1966

Mary Louise Gerard v. Preston L. Young and Unice Young : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY LOUISE GERARD,
Plaintiff-Respondent,

— vs. —

PRESTON L. YOUNG and
UNICE YOUNG,
Defendants-Appellants.

RESPONDENT'S BR

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TABLE OF CONTENTS

Cases Cited

Constitutional Citations

Statutes Cited

TABLE OF CONTENTS — (Continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY LOUISE GERARD,
Plaintiff-Respondent,

— vs. —

PRESTON L. YOUNG and
UNICE YOUNG,
Defendants-Appellants.

Case
No. 10712

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiff, as lessor of a cafe to defendants, sought cancellation of the lease on the grounds that defendants were gambling and allowing gambling at the cafe by paying off on punchboards and pinballs, both before and after service of notices to desist from the gambling or to quit the premises.

DISPOSITION IN LOWER COURT

Plaintiff was granted Summary Judgment against the defendants cancelling the lease between them and awarding plaintiff damages for unlawful detainer.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmation of the judgment of the lower court.

STATEMENT OF FACTS

Defendants were paying off bettors and punchboards and pinball machines at a cafe which they had leased from plaintiff. The cafe is situate at 890 West 2100 South, Salt Lake County, Utah. (Since filing of the Complaint the property has been annexed by Salt Lake City.) The lease provided in part:

> "It is understood and agreed that the said leased premises shall be occupied and used as a restaurant and cafe only, and for no other purpose whatever, and the Youngs agree to conduct said business strictly in compliance with law."

On April 12, 1966, plaintiff served written notice on defendants that they must stop the gambling or quit the cafe (R. 4). This notice was based, by its terms, both on the above terms of the lease and on 78-36-3(5) UCA, 1953. Defendants ignored the notice and continued their gambling, as admitted by their Answer which states in part, ". . . defendants admit receipt of notice and that they disregarded its contents (R. 8)." Thereafter plaintiff accepted no further rents. On April 15, 1966, and again on May 15, 1966, when the rents became due, plaintiff refused them, advising defendants that she would not accept rents until and unless they desisted from gambling. Defendants not having done so, plaintiff then served notice to quit on June 6, 1966 (R. 6),

and when the time for that notice had run without compliance by defendants, Complaint was filed on June 13, 1966 (R. 1).

ARGUMENT

POINT I

THE EVIDENCE SHOWS THAT DEFENDANTS HAD GAMBLING AT THE CAFE BEFORE AND AFTER SERVICE OF NOTICE TO DESIST AND THE FILING OF THE COMPLAINT.

The plaintiff's positive evidence is contained in the affidavits filed in support of her motions for summary judgment. The affidavit of Evan Holladay indicates a continuous course of gambling as part of defendant's business (R. 16). The affidavits of Bryant Hanson (R. 17), and Larry A. Hanson (R. 18), give evidence of specific instances of gambling even after filing of the Complaint.

The defendants' pleadings concern a point clearly within the factual knowledge of the defendants — that they either did or did not, as part of their business, pay off on their punchboards and pinballs to winning players.

Despite many pleadings, the defendants have still neither admitted nor denied the gambling. Their Answer states, "Defendants admit receipt of notice and that they disregarded the same," (R. 8). If they had not been gambling as part of their business, they would have had an automatic compliance with the notices. The Answer further states, "If plaintiff proves that defend-

ants maintained pinball machines as gambling devices and punchboards as gambling devices, which is denied . . .'' (R. 8). This statement is also a *non sequitur*. If they weren't gambling, why should they say plaintiff might prove that they were? If they were gambling, and this being a fact of which the defendants had to be aware, why did they deny it in their pleading?

The answer seems to violate R. 11, URCP, and to be an admission of gambling under R 8 (b) and (d), URCP, *Deseret Savings Bank* v. *Walker et al.*, 78 Utah 241, 248, 2P. 2d 609, holding on issue of non-specific denial of facts within pleader's knowledge, ''There was no specific denial of the facts alleged in paragraph 6 of the Complaint, and that it must therefor be assumed that such facts were admitted. In that event no evidence of their existence was necessary to support the findings of such facts by the court.''

Defendants' subsequent pleadings followed the same course and might have exhausted the patience of the court.

