1972

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

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

POINT I

SUPPLEMENTAL AUTHORITY ON ISSUE OF WHETHER RENT ABATEMENT IS LESSEE'S EXCLUSIVE REMEDY.

Under POINT I of its original brief, plaintiff-appellant (hereinafter referred to as "Club") argued that the lower court erred in holding that the Club's sole and exclusive remedy for Lessor's breach of the lease was rent abatement. In the course of the argument, the Club noted that there is no language in the lease which even suggests that rent abatement is to be

the *exclusive* remedy; rent abatement is merely an additional remedy available to the Club in the event the Club wished to pursue such remedy.

In further support of this argument, the Club calls the Court's attention to the case of *Bethers v. Wood,* 10 Utah 2d 313, 352 P.2d 774 (1960).

In the *Bethers* case, plaintiff sued to recover a sum of money alleged to be due him under the terms of a subcontract. Defendant counterclaimed alleging a right of setoff for damages sustained by reason of plaintiff's delay in furnishing gravel. The lower court dismissed the counterclaim on the ground that the defendant's exclusive remedy for plaintiff's delay in furnishing gravel was recovery of expenses; defendant could not recover damages.

The contractual provision which the trial court in the *Bethers* case regarded as constituting an exclusive remedy was as follows:

> "Delivery of materials to keep up as directed, behind grading equipment at all times. Should contractor have to assume charge on account of delay by subcontractor, the expense accrued therein will be deducted from the contract price. Contractor to receive gravel at site of crushing plant in the bin . . . The contractor agrees to make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract . . . That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated."

The contractural provision in the *Bethers* case and the lease provisions in the instant case are similar in that they provide for a deduction from amounts otherwise due the other contracting party. Moreover, in both cases, the remedy was clearly specified, but there was no language to suggest that such remedy must be pursued to the exclusion of other remedies.

This Court held that the lower court erred in construing said remedy to be exclusive. The Court called attention to the fact that by use of the word "should" in the second sentence of the quoted language, the parties recognized that a delay might not cause a charge or expense on the part of the defendant and therefore the parties could not have intended the remedy to be exclusive. Similarly, the use of the work "if" in paragraph 19 of the lease in question shows that the parties recognized that a breach by the Lessor may not render the premises untenantable but may still cause damage to Lessee. Thus, the parties could not have intended rent abatement to be the exclusive remedy.

Concerning the contention that the provisions constituted an exclusive remedy, this Court held:

> ". . . This section merely afforded the defendant an additional remedy in the event of breach by delay. He was entitled to this specific remedy, or he could at his election pursue any other remedies which the law affords."

The Court further stated that the intent to designate a remedy as being exclusive must be expressly stated in the contract under the proper rules of construction.

Although the Uniform Commercial Code does not govern the instant case, the Code provisions are persuasive as a recent expression of the Legislature with respect to exclusive remedies. The Code states:

> ". . . Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy. Utah Code Annotated, § 70A-2-719 (1)(b).

Since there is no indication whatsoever in the lease that the parties intended the rent abatement provisions to constitute an exclusive remedy, the district court erred in determining that it was the only remedy available to the Club.

POINT II

RESPONDENTS' BRIEF DEMONSTRATES THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACTS.

The main emphasis of Lessor's brief is to argue the facts and the inferences to be drawn therefrom. POINT I of Lessor's brief was dedicated entirely to the proposition that certain facts or inferences should be considered to the exclusion of other facts and inferences. These arguments by their very nature demonstrate the existence of factual disputes, and establish that the summary judgment should be reversed.

This Court has clearly stated that in reviewing an order granting a motion for summary judgment, all facts and inferences should be resolved in favor of the party against whom the summary judgment was granted:

"The party against whom the summary judgment is granted, is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light most favorable to him; which we do in reviewing the incident. *Morris v. Farnsworth Motel,* 123 Utah 289, 259 P.2d 297 (1953). *Accord, Kidman v. White,* 14 U.2d 142, 378 P.2d 898 (1963);*Richards v. Anderson,* 9 U.2d 25, 337 P.2d 410 (1959); *AutoLease Co. v. Central Mutual Insurance Co.,* 7 U.2d 336, 325 P.2d 264 (1958)."

