1972

University Club v. Invesco Holding Corporation And Wasatch Realty Corporation : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY CLUB, a non-profit Utah corporation,
Plaintiff-Appellant,

vs.

INVESCO HOLDING CORPORATION, a New York corporation, and WASATCH REALTY CORPORATION, a Utah corporation,
Defendants-Respondents.

Case No. 12792

BRIEF OF RESPONDENTS

Appeal from Summary Judgment of the Third Judicial District Court, Honorable Bryant H. Croft, Judge.

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NATURE OF CASE

This is a contract case involving a lease wherein plaintiff was lessee and defendants were lessors of certain premises in an office building. Defendants' air conditioning equipment failed. By agreement, plaintiff installed a new unit for its own premises and waived claim against defendants therefor. Plaintiff now sues for damages, seeking to avoid the waiver in the agreement.

DISPOSITION IN LOWER COURT

Defendants moved for summary judgment, dismissing all claims, except declaring plaintiff was entitled to

abatement of rent for the period the premises were untenantable (R. 41). The trial court granted defendants' motion and entered summary judgment accordingly (R. 113-4).

RELIEF SOUGHT ON APPEAL

Defendants pray the judgment be affirmed.

STATEMENT OF FACTS

The "Statement of Facts" in plaintiff's brief is so argumentative and based on incompetent evidence that defendants are compelled to state the facts accurately.

In 1963, plaintiff leased for 42 years the top two floors in defendant's office building (R. 43).

The air conditioning system maintained by defendants for the entire building failed Friday evening, July 18, 1969, because an employee of the independent contractor defendants hired to service the air conditioner put too much acid in the system (R. 18, 34; Miller depo. pp. 26-8). It did not fail from faulty maintenance by defendants as plaintiff's brief implies (p. 3).

Plaintiff claims its premises were rendered untenantable thereby from July 18 to July 30, 1969 (R. 80).

The lease provides (R. 47-56):

> "16. UTILITIES. Landlord shall furnish at its expense . . . air conditioning for the premises

and shall maintain a comfortable temperature therein at all times.

"19. REPAIRS. Lessor shall maintain and keep in good repair . . . all machinery and equipment provided for the use of the entire building such as . . . air conditioning . . . .*Neither Lessor nor Lessee shall be liable to the other for any damages sustained to the property of the other* resulting from the failure of either to make any repairs required to be made hereunder, except that the one failing to make such repairs shall be liable to the one suffering such damage if the latter has given written notice to the former of the need for such repairs and the former has failed to make the same with due diligence. If by reason of the making of repairs required to be made by Lessor hereunder, Lessee is deprived of the use or benefit of all or a substantial part of the premises, rent shall be abated or reduced according to the extent to which Lessee is deprived of such use or benefit. (Emphasis added)

"20 DAMAGE OR DESTRUCTION. If the demised premises, or the building of which the demised premises are to be a part, is destroyed or damaged, Lessor agrees to replace or repair the same with reasonable promptness and dispatch, and to allow Lessee an abatement in the rent for such time as the leased premises are untenantable or proportionately for such portion of the leased premises as shall be untenantable, and the parties covenant and agree that the terms of this lease shall not otherwise be affected.

"29 UNPERFORMED COVENANTS OF LESSOR. If . . . Lessor fails to make any repairs or do any work required by the Lessor by the

provisions of this lease, or in any other respect fails to perform any of the covenants . . . and such default continues for a period of 30 days after written demand for performances given by Lessee, then . . . Lessee may make such payments and cure such other defaults on behalf of Lessor and, in connection therewith, do all work and make all payments deemed necessary by Lessee. Lessor agrees to reimburse Lessee upon demand the amounts paid by Lessee . . . .

"31. ALTERATIONS. Lessee agrees not to make any changes, alterations or additions about the said building or premises without first obtaining the consent of the Lessor, consent not to be arbitrarily or unreasonably withheld . . . ."

By letter of Monday, July 22, 1969 (R. 64-5), plaintiff wrote to Invesco, saying:

"You are aware that the air conditioning system for the building ceased operating on Friday, July 19, and is still not operating. *While we assume you were not able to anticipate this occurrence and while we understand you are taking steps to make repairs*, you may not be aware of the problems the failure has caused this Club .... (Problems are outlined) We feel that a default has occurred under our lease for which you are responsible . . . . Without waiving our right to recover the damages we have suffered and will continue to suffer by reason of the default, *the Club feels that it is essential that you cure such default immediately* . . . . We offer our complete cooperation and assistance in taking what steps are necessary or appropriate. *We look forward to* meeting with your representatives at an early date to

learn of your plans for correcting the air conditioning problems and to *find out how we may assist is such plans.*" (Emphasis added)

Nowhere in the letter did plaintiff assert "a right to cure the defect" as plaintiff's brief, page 2, claims. Instead the letter insisted "that you cure such default immediately."

