

2005

Hal Company v. Multi Media Musketeers and Jeff Brewer : Brief of Appellant

Utah Court of Appeals

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Jackson Howard; Howard, Lewis & Peterson.

Joseph R. Goodman, Jr; Joseph R. Goodman Jr, LC.

Recommended Citation

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UTAH COURT OF APPEALS

HAL COMPANY,

Plaintiff, Appellee, and
Cross-appellant,

v.

Appellate Number:
20050226

MULTI MEDIA MUSKETEERS and
JEFF BREWER,

Defendants, Appellants,
And Cross-appellees.

**BRIEF OF APPELLANT
APPEAL FROM A FINAL JUDGMENT ENTERED IN THE
FOURTH DISTRICT COURT, PROVO DEPARTMENT
(Civil No. 020405666)**

Jackson Howard
HOWARD, LEWIS & PETERSON, P.C.
120 East 300 North Street
PO Box 1248
Provo, UT 84603
Attorney for Plaintiff/Appellee

Joseph R. Goodman, Jr.
JOSEPH R. GOODMAN, JR. L.C.,
2825 East Cottonwood Parkway
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Salt Lake City, UT 84121
Attorney for Defendants/Appellants

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JURISDICTION

This appeal is from a final judgment entered in the Fourth District Court, Utah County, State of Utah. The Appellate Court has jurisdiction over this matter pursuant to U.C.A. § 78-2a-3(2)(j), in that this case was transferred to this Court from the Supreme Court of the State of Utah.

ISSUES FOR REVIEW

1. Did the trial court err when it set aside a previously entered Findings of Fact and Conclusions of Law pursuant to an improper and untimely motion? This is reviewed pursuant to a plain error standard. “Plain error is error that is both harmful and obvious. This court reviews allegations of plain error despite the lack of a timely objection, provided, of course, that the trial court was not led into the error.” State v. Cook, 881 P.2d 913 at 914 (Ut. Ct. App. 1994).

2. Did the trial judge err when it set aside previously entered Findings of Fact and Conclusions of Law entered by a prior judge assigned to the same case? This is reviewed pursuant to an abuse of discretion standard. “When a trial court abuses its discretion, it has exceeded the range of discretion allowed for the particular act under review.” Rivera v. State Farm, 1 P.3d 539 at n. 2 (Utah 2000); 2000 UT 36 n. 2.

The issues presented stem from the second (2nd) objection Appellee filed and was allowed to be heard on. The matter was fully briefed at the trial court level, and taken under advisement by the trial court, which did issue written findings.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

I. Utah Constitution, Article I, Section 7.

“No person shall be deprived of life, liberty or property, without due process of law.

II. Utah Rules of Civil Procedure, Rule 5, section (e).

“Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.”

III. Utah Rules of Appellate Procedure, Rule 4, section (a).

“Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.”

IV. Utah Rules of Appellate Procedure, Rule 5, section (a).

“Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court,...

STATEMENT OF CASE

A trial was held in the Fourth District Court, Provo, Utah, during which the trial court heard evidence presented by both parties, as well as legal arguments and defenses presented by the same parties. At the time of trial, the trial court did issue oral findings, which were later entered by the trial judge as written Findings of Fact and Conclusions of Law. Immediately after the trial, Appellee (the Plaintiff in the matter below, and hereinafter referred to as “**HAL Company**”) submitted alternative Findings and a Memorandum in support thereof. The trial court set oral arguments on HAL Company’s Motion in April, 2004, and ruled in favor of Appellant (the Defendant in the matter below, and hereinafter referred to as “**Brewer**”) in May, 2004, when the trial judge entered Findings of Fact and Conclusions of Law in conformity with the ruling made at trial. In August, 2005, HAL Company essentially re-filed the identical motion, framed as a “Motion to Correct Docket.” This filing was untimely, and inappropriate pursuant to the Rules of Civil Procedure. Nonetheless, the trial court, this time with a different sitting judge, heard yet more oral argument on this motion, and did enter substantially different Findings of Fact and Conclusions of Law than had been entered approximately nine (9) months before.

SUMMARY OF ARGUMENT

HAL Company was improperly given three (3) “bites at the apple,” until the outcome HAL Company desired was reached. The trial court improperly set aside the previously entered Findings of Fact and Conclusions of Law nine (9) months later without the legal authority to do so. This case was fully tried and litigated before the Honorable Judge Steven L. Hansen on January 22, 2004. Judge Steven Hansen issued judgment from the bench, and Findings of Fact and Conclusions of Law were entered consistent with this judgment on May 24, 2004, and after HAL Company had filed a Motion objecting to these Findings, and after HAL Company was given the opportunity to argue the matter yet again. After the case was reassigned to the Honorable Samuel McVey, HAL Company filed yet another motion, this time characterized as a “Motion to Correct Docket,” and yet additional oral arguments were heard. The new trial judge improperly allowed HAL Company to boot-strap arguments already made and already objected to in this second set of oral arguments in December, 2004. In spite of no new evidence being presented, and in spite of Judge Hansen previously rejecting the same arguments, Judge McVey entered substantially and materially different Findings of Fact and Conclusions of Law in February, 2005. The Motion filed by HAL Company was untimely, and Judge McVey lacked the authority to alter the Findings already made by Judge Hansen. Finally, by allowing HAL Company to lodge the same argument multiple times, and without the presentation of any additional evidence, improperly violated Brewer’s due process rights.

ARGUMENT

I. TRIAL COURT IMPROPERLY GRANTED APPELLEE RELIEF ON THE AUGUST, 2004 OBJECTION.

Every party is entitled to their day in Court; no party is entitled to multiple days in the same court arguing the same issues until the conclusion they desire is reached. In this matter, even a cursory review of the docket shows the gross irregularities in the underlying case, and the repeated “chances” HAL Company was given to re-litigate a matter that had been decided multiple times. Namely, the following facts are not in dispute:

- a. The trial of this matter was held on January 22, 2004, before Judge Hansen. Judge Hansen entered judgment in favor of HAL Company “in the amount of \$1563.43 minus the security deposit.” (Docket, page 4).
- b. Subsequent to the trial, HAL Company submitted Findings and a Judgment inconsistent with the findings of the trial court. In addition, HAL Company submitted a Memorandum in Support of entry of these Findings, challenging the legal conclusions drawn by Judge Hansen. The Findings submitted by HAL Company were inconsistent with the ruling of Judge Hansen. (Docket, page 4).
- c. Accordingly, Judge Hansen set this matter for a hearing on April 7, 2004, at which the inconsistent Findings and Judgment of HAL Company were argued. Pursuant to the instructions of the trial court, counsel for Brewer did submit Findings of Fact and Conclusions of law consistent with the findings at the time of trial. These Findings of Fact and Conclusions of law granted judgment to HAL

Company in the amount of \$1038.45, representing the findings of the trial court. (Docket, page 5).

d. The Findings of Fact and Conclusions of Law submitted by Brewer were actually entered by the Court on May 24, 2004. This entry was docketed as “Filed judgment.” Judge Hansen issued no written decision. (Docket, page 5.)

e. On August 12, 2004, or in excess of two (2) months after the entry of the Findings of Fact and Conclusions of Law, HAL Company filed yet another, redundant motion, captioned as a “Motion to Correct Docket.” This Memorandum makes no mention of any discrepancies in the judgment, but merely focuses on the assertion that judgment had not yet entered. In addition, Judge Samuel McVey was now assigned to this case. (Docket, page 5).

f. Brewer submitted a Memorandum in Opposition to HAL Company’s Motion, setting forth many of the same issues now presented. HAL Company submitted a Reply Memorandum, again focusing solely upon the apparently inaccurate docket entry.

g. For reasons unknown to Brewer, oral argument was set yet again, and without any additional pleadings being filed. Although HAL Company, in written filings, made no objection to the substance of the Findings entered by Judge Hansen, at oral argument, HAL Company was allowed to re-argue the claims presented in April to Judge Hansen. As set forth in the docket, and again for reasons which appear to be inconsistent with the pleadings, Judge McVey asked for additional documents and did review the trial tape. Subsequently, and

although the issue had not been raised, Judge McVey did materially alter the Findings made by Judge Hansen, and now in favor of HAL Company. Judge McVey took the matter under advisement, issuing a written decision after argument. (Docket, page 6-7.)

h. On February 1, 2005, Judge McVey entered contradictory Findings of Fact and Conclusions of Law, granting HAL Company judgment in the amount of \$7,407.77. (Docket, page 7.)

This Court must be mindful that HAL Company was successful in overturning the trial judge's decision on the *second* opportunity, and without pleading for such affirmative relief. That is, subsequent to the trial, HAL Company filed contradictory Findings of Fact and Conclusions of Law, supported by a Memorandum asserting legal arguments which the Court should consider to modify the Findings. This filing led to Judge Hansen setting the matter for oral argument, in which HAL Company presented arguments to Judge Hansen which were previously made and ruled upon at the trial of the matter. Regardless, Judge Hansen did allow HAL Company the opportunity to re-litigate the case with legal arguments previously made. Hearing argument, and reviewing the pleadings, Judge Hansen issued his determination as to the merits of HAL Company's post-trial motion when he entered Appellant's Findings of Fact and Conclusions of Law in May, 2004. In August, 2004, HAL Company filed a pleading allegedly solely related to the correction of the docket. However, at the time of oral argument, HAL Company was given the opportunity to boot-strap his earlier, rejected arguments to a new judge. The substantive effect was that HAL Company filed a Motion to Correct Docket, but at

oral arguments on the same, was allowed to re-argue legal issues which had been already objected to by Judge Hansen. HAL Company was basically allowed appellate review of a legal decision at the district court level.

Appellant urges this Court to apply the time limit to this matter set forth in Utah Rules of Civil Procedure 59. Namely, and as was ordered by Judge Hansen, Brewer did submit Findings of Fact and Conclusions of Law to the trial court after oral arguments in April, 2004. The Court did enter these Findings of Fact and Conclusions of Law on May 24, 2004, with the docket actually reflecting “judgment.” The trial court did not issue any written findings. Pursuant to URCP 59, any motion to alter or amend the judgment “shall be served not later than 10 days after the entry of the judgment.” HAL Company did not file the motion to alter the judgment until August, 2004, in excess of sixty (60) days after the judgment was entered.

