *Strevall-Patterson Co. v. Francis*, 646 P.2d 741, 743 (Utah 1982) (citation omitted).

³ The guaranty also states the guarantors guaranteed tenant obligations under Section 14 of the lease. Fetter contends Section 14 is not at issue in this case because it relates to the tenant's obligations to pay for subsequent alterations to the premises. R. at 179-180. The subject exhaust system was not an alteration. Section 14.3 of the lease does refer back to the guaranty signed by Fetter and his co-guarantor. However, that reference does not create any additional liability. As argued in Point 1 herein, the guaranty is limited to those items set forth in the “PAID BY TENANT” list of Exhibit “B” to the lease.

(“*Tenant’s Improvements*”).” R. at 178 (emphasis added). Because Section 12 merely refers back to Exhibit “B,” which does not contain the exhaust system in the “PAID BY TENANT” list, any argument Fetter guaranteed payment for the exhaust system fails.

POINT 2.

FETTER DID NOT GUARANTY THE PAYMENT OF RENT

The lease reveals the tenant agreed to pay an additional amount of rent, for a five-year period, to cover the expense of the exhaust system, which was paid for initially by the landlord. Although Brailsford calls this obligation a “loan,” there is no promissory note evidencing any separate loan obligation. It was an obligation under the lease defined as rent. Under Section 5 of the lease, which sets for the base rent terms, there are two columns setting forth annual rent and monthly rent. The lease states that “[t]hese amounts [referring to the base rent amounts] will increase to include amortization of the cost of the [exhaust system] over a 5-year period, with interest at 8%.” R. at 175. In other words, the additional amount paid for the exhaust system is not referred to as anything other than rent.⁴

⁴ The “PAID BY LANDLORD” list contained in Exhibit “B” to the lease clarifies that the amounts paid by the tenant to cover the exhaust system cost was classified as rent: “[exhaust system] for kitchen...to be installed by Tenant, but cost of equipment and installation financed by Landlord and *repaid through rent*.” R. at 195 (emphasis added).

Not only did Fetter not personally guarantee the exhaust system, he did not guarantee the payment of rent.⁵ Because the payment for the exhaust system was classified by the parties as rent, Fetter is not liable for that expense under the guaranty.⁶

POINT 3.

FETTER HAS NOT WAIVED THE DEFENSE OF SURRENDER AND ACCEPTANCE

Fetter acknowledges his answer to the amended complaint does not specifically contain an affirmative defense defined as “surrender and acceptance.” However, the issue was raised during the summary judgment phase of this lawsuit. *See R.* at 273-280. Brailsford never challenged Fetter’s reliance upon that doctrine during the summary judgment proceedings.

⁵ It is noteworthy that despite Brailsford’s attempt to have the guaranty construed broadly, he has not argued that Fetter guaranteed the payment of rent.

⁶ Brailsford tries to make a big deal out of the fact a separate amortization schedule was prepared for repayment of the exhaust system and that separate checks were paid for the exhaust system portion of the rental payments. First, Brailsford’s prior counsel has already represented on the record that the fact separate checks were written “really doesn’t matter.” *R.* at 433 (p. 31). Additionally, Fetter has explained the reason why separate checks were written. There were ongoing disputes concerning which party was responsible to pay for what mechanical improvements. Fetter created an amortization schedule and wrote separate checks for accounting purposes. *R.* at 201-202. Brailsford cannot make the leap that because separate checks may have been written, Fetter guaranteed those payments. The amortized payments for the exhaust system were defined as rental payments no matter how the payments were made.

It is well settled in Utah that the failure to include a defense in the pleadings is not necessarily fatal. *See F.M.A. Financial Corp. v. Build, Inc.*, 404 P.2d 670, 671 (Utah 1965) (“this rule is not so sacrosanct as to be inviolable”). “If the interests of justice so require and the opposing party is given fair opportunity to meet such a defense, the trial court may permit the issue to be tried.” *Id.* *See also Olpin v. Grove Fin. Co.*, 521 P.2d 1221, 1223 (Utah 1974).

In the present matter, the surrender and acceptance issue was placed on the table long ago, and without any prior argument by Brailsford that it had been waived because it was not specifically set forth in the pleadings. Brailsford, by its failure to object until now, has essentially acquiesced and the issue is appropriate for consideration on appeal.

POINT 4.

THE DOCTRINE OF SURRENDER AND ACCEPTANCE IS APPLICABLE

Brailsford argues the doctrine of surrender and acceptance is inapplicable to this case because the subject obligation is not rent. However, as argued in Point 2 above, a clear reading of the lease reveals that if anything, the tenant’s obligation

to pay for the exhaust system over time was classified as rent. Because the obligation is classified as rent, the doctrine of surrender and acceptance applies.⁷

In any event, the overriding concern is Brailsford's apparent attempt to avoid the consequences of the landlord's duty to mitigate damages and the prohibition against double recovery. Brailsford's argument that the tenant continued to be liable for the payment of rent following the termination of the lease ignores the landlord's duty to mitigate damages. Brailsford also fails to readily acknowledge that at some point, the premises were relet to a new restaurant operator. Despite this, Brailsford contends that the tenant remained liable for the full, unpaid balance of the exhaust system, even when the premises were relet to a third party.

At a minimum, even if the tenant remained liable, and assuming Fetter was liable as a guarantor, there are certainly fact questions concerning the amount of liability. Despite this, the trial court simply entered judgment for the full balance of the cost of the exhaust system without considering the impact of the landlord's duty to mitigate, double recovery concerns and Fetter's claim for offsets.

⁷ The surrender and acceptance cases cited by Brailsford in his brief agree that the doctrine works to excuse liability for rent accruing after the surrender and acceptance occurs. See *Nicholas A. Cutaia, Inc. v. Buyer's Bazaar, Inc.*, 224 A.D. 2d 952 (N.Y. App. 1996); *Peterson v. Hodges*, 239 P.2d 180 (Utah 1951).

POINT 5.

FETTER'S CLAIM FOR OFFSET WAS BEFORE THE TRIAL COURT

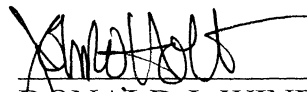
Fetter's defense of offset was specifically set forth in his answer to the amended complaint. R. at 113. Furthermore, the issue was debated during the summary judgment proceedings in the trial court. *See id.* at 231-239, 241-242, 273-280. The issue of offset is appropriately before this court for consideration. Additionally, at a minimum, because there are questions of fact surrounding the offset issue, it was improper for the trial court to enter summary judgment concerning the amount of liability.

CONCLUSION

This court should reverse the trial court's summary judgment against Fetter. Reading the lease and the guaranty in conjunction with each other reveals that while Fetter guaranteed the tenant's obligations specifically defined in the lease, he did not guarantee the payment for the exhaust system. Additionally, the guaranty did not cover the rental payments that were designed to cover the landlord's expense for the exhaust system. Brailsford's broad argument that Fetter is liable for each and every obligation the tenant had under the lease is incorrect. Fetter only guaranteed those items referenced in the guaranty, which must be strictly construed. In short, Fetter's guaranty obligation extended only to the items contained on the "PAID BY TENANT" list in Exhibit "B" to the lease.

RESPECTFULLY SUBMITTED this 7th day of September, 2004.

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CERTIFICATE OF SERVICE

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