Plaintiff's own affidavit asserts defendants' executive vice president, Ron Jefferies, informed plaintiff of the availability of an air conditioning unit adequate to cool the premises occupied by plaintiff (R. 80).

The very next day, by letter agreement of Tuesday, July 23, 1969 (R. 66-7), the parties agreed:

> " This letter will confirm our (defendants') understanding as to the terms and conditions under which you (plaintiff) *plan* to install a 60-ton air chiller for the use of you premises.
>
> "You *are contracting* . . . for the purchase and installation of this unit. *Such purchase and installation shall be your sole responsibility and all costs shall be borne by you.* You will procure all necessary permits and shall secure and furnish us with lien waivers on all labor done and materials furnished, and you shall hold us harmless from any claims made resulting from such installation. Also, *you will not make any claim against us for any of the costs of purchase or installation.*
>
> "We consent to your use without charge by us of sufficient space in the penthouse of the University Club Building for such unit, and we

consent ot tying such unit into the water tower of the building. You may have use of the water from the tower without charge provided that the tower has sufficient capacity to supply the needs of other chillers and water needs of the building as well as the needs of your unit. However, if such capacity is not adequate, we reserve the right to discontinue your use of water from the tower.

"You ~~will assume the cost of electricity and other such on going costs of maintenance and operation of the unit and~~ will assume sole responsibility for the adequacy of ~~the operation and~~ cooling capacity of the unit for your entire premises. (sic)

"In consideration for these commitments by us to you your signature below will indicate your conent to these terms and conditions." (Emphasis added)

The parties struck out of the letter the language indicated and at the conclusion of the letter the parties added the following:

"It is mutually understood and agreed that this letter does not waive any of the rights or covenants entitled to by the Lessee under its lease agreements for the premises leased in the University Club Building."

The letter was signed for plaintiff by its president, F. C. Colladay.

Plaintiff did install its own permanent unit by July 30, accepting the free penthouse space therefor, the free

tying of the unit into the building water tower and has ever since accepted free use of water from the tower pursuant to the letter agreement.

In reliance on the July 23 letter agreement, defendants did not furnish temporary air conditioning to plaintiff's premises or repair defendants' old unit within the 30-day period provided in paragraph 29 of the lease. Within six weeks, defendants installed a new unit, required to be custom made, for the entire building (depo., p. 33). The old unit could have been repaired, but it would have been as costly as a new one and there would be no guarantee on the old one (depo., p. 33).

Notwithstanding the July 23 agreement and paragraph 19 of the lease, plaintiff sues for (1) the cost of the air conditioner it installed; (2) lost profits; (3) food spoilage; (4) future loss of good will; and (5) attorney's fees on theories of breach of contract, unjust enrichment and negligence (R. 1-7).

On these facts in the record, the trial court granted defendants' motion for summary judgment, dismissing all claims except declaring that plaintiff was entitled to rent abatement which defendants admitted plaintiff was entitled to receive (R. 41, 112).

ARGUMENT

POINT I. PLAINTIFF MISSTATES THE FACTS.

Plaintiff's statement of the facts is not supported by the record and states facts based on incompetent evidence.

The inaccuracies will largely be pointed out in this Point.

Plaintiff's brief, page 6, says:

> "At the time of the breakdown, representatives of the Club immediately contacted representatives of Lessor in an attempt to work out a plan where the air conditioning system could be restored as soon as possible."

Plaintiff's letter of July 22 stated, "The Club feels it is essential that you (defendants) cure such default immediately," contrary to plaintiff's brief, top of page 7, which claims "the letter called attention to the . . . Club's right to cure the defect at the expense of the Lessor."

Thus, it is seen that plaintiff insisted upon an *immediate* plan to provide special air conditioning for its own premises. Defendants, of course, had to restore air conditioning for the whole building and did so. In so doing, air conditioning would be supplied to plaintiff without additional expense. Not content with rent abatement, plaintiff not only desired immediate action in less than 30 days, but also desired and agreed in writing to a plan for permanent capital expenditure for air conditioning for plaintiff's premises only by the letter of July 23. In so doing, plaintiff agreed "such purchase and installation shall be your (plaintiff's) sole responsibility and all costs shall be borne by you (plaintiff)," and that plaintiff would "not make any claim against us (defendants) for any of the costs of purchase or installation." Notwithstanding, plaintiff now sues for the entire capital cost of purchase and instal-

lation cost for its own permanent unit of some $16,000 (R. 18), plus the damages to its property waived by the lease.

Plaintiff's brief, page 6, says:

> "The Club representatives were informed by representatives of Lessor that *the air conditioning service* could not be restored within the 30-day period specified in paragraph 29 of the lease; restoration of service would involve two or three months" (R. 80).