HAL Company will argue, as Judge McVey states in the “Decision on Post Trial Motions,” that no judgment was ever entered, and that this was the reason for allowing additional pleadings on this matter. Brewer sees this argument as irrelevant. The only thing that matters is that the trial judge did enter Findings of Fact and Conclusions of Law. The role of Judge McVey, by the time he heard the matter, should have been limited to entry of a Judgment consistent with these Findings.¹

When Judge Hansen entered his Findings of Fact on May 24, 2004, this was essentially the denial of HAL Company’s post-trial motion. Accordingly, if HAL Company takes issue with the legal conclusion of Judge Hansen, the appropriate steps to

¹ Brewer did submit an appropriate judgment to the court in August, 2004.

have taken would have been to file an appeal. If this is the case, then the applicable rule would be either Utah Rules of Appellate Procedure, Rule 4 or Utah Rules of Appellate Procedure, Rule 5. HAL Company plainly missed

This Court must see the actions of Judge McVey for what they are: he did not “correct the docket, rather he substituted his legal opinion with that of Judge Hansen. The legal issue had been briefed and argued to Judge Hansen, triggering the application of the appellate rules, not some mischaracterized “Motion to Correct Docket.” Rather than correcting the docket, Judge McVey altered the Findings of Fact and Conclusions of Law in a material manner, thereby eviscerating the prior ruling of Judge Hansen. This activity can only be done by an appellate court, and the appellate rules for filing such an appeal apply. It is undisputed that HAL Company missed the timelines for such an appeal, whether treated as an appeal from a final judgment or an interlocutory appeal of Judge Hansen’s denial of the February, 2004 Motion.

Further, Brewer was under no obligation to inform HAL Company of the entry of the Findings of Fact and Conclusions of Law. Namely, the hearing which precipitated their filing and entry was as a result of the oral arguments held pursuant to the request of HAL Company and pursuant to its motion. HAL Company filed a motion which was denied by Judge Hansen on May 24, 2004. HAL Company did nothing in response to the denial of its Motion until August, 2004, and Brewer was not obligated to inform HAL Company of this denial. By this time HAL Company acted, there is no rule of Civil or Appellate procedure available to it to allow the relief given to it by Judge McVey.

Finally, the net result of the actions of the trial court have been to shift burdens.

Namely, if HAL Company felt strongly about the legal arguments made to Judge Hansen in April, 2004, HAL Company should have appealed from Judge Hansen's decision. Rather, HAL Company couched what would turn out to be its second bite at the apple as a "motion to correct docket," and in that the case had been fortuitously reassigned, benefited from a different judge entering a different decision on a matter that had been decided. The plain improprieties below have shifted the appellate burden, improperly, to Brewer.

II. APPELLANT'S DUE PROCESS RIGHTS VIOLATED.

Section 7 of the Utah Constitution states that "no person shall be deprived of life, liberty or property, without due process of law." This case features a full trial of the matter, with the determination of the trial judge being essentially overturned nine (9) months later and without the presentation of any new or additional evidence is in direct contravention of this principle. To allow a party unhappy with the decision of the trial court to re-plead the case at the trial court level is an obvious example of such a violation.

III. JUDGE MCVEY LACKED AUTHORITY TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It is the purpose of the trial judge to make a determination as to the veracity of the parties' testimony, to evaluate the legal arguments and claims made, and to issue findings and conclusions consistent with the decision of the trial judge. These decisions, if clearly erroneous, can be appealed to a higher court for a determination, but should not be allowed to be repeatedly debated in front of the same trial court until a satisfactory conclusion is reached. Compounding the confusion below is that in this case a different

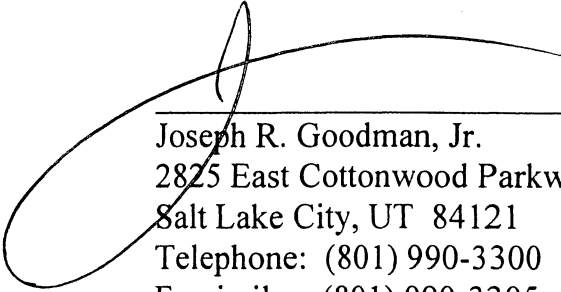
judge altered the decision. With all due respect to Judge McVey, why should his subsequent analysis of the case presented be given any greater weight than the decision made by Judge Hansen, on two occasions? They are both judges of the district court, with equal and concurrent jurisdiction, so how is it that Judge McVey was essentially allowed to “overturn” the decision of Judge Hansen? Brewer would suggest that this is entirely inappropriate, and represents yet another example of the due process rights of Brewer which have been trampled.

Brewer can find no authority which would allow a judge of the district court to examine the evidence taken by another judge, and to draw a differing legal conclusion. This appears to be the exclusive purview of the appellate court, and Judge McVey has improperly substituted his opinion of the matter presented with the rightful place of the appellate court.

RELIEF SOUGHT

Appellant seeks remand to the District Court for the entry of Findings of Fact and Conclusions of Law, and Judgment in conformity therewith, consistent with the Findings made at the time of trial, and consistent with the Findings entered on May 24, 2004 by the trial judge.

DATED this 29 day of October, 2005.



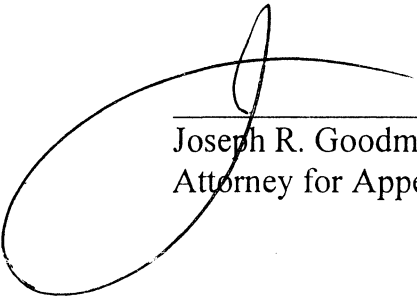
Joseph R. Goodman, Jr.
2825 East Cottonwood Parkway, Ste. 500
Salt Lake City, UT 84121
Telephone: (801) 990-3300
Facsimile: (801) 990-3305

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Joseph R. Goodman, Jr., L.C., and that I served two (2) true and correct copy of the foregoing **APPELLANT'S BRIEF**, via first class mail, postage prepaid, on the following:

Jackson Howard
HOWARD, LEWIS & PETERSON, P.C.
120 East 300 North Street
PO Box 1248
Provo, UT 84603
Attorney for Plaintiff/Appellee

on this 27 day of October, 2005.



Joseph R. Goodman, Jr.
Attorney for Appellant

ADDENDUM

1. Docket
2. HAL Company's Memorandum in Support of Motion for Entry of Findings of Fact and Conclusions of Law.
3. Brewer's Memorandum in Opposition to Plaintiff's Motion for Entry of Findings and Judgment.
4. Brewer's Findings of Fact and Conclusions of Law.
5. HAL Company's Memorandum Supporting Motion to Correct Docket.
6. Brewer's Memorandum in Opposition to Motion to Correct Docket.
7. HAL Company's Reply Memorandum.
8. Decision on Post-Trial Motions.
9. HAL Company's Findings of Fact and Conclusions of Law.
10. HAL Company's Judgment.

ADDENDUM #1

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

HAL COMPANY vs. MULTI MEDIA MUSKETEERS

CASE NUMBER 020405666 Contracts

CURRENT ASSIGNED JUDGE
GARY D STOTT

PARTIES

Plaintiff - HAL COMPANY
PROVO, UT 84603
Represented by: JACKSON B HOWARD

Defendant - MULTI MEDIA MUSKETEERS
Represented by: JOSEPH R GOODMAN JR

Defendant - JEFF BREWER
Represented by: JOSEPH R GOODMAN JR

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	500.50
	Amount Paid:	500.50
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	600.00
	Applied:	0.00
	Forfeited:	0.00
	Balance:	600.00

REVENUE DETAIL - TYPE: COMPLAINT 2K-10K

	Amount Due:	90.00
	Amount Paid:	90.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: APPEAL

	Amount Due:	205.00
	Amount Paid:	205.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

	Amount Due:	0.50
	Amount Paid:	0.50

CASE NUMBER 020405666 Contracts

Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: APPEAL

Amount Due:	205.00
Amount Paid:	205.00
Amount Credit:	0.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Appeals

Posted By:	JOSEPH R GOODMAN JR
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Civil, Mi

Posted By:	HOWARD LEWIS & PETERSON
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

CASE NOTE

PROCEEDINGS

12-20-02 Case filed by rebeccmw
12-20-02 Judge BURNINGHAM assigned.
12-20-02 Filed: Complaint
12-20-02 Fee Account created Total Due: 90.00
12-20-02 COMPLAINT 2K-10K Payment Received: 90.00
 Note: Code Description: COMPLAINT 2K-10K
01-30-03 Filed return: Summons
 Party Served: MULTI MEDIA MUSKETEERS
 Service Type: Personal
 Service Date: January 27, 2003
01-30-03 Filed return: Summons
 Party Served: BREWER, JEFF
 Service Type: Personal
 Service Date: January 27, 2003
02-18-03 Filed: Answer
 MULTI MEDIA MUSKETEERS
 JEFF BREWER

02-20-03 Filed: Answer
 MULTI MEDIA MUSKETEERS
 JEFF BREWER

03-13-03 Filed: Notice Of Telephonic Attorney Planning Meeting
03-31-03 Filed: Substitution Of Counsel
05-09-03 Filed: Plaintiff's Initial Disclosures
05-19-03 Filed: Notice Of Withdrawal Notice Of Appearance Notice Of
Change Of Address
05-19-03 Filed: Initial Disclosures
09-20-03 Judge JUDGE assigned.
09-25-03 Filed: Request for Scheduling Conference
09-26-03 Notice - NOTICE for Case 020405666 ID 1635817
PRETRIAL/SCHEDULING CONF is scheduled.
Date: 11/14/2003
Time: 10:00 a.m.
Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: DIVISION 04 JUDGE
09-26-03 PRETRIAL/SCHEDULING CONF scheduled on November 14, 2003 at
10:00 AM in Third floor, Rm 302 with Judge JUDGE.
11-14-03 Filed: Attorney Planning Meeting Report
11-14-03 Minute Entry - Minutes for Pretrial Conference
Judge: CLAUDIA LAYCOCK
Clerk: shellys
PRESENT

Plaintiff's Attorney(s): JACKSON HOWARD
Defendant's Attorney(s): JOSEPH R JR GOODMAN
Video
Tape Number: 78 Tape Count: 10:59

HEARING

TAPE: 78 COUNT: 10:59

Both parties are present, this matter is set for a Bench Trial on
January 22, 2004 1:00 p.m. All Documents counsel is planning on
using at trial must be exchanged at least 30 days prior to trial.

Judge Laycock is presiding for Division #4.

Judge Laycock is on the bench for Division #4.

11-17-03 BENCH TRIAL scheduled on January 22, 2004 at 01:00 PM in Third
floor, Rm 302 with Judge JUDGE.

12-15-03 Filed: Partial Disclosures

01-22-04 Minute Entry - Minutes for Bench Trial

Judge: STEVEN L. HANSEN

Clerk: emilyp

PRESENT

Defendant(s): JEFF BREWER
Plaintiff's Attorney(s): JACKSON HOWARD
Defendant's Attorney(s): JOSEPH R JR GOODMAN
Video
Tape Number: 7 Tape Count: 1:34

TRIAL

TAPE: 7 COUNT: 1:34

Both parties are represented by counsel, and both present their opening argument. Mark Dan Fish is sworn in examined & cross-examined. Sterling Lewis is sworn in examined & cross-examined. Catherine Schirman is sworn in examined & cross-examined.