On the basis of these authorities, the attempts by Lessor to persuade the Court to uphold the summary judgment because certain facts and inferences should be preferred over other facts and inferences serves only to demonstrate the error in granting the judgment in the first instance. The Club will herein note the factual disputes argued in Lessor's brief. No attempt will be made in this brief to repeat the additional factual disputes noted in the Club's original brief.

On pages 5 and 8 of its brief, Lessor states that nowhere in the letter of July 22, 1969 did the Club call attention to its right to cure the Lessor's default. However, the second to last paragraph of said letter clearly states: "We call your attention to paragraphs . . . 29 of our lease . . ." Since paragraph 29 of the lease concerns defaults by Lessor and the right of the Club to cure defaults, it is difficult to understand how Lessor can in good conscience assert that no reference was made to the Club's right to cure the breach. Lessor was well aware at the time that the replacement unit was discussed that the Club was relying on its rights to cure Lessor's default under paragraph 29 of the lease.

On pages 5 and 6 of its brief, Lessor reproduces a major portion of the letter of July 23, 1969. By the use of italics, Lessor attempts to characterize the letter as indicating an intent to waive the Club's right of reimbursement under paragraph 29 of the lease. In so doing, there is no mention of the relevant facts surrounding the preparation of that letter. The body of the letter was unilaterally prepared by Lessor's attorney (Miller deposition, pp. 7, 9). There is no question but that Lessor's attorney prepared the letter in an attempt to force the Club to waive all of its right to reimbursement for the new air conditioning unit. However, the fact remains, that the letter was unacceptable to the Club and therefore the concluding paragraph was added with the express intent by *both parties* (R. 81-82, Miller Dep., pp. 11-13) that the Club would retain its rights under the lease regardless of the content of the letter. The Club is entitled to have these facts considered by a jury so that the intent of the parties can be accurately ascertained. The mere quotation of the language unilaterally chosen by Lessor's attorney cannot be considered to the exclusion of the other relevant facts of the case. All of the facts should be considered and these facts must be viewed in the light most favorable to the Club at this point in the proceeding.

Realizing that its argument involves factual disputes, Lessor has attempted to resolve the dispute by claiming on page 7 of its brief that the facts which dispute its version of the facts are "based on incompetent evidence." The brief then goes on to raise a long series of factual disputes without ever noting why the contrary facts are "incompetent."

On pages 9-11 of its brief, Lessor speculates that there is a possibility that if the facts had not occurred as they did,

Lessor may have been able to provide temporary air conditioning until the main unit could be restored or repaired. There is absolutely no evidence whatsoever that suggests even the possibility that a temporary unit could have been installed within the 30-day period specified in paragraph 29 of the lease. Had such claim been made in the court below, it would have been controverted by the Club because, in fact, such temporary air conditioning was not available. Lessor had a full opportunity to present such evidence by way of affidavit, but no evidence was presented. Now Lessor chooses to speculate that temporary air conditioning could have been substituted during the 30-day period. If the case is remanded for trial as we contend it should be, Lessor will have full opportunity to present such evidence at the trial. However, on a motion for summary judgment, speculations such as this cannot be assumed in favor of any party, especially the party who prevailed on the summary judgment.

On pages 10-11 of its brief, Lessor argues that the Club deprived Lessor of the opportunity to perform within 30-days by purchasing the replacement unit and thereby removing the need for Lessor to perform. The argument presupposes that the Club's purchase of the replacement was contrary to the will of Lessor and wrongfully prevented Lessor from performance. This is simply not the fact. It was Lessor who stated it could not replace the unit for 3 months (R. 80) and it was Lessor who conceived of the idea of purchasing the replacement unit (R. 80-81). Moreover, Lessor suggested the replacement with full knowledge that the Club intended to make the purchase pursuant to its right of reimbursement under paragraph 29 of the lease (R. 64-65, 80-81). Under these facts, it is

difficult to find any reasonable basis for Lessor to argue that it was wrongfully deprived of the opportunity to perform.

On page 11 of its brief, Lessor chooses to infer from the facts that the purchase of the new unit by the Club was "unilateral action." However, the availability of the unit was made known to the Club by a representative of the Lessor and from this fact and from the evidence stated in the Bullen affidavit (R. 79-82), a jury would be amply justified in finding that both parties were fully aware of the situation and cooperated in the purchase.

