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Shirman Milliner And Shana Van Wagoner v. Walton R. Farmer And Heber Valley Ford, Inc. v. James Ford Sales, Inc., And G. Gordan James : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRMAN MILLINER and
SHANA VAN WAGONER,
Plaintiffs and Respondents

vs

WALTON R. FARMER and
HEBER VALLEY FORD, INC.
Defendants and Third Party Plaintiffs and Appellants

vs

JAMES FORD SALES, INC., and
G. GORDAN JAMES,
Third Party Defendants

Case No. 11955

APPELLANT'S BRIEF

Appeal from the Order for Summary Judgment of the
District Court of Wasatch County
Hon. Allen B. Sorensen, District Judge

J HAROLD CALL
Attorney for Defendants
Third Party Plaintiffs
Appellants
23 West Center
Heber City, Utah

PRINTERS INC. - SUGAR HOUSE

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STATEMENT OF KIND OF CASE

This is an action on a lease and for attorney's fees as provided for in said lease.

DISPOSITION IN LOWER COURT

The Third Party Defendant, G. Gordon James, was dismissed from the case and the Third Party Defendant

James Ford Sales, Inc. defaulted and judgment was taken against James Ford Sales, Inc., Third Party Defendant, in favor of Appellants.

The balance of the lawsuit was submitted to the court on stipulation of facts except as to the amount of the attorney's fees and this was testified to by the attorney for the plaintiffs and respondents and was the only testimony taken in the case.

At the conclusion of the testimony on attorney's fees the court awarded judgment to the plaintiffs and respondents as prayed for in their complaint and awarded attorney's fees in the sum of Five Hundred ($500.00) Dollars.

RELIEF SOUGHT ON APPEAL

Appellants seek to have that portion of the judgment which awarded Five Hundred ($500.00) Dollars attorney's fees to respondents reversed and no attorney's fees awarded.

STATEMENT OF FACT

July 23rd, 1962, respondent leased for five (5) years a building to G. Gordon James, third party defendant, for use as a Ford dealer agency in Heber City, Utah. (See Exhibit # I)

July 16, 1967, lease was assigned to Walton R. Farmer and then re-assigned to Heber Valley Ford, Inc., appellants. (See Exhibits #2 and #3). At the time of the assignment of the lease James Ford Sales, Inc. gave appellant a bill of

sale to a chain link fence and various other items. (See Exhibit #10)

The lease expired July 23rd, 1968, and respondent prepared a new lease for appellant to sign but the new lease was never executed. (See Exhibit #5) Appellant continued to occupy premises and pay the same rent as before while parties attempted to negotiate some agreement.

January 22nd, 1969, respondent served a notice to quit on Walton R. Farmer, one of the appellants, by certified mail, certificate #635489. (See Exhibit #6)

February 12, 1969, respondents had the Wasatch County Sheriff serve a notice of termination of lease and notice to vacate premises on both appellants, Walton R. Farmer and Heber Valley Ford, Inc. (See Exhibit #7)

Appellants continued to occupy premises and respondents filed suit for unlawful detainer February 20th, 1969, case number 3108 in the Wasatch County District Court. The complaint alleged appellants were on a month to month basis with the term ending on the 10th day of each month. This was admitted in the answer filed by appellants. This suit was dismissed with prejudice June 9, 1969 because of failure of respondent to give proper notice under the statute.

About the 1st of June, 1969 the appellant Heber Valley Ford, Inc. signed an undated stipulation wherein it agreed to vacate said premises July 10, 1969 and pay the back rent due. This was done. (See Exhibit #9)

While the suit for unlawful detainer was being processed and during March of 1969, the appellants removed

the chain link fence and certain other items from the premises, all items being covered in the bill of sale.

Respondents then brought this action to recover all such items or for damages, including a reasonable attorney's fee, under a theory of breach of the lease originally made between respondents and third party defendants and assigned to appellants.