Jackson Howard is sworn in and he testifies as to plaintiffs attorney's fees. William Clausen is sworn in examined & cross-examined. Jeff Brewer is sworn in examined & cross-examined. Mr. Fish is re-examined & cross-examined. Mrs. Schirmer is recalled and examined.

COUNT: 4:05

Counsel from both sides present their closing arguments. The court finds that this is a constructive unlawful detainer, no attorney's fees are awarded, defendant is order to pay for new carpet. The security deposit is to be deducted from the carpet bill, judgment is granted in favor of the plaintiff in the amount of \$1563.43 minus the security deposit. Joseph Goodman is instructed to prepare the Judgment and Order. Judge Hansen is presiding for Div #4 today.

02-09-04 Filed: Motion for Entry of Findings of Fact and Conclusions of Law and Judgment and Decree

02-09-04 Filed: Memorandum in support of Motion for Entry of Findings of Fact and Conclusions of Law and Judgment and Decree

03-10-04 Notice - NOTICE for Case 020405666 ID 1740030

HEARING ON MOTION is scheduled.

Date: 04/07/2004

Time: 08:30 a.m.

Location: Second floor, Rm 203

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: STEVEN L. HANSEN

03-10-04 HEARING ON MOTION scheduled on April 07, 2004 at 08:30 AM in Second floor, Rm 203 with Judge HANSEN.

03-31-04 Filed: FAXED Memorandum of Defendants in Opposition to Plaintiff's Motion for Entry of Findings and Judgment

04-05-04 Filed: Memorandum of Defendants in Opposition to Plaintiff's Motion for Entry of Findings and Judgment

04-07-04 Minute Entry - Minutes for HEARING ON MOTION

Judge: STEVEN L. HANSEN

Clerk: taras

PRESENT

Plaintiff's Attorney(s): JACKSON HOWARD

Defendant's Attorney(s): JOSEPH R JR GOODMAN

Video

Tape Number: 16 Tape Count: 8:43

HEARING

TAPE: 16 COUNT: 8:43

This matter comes before the court for a hearing. The Court addresses plaintiff's findings of fact and conclusions of law. The Court inquires why Mr. Goodman did not prepare the findings of fact and conclusions of law.

Mr. Howard argues plaintiff's findings of fact and conclusions of law. Mr. Goodman responds. The Court advises Mr. Goodman to prepare and submit finding of fact and conclusions of law by April 14, 2004.

The Court takes matter under advisement.

04-16-04 Judge MCVEY assigned.

05-24-04 Filed judgment: Findings of Fact and Conclusions of Law

Judge shansen

Signed May 24, 2004

05-24-04 Case Disposition is Judgment

taras

Disposition Judge is SAMUEL MCVEY

taras

08-12-04 Filed: Motion to Vacate Findings of Fact and Conclusions of Law

08-16-04 Filed: Motion to Correct Docket

08-16-04 Filed: Memorandum Supporting Motion to Correct Docket

08-25-04 Filed: Memorandum in Opposition to Motion to Vacate Findings of Fact and Conclusions of Law/Motion to Correct Docket/Request for Attorney's Fees

08-30-04 Filed: Objection to Form of Judgment

08-30-04 Filed: Reply Memorandum Supporting Motion to Vacate and Motion to Correct Docket

09-22-04 Filed: Request for Oral Argument

10-04-04 ORAL ARGUMENTS scheduled on November 12, 2004 at 08:30 AM in Third floor, Rm 302 with Judge MCVEY.

10-04-04 Notice - NOTICE for Case 020405666 ID 1880687

ORAL ARGUMENTS is scheduled.

Date: 11/12/2004

Time: 08:30 a.m.

Location: Third floor, Rm 302

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: SAMUEL MCVEY

10-13-04 Filed: Returned Mail - Joseph R Goodman, Jr - not deliverable
as addressed

10-19-04 Note: Resent notice to Joseph Goodman JR at 2825 E Cottonwood
Parkway #500, SLC 84121 (took the PO Box off)

10-25-04 Filed: Motion to Continue Oral Arguments Set for November 12,
2004

10-27-04 Filed: Letter from Jackson Howard regarding Judge Hansen
hearing Oral Arguments

11-09-04 Filed order: Order (continuing 9/12/04 oral arguments)

Judge smcvey

Signed November 09, 2004

11-09-04 Notice - NOTICE for Case 020405666 ID 1907067

ORAL ARGUMENTS.

Date: 12/10/2004

Time: 02:00 p.m.

Location: Third floor, Rm 302

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: SAMUEL MCVEY

The reason for the change is Counsel's request.

11-09-04 ORAL ARGUMENTS rescheduled on December 10, 2004 at 02:00 PM

Reason: Counsel's request..

12-10-04 Minute Entry - Minutes for ORAL ARGUMENTS

Judge: SAMUEL MCVEY

Clerk: ambere

PRESENT

Plaintiff's Attorney(s): JACKSON B HOWARD

Defendant's Attorney(s): JOSEPH R GOODMAN JR

Audio

Tape Number: 04-70 302 Tape Count: 2:05-2:34

HEARING

This matter comes before the Court for Oral Arguments on the post trial motions. Mr. Goodman addresses the Court. Mr. Howard responds. Mr. Howard addresses the Court regarding damages. Mr. Goodman responds.

The Court takes this matter under advisement. The Court requests that Mr. Howard deliver a copy of the agreement between the parties, as there is not one attached to the complaint. The Court will send out a written ruling on this matter.

12-10-04 Filed: Lease Agreement

12-21-04 Filed order: Decision on Post-Trial Motions

Judge smcvey
 Signed December 20, 2004
 12-31-04 Judge STOTT assigned.
 02-01-05 Filed order: Findings of Fact and Conclusions of Law
 Judge smcvey
 Signed January 27, 2005
 02-01-05 Judgment #1 Entered
 Debtor: MULTI MEDIA MUSKETEERS
 Creditor: HAL COMPANY
 Debtor: JEFF BREWER
 7,407.77 Total Judgment
 7,407.77 Judgment Grand Total
 02-01-05 Filed judgment: Judgment and Decree
 Judge smcvey
 Signed January 27, 2005
 02-01-05 Case Disposition is Judgment ambere
 Disposition Judge is SAMUEL MCVEY ambere
 02-04-05 Filed: Notice of Judgment
 03-04-05 Filed: Motion for Extension of Time to File Appeal
 03-04-05 Filed: Notice of Appeal/Notice of Filing of Bond
 03-04-05 Fee Account created Total Due: 205.00
 03-04-05 APPEAL Payment Received: 205.00
 Note: Code Description: APPEAL; Record Number 8
 03-04-05 Bond Account created Total Due: 300.00
 03-04-05 Bond Posted Payment Received: 300.00
 03-07-05 Note: A certified copy of the Notice of Appeal was sent to the
 Utah Supreme Court on this date, via State Mail with tracking
 number 55500012809.
 03-11-05 Filed: Letter from the Utah Court of Appeals to Mr. Goodman
 dated March 10, 2005-- Their case number is 20050226--CA. This
 case has been transferred to the Utah Court of Appeals.
 03-11-05 Filed: Copy of Order from the Utah Supreme Court--Matter is
 transferred to the Utah Court of Appeals for Disposition. Case
 number 20050226--CA.
 03-16-05 Fee Account created Total Due: 0.50
 03-16-05 COPY FEE Payment Received: 0.50
 Note: 1.00 cash tendered.
 03-18-05 Filed: Notice of Deposit of Cost Bond on Appeal
 03-18-05 Filed: Memorandum Opposing Motion for Extension of Time to
 Appeal
 03-18-05 Filed: Notice of Cross-Appeal
 03-18-05 Fee Account created Total Due: 205.00
 03-18-05 APPEAL Payment Received: 205.00
 Note: Code Description: APPEAL
 03-18-05 Bond Account created Total Due: 300.00
 03-18-05 Bond Posted Payment Received: 300.00
 03-21-05 Note: A Certified copy of the Notice of Cross- Appeal was sent
 to the Utah Court of Appeals via State Mail with tracking
 number #55500013010.

dated March 23, 2005--Cross Appeal has been filed and that
number is 20050226--CA

ADDENDUM #2

JACKSON HOWARD (1548), for:
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Our File No. 22,372-9

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY, Plaintiff, vs. MULTI MEDIA MUSKETEERS and JEFF BREWER, Defendants.	MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT AND DECREE Case No. 020405666 Division No. 4
----------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

COMES NOW the plaintiff and submits this memorandum in support of its Motion for Entry of Findings of Fact and Conclusions of Law and Judgment and Decree filed herewith.

ARGUMENT

POINT I

**THE COURT HAS AUTHORITY TO
RECONSIDER AND CORRECT ITS DECISION.**

Although the court has already announced a decision, no formal order has been entered. In a case in an identical posture, the Utah Supreme Court held: "It is settled law that a trial court is free to reassess its decision at any point prior to entry of a final order or judgment." Ron Shepherd Insurance, Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994).

Plaintiff shows below that certain rulings of the Court were contrary to established law. Plaintiff respectfully submits the Court has the authority and power to change its decision, and should do so.

POINT II

THE WRITTEN LEASE REMAINED IN EFFECT DURING THE HOLD-OVER PERIOD.

The Utah Supreme Court has directly held that attorney fee and other provisions of a lease remain in effect during a hold-over period. Plaintiff submits the Court's ruling to the contrary was error and should be corrected.

The parties entered into a written lease agreement on February 1, 1996, which by its terms expired on January 31, 1999. The lease had a hold-over provision, provision 20, which states as follows:

If Tenant remains in possession of the Premises or any part thereof after the expiration of the term hereof, with or without express written consent of Landlord, such occupancy shall be a tenancy from month to month at a rental in the amount of the last monthly rental, *plus all other charges as payable hereunder, and upon all the terms hereof applicable to a month to month tenancy.*

Italics added.

The Court indicated concern as to whether the lease had terminated automatically, and whether this provision pertained only to the payment of rents but did not incorporate any of the other provisions of the lease.

It is the plaintiff's contention that provision 20 by its terms is sufficiently explicit to demonstrate that the lease is totally enforceable; however, a fortiori, it is enforceable because all of the parties have couched their contentions and claims upon the existence of this lease agreement.

Notwithstanding the strength of this provision in the lease, the courts have uniformly held that the terms of a written lease agreement pertain to any hold-over period.