On page 11 of its brief, Lessor suggests that the claims of fraud, duress and undue influence should be excluded from the case since they were never pleaded. It should be noted that the claims of fraud, duress and undue influence were asserted only with respect to the letter of July 23, 1969. The Club contends the letter is a nullity since the body of the letter purports to waive paragraph 29 of the lease and the addendum reinstates it. For this reason the letter was not mentioned in the complaint and there was no reason to mention fraud, or duress at that point in the proceeding. The letter was first mentioned in Lessor's answer. Since the Club is not permitted to respond to the answer, the Club did not have the opportunity to raise the issues of fraud, duress and undue influence in the pleading stage of the case. However, the issues was timely raised and placed before the court at the hearing on the motion for summary judgment (R. 88-89).

Throughout the brief, and more particularly on pages 11-12, Lessor asserts that a jury would be compelled to conclude that the free donation of space and use of the water tower

constituted the consideration for the Club's waiver of its right to reimbursement under paragraph 29 of the lease. However, a jury could reasonably conclude that these concessions were consideration for the Club advancing funds for the purchase and installation of the replacement unit, which was required in order for Lessor to fulfill its obligations under the lease.

On page 12 of its brief, Lessor attempts to persuade the Court to find that the purchase by the Club of the replacement unit occurred after the meeting of July 23 and thus Lessor could not have been guilty of duress by taking advantage of the Club's commitment to purchase. Again, Lessor argues with the facts. Paragraph 7 of Mr. Bullen's affidavit (R. 81) clearly and unequivocally states that the purchase had been made *prior* to the meeting of July 23.

On page 12 of its brief, Lessor states that the purchase of the replacement unit "with the acquiescence of defendant" is an incompetent conclusion. The basis of the claim of incompetency is that the Bullen affidavit does not state what Lessor said or did in this regard. However, paragraphs 6, 8 and 9 of the Bullen affidavit (R. 80, 81) describes the acts and representations of Lessor and the description was from the personal knowledge of Mr. Bullen who was present at the meeting. Lessor goes on to state that Lessor's acquiescence in the purchase of the replacement unit by the Club cannot be inferred from the fact that *prior* to any purported waiver of rights under paragraph 29 of the lease Lessor informed the Club of the availability of the replacement unit and advised the Club that the unit must be purchased immediately. Such an argument with the facts is improper at this stage of the proceeding. It is for a jury

to determine whether these facts justify the inference that Lessor acquiesced and cooperated in the purchase.

On page 13 of its brief, Lessor asserts a series of arguments with the facts numbered 1-4. First, Lessor asserts that it did not breach the lease by the breakdown of the air conditioning since paragraph 29 required that the default must last for a period of 30 days. However, it should be noted that there is no 30-day requirement with regard to paragraphs 10, 16, and 19 of the lease. These provisions require Lessor to provide quiet enjoyment for the "full term of the lease", furnish air conditioning *at a comfortable temperature "at all times"* and *maintain* the air conditioning equipment in good repair and Lessor failed to perform each of these obligations. Furthermore, the doctrine of anticipatory breach nullified the 30-day requirement as to paragraph 29 (See pp. 25-28 of the Club's original brief). Second, Lessor asserts that it did not have knowledge that the Club had purchased the unit when the meeting was called on July 23, 1969. However, the content of the letter of July 23 (R. 66) will justify a finding that they did have such knowledge. The introductory paragraph of that letter states the purpose of the letter as setting forth terms and conditions under which the unit would be installed. There would be no need to agree upon terms of installation of the unit which was not yet purchased. Furthermore, the suggestion of the availability of the unit by Lessor several days prior to July 23 was accompanied by a statement that it must be immediately purchased. This permits the inference that Lessor knew or had reason to know that the purchase had been completed by July 23. Third, Lessor asserts that the unit had not been purchased by July 23. This is directly contradicted by the affidavit of

Mr. Bullen, paragraph 7 (R. 81). Finally, Lessor asserts that the unit was not purchased through "joint effort", which conflicts with the evidence as above noted.