This implies the fact to be that defendants could not, or refused, to supply air conditioning to plaintiff's premises for more than 30 days. The actual quotation from the record, plaintiff's own affidavit, on R. 80 is:

> "Representatives of defendants stated to me that it would take approximately two or three months before the system (meaning defendants' entire system) could be *replaced.*"

It is important to recognize that nowhere does the record show that defendants could not, or refused to, provide air conditioning for plaintiff's premises within thirty days, as plaintiff's brief implies. Temporary air conditioning could have been rented or portable coolers temporarily installed. Defendants' own system could have been repaired. Obviously, the reason defendants did not provide air conditioning within the thirty-day period to plaintiff's premises is that the parties *agreed* on July 23, (R. 66), one day after *defendant* found a suitable air conditioning unit, and one day after plaintiff's demand let-

ter (R. 64), and five days after the air conditioning failure (with Saturday and Sunday intervening), that plaintiff would purchase, install and have control of its own unit, an advantage to plaintiff, in return for free roof space, free use of defendants' water tower, free water for plaintiff's unit, etc. The parties after negotiation struck the clause from the letter agreement (R. 66), that plaintiff would "assume the cost of electricity and such other on-going costs of maintenance and operation of the unit." In consideration of all that, plaintiff expressly agreed:

> "Such purchase and installation (of the unit) shall be your (plaintiff's) sole responsibility and all costs shall be borne by you (plaintiff) . . . Also, you (plaintiff) will not make any claim against us (defendants) for any of the costs of purchase or installation."

Plaintiff's brief, middle of page 7, says:

> "It was *apparently acknowledged* by both parties that since more than thirty days would be required to replace the inoperative unit, the Club had the right to purchase a unit and cure the Lessor's default in accordance with paragraph 29 of the lease."

Here, plaintiff's whole case, the whole attempt to avoid the clear written agreements in the lease and in the July 23 agreement not to sue, is bottomed and here it fails. Such statement is clearly not supported by the record, as shown above. Plaintiff simply ignores the fact that defendants might have furnished air conditioning for plaintiff's premises within the thirty days, even on a temporary basis. Plaintiff in fact had permanent air condi-

tioning installed for its own premises within three weeks. Plaintiff's letter of July 22 admits "we understand you are taking steps to make repairs." After all, it was defendants who located the very unit plaintiff installed. Defendants might have installed it within thirty days had plaintiff, by the letter agreement of July 23, not made such performance unnecessary. Indeed, plaintiff, by the July 23 letter agreement, deprived defendants of the right to provide air conditioning for plaintiff's premises in thirty days and induced defendants not to do so. Then plaintiff turns right around and says defendants breached the lease by not performing the very act plaintiff expressly accepted as performance and sues for damage for the very same act it expressly accepted even though it expressly waived that damage claim.

Plaintiff's brief, bottom of page 7, next says:

> "Ronald Jeffries, a representative of Lessor, informed the Club of the availability of an air conditoning unit adequate to cool the premises occupied by the Club (R. 80). Representatives of the Club investigated the information and learned that such unit was in fact available, but that it had to be immediately purchased (R. 80-1) . . . (a)nd pursuant to the *combined* efforts of the Club and Lessor, the Club purchased the available unit" (R. 79-82).

Based upon defendants' telling plaintiff of the unit, plaintiff's unilateral action in buying it, and defendants' calling a meeting, plaintiff now claims "duress and undue influence," even though such was never pleaded. Plaintiff ignores the fact that when it unilaterally bought the

unit and not through "combined efforts," it had made no arrangements for space, water or water tower; yet, even though plaintiff was given these free in consideration of its unambiguous promise not to make claim against defendants for purchase or installation costs, plaintiff claims that its own, unilateral, "bootstrap" conduct constitutes a basis for avoiding its promise in the very agreement whose benefits it has willingly accepted to date.

Plaintiff ignores the fact that the record does not show defendants had purchased the unit at the time of the July 23 meeting and letter agreement. The letter agreement refers to the chiller "which you (plaintiff) plan to install" and says "you (plaintiff) are contracting . . . for the purchase and installation of this unit."

Plaintiff's affidavit from Bullen, the club manager (R. 81), paragraph 7, says plaintiff purchased the unit "with the acquiesence of defendant." That is an incompetent conclusion. The affidavit does not say what defendants' representative said or did. *Rainford v. Rytting* (1969), 22 Utah 2d 252, 451 P.2d 769, holds that affidavits in opposition to motion for summary judgment must set forth such *facts* as would be admissible in evidence. Clearly, defendants' mere telling of plaintiff of the unit's availability (the only *fact* in the sentence from the Bullen affidavit), is not a direction that plaintiff should purchase it and is not "assistance," "joint efforts," "combined efforts" or "acquiesence" on defendants' part. Defendants advised the trial court this portion of the affidavit should be stricken (R. 100) and all references to this claim in defendants' brief should be similarly stricken.