The most important case on this subject is Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1988). This case is almost identical in facts to the instant case. In that case, the successor to the tenant had attempted to negotiate a new lease with the owner, but had been unsuccessful in agreeing on the terms. The tenant stayed on the premises after the lease had expired by its own terms, contending he had a right to be on the premises under an oral contract the terms of which varied from the written lease agreement. The court, in a unanimous opinion, held that the written lease agreement was still in effect and stated as follows:

It is a firmly established rule that proof of a holding over after the expiration of the fixed term in a lease gives rise to the presumption which, in the absence of contrary evidence, will be controlling that the holdover tenant continues to be bound by the covenants which were binding upon him during the fixed term.

499 P.2d at 503.

As in the instant case, the tenant claimed the attorney fee provisions of the lease agreement no longer applied. The Supreme Court rejected that claim and held the attorney fee provisions remained in effect:

Since there was no evidence by either party that the provisions and conditions of the written lease were modified during the month-to-month tenancy except for the increase in the amount of rent, the provision in the 1961 lease regarding attorney fees remained binding on the parties until the month-to-month tenancy expired on November 30, 1981.

Id.

The court then remanded the case to the trial court to determine the amount of attorney fees, including those on appeal, together with trial and appeal costs. This, of course, was a correct decision and is applicable to the lease in this case. The general rule is that all provisions of the lease

governed during the holdover period. No evidence was presented to require a different result. It follows that the attorney fee and other lease provisions were still in effect.

POINT III

THE FACT THAT A FIXTURE REVERTS TO THE OWNER OF THE PREMISES DOES NOT PROHIBIT THE OWNER FROM RECOVERING DAMAGES BY REASON OF THE REPLACEMENT OF A FIXTURE AND ITS REMOVAL.

In this case, the defendant Multi Media had occupied other space in the building. In February, 1996, it moved to its present location on the third floor of the Highland Plaza building. At that time, it entered into a new lease agreement, which is Exhibit 1 in this case. After taking possession of the premises, it installed a work bench or shelf along the south wall of the largest room in its suite. This shelf or bench was attached to the wall with toggle bolts which required breaking the wall board to insert the sizeable attachment bolts, which further was attached with various devices which damaged the underlying wall. In addition, it installed several hanging electrical harnesses which were wired into the electrical wiring by removing sections of the ceiling. When it left, it detached the equipment, but left the wires hanging.

Under terms of the law, the bench and the wiring could be regarded as fixtures. They were installed without the consent of the landlord. There is no other evidence in the record. It is admitted that the landlord saw these fittings after the lease was entered into, but because it did not give authority for the installation of it, provisions 9 and 10 are applicable and the landlord is entitled to costs of repairing the damage caused by the removal. Furthermore, provision 33c gives the landlord authority to require the removal at the tenant's expense; however, since this was a month-to-month lease and the tenant was in default, no notice would be required. Therefore, the landlord when repossessing the premises is entitled to take whatever steps are necessary to restore the premises to

a condition identical to that in which it was received by the tenant, less reasonable wear, tear and depreciation. The work bench and hanging wires cannot be considered reasonable wear, tear and depreciation.

POINT IV

REMOVING THE DEFENDANT'S SIGNAGE ON THE MARQUEE DID NOT CONSTITUTE A BREACH OF CONTRACT OR ABATE THE DUTY TO PAY RENT.

The defendant did not claim a rent abatement because plaintiff removed a marquee advertisement regarding defendant's business. The court, "suasponete", determined that the removal of the marquee language was a breach of contract which justified a rent abatement. Utah law, however, establishes that rent abatements are available only for breaches that defeat the essential objective of the lease. No evidence would establish that required element in this case, and there was no evidence offered of the amount of defendant's damages.

In Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368 (Utah 1996), the Utah Supreme Court thoroughly analyzed the circumstances under which landlord's breach of the lease will excuse a tenant's obligation to pay rent. The court concluded:

Not all breaches of covenants by a lessor, however, justify a lessee in withholding rent. Only a significant breach of a covenant material to the purpose for which the lease was consummated justifies a lessee in abating rent. Temporary or minor breaches of routine covenants by a lessor do not. Thus, if a breach has little effect on the essential objectives of the lessee in entering into the lease, the lessee may not withhold rent. Restatement (Second) of Property § 7.1, cmt. c (1977) states that a covenant is not a significant inducement if "the landlord's failure to perform his promise has only a peripheral effect on the use of the leased property by the tenant." A significant inducement means the "performance of [a] promise [that has] a significant impact on the benefits the tenant anticipated he would receive under the lease." Restatement (Second), § 7.1 cmt. c. Thus, in assessing whether a lessor's breach is sufficient to justify the withholding of rent, a lessee first and a court later, if necessary, must gauge the materiality of the breach in light of the lessee's purpose in leasing the

premises. Relevant to that determination may be whether the breach has a significant effect on the rental value of the premises.

In sum, we hold that the lessee's covenant to pay rent is dependent on the lessor's performance of covenants that were a significant inducement to the consummation of the lease or to the purpose for which the lessee entered into the lease.

928 P.2d at 377-78 (some citations omitted).

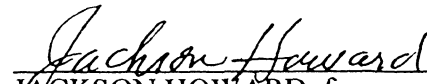
To prove that the marquee listing was material, defendant would have been required to submit evidence of the value of that listing, and evidence of how much the lease value of the property was affected by the loss of the listing. No such evidence was presented.

Numerous Utah cases confirm the need for specific evidence of damages. In Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 601 (1962), the court held that "to warrant a recovery based on the value of the property there must be proof of its value or evidence of such facts as will warrant a finding of value with reasonable certainty." In Atkin Wright & Miles v. Mountain States Telephone and Telegraph Co., 709 P.2d 330 (Utah 1985), the court held that "[w]hile the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages, there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages." 795 P.2d at 336. The court held that where the issue was whether the plaintiff had lost net income, proof of loss of gross income was insufficient. Similarly, in Nelson v. Trujillo, 657 P.2d 730, 735 (Utah 1982), the court held there was insufficient evidence to support an award of lost earnings where "the jury had no basis, except pure guesswork, for estimating earnings reasonably certain to be lost in the future." 637 P.2d at 735 (citation omitted).

The defendant offered no testimony or evidence that the language on the marquee was a significant inducement to entering into the lease agreement of February 1, 1996. Further, the defendants offered no evidence or testimony that it had been damaged, but rather continued to pay

rent intermittently, after been served with a notice to quit the premises in May, 2002. Multi Media did not vacate the premises until October 10, 2002, and then without notice to the plaintiff. Because there was no evidence of materiality and no evidence of damages, defendant was not entitled to any abatement of rent.

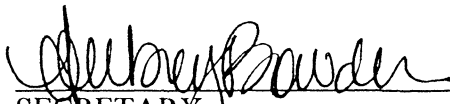
DATED this 9th day of February, 2004.


JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 9 day of February, 2004.

Joseph R. Goodman, Esq.
2825 East Cottonwood Parkway, #500
Salt Lake City, UT 84121


SECRETARY

G JH\HALCO MEM

ADDENDUM #3

Joseph R. Goodman, Jr., #7864
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Attorney for Multi Media Musketeers and Jeff Brewer

IN THE SECOND DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY,

Plaintiff,

vs.

MULTI MEDIA MUSKETEERS and JEFF
BREWER,

Defendants.

**MEMORANDUM OF DEFENDANTS IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR ENTRY OF FINDINGS AND
JUDGMENT**

Case No. 020405666

Division No. 4

COMES NOW, the above-captioned Defendants, by and through counsel of record, Joseph R. Goodman, Jr., who hereby submits this Memorandum in Opposition to Plaintiff's Motion. As reasons therefore, Defendants set forth as follows:

BRIEF STATEMENT OF FACTS

First, the Court must recognize that the pertinent findings submitted by Plaintiff are entirely inconsistent with the findings entered by the Court on January 22, 2004, and after a full trial of the relevant issues. The findings, as drafted, are so skewed in favor of Plaintiff as to "turn on its ear" what this Court actually ruled when it denied all but one of Plaintiff's claims. Accordingly, and given this documents conflict with what this Court actually found on January 22, 2004, they should be given no deference at this time.

What this Court actually found was that Plaintiff's removal of exterior signage acted as a "constructive eviction" of Defendants, thereby breaching the underlying Lease Agreement by and between the parties, whether written or oral. Of note, in Plaintiff's findings, paragraph 10, Plaintiff states that "neither the Plaintiff or the Defendant admit to placing the Multi Media signage language on the marquee or when it was place on the marquee." Plaintiff then uses this finding to support paragraph 14 when Plaintiff states that the sign was not an inducement pursuant to the Lease. The actual findings were that the sign was placed on the marquee, for some time, and that it was not credible that Plaintiff had no notice of its presence there. When the Court viewed this finding in light of the letter presented by Plaintiff and from Defendants detailing the concerns related to the sign, the Court found that the sign was a significant factor in the entry of a commercial lease, as it allowed Defendants to have a business presence for its existing customers, and to attract new customers. Its removal had a negative impact on the Defendants, as testified to by Jeff Brewer and as offered by Plaintiffs in a letter from Jeff Brewer.

Defendants contend that the sole finding of relevance, both in the trial and at this point, is that the removal of the sign constituted a constructive eviction of Defendants. As such, the eviction terminated any obligations to pay monies pursuant to the Lease, and also precludes Plaintiff from recovery of exorbitant and outrageous attorney's fees pursuant to the provisions of written lease breached by Plaintiff. This finding of fact, which was made by the Court, is all that this Court need focus on.

ARGUMENT

- 1. This Court has Already Found the Sign to be a Significant Inducement.**

Plaintiff takes the facts already presented to this Court, the oral arguments already made to this same Court, and now expects a different ruling. Such a result cannot be allowed to occur.

Plaintiff correctly cites the case of Barton v. Tsern, which case was presented by Defendants at trial, and which case was fully reviewed by this Court prior to a ruling being given. This Court, after analyzing the evidence presented and the Barton case ruled that the removal of the sign by Plaintiff constituted a breach of the parties' agreement, and thereby relieved Defendants of any obligation to pay rent pursuant to the Lease. In short, Defendants assert that these arguments and case law have already been argued to this Court, and there is nothing new which would justify this Court in disregarding its earlier ruling. If Plaintiff was unprepared to deal with the defenses presented, this hearing should not be allowed as a "do over" for what should have been presented on January 22, 2004.

Plaintiff argues that no evidence was presented related to Defendants' damages resulting from the removal of the signs. In making this assertion, Plaintiff disregards evidence he presented: namely, a letter from Jeff Brewer detailing his consternation over the removal of the sign and the negative impact on his business.¹ After evaluating the testimony of Mr. Brewer and the letter presented by Plaintiff, this Court found that the damages suffered by Brewer were significant, and ruled that they were equivalent to the monthly rental value, thereby extinguishing any claim for damages sounding as unpaid rent. Further, Defendants did not file a counterclaim, merely offered this evidence as an affirmative defense, which Court has already moved was sufficient to defeat the claims of

¹ Plaintiff did not provide copies of this letter to Defendants, and so they are unable to

Plaintiff. Again, the relevant facts were presented at trial and the relevant case law was argued on January 22, 2004. Again, Plaintiff is not entitled to a “do over.”