On page 14 of its brief, Lessor quotes the deposition of Marion Miller, Lessor's building manager, and argues that her testimony should not be taken literally because she was a new employee and was not totally aware of the problem. An argument as to the weight to be given to the testimony of Mrs. Miller is a matter to be considered by a jury. If Mrs. Miller's testimony is to be weighed due to the circumstances noted by Lessor, a jury must decide on the weight of that testimony rather than the court on a motion for summary judgment.

On pages 14-15 of its brief, Lessor asserts that there was no basis to infer that Lessor took advantage of the commitment by the Club to purchase the replacement unit. Again, the facts do not compel the inference Lessor chooses to make on this motion for summary judgment. The fact remains that the discussion concerning the purchase of the new unit was made with the expectation of reimbursement. There is no suggestion whatsoever in the record that during the discussion for the purchase of the replacement unit that either party intended that the lease provisions for reimbursement would not govern the situation. In fact, both parties expressed their intent that the lease was in full force and effect (see quotation from record in Club's original brief, pages 30-31; see also Bullen affidavit, R. 81-82). It was only *after* Lessor had contracted to purchase the unit that there was any suggestion that the reimbursement provisions of the lease would not govern the rights of the parties in this situation.

Lessor's argument with the facts is very apparent on page 15 of its brief. At that point Lessor states that the record is devoid of any suggestion that the "representatives of the club refused to waive their reimbursement rights of paragraph 29 of the lease." Paragraph 8 of the Bullen affidavit (R. 81) clearly and unequivocally states in language understandable to everyone except Lessor as follows:

> "Since we had understood the unit was to be installed on the account of defendant, we refused to sign the letter since the substance indicated otherwise. However, under threat that space would not be made available to a unit already purchased and scheduled to be installed we agreed to sign the letter only after adding a clause which appears at the end of the letter so that the purchase and installation would remain on the account of defendants.
>
> It was our understanding, and our stated purpose to the representative of defendants at the meeting, that the purchase and installation of the unit would be on the account of defendants and that the addition of the clause was intended as a statement of that purpose."

Despite this clear statement on the record, Lessor concludes on page 15 of its brief: "Nowhere does the record show any discussion of waiver of rights under paragraph 29 of the lease." The above quotation from the Bullen affidavit directly contradicts Lessor's assertion.

Lessor's brief goes on to state that Bullen's version of what occured at the meeting is "a pure incompetent conclusion on his part anyway, for he does not say what defendant said." The Club cannot conceive of any means other than that used in the affadivit to state the substance of what was said at the meeting. Bullen was present at the meeting, heard and participated in the

discussion and in paragraphs 8 and 9 of his affidavit he related under oath the substance of what was stated by the parties. His version of the substance of the conversation under no circumstances could be considered an incompetent conclusion. Moreover, his version of the discussion is corroborated to a large extent by the testimony of Mrs. Miller (Miller deposition, Page 13).

One of the most flagrant misstatements of fact is contained on pages 15-16 of Lessor's brief. At that point Lessor states that the record is devoid of any evidence that the parties did not intend to alter or amend the lease. This statement is made in complete disregard of the testimony of Mrs. Miller set out verbatim and quoted in its entirety on pages 30-31 of the Club's original brief and the testimony of Mr. Bullen in paragraphs 8 and 9 of his affidavit (R. 81). Mrs. Miller clearly and unequivocally states that it was her impression that the parties did not intend to amend or alter the lease. She also clearly and unequivocally stated that her impression was based upon statements which Mr. Jeffries had made to her or to others during the course of the meeting. Mr. Jefferies was the spokesman for Lessor at the meeting (Miller's deposition, p. 13). Mrs. Miller was present during said meeting, she was the signatory to the letter agreement of July 23, and is perfectly competent to relate the expressions of intent made during the course of the meeting. Her version of the stated intent of the parties is corroborated by Bullen's affidavit (R. 81). So that there will be no question concerning Lessor's assertion in this regard, the Club invites the Court to again review the testimony which is quoted in full on pages 30-31 of the Club's original brief.