Plaintiff's brief, page 8, says:

> "With full knowledge of the precarious position in which the Club had been placed by the Lessor's breach of the lease, and with full realization of the purchase of the replacement unit pursuant to the joint efforts of the parties, the representatives of Lessor called a meeting for July 23, 1969."

This argumentative "Statement of Facts" is wrong for a number of reasons: (1) Defendants had not breached the lease; They had at least 30 days after written demand for performance to make the repairs under paragraph 29 of the lease, or more likely, a reasonable time under paragraphs 19 and 20 to do so; (2) defendants did not have knowledge the Club had purchased the unit when the meeting was called, as shown above; (3) plaintiff had not purchased the unit when the meeting was called (R. 66); and (4) the unit was not purchased through the "joint efforts" of the parties as shown above.

Plaintiff's brief says, middle of page 8, "Lessor employed its attorney to prepare a letter agreement." It is not true that defendants solely prepared the agreement of July 23, for both parties mutually struck the language on the first page and plaintiff added the clause on the second page of the July 23 letter agreement (R. 81), so it cannot be said "defendants prepared the letter." It is very significant that plaintiff retained its will to bargain for these changes, for this shows reasonable minds could not differ in finding plaintiff was not under duress when it bargained away "any claim for the costs of purchase or installation" of the unit.

Plaintiff's brief, top of page 10, says:

> "There was nothing which prevented Lessor from presenting the letter prior to the time the Club had committed itself to the purchase and installation of the new unit" (Miller deposition, page 15, line 22).

That statement of fact is wrong. The whole tenor of the Miller deposition, page 14, was that, at the time of the July 23 meeting, she did not know when plaintiff bought the unit (p. 14, line 11), only knew that "it was being considered that the Club would buy the unit," (p. 15, line 3), and that she "was a new employee, had never met any of the people before and was totally in the dark" (p. 11, line 21). No wonder her deposition, page 15, line 22, reads not as plaintiff's brief says, but:

> "Q. Do you recall any circumstances that prevented submitting this letter or any other agreement prior to the date it was actually submitted?
>
> "A. No."

As plaintiff's brief says, the timing of the letter is very significant. The fact is on July 22, plaintiff wrote defendants (R. 64):

> "While we assume you were not able to anticipate (the air conditioning failure) and while we understand that you are taking steps to make repairs . . . , it is essential that you cure such default immediately . . . We look forward to meeting with your representatives . . . to learn your plans . . ."

Thus on July 22 plaintiff had not been informed of the availability of the new unit. Yet by the next day plaintiff had been told of it and plaintiff expressly agreed the next day on July 23 to buy it, to install it, to assume sole responsibility for installation and not to make any claim for the costs of purchase or installation against defendants. Defendants could hardly have acted with greater dispatch, but nevertheless plaintiff *infers* sinister motives from the timing of the July 23 agreement. Mere ill-founded inference will not substitute for *facts* in the record to resist the motion for summary judgment. *Dupler v. Yates*, 10 Utah 2d 251, 351 P.2d 64.

The same may be said for plaintiff's claim in its brief, page 9:

> ". . . (t)he representatives of the Club refused to agree to waive their reimbursement rights of paragraph 29 of the Lease" (R. 81).

The actual quote from R. 81, the affidavit of Bullen, plaintiff's manager, is:

> "Defendants . . . insisted the letter be signed before defendants would allow the air conditioning unit to be installed."

Nowhere does the record show any discussion of waiver of rights under paragraph 29 of the lease. The Bullen affidavit is a pure incompetent conclusion on his part anyway, for he does not say what defendants said.

Nowhere does the record competently show that any party, or either party, said it did not intend to alter or

amend the lease or waive the Club's rights under the lease as plaintiff's brief, page 9, claims R. 81-2 and the Miller deposition, pp. 11-3, says. R. 81-2 is Bullen's affidavit, containing not what persons said or did, but his conclusions of *his* unexpressed intent, and he was not even a signatory to the July 23 agreement. His conclusions in his affidavit do not even say he did not intend to amend the lease. The Miller deposition, pp. 11-3, said Mrs. Miller did not remember if Jefferies said it was not his purpose to alter or amend the lease, but such was her "impression," to which counsel three times on page 12 directed her to simply say what Jefferies said.

The whole question of "intent to amend the lease" is immaterial in any event, for the lease and letter agreement speak for themselves in that regard. The lease has not, in fact, been amended. It waives claim for property damage, yet plaintiff makes claim for property damage. The lease does not give plaintiff a right to claim the capital cost of a new air conditioning unit from defendant in absence of consent by defendants (lease, para. 31, R. 57), particularly when the written consent and agreement waived claim for the cost thereof. Yet plaintiff seeks to avoid that agreement. It is plaintiff who must claim the lease was amended; yet plaintiff argues it was not amended.