Plaintiffs also assert that the sign was not an inducement to enter the 1996 written Lease Agreement. However, as this Court is well aware, the 1996 Agreement had long expired, and the parties were operating on a month-to-month tenancy, terminable by either upon 30 days notice. Essentially, the sign was inducement for Defendants to continue pursuant to this month-to-month tenancy for years after the expiration of the written Lease Agreement and prior to the eviction. The sign acted as a continuing inducement to remain in the lease each month Defendants remained on the premises.

Defendants assert that at the time of trial, their burden was adequately met, and this Court ruled that the actions of Defendant constituted a constructive eviction of Defendants. This finding is that Plaintiffs, not Defendants, breached the Lease. As such, any consideration of the Lease provisions must be examined pursuant to this finding.

2. Plaintiff’s Prior Breach Terminates Attorney’s Fees Provisions and Plaintiff Not Entitled to Fees.

What this Court really needs to examine is the true motive of Plaintiff: namely, to recover an exorbitant and outrageous amount of money from Defendants as and for attorney’s fees. This was the single issue driving the underlying case, and Defendants would submit, driving this present motion. However, Plaintiff is entitled to the recovery of attorney’s fees only if this Court finds that the *written* Lease Agreement is applicable.

Given that this Court found that Plaintiff’s breached the parties agreement by

submit this document at this time.

removal of signage from the premises, Plaintiffs were in prior breach of the parties' agreement, whether written or oral. The finding of this Court was that Plaintiff breached the parties' agreement, and as such, Plaintiff cannot be allowed to recover costs and fees pursuant to the Agreement which it breached. The applicability of the written Lease Agreement is irrelevant once this Court found Plaintiff to have breached the Agreement. As such, the Lease provisions, particularly as to attorney's fees, are no longer applicable, and Plaintiff has no contractual basis to recover fees.

3. Undisputed Evidence is that Plaintiff Removed Fixtures.

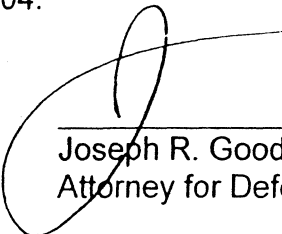
One fact that was never in dispute, even in the present motion, is that Plaintiff caused the fixtures on the premises to be removed. Another fact which is not in dispute was that the fixtures were present shortly after Defendants moved into the premises in 1996, yet Plaintiff never objected to their installation or demanded their removal. Further, and even more telling, is that Plaintiff never directed Defendants to remove the fixtures at the time they vacated the premises, which would have been in complete conformity with the written Lease Agreement, were it applicable. As such, when Plaintiff undertook to remove the fixtures, it did so at its sole risk, and bore any loss associated with sloppy or shoddy removal of the fixtures. There is no basis, in law or equity, for Plaintiff to be awarded costs associated with the removal of those fixtures.

CONCLUSION

Plaintiff's Motion presents "nothing new under the sun." Defendants would suggest that all the issues presented by Plaintiff's motion were factually developed, the legal arguments presented and reviewed by the Court, and the matter was fully and fairly

adjudicated at that time. Plaintiff presents no new factual or legal arguments which would justify this Court disregarding its earlier opinion. Accordingly, Plaintiff's Motion must be denied and an appropriate set of Findings and Judgment entered. Further, Defendants should be awarded their reasonable costs and fees incurred in responding to this frivolous motion.

DATED this 31 day of March, 2004.



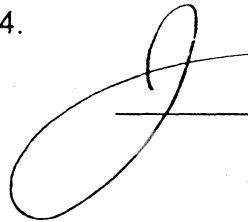
Joseph R. Goodman, Jr.
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Joseph R. Goodman, Jr., L.C., and that I served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION**, via facsimile and first class mail, postage prepaid, on the following:

Jackson Howard
HOWARD, LEWIS & PETERSON
PO Box 1248
Provo, UT 84603
Fax: (801) 377-4991

on this 31 day of March, 2004.



ADDENDUM #4

Joseph R. Goodman, Jr. #7864
JOSEPH R. GOODMAN, JR., L.C.
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Telephone: (801) 990-3300
Facsimile: (801) 990-3305

Attorney for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

HAL COMPANY,

Plaintiff,

v.

MULTI MEDIA MUSKETEERS and JEFF
BREWER,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 020405666

Division 4
Judge Hansen

This matter having come on regularly for trial on the 22nd day of January, 2004, the plaintiff having appeared by and through its counsel, Jackson Howard, and the defendants having appeared through its principal officer and co-defendant, Jeff Brewer, and being represented by their attorney, Joseph R. Goodman, Jr., and the Court having heard testimony, received evidence and heard arguments, now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is a limited liability company doing business in the State of Utah.
2. Defendant Multi Media Musketeers is a company doing business in the State of

Utah.

3. Defendant Jeff Brewer is a resident of Salt Lake County, State of Utah.
4. On the 1st day of February, 1996, Multi Media Musketeers entered into a lease agreement with Hal Company for certain premises in a building known as Highland Plaza.
5. Jeff Brewer signed as guarantor of said lease agreement.
6. The agreement entered into terminated by its terms on February 1, 1997, and Defendant operated on the premises on a month-to-month thereafter. The Court finds the 1996 Lease Agreement to be clear and unambiguous, and to have expired on February 1, 1997, at which point the parties operated on a month-to-month tenancy.
7. The Court finds that Plaintiff's exhibits related to allegedly unpaid rental monies are in conflict with one another, and are insufficient as a matter of law to establish any unpaid rental monies due and owing from Defendant.
8. During the period of the Lease, an exterior sign was placed on the marquee in front of the office complex. The sign made reference to "Multi Media Musketeers," and did put the public traveling on Highland Drive on notice as to Defendants' business location.
9. The sign was removed by Plaintiff over the objection of Defendants in the spring of 2002, resulting in the loss of business to Defendants. Defendants did protest the removal of the sign in writing to Plaintiffs, which letter was admitted as evidence by Plaintiff. This letter offered compelling evidence as to the negative impact on

Defendants business caused by the removal of the sign. The removal of this exterior sign was a breach on the part of Plaintiff of the parties' month-to-month tenancy, in that it was a constructive eviction of Defendants on the part of Plaintiff.

10. Despite repeated efforts on the part of Defendants to amicably resolve the situation related to the sign, Plaintiffs refused to replace the signage. Plaintiffs peacefully vacated the premises on or about October 10, 2002.

11. The plaintiff expended the following sums in repairing the premises after the defendant vacated the premises:

Replacing Carpet	\$1563.43
Painting	\$380.00
Employee Time	<u>\$400.00</u>
Total	\$2343.43

12. Plaintiff had actual knowledge to the installation and existence of a work bench and electrical hookups on the leased premises. The work bench and electrical hookups became fixtures, which Plaintiff removed at the expiration of the Lease at it own risk. Plaintiff is therefore not entitled to recover any monies for painting and employee time related to removing these fixtures. The staining of the carpet was not reasonable wear, tear and depreciation, and the plaintiff is entitled to the cost of replacement in the amount of \$1563.43.

13 The defendant paid a security deposit at the commencement of the lease on February 1, 1996, in the amount of \$525.00 for which is entitled to credit.

14. Plaintiff's material breach of the parties' month-to-month Lease Agreement precludes their recovery of costs and fees in this matter. There is no contractual

basis for Plaintiff to be awarded attorney's fees and costs.

CONCLUSIONS OF LAW

1. The 1996 Lease Agreement is clear and unambiguous, and did expire in February, 1997.
2. Plaintiff did remove Defendants' exterior signage, which removal was a constructive eviction on the part of Plaintiff, thereby breaching the parties' month-to-month tenancy, and relieving Defendant of any obligation to pay monthly rent.
3. Plaintiff failed to meet its burden of proof regarding any unpaid monthly rents, and therefore is entitled to no monies for allegedly unpaid monthly rent.
4. Plaintiff did have knowledge of the work bench and electrical hookups, did acquiesce to their presence, and did remove the fixtures at the end of the lease at its own peril, and is entitled to no compensation thereon.
5. Plaintiff retained a security deposit in the amount of \$525.00 at the expiration of the lease, which sum should be credited to Defendants.
6. The damage to the carpet by Defendants was not reasonable wear and tear, and Plaintiff is entitled to the sum of \$1563.43 for the replacement thereof.
7. Each party to bear their own costs and fees.
8. Judgment to enter in favor of Plaintiff in the amount of \$1038.45.

DATED this _____ day of _____, 2004.

BY THE COURT

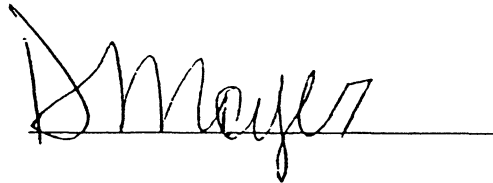
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Joseph R. Goodman, Jr., L.C., and that I served a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW**, via first class mail, postage prepaid, on the following:

Jackson Howard
HOWARD, LEWIS & PETERSEN, P.C.
120 East 300 North
P.O. Box 1248
Provo, Utah 84603

on this 13th day of April, 2004.

A handwritten signature in black ink, appearing to read "D. Mayer", is written over a horizontal line.

ADDENDUM #5

JACKSON HOWARD (1548), for:
HOWARD, LEWIS & PETERSEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No.

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY, Plaintiff, vs. MULTI MEDIA MUSKETEERS and JEFF BREWER, Defendants.	MEMORANDUM SUPPORTING MOTION TO CORRECT DOCKET Case No. 020405666 Judge _____ Division # _____
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Plaintiff submits the following memorandum in support of its Motion to Correct Docket filed herewith.

A copy of the Court's computer docket is attached. The entries for 05-24-04 reflect that a judgment was entered. The only document entered on that date, however, was a document entitled "Findings of Fact and Conclusions of Law." A copy of that document is attached and will be referred to herein as "Findings and Conclusions."

The Rules of Civil Procedure and the practice in the courts is that findings and conclusions are separate documents from the judgment. Rule 52(a) of the Utah Rules of Civil Procedure states: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and

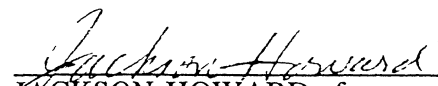
the judgment shall be entered pursuant to Rule 58A[.]" Rule 58A(b) states that judgments "shall be signed by the judge and filed with the clerk." These rules, read together, contemplate that a judgment is a separate document from the findings of fact and conclusions of law.