At the conclusion of Point I, Lessor asserts for the first time in this proceeding that the matter should be decided on the basis of paragraph 31 (alterations to the premises) rather than paragraph 29 of the lease (Club's right to reimbursement for curing Lessor's default). Since the issue was not raised in the trial court, it should not be considered in this Court. Even if considered, the argument has no merit. Alteration of the premises was insignificant and occured incidental to the Club's curing of the Lessor's breach. At all times the parties considered the problem as being governed by the reimbursement provisions of paragraph 29 of the lease. Lessor regarded paragraph 29 as the only relevant provision as shown by its preparation of the letter of July 23 (R. 66). The Club regarded paragraph 29 as the only relevant provision as stated in its letter on July 22 (R. 64) and the Bullen affidavit, paragraph 8 and 9 (R. 81).

To the extent that Lessor claims consent was required in order for the Club to obtain reimbursement, the jury could reasonably conclude from the facts stated in the Bullen affidavit that consent was given. There is no requirement of consent in paragraph 29 of the lease.

POINT III

THERE ARE GENUINE ISSUES OF FACT CONCERNING APPLICATION OF RELEASE PROVISIONS, RENT ABATEMENT PROVISIONS, DURESS AND NEGLIGENCE.

Under Point II of its brief, page 17, Lessor argues that the provisoins of paragraph 19 release Lessor from all liability in this case. Realizing that paragraph 19 does not purport to release any of the obligations under paragraphs 10 and 16,

Lessor states that the Club had not pleaded a breach of the covenant of quiet enjoyment (lease paragraph 10) or a breach of the utilities covenant (lease paragraph 16). On the contrary, the complaint clearly and unequivocally alleges a breach of these covenants. The covenants themselves were quoted in paragraph 5 of the complaint (R. 2). Paragraph 5 of the complaint is a part of or incorporated by reference into all counts of the complaint.

The alleged release clause (lease paragraph 19, R. 50-51) is the basis for the lower court's decision Lessor was not liable for damages and that the Club's exclusive remedy was rent abatement. However, paragraph 19 purports to release Lessor from liability only in the event Lessor fails to make the repairs specified in that paragraph. It does not purport or even suggest a release from paragraph 10 (quiet enjoyment), paragraph 16 (utilities including air conditioning) or paragraph 29 (Lessee's right to cure default) and should not have been used as a basis to limit the Club's recovery to rent abatement.

Beginning on page 19 of its brief, Lessor argues that the provisions of paragraph 19, which purport to release Lessor from liability arising out of damages to property of the Club, includes loss of profits.

At the outset, it should be noted, that it makes no difference whether loss of profits is included or excluded from the term "property" since the release provisions are not operative until certain disputes of fact are resolved. In this regard, see pages 19-25 of our original brief. Even if operable, the purported release provisions do not effect Lessor's liability under

paragraphs 10 and 16 of the lease. Therefore, a decision as to whether the term "property" includes loss of profits is unnecessary at this point in the proceeding.

Lessor's argument that "property" includes loss of profits as based upon an annotation written in 1925 and the Nebraska case of *Wood vs. Security Mutual Life Insurance Co.,* 198 N.W. 573, decided in 1924. The *Wood* case is not in point since it involved a liberal construction of the term whereas the relevant law in the instant case compels a narrow construction of the term. Moreover, the more recent view, noted in the cases cited in the Club's original brief, supports a construction excluding the loss of profits from the term "property".

The only Utah case cited by Lessor was *Clayton vs. Bennett,* 5 Utah 2d 152, 298 P.2d 531 (1956). The case involved the constitutionality of a licensing statute and has nothing whatsoever to do with the question of lost profits or the meaning of the term "property" in a contractual provision.

Lessor ignores the Utah cases cited in the Club's prior brief which compel a narrow construction of the term "property," and calls attention to cases from other jurisdictions in support of its proposition. The recent cases dealing with the issue, and the rules of construction heretofore establish by this Court, compel the conclusion that the term "property" must be strictly construed against Lessor in this matter and the term must be taken in its ordinary meaning in the absence of language to specify otherwise.

Lessor cites *Lee and Eastes vs. Public Service Commission,* 328 P.2d 700 (Wash. 1958), in support of its argument. That

case involves the liberal construction of the Washington statute rather than the construction of a contractual term in circumstances where strict construction should be followed. Moreover, the case made a distinction between "property" on the one hand, and "property right" on the other. The former deals with property itself whereas the latter deals with the right to use property and obtain profit therefrom. The case did not hold, nor did it even suggest, that property is the equivalent of the right to earn a profit.

