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In The Supreme Co
of the State of U

E. A. RUSSELL and MARTHA
RUSSELL,

Plaintiffs-Respo

vs.

PARK CITY UTAH CO
TION, a corporation; THE
BLAKENEY CORPOR
corporation; and ROB
MAJOR,

Defendants

BRIEF OF
PARK CITY UTAH

APPEAL FROM THE
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RIC
Gary
Att
900 W
Salt La

NIELSEN, CONDER, HA
AND HENRIOD
Arthur H. Nielsen
410 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Respondents

LORRAINE PRESS 1307 SOUTH MAIN STREET

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STATUTES

In The Supreme Court of the State of Utah

E. A. RUSSELL and MARTEL E. RUSSELL,
Plaintiffs-Respondents,

vs.

PARK CITY UTAH CORPORATION, a corporation; THE MAJOR-BLAKENEY CORPORATION, a corporation; and ROBERT W. MAJOR,
Defendants-Appellant.

Case No. 12879

BRIEF OF APPELLANT PARK CITY UTAH CORPORATION

STATEMENT OF CASE

Respondents instituted this proceeding in the form of a Declaratory Relief Action wherein a determination was sought that a certain Lease and Purchase Agreement dated the 31st day of March, 1967, between Respondents and Appellants predecessor in interest was terminated for the nonpayment of the 1970 annual rental. The amount of $2,500.00 by way of liquidated damages was also sought by Respondents.

After the completion of preliminary discovery proceedures, Respondents, pursuant to Rule 56 of the Utah Rules of Civil Proceedure, moved the lower court for Summary Judgment.

Appellant resisted Respondents' Motion for Summary Judgment on the basic grounds that genuine disputes existed as to material facts, that there had not been a default on which to predicate a forfeiture, that if there had been a forfeiture Appellant was entitled to equitable relief therefrom, and, further, that Appellant had tendered the rent due to Respondents prior to the institution of the proceeding and Appellant was entitled to the restoration of its leasehold estate pursuant to Section 78-36-1 Utah Code Anno., 1953 (As amended).

DISPOSITION OF LOWER COURT

The lower court granted Respondents' Motion for Summary Judgment terminating said Lease and Purchase Agreement and further awarded Respondents the amount of $2,500.00 as liquidated damages. The action was dismissed as to the defendants Robert W. Major and the Major-Blakeney Corporation.

Within five days after the entry of said judgment, Appellant for the second time tendered the rent due, together with interest thereon and costs, to Respondents by depositing the same with the Summit County Clerk's Office. Thereafter, Appellant's Motion to Stay Execu-

tion, Motion for Reconsideration and a Petition and Order to Show Cause why Respondents should not be compelled to accept Appellant's tender were all denied by the lower court.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Summary Judgment granted by the lower court and a remand of the matter for trial; or, in the alternative, Appellant seeks a reversal of the lower court's denial of Appellant's Order to Show Cause and a determination by this Court that Appellant is entitled to the restoration provisions of Section 78-36-10 Utah Code Anno., 1953 (as amended).

STATEMENT OF FACTS

On the 31st day of March, 1967, Respondents and Appellant's predecessor in interest executed a Lease and Purchase Agreement (R. 37-44), hereinafter referred to as the Master Lease. Subsequently, Appellant's predecessor in interest entered into a Sublease of the same leasehold property constituting 1,942 acres with Ski Park City West, Inc., a Utah corporation, hereinafter referred to as the Sublessee (R. 94-122). Both the Master Lease of March 31, 1967, and the Sublease dated July 31, 1967, were consumated in accordance with and pursuant to a basic Agreement executed between Appellants' predecessor in interest and the predecessor in

interest of the Sublessee dated January 24, 1967 (R. 144-155).

Since the execution of the Sublease on July 31, 1967, the sublessee has enjoyed continued and uninterupted possession of the entire 1942 acres constituting the leasehold property.

In November, 1967, Respondents were advised by Appellant of the Sublease Agreement and Respondents accepted the first annual rental payment due under the Master Lease from the Sublessee (Deposition Exhibit P-1). Appellant made the next two annual rental payments under the Master Lease.

The annual rental payments under the Master Lease due on the 1st day of November of each year covered a rental period commencing March 31 of that year and continuing through March 30 of the next succeeding year (R. 37).