Plaintiff filed a Motion for Summary Judgment based on the pleadings and the aforesaid affidavits (R. 14, 15). Defendants' reply was an affidavit which did not deny that defendants used the cafe for gambling purposes, nor even that specific payoffs as alleged had been made. Their affidavit stated only that they had no recollection of the specific payoffs alleged by plaintiff (R. 23, 24). The court promptly entered Judgment against defendants. Defendants, without any notice to plain-

tiff, prevailed on the trial court to set aside the Judgment (R. 30), on the grounds that defendants' pleadings were "a mistake of counsel, George E. Bridwell, and such should not be given efficacy to penalize substantive rights of defendants" (R. 29).

On close reading, however, defendants' affidavit in support of their motion to set aside (R. 26), does not deny a course of business including gambling, but only again that they do not recall the specific payoffs alleged by the Hansons' affidavits (R. 17, 18), and that as to the affidavit of Evan Holladay alleging a continuous course of gambling (R. 16), Holladay might be a liar. The clear inference from defendant's affidavits is that they gambled so often that they can't remember who they paid.

Plaintiff then took defendant Preston Young's deposition (R. 60). Pages 3 through 6 of the deposition are a list of questions concerning whether the defendants maintained pinballs and punchboards at the cafe for gambling (Depos. 3, 4), both before and after notice to desist and the filing of the Complaint, and as to whether both before and after notice the defendant was paying off the winners (Depos. 4-6). Defendant Preston Young refused to answer all questions based on the Fifth Amendment.

Plaintiff then filed a new Motion for Summary Judgment (R. 36, 37). The Motion pointed out that defendants had still refused in their pleadings to admit or deny the facts and that in the deposition the Fifth Amend-

ment was taken. Because defendants had complained of collusion between plaintiff's affiants, plaintiff, in her motion, volunteered to have the affiants and Eddie Davies, one of the persons who had received payoffs, present at the hearing. They did appear and defendant chose not to examine them. Defendant Preston Young's deposition was published and plaintiff again was given Summary Judgment.

The evidence summarized shows a course of gambling by defendants at all times. It shows that defendants still evade an answer to this issue in their pleadings. It show that the defendant Preston Young, refused to answer concerning gambling, based on self-incrimination at his deposition, even though he was then aware that such refusal would be a basis for the court to infer that he had been using the cafe for gambling purposes (Depos. 5, 6). *State* v. *Aime,* 62 Utah 476, 486, 220 P. 704, states, although in a criminal case, "... When he voluntarily testified he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge previously testified to against him warrants the inference that it is true." 20 Am. Jur., Evidence §190, pp. 193-194.

POINT II

DEFENDANTS' GAMBLING OPERATION AT THE CAFE WAS A PROPER GROUND FOR TERMINATION OF THEIR LEASE.

Defendants' gambling was unlawful. Their brief alleges that the gambling statutes of Utah are void and

so their gambling was legal. This overlooks the general prohibition against gambling contained in Art. 6 §27, Utah Constitution, and implemented by anti-gambling ordinances of Salt Lake City and Salt Lake County.

The cafe was situate in Salt Lake County at the time this lawsuit was started. It is now in Salt Lake City by annexation. Salt Lake County acted under the authority given it by the State Legislature in 17-5-35 UCA, 1953 (Police, building, and sanitary regulations — Power to make) and 17-5-77 UCA, 1953 (Ordinances — Power to Enact — Penalty for Violation).

4-10-1, Salt Lake County Ordinances, Revised 1953, prohibits gambling in the county by language which covers pinball and punchboard payoffs.

> "All gambling and gaming of every kind and description by playing of cards, dice, faro, roulette, keno, poker, slot machines, devices known as trade machines, or any like machines or devices by whatever name known, or any contrivance or device by or with which money, merchandise or anything of value may be bet, staked, hazarded, won or lost, upon chance, or at any other game or scheme of chance whatever, and by betting on the results of horse races or on the result of any contest, skill or endurance of men or animals by means of book-making, pools, turn exchanges or other devices, for money or other property or thing of value within the county is hereby declared unlawful."