In addition, the Findings and Conclusions entered in this action do not contain language awarding a judgment. Paragraph 8 of the Conclusions of Law states: "Judgment to enter in favor of Plaintiff in the amount of \$1038.48." This sentence is written in the future tense, indicating that a judgment is to be entered at some point pursuant to the Findings and Conclusions. The statement does not state that "judgment is entered," but rather "judgment to enter." This wording clearly contemplates the subsequent entry of a separate judgment document.

No judgment, therefore, has yet been entered. The Findings and Conclusions signed by the Court do not contain language awarding a present judgment, but contemplate the preparation of a separate judgment document. The Rules of Civil Procedure require the preparation of a separate judgment document. No "judgment" has been signed by the Court or entered by the clerk. That step would be required for a judgment to exist.

Because no judgment has been entered, the docket entry is wrong. The Court should order the docket entry corrected to omit any reference to the entry of a judgment.


DATED this 16th day of August, 2004.


JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 16 day of August, 2004.

Joseph R. Goodman, Jr.
2825 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121



SECRETARY

G:\LWS\HALCO.MEM

ADDENDUM #6

Joseph R. Goodman, Jr., #7864
JOSEPH R. GOODMAN, JR., L.C.
2825 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121
Telephone: (801) 990-3300
Facsimile: (801) 990-3305

Attorney for Multi Media Musketeers and Jeff Brewer

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY,

Plaintiff,

vs.

MULTI MEDIA MUSKETEERS and JEFF
BREWER,

Defendants.

**MEMORANDUM IN OPPOSITION TO
MOTION TO VACATE FINDINGS OF
FACT AND CONCLUSIONS OF
LAW/MOTION TO CORRECT
DOCKET/REQUEST FOR ATTORNEY'S
FEES**

Case No. 020405666

Division No. 4

Comes now the above-captioned Defendants, by and through counsel of record Joseph R. Goodman, Jr., who hereby submits this Memorandum in Opposition to Motion to Vacate Findings of Fact and Conclusions of Law/.Motion to Correct Docket, and as reasons therefore, sets forth as follows:

BRIEF STATEMENT OF FACTS

1. This matter was tried before Judge Stephen Hansen on January 22, 2004, with judgment being entered on behalf of *Plaintiff* on the same date. Pursuant to the Order of the Court, and upon information and belief, as a result of Plaintiff only being granted a small portion of the monies sought, the Court ordered counsel for Defendants to prepare

the appropriate pleadings, even though judgment was entered against Defendants and in favor of Plaintiff.

2. Counsel for Defendants erroneously believed that Counsel for Plaintiff would prepare the pleadings, as evidenced by the correspondence mailed to Plaintiff's attorney on January 26, 2004. (See "January 26, 2004 Letter" attached hereto as Exhibit "A.")

3. Subsequent to this correspondence, Plaintiff filed pleadings not in conformity with the Order of this Court, along with supporting documentation. Defendant responded to these pleadings, and oral argument was held on this matter on April 7, 2004. (See "Docket," attached hereto as Exhibit "B.")

4. Pursuant to this hearing, this Court ordered Defendants to submit only Findings of Fact and Conclusions of Law. This was done, and this Court entered the same on or about May 24, 2004. (Exhibit "B.")

5. Since May 24, 2004, no activity took place until August 11, 2004, when Defendants learned that judgment had been entered. At this time, Defendants did contact Plaintiff, inquiring about the method and manner of payment. (See "Letter of August 11, 2004," attached hereto as Exhibit "C.")

6. Plaintiff states that it "inquired repeatedly of the Clerk of the Court regarding the entry of the findings and judgment," and only discovered the May 24, 2004 docket entry on August 9, 2004, or two (2) days before Defendant discovered it on its own on the first try. There would be no logical explanation as to why Plaintiff failed to discover this entry for nearly three (3) months, and in spite of repeated inquiries.

ARGUMENT

I. Plaintiff's Motion to Vacate Already Ruled Upon.

In Plaintiff's Motion to Vacate, dated August 12, 2004, paragraph 5 therein, Plaintiff states "[I]n the alternative, plaintiff moves the Court to allow the parties to reargue the case." In this statement, Plaintiff acknowledges the only relevant fact now before this Court: namely, this issue has already been fully briefed and argued, with the Court finding in favor of Defendants. As set forth by Defendants in the earlier response filed to that Motion, the argument of Plaintiff is a disagreement over the facts found by the trial court, not the law applicable to the case. Namely, Defendants presented the relevant case law at the time of trial, the trial court took the matter under advisement, and ruled accordingly based upon the facts presented at that time. Those facts were determined in light of the case law presented at the very time of trial, and reviewed by the trial court at the time of trial. The law of the case has, at all times, been the same, and there is simply "nothing new under the sun" for this Court to now overturn *two* (2) of its own prior rulings.

As to the findings which have been entered in this matter, Rule 52(a) states that said Findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Quite obviously, this is a high burden to meet, but this burden lay squarely on the shoulder of Plaintiff. Utah courts have held that findings of fact are clearly erroneous if it can be shown that they are against the clear weight of evidence or that they induce a definite and firm conviction that a mistake has been made. *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989). The findings entered in this matter conform with the ruling of the trial court, as opposed to the

findings submitted by Plaintiff which had no relation whatsoever to the facts or law found applicable by the trial court. Plaintiff has provided no evidence that the Findings entered on May 24, 2004 are erroneous.

Finally, Defendants are quite unclear as to what rule of civil procedure allows Plaintiff to submit this pleading. Again, this matter has been argued and determined. Nearly three (3) months elapsed before Plaintiff moves to set aside the Findings. Plaintiff makes no reference to any rule of civil procedure which contemplates or allows for such extraordinary relief.

II. Judgment Submitted Herewith.

However, Plaintiff does correctly point out that no judgment was submitted by Defendants, although the Docket clearly states that a judgment was entered on May 24, 2004. Again, making reference to the Docket, Defendants submitted all pleadings required of them in a timely fashion. The Court, some time later, apparently reviewed these pleadings and ruled, in effect, by entering the Findings of Fact and Conclusions of Law submitted by Defendant. This has only been recently learned, and Defendants do now submit the appropriate pleadings necessary to correct any mistake which may have been made earlier.

III. Request for Attorney's Fees.

As set forth in some detail in the earlier reply submitted by Defendants to Plaintiff's

prior motion, attorney's fees are driving this case. The amount originally in controversy was only slightly more than \$3,000.00. This sum of money was well within the jurisdiction of a "small claims court." However, Plaintiff elected to pursue this matter in a District Court setting solely so as to grossly inflate the amount allegedly owing by the imposition of attorney's fees and costs. The trial court correctly denied Plaintiff this remedy when it granted judgment in the amount of \$1,038.45.¹

The actions of Plaintiff subsequent to the trial can only be deemed as harassing and brought in bad faith. Furthermore, given the initial posture of this case, it is reasonable to assume that the only motivation of Plaintiff is to seek the recovery of excessive and repugnant attorney's fees. Such action should offend judicial notions of propriety, and should not be allowed to continue going forward. The only mechanism available to this Court is to award Defendants fees and costs incurred in now defending a frivolous pleadings for a second time.

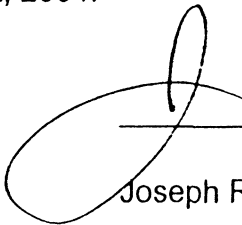
CONCLUSION

This Court has already reviewed Plaintiff's objections to the findings of the trial court, heard oral argument on the same, and has ruled accordingly. This Court should not entertain a second "bite at the apple" on this issue. Defendants, in reliance upon the plain and unambiguous nature of the Docket, was under the reasonable belief that a judgment

¹ The complaint sought damages in the amount of \$3,180.43. At trial, Plaintiff sought attorney's fees of \$3,500.00, approximately *six (6) times the attorney's fees incurred by Defendants* in successfully defeating Plaintiff's claims. The award of this Court is but a

had been entered pursuant to prior order of this Court. With this being said, and in an effort to rectify this possible error, an appropriate Judgment is submitted herewith. Finally, this Court should exercise its reasonable discretion in awarding Defendants its costs and fees incurred in defending these frivolous pleadings for a second time.

DATED this 22 day of August, 2004.



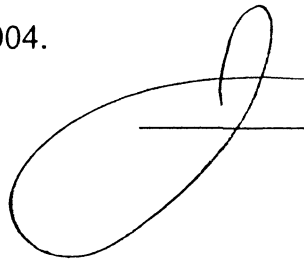
Joseph R. Goodman, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Joseph R. Goodman, Jr., L.C., and that I served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO VACATE FINDINGS OF FACT AND CONCLUSIONS OF LAW/MOTION TO CORRECT DOCKET/REQUEST FOR ATTORNEY'S FEES**, via first class mail, postage prepaid, on the following:

Jackson Howard
HOWARD, LEWIS & PETERSON
PO Box 1248
Provo, UT 84603
Fax: (801) 377-4991

on this 22 day of August, 2004.



fraction of these grossly inappropriate attorney's fees sought by Plaintiff.

EXHIBIT “A”

Joseph R. Goodman, Jr. L.C.

Attorney at Law

2825 East Cottonwood Parkway
Suite 500
Salt Lake City, Utah 84121

Telephone (801) 990-3300
Facsimile (801) 990-3305
Email jrg@jgoodmanlaw.net

January 26, 2004

VIA US MAIL

Jackson Howard
HOWARD, LEWIS & PETERSEN
PO Box 1248
Provo, UT 84603

Re: HAL Company v. Multi Media et al.

Dear Mr. Howard:

I received your message last week, and wanted to clarify the issue of the judgment entered in this matter. Namely, the Court ruled that your client could recover the amount prayed for as damages related to the replacement of the carpet, or \$1563.43. However, this sum was reduced by the \$525.00 retained on deposit by your client, reducing the amount of judgment to \$1038.43. Please forward the appropriate Order of Judgment to my office for review upon your completion of the same.

Feel free to contact me with any questions or concerns.

Very truly yours,


Joseph R. Goodman, Jr.