In February, 1971, the Sublessee was instructed by Appellant to again make the annual rental payment under the Master Lease directly to Respondents, as had been done previously with the first annual rental payment. Sublessee was further advised that its accounts payable to Appellant would be credited to the extent of this payment (Deposition Exhibit P-5). At this time, Sublessee owed amounts provided for under the Agreements of January 24 and July 31, 1967, to Appellant which exceeded the annual rental payment under the Master Lease (Deposition pp. 38-40). By let-

ter dated March 3, 1971, Respondents were advised of this payment procedure (Deposition Exhibit P-6).

On March 9, 1971, Appellant was advised by Sublessee's attorney, Mr. Arthur H. Nielsen, that Sublessee would not partially satisfy its obligation to Appellant by making the annual rental payment under the Master Lease directly to Respondents (Deposition Exhibit P-7). Significantly, Mr. Nielsen also represented Respondents and mailed a notice dated March 11, 1971, wherein a forty-five (45) day deadline was established within which Appellant was to make the annual rental payment (Deposition Exhibit P-8). However, said notice was not actually received by Appellants until after April 1, 1971 (Deposition pp. 57-60).

Respondents, through their attorney Mr. Nielsen, were advised by letter dated April 19, 1971, that the annual rental payment would be made within such further time as reasonable necessary following the expiration of the forty-five day period pursuant to Article VIII of the Master Lease. Mr. Nielsen was further advised on behalf of his other client, Appellants' Sublessee, that the default in the Master Lease could be cured by payment of the Master Lease rental obligation by the Sublessee as provided in paragraph 15, subparagraph 3 of the Sublease Agreement of July 31, 1967 (Exhibit P-11 to Affidavit of E. A. Russell).

On May 4, 1971, eight days after the expiration of the forty-five day period purportedly established by Mr. Nielsen on March 11, 1971, Appellant was advised

that the Master Lease provision relating to additional time would not be recognized by Respondents and that the Master Lease was terminated (Exhibit P-12 to Affidavit of E. A. Russell).

After Appellant finally determined that the Sublessee would not partially perform its obligations to Appellant by satisfying the annual rental payment due under the Master Lease, the full amount of said rent, $4,855.18, was tendered to Respondents by Appellant on June 7, 1971 (R. 68). This tender was refused by Respondents on June 15, 1971 (Exhibit P-13 to Affidavit of E. A. Russell).

Service of process on Appellant in this matter was made on June 25, 1971, and, on July 1, 1971, Respondents entered into a new Lease Agreement covering the identical 1,942 acres encompassed by the Master Lease and the Sublease with a corporation known as Life Resources, Inc. (R. 155-161). Life Resources, Inc., owns eighty percent of the stock of Ski Park City West, Inc., Appellant's Sublessee.

Respondents and representatives of Sublessee and Life Resources, Inc., were in personal contact with each other, unknown to Appellant, as early as March, 1971 (Deposition pp. 70-71). The concerted efforts of the Sublessee, Life Resources, Inc. and Respondents to frustrate the Master Lease are established by the following, but not inclusive, facts: The contact between the representatives of the Sublessee and Life Resources, Inc., and Respondents as early as March, 1971 (Deposi-

tion pp. 70-71; R. 162-163); the common counsel shared by Sublessee and Respondents as evidenced by the letters dated March 9 and March 11, 1971 (deposition Exhibits P-7 and P-8); the unjustified refusal of Sublessee to partially satisfy its obligations to Appellant by paying the annual rental payment due under the Master Lease (Deposition Exhibits P-5 and P-7); and, the fact that on July 1, 1971, Respondents entered into another Lease and Purchase Agreement (R. 155-161) encompassing the exact acreage as originally covered by the Master Lease and Sublease with the corporation that owns eighty percent of the stock of Appellant's Sublessee, wherein the rental payment to Respondents was increased from $2.50 per acre or $4,855.18 annually under the Master Lease to $3.00 per acre or $5,826.21 annually under the lease with Life Resources, Inc., and the rental obligation of Appellant's Sublessee, who has continued in uninterupted possession of said property from July 31, 1967 to the present, was reduced to $3.00 per acre from a minimum rental of $4.00 per acre or $7,768.28 annually plus an added percentage of gross receipts per annum, under the Sublease with Appellant.

In consideration for their execution of the Agreement dated July 1, 1971 (R. 155-161), Respondents received and accepted the amount of $5,826.21 as the first rental payment.