In further support of its argument, Lessor asserts that it is difficult to imagine how the failure to repair air conditioning could result in damage to tangible property and therefore the parties must have intended the term to include intangible property. A reading of the lease provision itself illustrates the complete lack of merit to his argument. Under paragraph 19, Lessor was obliged not only to keep the air conditioning in good repair, but also roof, awnings, exterior and structural portions of the premises, pipes, wires, conduits, sewers, drains, elevators, elevator shafts, stairways, signs and heating. It is apparent when the entire paragraph is considered that the parties contemplated damage to tangible property. Moreover, even if the air conditioning were the only item mentioned in the paragraph, the failure to maintain the system could destroy perishable food items and leakage from the system could destroy any number of tangible items.

On page 19 of its brief, Lessor asserts the following:

> "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, t
> ages are not so waived. Plaintiff cites no au
> ever for that proposition."

On the contrary, the Club has cited the best autho
proposition: paragraph 19 of the lease. The all
provisions of paragraph 19 are not applicable unti
fact determines that repairs were made "with du
Even if repairs are made with due diligence said
applicable *only* to the covenant to make repairs s
in the same paragraph. The alleged release provisi
graph 19 do not waive any claims in the event of
the covenant of quiet enjoyment (paragraph 10) c
ant to furnish air conditioning and to maintain t
at a comfortable temperature (paragraph 16). Th
court could conclude as a matter of law that repai
six weeks were made "with due diligence," summa
should not have been granted since there could b
of liability under paragraphs 10 and 16 of the lea

In an attempt to argue that a factual dete
not raised by the words "with due diligence," Les
on page 24 of its brief, that the Court should c
the short period between the breakdown and the
the Club undertook to remedy the Lessor's defaul
compels the conclusion that the relevant time perio
3 months that Lessor stated would be involved (R
six weeks that were actually involved (Miller d
33). It was the representation, that replacemen
volve two or three months, which compelled the Cl
take *Lessor's* obligations and therefore his period o
one that should be considered in determining whe

pairs were made "with due diligence" (See Club's original brief, pp. 25-28). Had Lessor represented that it might be able to restore service within the 30-day period, the Club would obviously not have acted.

Lessor asserts that the record does not support a claim of negligence. On the conrary, the record establishes and Lessor admits on page 24 of its brief that the air conditioning failure occurred by reason of the acts of persons *hired by Lessor.* Lessor has not cited any portion of the record which purports to establish that the guilty party was not its servant under the circumstances. Rather, Lessor asks the Court to speculate as to the identity of the principal of the negligent party. The agency of the party who damaged the system is a factual determination which should not be decided summarily as a matter of law. *Goddard v. Lexington Motor Co.,* 63 Utah 161, 223 Pac. 340 (1924).

With regard to the reimbursement provisions of the lease, covered in point 3 of the Club's initial brief, one point should be clearly specified. The exculpatory provisions in paragraph 19, if applicable at all, do not apply to the reimbursement provisions of paragraph 29 of the same lease. It is absurd to argue that the parties intended that the release provisions of paragraph 19 released Lessor from the obligation later specified in the same lease. Therefore, regardless of the effect of the exculpatory provision, the reimbursemnt provision of paragraph 29 remains in full force and effect.

At several points during Lessor's argument, it is speculated that Lessor could have repaired the unit at an earlier point in time. It should be noted that this assertion is merely

speculative, there is absolutely no evidence in the record that the system was repairable nor is there any indication as to how long repairs, if any, would have taken. Since the unit was ultimately replaced rather than repaired (Miller deposition, p. 33), the only available evidence suggests that the repairs were not an acceptable alternative.