The balance of the claimed "facts" set out in plaintiff's brief is so obviously argumentative and unfounded by the record as to not require further specific itemization.

POINT II. THE PARTIES MUTUALLY RELEASED EACH OTHER FOR PROPERTY DAMAGE CLAIMS FOR THE OTHERS' FAILURE TO REPAIR.

By paragraph 19 of the lease, the parties agreed that defendants "shall maintain and keep in good repair . . . the air conditioning." They then agreed: "Neither Lessor nor Lessee shall be liable for the other for any damages sustained to the property of the other resulting from . . . failure . . . to make any repairs." They excepted from the waiver the case where one fails to repair after "written notice" from the other of need for repairs and "the former has failed to make the same with due diligence." Then the lease expressly provided that, notwithstanding the waiver of property damage claims, the Lessee would receive rent abatement while the repairs were made.

There is no question but that plaintiff's claim arises from defendants' failure to keep the air conditioning in good repair. That specifically is what plaintiff pleaded in paragraphs 7, 10, 14, 17 and 20 of its complaint for defendants' breach of the lease (R. 3-5). No breach of the quiet enjoyment or utilities paragraphs was pleaded. Even if they had been, the lease still must be read as a whole. The specific reason for claimed breach of the quiet enjoyment and utilities paragraphs still was the failure to keep the air conditioning in good repair and, therefore, the mutual waiver of property damage claims still applies. It is because of this waiver that the trial court held plaintiff was entitled to rent abatement, as rent abatement was excepted from the property damage waiver and, hence, is the only remedy available to plaintiff from the damage claims alleged.

In any event, defendant did not breach the "Quiet Enjoyment" clause. An eviction or disturbance of possession is required for breach of that clause (51 C.J.S. Landlord and Tenant, Section 323(3)). Plaintiff did not move out of the premises. Cases might be imagined where unjustified and inexcusable failure to provide elevator service, heat, light and power for a long, indefinite time in the future might justify a tenant's moving out under claim of breach of quiet enjoyment, but such is not the record here.

Certainly, the parties may limit their damage claims by contract, particularly as here, when each mutually agreed to limit its claims against the other.

There is nothing ambiguous or unfair about the mutual property damage waiver clause. It is rather astounding that in the face of the waiver, plaintiff claims in its brief that, of the remedies sought by the complaint, "there is no provision in the lease that even suggests that rent abatement is the exclusive remedy." (Brief, p. 14)

The law of Utah is not that a lease is construed most strongly against the lessor, but is instead that ambiguous language is construed against the party who drafted it, and when possible, the court should give effect to all words and clauses and construe the lease as a whole. *Powerine Co. v. Russell's, Inc.*, 103 Utah 441, 135 P.2d 906; *Wolfe v. White*, 119 Utah 183, 225 P.2d 729.

Here there is no evidence as to which party drew the lease. The damage waiver clause in question certainly is not ambiguous and it cannot be ignored as plaintiff urges.

While no argument is had with the legal principles plaintiff cites from *Estate of Corbin v. McKey & Poague, Inc.*, (211, 1969), 245 N.E.2d 117, the case is not here applicable. It involved an exculpatory clause providing the lessor would not be liable for any damages for loss of property nor would rent be abated by reason of landlord's failure to repair as well as "any act by lessor." The lessor unjustifiably locked lessee's representative out and refused to allow rent abatement. Tenant there claimed only rent abatement. These two facts distinguish the case from the case at bar, for here the rent has been abated and the breach was failure to repair. The specific holding there was:

> "We will not construe 'any act' to be so all inclusive as to mean that when a lessor wrongfully deprives a tenant of possession, the rental is not abated."

Plaintiff urges this proposition: When two lease clauses provide the tenant is to receive quiet enjoyment to, and air conditioning for, the premises, and a third clause provides on failure to maintain the air conditioning equipment property damages are waived, that the damages are not so waived. Plaintiff cites no authority whatever for that proposition.

The *mutual* waiver of claim for "*any* damage sustained to . . . *property*" includes the waiver of claim for plaintiff *non-profit* corporation's lost profits.

In *Wood v. Security Mutual Life Insurance Company*, (Neb., 1924), 198 N.W. 573, 34 A.L.R. 712, plain-

tiff leased premises from defendant under a lease which provided the tenant would hold the insurance company harmless "for damage to the person or property" of the tenant during defendant's reconstruction. During reconstruction, plaintiff's barbershop was made untenantable by dust, etc., and plaintiff sued for damage to his business, saying the exculpatory clause pertained only to his tangible property. The court held to the contrary citing numerous cases ("the weight of authority") that "property" includes "business" and "damage" includes "loss." That case is precisely in point here.

The annotation at 34 A.L.R. 712 cites 11 cases to the that "property" includes "business."

No Utah cases precisely in point could be found, but *Clayton v. Bennett* (1956), 5 Utah 2d 152, 298 P.2d 531, while dealing with the constitutionality of professional licensing statutes, holds the right to engage in business is a property right.