EXHIBIT “B”

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

HAL COMPANY vs. MULTI MEDIA MUSKETEERS

CASE NUMBER 020405666 Contracts

CURRENT ASSIGNED JUDGE
SAMUEL MCVEY

PARTIES

Plaintiff - HAL COMPANY
PROVO, UT 84603
Represented by: JACKSON HOWARD

Defendant - MULTI MEDIA MUSKETEERS
Represented by: JOSEPH R JR GOODMAN

Defendant - JEFF BREWER
Represented by: JOSEPH R JR GOODMAN

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	90.00
	Amount Paid:	90.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT 2K-10K

	Amount Due:	90.00
	Amount Paid:	90.00
	Amount Credit:	0.00
	Balance:	0.00

CASE NOTE

PROCEEDINGS

12-20-02 Case filed by rebeccmw
12-20-02 Judge BURNINGHAM assigned.
12-20-02 Filed: Complaint
12-20-02 Fee Account created Total Due: 90.00
12-20-02 COMPLAINT 2K-10K Payment Received: 90.00
 Note: Code Description: COMPLAINT 2K-10K
01-30-03 Filed return: Summons
 Party Served: MULTI MEDIA MUSKETEERS
 Service Type: Personal

CASE NUMBER 020405666 Contracts

Service Date: January 27, 2003
01-30-03 Filed return: Summons
Party Served: BREWER, JEFF
Service Type: Personal
Service Date: January 27, 2003
02-18-03 Filed: Answer
MULTI MEDIA MUSKETEERS
JEFF BREWER

02-20-03 Filed: Answer
MULTI MEDIA MUSKETEERS
JEFF BREWER

03-13-03 Filed: Notice Of Telephonic Attorney Planning Meeting
03-31-03 Filed: Substitution Of Counsel
05-09-03 Filed: Plaintiff's Initial Disclosures
05-19-03 Filed: Notice Of Withdrawal Notice Of Appearance Notice Of
Change Of Address
05-19-03 Filed: Initial Disclosures
09-20-03 Judge JUDGE assigned.
09-25-03 Filed: Request for Scheduling Conference
09-26-03 Notice - NOTICE for Case 020405666 ID 1635817
PRETRIAL/SCHEDULING CONF is scheduled.
Date: 11/14/2003
Time: 10:00 a.m.
Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: DIVISION 04 JUDGE

09-26-03 PRETRIAL/SCHEDULING CONF scheduled on November 14, 2003 at
10:00 AM in Third floor, Rm 302 with Judge JUDGE.
11-14-03 Filed: Attorney Planning Meeting Report
11-14-03 Minute Entry - Minutes for Pretrial Conference
Judge: CLAUDIA LAYCOCK
Clerk: shellys
PRESENT

Plaintiff's Attorney(s): JACKSON HOWARD
Defendant's Attorney(s): JOSEPH R JR GOODMAN
Video
Tape Number: 78 Tape Count: 10:59

HEARING

TAPE: 78 COUNT: 10:59

Both parties are present, this matter is set for a Bench Trial on

January 22, 2004 1:00 p.m. All Documents counsel is planning on using at trial must be exchanged at least 30 days prior to trial. Judge Laycock is presiding for Division #4.

Judge Laycock is on the bench for Division #4.

11-17-03 BENCH TRIAL scheduled on January 22, 2004 at 01:00 PM in Third floor, Rm 302 with Judge JUDGE.

12-15-03 Filed: Partial Disclosures

01-22-04 Minute Entry - Minutes for Bench Trial

Judge: STEVEN L. HANSEN

Clerk: emilyp

PRESENT

Defendant(s): JEFF BREWER

Plaintiff's Attorney(s): JACKSON HOWARD

Defendant's Attorney(s): JOSEPH R JR GOODMAN

Video

Tape Number: 7 Tape Count: 1:34

TRIAL

TAPE: 7 COUNT: 1:34

Both parties are represented by counsel, and both present their opening argument. Mark Dan Fish is sworn in examined & cross-examined. Sterling Lewis is sworn in examined & cross-examined. Catherine Schirman is sworn in examined & cross-examined.

Jackson Howard is sworn in and he testifies as to plaintiffs attorney's fees. William Clausen is sworn in examined & cross-examined. Jeff Brewer is sworn in examined & cross-examined. Mr. Fish is re-examined & cross-examined. Mrs. Schirmer is recalled and examined.

COUNT: 4:05

Counsel from both sides present their closing arguments. The court finds that this is a constructive unlawful detainer, no attorney's fees are awarded, defendant is order to pay for new carpet. The security deposit is to be deducted from the carpet bill, judgment is granted in favor of the plaintiff in the amount of \$1563.43 minus the security deposit. Joseph Goodman is instructed to prepare the Judgment and Order. Judge Hansen is presiding for Div #4 today.

02-09-04 Filed: Motion for Entry of Findings of Fact and Conclusions of Law and Judgment and Decree

02-09-04 Filed: Memorandum in support of Motion for Entry of Findings of Fact and Conclusions of Law and Judgment and Decree

03-10-04 Notice - NOTICE for Case 020405666 ID 1740030

HEARING ON MOTION is scheduled.

Date: 04/07/2004

Time: 08:30 a.m.
Location: Second floor, Rm 203
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: STEVEN L. HANSEN

03-10-04 HEARING ON MOTION scheduled on April 07, 2004 at 08:30 AM in
Second floor, Rm 203 with Judge HANSEN.

03-31-04 Filed: FAXED Memorandum of Defendants in Opposition to
Plaintiff's Motion for Entry of Findings and Judgment

04-05-04 Filed: Memorandum of Defendants in Opposition to Plaintiff's
Motion for Entry of Findings and Judgment

04-07-04 Minute Entry - Minutes for HEARING ON MOTION

Judge: STEVEN L. HANSEN

Clerk: taras

PRESENT

Plaintiff's Attorney(s): JACKSON HOWARD

Defendant's Attorney(s): JOSEPH R JR GOODMAN

Video

Tape Number: 16 Tape Count: 8:43

HEARING

TAPE: 16 COUNT: 8:43

This matter comes before the court for a hearing. The Court
addresses plaintiff's findings of fact and conclusions of law. The
Court inquires why Mr. Goodman did not prepare the findings of fact
and conclusions of law.

Mr. Howard argues plaintiff's findings of fact and conclusions of
law. Mr. Goodman responds. The Court advises Mr. Goodman to
prepare and submit finding of fact and conclusions of law by April
14, 2004.

The Court takes matter under advisement.

04-16-04 Judge MCVEY assigned.

05-24-04 Judgment #1 Entered

Debtor: MULTI MEDIA MUSKETEERS

Creditor: HAL COMPANY

Debtor: JEFF BREWER

1,038.45 Total Judgment

1,038.45 Judgment Grand Total

05-24-04 Filed judgment: Findings of Fact and Conclusions of Law

Judge shansen

Signed May 24, 2004

05-24-04 Case Disposition is Judgment

taras

Disposition Judge is STEVEN L. HANSEN

taras

08-12-04 Filed: Motion to Vacate Findings of Fact and Conclusions of Law

08-16-04 Filed: Motion to Correct Docket

08-16-04 Filed: Memorandum Supporting Motion to Correct Docket

EXHIBIT “C”

Joseph R. Goodman, Jr. L
Attorney at Law

2825 East Cottonwood Parkway
Suite 500
Salt Lake City, Utah 84121

Telephone (801) 990-3300
Facsimile (801) 990-3300
Email jrg@jgoodmanlaw.net

August 11, 2004

VIA US MAIL

Jackson Howard
HOWARD, LEWIS & PETERSEN
PO Box 1248
Provo, UT 84603

Re: HAL Company v. Multi Media et al.

Dear Mr. Howard:

I have not discussed this matter with you since the hearing in April, 2004, but have reviewed the docket and discovered that the Court entered judgment in favor of your client consistent with the findings from the trial. Accordingly, as of May 24, 2004, your client has had a judgment against my client in the amount of \$1038.45, which has accrued interest at the post-judgment rate of 3.28%. Please calculate the amount due and owing through the end of August, 2004, so that my client may tender the funds necessary to satisfy this judgment.

I thank you in advance for your assistance in this matter.

Very truly yours,


Joseph R. Goodman, Jr.

ADDENDUM #7

JACKSON HOWARD (1548), for:
HOWARD, LEWIS & PETERSEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No.

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY, Plaintiff, vs. MULTI MEDIA MUSKETEERS and JEFF BREWER, Defendants.	REPLY MEMORANDUM SUPPORTING MOTION TO VACATE AND MOTION TO CORRECT DOCKET Case No. 020405666 Judge Hansen Division 4
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Plaintiff submits this memorandum in reply to defendants' Memorandum in Opposition to Motion to Vacate Findings of Fact and Conclusions of Law/Motion to Correct Docket/Request for Attorney's Fees dated August 22, 2004.

POINT I

THE DOCKET SHOULD BE CORRECTED.

Defendants apparently agree the docket is wrong. Contrary to the statement in the court docket, no judgment was actually entered on May 24, 2004. In fact, there has still not been a judgment entered in this case.

Simply submitting a form of judgment at this point does not cure the error in the docket. It is important that the docket reflect the actual date that the judgment was entered. That date is critical for calculating the time for appeal and for calculating interest. Because the judgment is clearly

wrong, the Court should order the docket corrected to delete the reference to a judgment being entered on May 24, 2004.

POINT II

THE FINDINGS AND CONCLUSIONS WERE APPARENTLY ENTERED BY MISTAKE.

Defendants have not disputed the assertion, made in paragraph 6 of plaintiff's Motion to Vacate Findings of Fact and Conclusions of Law, that the Court was leaning in favor of plaintiff but wanted to see findings and conclusions prepared by defendants before making a decision. Defendants now claim that the Court "in effect" ruled in defendants' favor by entering the defendants' proposed findings and conclusions. (Defendants' Memorandum at Section II on page 4.) If the Court had in fact made a conscious choice between the two proposed sets of findings and conclusions, however, one would have expected the Court to explain its reasoning in a memorandum decision or ruling. That did not happen, so the reasonable inference is that the findings and conclusions were simply entered by mistake. Given the volume of paperwork handled by the Court, it is easy to understand how such a mistake could occur.

Of course, only the Court knows whether the entry of the findings was intentional or inadvertent. If the findings were entered by inadvertence, as appears likely based on the Court's comments at the last hearing, then the findings should be vacated.

POINT III

DEFENDANTS' REQUEST FOR ATTORNEY FEES IS FRIVOLOUS.

In Section III of their memorandum, defendants request an award of attorney fees. Defendants did not, however, state any legal basis for the Court to make such an award, but claim

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following,
postage prepaid, this 30 day of August, 2004.

Joseph R. Goodman, Jr.
2825 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121



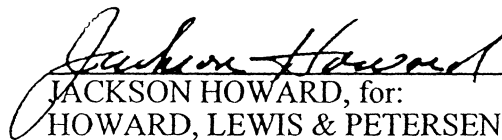
SECRETARY

J:\LWS\halcomultimediareplymem wpd

The motion to vacate the findings and conclusions is based on the assumption that those findings and conclusions were entered by inadvertence. That assumption is reasonable because there is no memorandum decision or ruling explaining why the Court chose defendants' documents over those submitted by plaintiff, and because the Court's comments at the last hearing indicated the Court was leaning in favor of the position advocated by plaintiff. If the entry was inadvertent, the Court should acknowledge the error and correct it. If the entry was not inadvertent, the Court should explain the reasons for selecting the defendants' proposal over that of the plaintiff.

