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IN THE SUPREME COURT

of the

STATE OF UTAH

SHERMAN MILLINER and SHANNA 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 C. GORDON JAMES, Third Party Defendants.	)	Case No. 11955

RESPONDENT'S BRIEF

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SHIPMAN MILLINER and
SHANNA 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. GORDON JAMES,

Third Party Defendants.

Case No.
11955

RESPONDENTS BRIEF

DISPOSITION OF LOWER COURT

The District Court of Wasatch County, the Honorable Allen B. Sorensen presiding, entered final judgment for the restoration of various personal property and for judgment for the costs of restoration all in accordance with the stipulation of the parties, and in addition thereto entered judgment for attorneys fees in the amount of $500.00 and for costs. The award of attorneys fees is the only portion of the said judgment being appealed.

RELIEF DESIRED

Respondents respectfully submit that the judgment of the District Court should be affirmed and that an additional sum for reasonable attorneys fees should be awarded to the Respondent for the prosecution of this appeal; a reasonable fee to be awarded is the minimum bar fee schedule of $500.00, or in the alternative

the Court should hear testimony on the amount of a reasonable attorneys fee to be awarded on the appeal.

STATEMENT OF FACTS

The Defendants and Third Party Plaintiffs, hereinafter referred to as Appellants, leased premises belonging to the Respondents pursuant to a written lease (Exhibit 1). Appellants held as an assignee of the original lease (Exhibits 2 and 3). The initial term in the lease was for five years with a renewal option of an additional five years (Exhibit 1). The five year term ended and the Appellants continued to hold over (Stipulation of Facts). During the holdover period the Appellants removed from the leased premises fencing belonging to the Respondents. This occured in March of 1969 (Amended Finding of Fact #14). On July 10, 1969, the Appellants vacated the premises and

removed additional personal property belonging to the Respondents (Finding of Fact #15). The Appellants were notified in person, prior to the removal of the personal property, that the said personal property was that of the Respondents and should not be removed. In spite of the notification the Appellants tore down the fencing, removed the same, and later removed the other personal property (Appellants Answer to Interrogatories 1 and 2). Respondents filed a suit to recover said personal property which ended in the judgment under consideration.

FACTS IN DISPUTE

Appellants brief alleges an appeal from a summary judgment whereas the judgment awarded was following the trial on its merits and following the submission of evidence, Stipulation, Findings of Fact and Conclusions of Law.

Appellants brief contends that the hold over

was for the purpose of accomodating negotiations for a new lease. There is no stipulation to support the contention of negotiation and no other evidence submitted thereon. The only testimony other than the extent and value of the legal services was that of the Respondent Shirman Milliner, who testified that there was no agreement contrary to those within the written lease.

Appellant contends that the property was removed in good faith and that the Bill of Sale included said items. The facts are contrary, however. It was conceeded that the railing and piping were not a part of the Bill of Sale (Pre-trial Order). The Appellant was notified that any remedy was against his assignor but he persisted in his course of action after full knowledge.

ARGUMENT I

A HOLDOVER TENANT IS BOUND BY THE COVENANTS IN A WRITTEN LEASE.

The General Rule is set forth 49ALR2d 480, 483-4:

> "It is a firmly established rule . . . that proof of a holding over after the expiration of the term fixed in the lease gives rise to the presumption . . . that the holdover tenant continue to be bound by the covenants which were binding upon him during the term"

See also to the same effect 33 Am Jur Landlord and Tenant §§ 948. In the case of Wight vs. Callaghan, 17 Utah 2d 251, 408 P2d 908 the Court construed and applied the covenants in leases of premises vacated after a holdover period. The Court found lessee bound by the terms in said leases and affirmed the award of damages from breach thereof including attorneys fees and

Court costs.

There were no facts or stipulations entered into which would in anyway rebut the presumption. There certainly is no inconsistenancy in the breached covenants within the lease and the holdover. There is nothing inconsistant with the requirement that the tenant not commit waist; that he return the property in good condition less normal wear and tear; that the improvements remain with the property or that the tenant pay reasonable attorneys fees required in enforcing the terms of the lease.

Certainly the tenant would be bound including attorneys fees had the same wilful conduct accured during the term of the lease. It seems unreasonable that the tenant could lessen his responsibility by

holding over.

The cases cited by Appellants are not inconsistant with the majority rule. They deal with lease renewal and not with the responsibility of a holdover tenant for breaches of covenants contained in the original lease. There is no case cited wherein the tenant was relieved of his responsibility for damages to the premises by holding over.

ARGUMENT II

COURT SHOULD AWARD ATTORNEYS FEES ON APPEAL.

The Trial Court found that the enforcement of the covenants within the lease involved reasonable attorneys fees for the work then completed in the amount of $500.00. The Respondent is still expending attorneys fees in enforcement by its appearance under this appeal. In each incident this expense

and damage to the Respondent was compelled by the tenant.

Contrary to the statement in the Appellants brief, the Appellants were not in good faith in removal of the items of the Respondents and part of the items removed were not even within the bill of sale upon which the Appellants claim to have relied.

The Court should hear and consider a reasonable attorneys fee to be awarded to Respondents for this appeal taken by the Appellants.

CONCLUSION

The law is nearly unanamous in that a holdover tenant remains responsible to the covenants in a lease which are not inconsistent with the holdover tenancy. The covenants breached by the Appellants are in no way consistent with the hold over. The Appellants are not

innocent and a victim of a faulty purchase of the equipment. They had full and complete knowledge that the property they attempted to take was that of the Respondents, all prior to the removal. Appellants were notified not to remove the property but in direct derogation of their instruction, after being fully advised, removed the property of the Respondents and failed and refused to return the same until after the judgment was awarded at the Trial Court. The Court fixed the reasonable damages including attorneys fees pursuant to the testimony given as to the amount of the legal services to the date of the trial. Appellant's appeal now forces additional legal expenses upon the Respondents for which there should be compensation. It is respectfully submitted that the judgment of the Trial Court should be affirmed and

that the Court determine a reasonable attorneys fee for the prosecution of this appeal and award judgment accordingly.

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