Hargis v. Sample (Mo., 1957), 306 S.W.2d 564, cited by plaintiff, is contrary to the weight of authority. It cites no authority whatever for its holding. It is distinguishable on its facts. There the *hotel* lease, where businesses are not ordinarily carried on, said:

> "Under the marginal heading 'Damage to Tenants' Property': 'Lessor shall not be liable to said lessee or any other person or corporation, including employees for any damage to their person or property caused by water . . .' "

The court held:

> "We have the view . . . that the parties . . . , when they referred to 'lessee's property' under the marginal heading 'Tenants' Property,' intended to and did use the word 'property' to describe . . . *personal* property . . .
>
> "That such was likely, it seems to us, is indicated by the fact that the entire clause . . . included damage to the property of guests or employees. *Property* of employees and guests would, of course, be the items of tangible personal property that those persons . . . might have within the rented structure. And if so, then the word *property* indicating 'lessee's property' would have no different connotation." (Emphasis theirs)

Here the damage waiver clause contains no words which tend to show anything less than all property in its broadest sense was intended by the parties. It says merely "*any* damage . . . to property."

Indeed, it can be argued that were intangible property claims here waived, then there would be no need for the rent abatement clause. If only tangible property claims were waived, then the tenant would be entitled to rent abatement or claim for loss of use of the premises without expression of that right in the lease. Since the parties expressly preserved plaintiff's right to rent abatement, they must have intended that the right would be lost without expression and that could only follow if the property damage waiver were broader than personal property and included claim for loss of use of the premises, which is the equivalent of rent abatement.

Plaintiff cites *Wells v. Jersey City*, 207 Fed. 871 (1913), for the proposition that "loss of business" is not

included within waiver of damage to property. The case is not in point. There, a statute provided:

> "(W)henever any buildings or other real or personal property shall be destroyed . . . (by) mob or riot, the city in which the same shall occur, or if not in a city, then the county in which such property was situated, shall be liable to . . . the party whose property was thus destroyed . . . for the damages sustained."

A jury awarded plaintiff $300 damage to tangible property and $43,000 damage to plaintiff's business, but the court held the latter was not included within the statute. The court said at 219 Fed. 701:

> "Strictly, and as a matter of abstract reasoning, 'property' in a thing is different from the thing itself. It is a right to use, enjoy and control, and therefore is neither visible nor tangible. In this sense, which is often properly applied, the right to carry on a business is property. But we are not able to agree that such a conception was present in the mind of the draftsman or of the New Jersey Legislature. If it had been, the word 'property' alone would have been employed, for nothing more would have been needed. It seems plain, however, that a more limited conception of 'property' was embodied in the statute, for the phrase, 'buildings or other real or personal property,' while it is awkward and incorrect, does convey the idea that the 'property' thought of consists of things and not of intangible rights. And we find the same idea again in section 5 (and also in section 7, which we need not quote), where the property is twice referred to as existing physically in space—as 'situated,' or 'situate,' in a described municipality."

That case must be considered in light of its own distinguishable facts. If anything it supports defendants' position, for the word "property" was here employed alone.

Plaintiff's brief fails, on the other hand, to distinguish the contrary holding in the Nebraska lease case, precisely in point, or the weight of authority from the A.L.R. annotation, all of which were cited to the trial court. (R. 73)

Plaintiff cited to the trial court *Lee & Eastes, Inc. v. Public Service Commission*, 1 Wash. (1958), 328 P.2d 700. It supports defendants' position. There, a statute said common carrier permits could not be transferred except on showing that "property rights might be affected thereby." On application to transfer an insolvent carrier's permit, protestants claimed there was no good will or going business value in the insolvent carrier's business and therefore the certificate could not be transferred. The case factually is of no assistance here, but for what it is worth, the Washington court cited cases holding:

> " 'Property' is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights and other intangibles as well as physical things . . . *The right to operate a business is a property right.*"

It is difficult to imagine how failure to repair air conditioning could result in damage to any personal or tangible property. The only likely damage the parties

could have anticipated would be intangible property damage, such as loss of profits.

Finally, had the parties intended "any property" to be narrower than its customary meaning, they could have easily expressed "personal property" or "contents" or some such similar language.

It is noted this exculpatory clause is drafted in favor of *both* parties, for both released each other. There is, therefore, no reason or rule which requires it to be strictly construed against defendants.

The trial court dismissed plaintiff's negligence claim not only on the basis of paragraph 19 of the lease, but also on the basis that there is no evidence of negligence by defendants in the record. The air conditoning failed because an employee of an independent contractor hired by defendants to maintain the system put in too much acid (R. 34). That record does not support a claim of negligent act or omission by defendants. Plaintiff's claim is based strictly on contract, for without the contract, defendants had no duty to provide air conditioning, and no act or omission by defendants interrupted the air conditioning.