4-10-2, Salt Lake County Ordinances, revised 1953, defines a gambling house without reference to frequency

of the gambling, and makes it unlawful for either a lessee or a lessor of property to allow it to be used for gambling,

> "UNLAWFUL TO KEEP OR MAINTAIN GAMBLING HOUSE. It shall be unlawful for any person to conduct, keep or maintain a house, building, room or other place where any of the games or schemes herein prohibited are carried on, conducted or operated. It shall be unlawful for any person knowingly to permit or suffer any of the games or schemes herein declared unlawful to be carried on or kept, maintained or operated in any house, building, room or other place owned by him in whole or in part or by him leased or let to any other person."

1-1-6 Salt Lake County Ordinances, Revised 1953, make the above offenses misdemeanors.

The legislature by 10-8-41, UCA, 1953, gave a similar power to Salt Lake City, and the city enacted ordinances comparable to those of Salt Lake County by 17-1-4, 6, Salt Lake City Ordinances.

The gambling being unlawful, did plaintiff have grounds for termination of the lease?

Defendant relies on this point on the case of *Keating* v. *Preston,* 108 P. 2d 479 (Calif.). In that case the lessor's attempt to terminate a lease was denied although the lessee was permitting gambling. That case, however, was conditioned on two points, first that the lease didn't prohibit the conduct, and second that there was no statutory provision that made the conduct a basis for lease forfeiture.

In the instant case as to the first point above, the lease provides:

> "It is understood and agreed that the said leased premises shall be occupied and used as a restaurant and cafe only, and for no other purpose whatever, and the Youngs agree to conduct said business strictly in compliance with law." (R. 2)

As to the second point, 78-36-3, UCA, 1953, provides:

> "UNLAWFUL DETAINER BY TENANT FOR TERM LESS THAN LIFE. — A Tenant of real property, for a term less than life, is guilty of an unlawful detainer:
>
> (4) When he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste thereon, or *when he sets up or carries on therein or thereon any unlawful business,* or when he suffers, permits or maintains on or about said premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or,
>
> (5) *When he continues in possession, in person or by subtenant, after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held,* other than those hereinbefore mentioned, *and after notice in writing requiring in the alternative the performance of such conditions or covenant or the surrender of the property,* served upon him, and, if there is a subtenant in actual occupation of the premises, also upon such subtenant, *shall remain uncomplied with for five days after service thereof.* Within three days after the service of the notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the

term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from forfeiture; provided, that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice as last prescribed herein need be given." (Emphasis added)

It should be noted that while the unlawful detainer statutes have a number of precise conditions concerning due notice, that defendants have stated no point denying proper notice at any point in the proceedings before the trial court or this court.

Is the gambling of sufficient substance to justify lease termination? The facts show a continuous course of gambling. While the affidavits of the Hansons (R. 17-19) relate only isolated instances, the Complaint charges a course of gambling and of *maintaining machines for that purpose* at the cafe, as does the affidavit of Evan Holladay (R. 16). As stated in Point I, these allegations not having been denied are deemed admitted.

The gambling is substantial when viewed from plaintiff's eyes because, as lessor, she herself is liable to criminal prosecution if she allows gambling on the premises she has leased. 76-27-3 UCA, 1953, and 4-10-2, Salt Lake County Ordinances, Revised, 1953. The defendants having refused to desist, she has the duty of forcing them to, which this lawsuit hopes to do. The rule is stated in *Zotalis* v. *Cannellos et al.*, 164 NW 807 (Minn.), which held shaking dice for cigars was grounds for lease termination based on a lease term against gambling:

"The violation of a condition in the lease cannot be said to be trivial when the violation is of such a character that the lessor may be subjected to a criminal prosecution therefore."

Finally, 78-36-3(5) UCA, 1953, makes no distinction between great and small breaches of a lease, nor is there a Utah case on this point. To satisfy this statute what is required is only that a breach be proved and that after notice given pursuant to the statute, that the breach continue. On this there is no argument on the facts as evidenced by the unrebutted affidavits of Bryant and Larry A. Hanson as to payoffs, on May 21, 1966, and June 3, 1966 (R. 17-19), with notice under 78-3-36(4)& (5) UCA, 1953, previously served on April 12, 1966 (R. 4, 5). *Gilbert* v. *Peck,* 121 P. 315 (Calif.); 32 Am. Jur., Landlord and Tenant, §864, pp. 731; 100 ALR 2d 469 et seq.

CONCLUSION

It is respectfully submitted that the summary judgment is well supported by the facts and law and should be affirmed.

Respectfully submitted,

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