The request for attorney fees is frivolous and should be denied.

DATED this 30 day of August, 2004.


JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

ADDENDUM #8

FILED
Fourth Judicial District Court
of Utah County, State of Utah
DEC 21 2004 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

HAL COMPANY, plaintiffs	DECISION ON POST-TRIAL MOTIONS
vs.	
MULTI MEDIA MUSKETEERS and JEFF BREWER, defendants	Civil No. 020405666 Judge Samuel D. McVey

After hearing arguments from counsel and reviewing counsels' memoranda, the Court reviewed videotape of the proceedings in this matter including the bench trial on January 22, 2004. The Court is now ready to rule on the parties' various post-trial motions, submittals and objections.

As an initial matter, a trial court clearly has jurisdiction and discretion under rule 52 of the Utah Rules of Civil Procedure to amend earlier findings and conclusions. Rule 52 and case law make it clear the trial court can amend up to ten days after entry of judgment. No judgment was entered in the present case. (See *Rod Shepherd Insurance, Inc. v. Shields*, 882 P.2d 650, 654 (Utah 1994).)

Next, the Court corrects the earlier conclusion determining the lease did not apply to the month to month tenancy period. Courts interpret contracts as a matter of law and, as noted, the trial court can correct legal conclusions at this stage of the case. The holdover provision contained in the lease in effect before the month-to-month tenancy began provided in relevant part that occupancy after the lease-term expired would continue "upon all the terms hereof applicable to a month to month tenancy." Consequently, terms not applicable to month-to-month tenancy such as the three-year term or "Early Occupancy" provisions would not apply to the month-to-month tenancy. On the other hand, the "Rules and Regulations," "Waiver" and various maintenance provisions would apply. We merely have to look at each term and see whether it has practical application to a month-to-month tenancy. Because of the specific language in the lease, it is not necessary for the Court to look at the case law stating written lease terms apply to a subsequent month-to-month holdover. The lease is the parties' law in this case.

The Court is unwilling to set aside factual findings made after trial unless they are clearly erroneous. Although the Court was able to watch the trial videotape, the judge presiding at trial was in a superior position to determine credibility of witnesses and further saw all the exhibits and the witnesses' interactions with them. The Court will not disturb the trial judge's findings of fact regarding the material nature of the sign and related facts and their impact on the issue of waiver.

The court also will not disturb findings and factually-premised conclusions relating to rent, constructive eviction, waste and fixture removal.

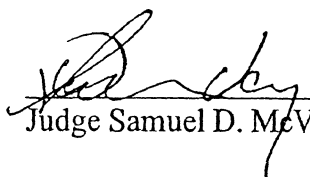
The earlier findings that plaintiff breached the lease through constructive eviction, however, does not allow defendants to escape responsibility for their own breach. While the Court is familiar with the general concept that a party in breach of a contract cannot then complain of the other party's subsequent breaches, the lease contains an anti-waiver clause with respect to contractual terms and the trial court's findings imply the tenant's commission of waste violating the "Repair" and "Surrender of Premises" lease clauses occurred before the sign removal, for which removal defendants get rent abated. Further since the dispute is governed by the lease, the attorneys fees provisions apply. A breach of the lease by either party does not waive its application. To state the landlord's violation of the lease defeats all provisions, including remedies, protecting the landlord who prevails on other disputed questions has no basis in law, particularly in the light of the waiver provision contained in the subject lease.

The earlier finding that constructive eviction abates the rent remains. The earlier finding that defendants committed waste in the amount of \$1563.43 remains. That amount is offset by the \$525 deposit the landlord retained resulting in a \$1038.43 waste amount. Under the unlawful detainer statute, finding of waste mandates imposition of treble damages. The Court therefore corrects the earlier finding as a matter of law and sets the waste amount at \$3115.29 to which plaintiff is entitled a judgment. Plaintiff is also entitled to pre-and post-judgment interest at the legal rate since the Court can find no express interest-rate in the lease. As the prevailing party, having received the net money judgment, plaintiff is entitled to a reasonable attorney's fee and costs. The fee amount is the \$2,937.50 testified to without objection at trial.

The Court notes defendants did not plead waiver as an affirmative defense as required by the Rules of Civil Procedure. Plaintiff raised a general objection at trial to defendants' pleading but did not press the matter and showed no prejudice. Consequently, this ruling is unaffected by failures to plead.

If plaintiff would like to amend its findings of fact and conclusions of law to comply specifically with this ruling and serve and file them, the Court will review them and any objections by defendants. The Court requests plaintiff also submit a form of judgment complying with this ruling. The court congratulates counsel on zealous representation of their clients.

Dated 20 December 2004



Judge Samuel D. McVey

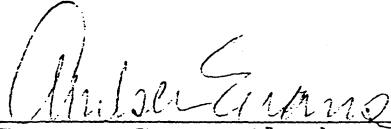
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020405666 by the method and on the date specified.

METHOD NAME

Mail	JOSEPH R JR GOODMAN ATTORNEY DEF 2825 E COTTONWOOD PARKWAY #500 SALT LAKE CITY, UT 84121
Mail	JACKSON HOWARD ATTORNEY PLA 120 EAST 300 NORTH P. O. BOX 1248 PROVO UT 84603

Dated this 21 day of December, 2014.


Deputy Court Clerk

ADDENDUM #9

FILED
Fourth Judicial District Court
of Utah County, State of Utah
FEB 01 2005 Deputy

JACKSON HOWARD (1548), for:
HOWARD, LEWIS & PETERSEN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 22,372-9

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY, Plaintiff, vs. MULTI MEDIA MUSKETEERS and JEFF BREWER, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 020405666 Division No. 4
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This matter having come on regularly for trial on the 22nd day of January, 2004, the plaintiff having appeared by and through its counsel, Jackson Howard, and the defendants having appeared through its principal officer and codefendant, Jeff Brewer, and being represented by their attorney, Joseph R. Goodman, and the court having heard testimony, received evidence and heard arguments, now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is a limited liability company doing business in the State of Utah.
2. Defendant Multi Media Musketeers is a company doing business in the State of Utah.

3. Defendant Jeff Brewer is a resident of Salt Lake County, State of Utah.
4. On the 1st day of February, 1996, Multi Media Musketeers entered into a lease agreement with Hal Company for certain premises in a building known as Highland Plaza.
5. Jeff Brewer signed as guarantor of said lease agreement.
6. The agreement entered into terminated by its terms on February 1, 1997, and the "hold-over" provision of the lease became effective.
7. Provision 20 of the lease states as follows:

HOLDING OVER. If Tenant remains in possession of the Premises or any party thereof after the expiration of the term hereof, with or without the express written consent of Landlord, such occupancy shall be a tenancy from month to month at a rental in the amount of the last monthly rental, plus all other charges as payable hereunder, and upon all the terms hereof applicable to a month to month tenancy.
8. The Court finds that Plaintiffs' exhibits related to allegedly unpaid rental monies are in conflict with one another, and are insufficient as a matter of law to establish any unpaid rental monies due and owing from Defendant.
9. During the period of the Lease, an exterior sign was placed on the marquee in front of the office complex. The sign made reference to "Multi Media Musketeers," and did put the public traveling on Highland Drive on notice as to Defendants' business location.
10. The sign was removed by Plaintiff over the objection of Defendants in the spring of 2002, resulting in the loss of business to Defendants. Defendants did protest the removal of the sign in writing to Plaintiffs, which letter was admitted as evidence by Plaintiff. This letter offered compelling evidence as to the negative impact on Defendants' business caused by the removal of the sign. The removal of this exterior sign was a breach on the part of Plaintiff of the

parties' month-to-month tenancy, in that it was a constructive eviction of Defendants on the part of Plaintiff.

11. The staining of the carpet was not reasonable wear, tear and depreciation, and constitutes waste and the plaintiff is entitled to the cost of replacement in the amount of \$1,563.43.

12. The defendant paid a security deposit at the commencement of the lease on February 1, 1996, in the amount of \$525.00 for which is entitled to credit.

13. Under the Findings, 10 and 11, above, the Plaintiff is entitled to treble damages of \$3,115.29.

14. The plaintiff's attorney performed services which were reasonably necessary based on its theory of the case, the fair value of which is \$2,937.50.

15. The defendant vacated the leased premises on October 10, 2002.

16. The Plaintiff is entitled to pre and post judgment interest at the legal rate; the pre judgment interest, not compounded, the Court calculates to be \$1,354.98, to January 5, 2005.

CONCLUSIONS OF LAW

The court having made its Findings of Fact, now makes and enters its conclusions of law.

1. The lease agreement of February 1, 1996, by reason of Provision 20, carried on in full force and effect on a month to month basis thereafter while Multi Media occupied the premises.

2. It is a firmly established rule that proof of a holding over after the expiration of a fixed term in a lease gives rise to the presumption, which in the absence of contrary evidence, will be controlling, that the hold-over tenant continues to be bound by the covenants which were binding upon him during the fixed term.

3. The defendant has not sought to amend or modify the lease agreement and has not offered any evidence of damages.

4. The defendant is entitled to an offset of \$525.00 for its security deposit.

5. Because of the waste committed by the Defendants, the Plaintiff is entitled to judgment of \$1,563.43 less \$525.00, security deposit which is \$1,048.43, tripled amounts to \$3,115.29.

6. Because the plaintiff has prevailed substantially in its contentions it is entitled to be awarded reasonable attorneys fees in the amount of \$2,937.50.

7. The plaintiff is entitled to pre and post judgment interest and pre judgment interest in the amount of \$1,354.98.

8. The plaintiff is entitled to the costs of this action.

DATED this 27 day of January, 2005.


BY THE COURT

/S/Samuel D. McVey
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following,
postage prepaid, this 10th day of January, 2005.

Joseph R. Goodman, Esq.
2825 East Cottonwood Parkway, #500
Salt Lake City, UT 84121



SECRETARY

ADDENDUM #10

FILED
Fourth Judicial District Court
of Utah County, State of Utah
FEB 01 2005
Deputy

JACKSON HOWARD (1548), for:
HOWARD, LEWIS & PETERSEN, P.C.
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Our File No. 22,372-9

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HAL COMPANY, Plaintiff, vs. MULTI MEDIA MUSKETEERS and JEFF BREWER, Defendants.	JUDGMENT AND DECREE Case No. 020405666 Division No. 4
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The court having made and entered its Findings of Fact and Conclusions of Law now makes and enters its Judgment and Decree.

1. Plaintiff is granted judgment against the defendants in the amount of \$7,407.77.
2. Plaintiff is awarded costs of this action.

DATED this 27 day of January, 2005.

BY THE COURT

/S/Samuel D. McVey
~~STEVEN L. HANSEN~~ SAMUEL D. MCVEY
DISTRICT COURT JUDGE