No question of fact exists as to defendants' failure to make repairs "after due diligence." Three working days after the failure, plaintiff signed the agreement of July 23 that it would "assume sole responsibility for the adequacy and cooling capacity of the unit." The question is not whether a delay of six weeks was "due diligence" because plaintiff accepted the arrangement set out in the July 23

letter. The question, therefore, is whether plaintiff bargained away its claim. In any event, the court properly ruled as a matter of law that three working days is "due diligence," particularly when plaintiff in effect so agreed by the letter agreement of July 23.

POINT III. THE COURT DID NOT ERR IN DENYING PLAINTIFF REIMBURSEMENT FOR CURING LESSOR'S DEFAULT.

Plaintiff did not cure defendants' default, and certainly had no right so to do until 30 days after notice. Nowhere does the record show defendants could not have provided, or refused to provide, temporary air conditioning to plaintiff's premises in 30 days. Even plaintiff's brief, page 24, admits defendants had the available opportunity of repairing rather than replacing in six weeks the damaged unit. Instead, plaintiff insisted upon immediate capital expenditure for plaintiff's own purposes, and agreed that for the free space, free use of water and water tower, to be provided by defendants, and in consideration of defendants' striking the clause that plaintiff would be responsible for electricity and maintenance of the new unit, that plaintiff would assume sole responsibility for its own unit that plaintiff would buy and install it and not sue defendants therefor. To claim it "cured lessor's default," plaintiff would have had to repair or replace defendants' air conditioner for the whole building.

Consider the unfairness of plaintiff's position. Plaintiff first insisted on immediate special action by a large capital expenditure for special air conditioning equipment

for its own premises, which plaintiff had no right to install without defendants' consent (lease, para. 31, R. 57), and then after defendants replaced the unit for the entire building, which could have served plaintiff too, plaintiff expects defendants to pay for the special unit for plaintiff's premises, even though plaintiff agreed defendants would not be liable for such, and this after plaintiff, by the letter of July 23, induced defendant not to provide cooled air for plaintiff at an earlier date.

Plaintiff's Point III argues plaintiff's promises in the July 23 agreement should be ignored on grounds of duress even though plaintiff has continued to accept the benefits of defendants' promises in the same agreement. Plaintiff says there exists a fact issue of "duress and undue influence." Even if plaintiff purchased its unit with the "assistance and acquiescence" of defendants, such would not make "duress or undue influence," as plaintiff claims to avoid the July 23 agreement.

Undue influence requires either a confidential relationship or the destruction of the promisor's will. Certainly the affidavit of Bullen (R. 79), not a signatory to the July 23 agreement, does not show that the will of defendants was substituted for the will of the University Club, a non-profit corporation, or its president who signed the agreement.

Duress is defined in *Fox v. Piercey*, 119 Utah 365, 227 P.2d 763, 766 (1951), as a "wrongful act or threat which actually puts the victim in such fear as to compel him to act against his will." Was Mr. Calladay, who signed the July 23 agreement for plaintiff, in fear!?

State v. Barlow, 107 Utah 292, 153 P.2d 654 (1944), says:

> "As a rule, in a transaction requiring mutual consent, if consent is obtained by coercion, the victim may either affirm or avoid the transaction, but he may not claim the benefits and escape the obligations."

Duress in cases of business compulsion is not established by the pressure of financial circumstances or by one party insisting on a legal right and the other yielding thereto. "The doctrine of business compulsion cannot be predicated upon a demand which is lawful or upon doing or threatening to do that which a party has a right to do." 25 Am.Jur.2d 363-4, Duress, Section 7.

Clear and convincing proof of duress is required to avoid a transaction. 25 Am.Jur.2d 392, Duress, Section 31.

Even assuming that defendants knew plaintiff was purchasing the air conditioning unit on July 22, does the record clearly and convincingly establish that the next day the University Club was thereby compelled to act against its will when it made the July 23 agreement? Consider:

1. Plaintiff bargained for deletion of the clause that plaintiff would supply electricity and maintenance for the new unit. This shows plaintiff retained its bargaining will.

2. No showing is made that plaintiff could no have cancelled its air conditioning purchase—or what th cancellation cost might have been, if any.

Plaintiff's purchase contract is not even in the rec ord. All we have is Bullen's conclusion in his affidavi that "plaintiff purchased the unit" (R. 81). The record is devoid of any showing that plaintiff had no other eco nomic choice but to sign the July 23 agreement. Hence not only did plaintiff have other remedies available rath er than sign the July 23 agreement under economic du ress, as claimed, but moreover there is no basis in fac for reasonable minds to even believe plaintiff was unde duress.

3. Mrs. Miller testified (depo., p. 10, line 20):

> "They (Mr. Bullen and Mr. Calladay) didn't ex press any dissatisfaction over the proposal (th July 23 agreement). There was a sentence or two they did wish changed or deleted."