The third party defendant, G. Gordon James, was dismissed from the lawsuit and third party defendant James Ford Sales refused to stand back of its bill of sales and defaulted.

Respondent was granted judgment against appellant which could be satisfied by restoring the items taken plus attorney's fees in the sum of Five Hundred ($500.00) Dollars. Appellant was given judgment against third party defendant James Ford Sales, Inc. for the amount of the judgment against the appellants.

POINT I

REVIEWING COURT NEED NOT SUSTAIN TRIAL JUDGE WHERE FINDINGS ARE BASED ON STIPULATED FACTS.

All issues were submitted to trial Judge on stipulated facts except as to reasonableness of attorney's fees and this point is not in issue.

Where trial Judge based his findings on stipulated facts, reviewing court need not sustain him unless it is convinced

of the correctness of his holding.

Prince v. Western Empire Life Insurance, 19 Utah 2d 174; 428 P. 2d 163

POINT II

LEASE HAD EXPIRED AND TERMINATED AS A MATTER OF LAW.

For respondent to be entitled to attorney's fees there must be in existence a valid lease which appellant violated.

By statute the lease had expired July 23rd, 1968.

> 78-36-8 (1) "In all cases where real property is leased for a specified term or period, by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of such specified term or period. . . ."

If the tenancy has terminated, the instrument which created tenancy, the lease, would cease to have force and effect. Acts committed after the tenancy had terminated cannot be held to relate back and be a violation of the original tenancy or the lease which created the tenancy.

POINT III

WHEN A TENANT HOLDS OVER THE LANDLORD HAS THE CHOICE OF HOLDING THE TENANT FOR A NEW TERM OR AS A TRESPASSER, BUT NOT AS BOTH.

The rule is well established that when a tenant holds over the term the Landlord can make a choice to either hold

the tenant for a new term or treat him as a trespasser but not both.

At 51 C CJS 221 the rule is stated as follows:

> "Where a tenant holds over his term, the Landlord must treat him either as a trespasser or as a tenant, but he may not do both; and after the Landlord has made and indicated his election he may not alter it."

Thus if the Landlord assumes to act inconsistently with the theory of the original tenancy, he will waive his option and may not then treat the tenant as hold over for another term.

2 Thompson on Real Property P 30 says:

> "It follows that mere holding over by a tenant does not of itself renew the tenancy. It only gives the Landlord an option to renew the term."

The rule at 32 Am Jur 779 is stated as follows:

> "A tenant holding over has no election to regard himself as a tenant; such election is in the Landlord. After the Landlord has once exercised his election not to hold the tenant another term, his right to hold him is lost."

In the case of *Sinclair Refining Company v. Shakespeare* 171 ALR 1058 the court held that upon holding over by a tenant the Landlord may at his election hold the tenant as a trespasser or as a continuing tenant.

These rules were followed in the case of *Emery v. Metzyner* 156 A 2d 627:

> "When a lease contains a covenant or option to renew, any holding over, even for a very short time gives the Landlord the right to elect to hold the tenant liable as a tenant for the specific term of the renewal, and once the Landlord has exercised his option and indicated his election to treat the tenant either as a holdover tenant or as a trespasser, he may not alter it."

In the instant case respondent prepared a new lease (Exhibit #5) when the original lease expired and submitted it to appellants for signing but it was never executed by appellants. The respondent then brought suit for unlawful detainer claiming the appellants were on a month to month tenancy. This was admitted in the answer. The Landlord and the respondent had now made his election as to how he wanted to treat the possession of his property. That election was as a trespasser.

By statute the lease had ended.

By Landlord's choice the lease and tenancy had ended.

It was not till respondent had elected to treat appellants as a trespasser that the appellants in good faith removed the items complained of. When the third party defendants refused to stand back of their warranty bill of sale the appellants returned the items removed from the respondent's premises.

CONCLUSION

No lease was in effect at the time the appellants removed the items listed in the bill of sale, therefore no

attorney's fees based on a breach of the lease should have been awarded.

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