In its argument against the application of the doctrine of duress, Lessor notes a series of assertions which amount to nothing more than speculation or a statement of facts in dispute. On page 27, Lessor argues that the Club had retained all of its bargaining power as evidenced by the deletion in the letter agreement of July 23 wherein Lessor undertook the responsibility of paying electricity for the unit. This is merely an attempt by Lessor to distract the Court from the overall picture by calling attention to a single fact. Considering all of the facts, the record establishes that after the system became inoperable the Lessor acknowledged that it could not restore service within 30 days. The Club noted its right to cure the default at Lessor's expense and in response thereto Lessor noted the availability of a replacement unit without any indication that the reimbursement provisions would be contested. The Club purchased the unit and only then did Lessor disclaim any right to reimbursement. By the use of threats not to allow installation of the unit already purchased at substantial cost did the Club sign the July 23 letter. Certainly a jury could reasonably conclude that the letter was signed under duress as that term is defined by the cases cited in the Club's original brief. The existence or absence of duress is a factual determination, 25 *Am. Jur. "Duress and Undue Influence"*, § 34. The factual argument concerning the issue of fraud and duress demonstrates the need for a trial.

ge 28 Lessor speculates that the Club perhaps could led its air conditioning purchase and argues that the d no evidence as to whether it could or could not agraph 7 of the Bullen affidavit (R. 81), clearly the purchase had already been made and arrange- nstallation had been completed. The detailed factual ch Lessor wishes to argue, can only be presented le trial of the matter. The nature of this assertion nly emphasizes the fact that the matter was in- ly decided on a motion for summary judgment.

ges 27 and 31 of its brief, Lessor argues that if isaffirms the "contract" it cannot retain the bene- apparently misunderstands the issues. The Club aim that the lease was the result of duress; only ed amendment of July 23 is the result of duress. ttempted amendment is declared void, the parties matter in accordance with the lease contract. The ot attempted to avoid any obligation under the only attempt to avoid obligations under the lease part of Lessor when it prepared the letter of July ub seeks to retain the benefits under the lease as it is has not attempted to avoid the obligations.

CONCLUSION

ghout its brief, Lessor characterizes the facts in an present a picture that simply does not exist. Or, ularly, if the picture does exist, such should be the a jury rather than that of the Court on a summary The characterization of the facts of which Lessor e as follows: After the failure of the air condition-

ing system, the Club decided that they wanted their own system independent from that of the building; the Club wanted a separate system enough to expend in excess of $15,000 and in addition to this expenditure, waive an already existing right to be reimbursed for this expenditure; Lessor consented to make great sacrifices in allowing the system to be tied into the water tower (which would not result in any additional water use since the main system also used the water tower), consented to pay for electricity and costs of maintaennce (which they were already obliged to do under the lease at the time of the breakdown), and donate space to accomodate the new unit (which space was unusable for any other purpose). In exchange for these "generous" concessions, the Club waived its right to be reimbursed for the purchase of the system, a right which was well established under the terms of its lease.

The whole point of the matter is that the following version of the facts, as contended by the Club, if not more probable, are at least a reasonable conclusion to be made from the evidence: The air conditioning system failed, leaving the premises untenantable for the purposes for which the Club used the premises. Representatives of the Club were faced with an emergency situation and reviewed the provisions of the lease which allowed them to replace the air conditioning system on the account of Lessor under paragraph 29 of the lease. On July 22, the Club formally notified Lessor of this right. Discussions with Lessor definitely established that the default could not be cured within the 30 day period established by paragraph 29. All parties realizing that paragraph 29 was operable, immediately cooperated to find the most economic manner in which to cure Lessor's default and get the Club back into operation. Their cooperative effort resulted in the location of a replace

ment unit. The Club purchased the unit and made arrangements for its installation upon the understanding that it would be reimbursed by Lessor. After the unit was purchased, Lessor attempted to pursuade the Club to bear the expense contrary to the lease. This attempted shift of the expense was done by presenting the letter of July 23. The Club refused to sign the same since it did not wish to waive its rights to reimbursement which it believed were provided for by the lease. Thus, it was suggested and agreed that the addendum be added so that it would be clear that the Club retained *all* rights under the lease. Despite the attempt to shift the burden, Lessor accepted the addendum and arrangements were made to accommodate the unit. Lessor donated space which was not usable for any other purpose and allowed the unit to be tied into the water tower, and continued its obligation under the original lease to provide for maintenance.

It is apparent from the facts before the Court that there is a genuine issue as to almost all of the material facts and that summary judgment should be reversed and the case remanded for trial.

Respectfully submitted

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& McDONOUGH

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