In addition to tendering the full rental payment of $4,855.18 on June 7, 1971, Appellant made an addi-

tional tender of the full amount of the rental together with interest thereon and Respondents' costs, for a total of $5,319.00, to the Summit County Clerk's Office within five days after the entry of the Summary Judgment (R. 128-129). This payment was not accepted by Respondents and the court denied Appellant's Petition and Order to Show Cause (R. 140-141, 136) to compel Respondents to accept the tender and restore Appellant to its leasehold estate under the Master Lease of March 31, 1967.

ARGUMENT

POINT 1.

THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTS GENUINE DISPUTES AS TO MATERIAL ISSUES OF FACT AND THE SAME MAY BE RESOLVED ONLY BY A FULL AND COMPLETE TRIAL ON THE MERITS.

As stated by this Court in *Bullock vs. Deseret Dodge Center, Inc.*, 11 Utah 2d , 354 P. 2d 559 (1960), at 11 Utah 2d 4, 5:

> "A summary judgment must be supported by evidence, admissions and inferences

> which when viewed in the light most favorable to the loser show that, 'There is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."

Article VIII of the Master Lease provides, in part:

> "No default of lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to lessee specifying of what the default consists, *and in the event lessee fails to correct said default within such further time as is reasonably necessary to cure the same,* lessee shall quit and surrender the premises to lessors subject to the reservation contained in paragraph II above. * * *" (Emphasis added).

By the clear language of the Master Lease, a default in any of the lease provisions, including the provisions for the payment of rent, may not constitute a basis for forfeiture unless the same continues for more than a reasonable time beyond the expiration of the forty-five day written notice period. A determination

of what constitutes reasonable additional time presents an immediate question of fact, particularily in light of Respondents' acts and conduct. To avoid repetition, Respondents' objectionable conduct will be specified in the following portions of this brief.

Appellant respectfully submits that this Court has never sanctioned a procedure of trial by affidavit and it is apparent that Appellant could produce evidence, if given a trial, that would preclude Respondents from terminating the Master Lease.

POINT 2.

THE LOWER COURT ERRONEOUSLY APPLIED THE LAW TO THOSE FACTS PRESENTED BY THE INSTANT MATTER NOT IN DISPUTE.

A. THERE WAS NO DEFAULT BY APPELLANT ON WHICH TO PREDICATE A FORFEITURE OF THE MASTER LEASE.

The purported notice of March 11, 1971, was ineffective to commence a time within which payment of the annual rent was to be made to avoid a forfeiture. As stated in 49 Am Jur 2d, *Landlord and Tenant,* Section 1087, p. 1047," (The Notice) * * * must comply with the requirements of the lease and the law respecting the time allowed for payment." The subject notice

completely ignored any additional time beyond a forty-five day period contrary to the language of the Master Lease. Therefore, Appellant never received adequate notice which commenced the time within which a default would have to be rectified.

Respondents' pronounced termination of the Master Lease on May 4, 1971, was ineffective because a default had not continued beyond the grace period provided for in Article VIII of the Master Lease. Appellant contends that it did not receive the notice of March 11, 1971, until after April 1st of the same year. In this event, the forty-five day period had not yet expired. Even if Appellant had received the notice on March 12, 1971, the day after the date the notice bears, such additional time as was reasonably necessary to cure the default had not yet expired.

The termination of May 4, 1971, was effective only to render further action by Appellant useless and futile. This Court stated in *Utah Hotel Company vs. Madsen,* 43 Utah 285, 134 P. 577 (1913), at 43 Utah 301:

> "But, entirely apart from all authority, how often must it be decided that where it appears, as in this case, that a tender would have been wholly useless no tender is necessary? While there are a few sporatic cases, perhaps, that in particular cases have departed from the general principal, yet the great weight of

> authority is to the effect that where the evidence without conflict shows, or where it is found, that a tender would have been useless, none is required to be either alleged or proved."

The futility of further action by the Appellant after May 4, 1971, is substantiated by the fact that Appellant's tender of the full rental amount of $4,855.18, on June 7, 1971, was immediately rejected by Respondents.

B. SHOULD IT BE DETERMINED THAT THERE WAS A DEFAULT BY APPELLANT ON WHICH TO PREDICATE A FORFEITURE, APPELLANT IS ENTITLED TO EQUITABLE RELIEF FROM THE FORFEITURE.