These *facts* in the record affirmatively show the absence of duress.

4. Plaintiff had a perfect right to insist on some consideration for the free use of the roof space, the tying of plaintiff's unit into defendants' water tower, free water for plaintiff's unit, etc., whether or not defendants knew plaintiff had bought the air conditioner.

Plaintiff simply wanted its own air conditioner. De fendants' own unit for the entire building could just as well serve plaintiff. Considering the large expense of

plaintiff's new unit and the additional costs of utilities and maintenance that would have to be borne, it certainly was not unusual that plaintiff would agree not to sue defendants for its initial cost or that defendants would insist on such waiver. It was plaintiff's duty to make arrangements with defendants before getting into its claimed predicament. Paragraph 31 of the lease specifically required plaintiff to obtain defendants' consent before making alterations or additions about the building. Defendants' lawful demands in this regard cannot form the basis for claim of economic duress as a matter of law. As shown, the record does not contain any competent admissable facts on which reasonable minds could find duress or undue influence. When reasonable minds cannot differ on an alleged question of fact, the case is ripe for summary judgment as a matter of law. The record indeed affirmatively shows the absence of duress or undue influence as a matter of law.

Plaintiff further claims in Point III the July 23 agreement, bargaining away claim for purchase and installation costs, is ambiguous. Plaintiff says the added clause at the end, reading that "this letter does not waive any of the rights or covenants entitled to by the Lessee," is contradictory. Not so. The added clause merely preserved plaintiff's rights under the lease not otherwise affected by the July 23 agreement, and specifically preserved plaintiff's claim to rent abatement under the lease. By no means can the added clause be taken to mean the parties intended that plaintiff *may* make claim for purchase and installation of the unit, for they expressed, without ambiguity, the opposite. Had they intended that

plaintiff could still make claim for purchase or installation, the parties could have stricken the opposite sentence from the agreement, just as they did the "electricity and maintenance" clause. Mr. Bullen, who was not a signatory to the agreement, may have *thought* or *unilaterally intended* that the addition of the clause at the end of the agreement made purchase and installation for the account of defendants, as his affidavit, paragraph 9 says, but unexpressed thoughts or intentions are immaterial and inadmissable parol evidence offered to vary the exact terms of the written agreement. What counts is the expression in the contract and twice the parties mutually and clearly expressed:

> (1) "Such purchase and installation should be your (plaintiff's) sole responsibility and all costs shall be borne by you (plaintiff);" and
>
> (2) "You (plaintiff) will not make any claim against us for the costs of purchase or installation."

Without giving effect to these promises by plaintiff, there simply is no consideration in the agreement to support defendants' mutual promises, for plaintiff promised nothing.

The only language that plaintiff claims makes the agreement ambiguous is the clause added by plaintiff at the end of the agreement, reading that plaintiff's rights under the lease are preserved. That language must be construed most strongly against plaintiff, the party who prepared it. *Powerine Co. v. Russell's, Inc.*, 103 Utah 441, 135 P.2d 906.

Whether the written contract is ambiguous is a question of law for the court. Since it is clearly not ambiguous, the trial court correctly ruled as a matter of law no fact issue exists as to whether plaintiff bargained away its claim for installation and purchase costs, and that plaintiff did so bargain.

POINT IV. PLAINTIFF IS NOT ENTITLED TO RESTITUTION FOR UNJUST ENRICHMENT.

Plaintiff's claim for relief based on unjust enrichment is ill-founded, for plaintiff is bound by the bargain contained in the letter agreement of July 23, pursuant to which plaintiff installed the air conditioner plaintiff still owns and pursuant to which plaintiff agreed not to sue defendants.

Plaintiff's citation of Section 1 of the *Restatement of Restitution* is interesting, but Section 107 thereof provides:

> "(1) A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain."

Furthermore, plaintiff has continued to accept to date the benefits conferred in it by the July 23 letter agreement.

Unjust enrichment applies when one confers benefits with the reasonable expectation of repayment therefor. The letter agreement of July 23 makes it clear that plaintiff not only did not expect reimbursement, but instead expressly waived such claim.

CONCLUSION

This is a contract action. The contracts, i.e., the lease and the letter agreement of July 23, 1969, are not ambiguous, construing them as a whole. No competent facts are in evidence to create any unpleaded fact issue of duress or undue influence which might avoid the very contracts plaintiff seeks to enforce by retaining their benefits. The case is therefore one which can and should be decided as a matter of law. The contracts unambiguously waive claim for property damage and for the cost of purchasing and installing an air conditioner, for which plaintiff sues. Therefore, the trial court did not err in summarily ruling, as a matter of law, plaintiff may not recover on these items in accordance with the contracts.

The judgment should be affirmed and defendants should be awarded their costs.

Respectfully submitted,

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