The Master Lease was for a term of ten years commencing the 31st day of March, 1967, and ending on the 31st day of March, 1977 (R. 37). After three annual payments had been made, the circumstances giving rise to the instant proceeding occured. The only basis on which Respondents sought a termination of the Master Lease was the alleged default in the annual rental payment for the period of March 31, 1970 to March 30, 1971.

A contractual provision for forfeiture is looked upon with disfavor and strictly construed against the

party seeking to invoke the forfeiture. In a lease agreement, a forfeiture provision is considered security for the payment of rent and equity will offer relief against a forfeiture upon the payment by the lessee of the principal and interest. 31 ALR 2d, Anno., *Lease-Forfeiture-Relief* (1953). The tender justifies relief because the purpose of forfeiture is served.

Prior to the purported notice of March 11, 1971, Appellant assigned a portion of its accounts receivable from its Sublessee to Respondents. Curiously, the first objection to the assignment came from the debtor-Sublessee in a letter from its attorney dated March 9, 1971. Two days later, the same attorney, now representing Respondents, submitted to Appellant the inadequate notice of March 11, 1971. The assignment as a method of payment was defeated by and through the collusion of Respondents and Appellant's debtor-Sublessee. Even before any time period within which to cure a default as provided for in the Master Lease had been commenced, Respondents were in negotiation with Appellant's Sublessee for the betterment of their own position without any intention of permitting Appellant to pursue the rights provided for in the Master Lease.

In light of the total circumstances, including both Appellant's good faith efforts to remedy any default and Respondents acts and conduct intended to frustrate any course pursued by Appellant, equitable relief from termination of the Master Lease should be afforded Appellant.

C. APPELLANT IS ENTITLED TO THE REDEMPTION AND RESTORATION PROVISIONS OF SECTIONS 78-36-10 UTAH CODE ANNO. 1953 (AS AMENDED).

After judgment has been entered against a defaulting tenant, Section 78-36-10 Utah Code Anno. 1953 (As amended) provides:

> "When the proceeding is for an unlawful detainer *after default in the payment of the rent, and a lease or agreement under which the rent is payable has not by its terms expired,* execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, *within which time the tenant or any sub-tenant,* or any mortgagee of the term, *or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant shall be restored to his estate;* but if payment as herein provided is not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately." (Emphasis added.)

As previously noted, the Master Lease had several years remaining as an unexpired term and Respondents' action was predicated solely on the purported default in the annual rental payment for the period March 31, 1970 through March 30, 1971. Also, in addition to the tender of June 7, 1971, the full amount of the annual rental payment, together with interest thereon and Respondents' costs, was deposited with the Summit County Clerk's Office on the 20th day of March, 1971 (R. 128-129).

Appellant submits that the execution of a sublease does not effect the lessee's right of possession as against the master lessor. To accomplish a termination of the lessee's constructive possession, a lessor is required to give a three day notice to pay or quit the premises. The only additional requirement brought about by the existence of a sublease is that the subtenant must be made a party defendant. Section 78-36-7 Utah Code Anno., 1953 (as amended).

Should the lessee or subtenant remain in possession after the appropriate notice, either or both would be subject to unlawful detainer proceedings. However, the lessee or the subtenant would then be entitled to invoke the five day redemption and restoration privilege set forth in Section 78-36-10 Utah Code Anno., 1953 (as amended).

This Court recognized the restoration provision of 78-36-10 Utah Code Anno., 1953 (as amended) in *Commercial Block Realty Co. vs. Merchants' Protective*

Ass'n., 71 Utah 505, 267 P. 1009 (1928), where a tenant was not required to tender delinquent rent to preserve his lease. This Court stated at 71 Utah 509:

> "He (tenant) may await the judicial determination of the amount of rent, and after judgment pay the rent and costs and be restored to his estate."

This privilege was characterized as a "safeguard" to the tenant. This same "safeguard" should apply where, as in the instant case, the proper rental amount was tendered to Respondents both before and after judgment.

In an effort to circumvent the restoration "safeguard", Respondents elected to bring an action in the nature of a Declaratory Judgment proceeding. However, the lower court should have recognized that Respondents' action was "in the nature" of an unlawful detainer proceeding.

See *Gray vs. Defa,* 103 Utah 339, 135 P. 2d 251 (1943), wherein the lower court had dismissed defendants' counterclaims and excluded evidence thereon because the complaint sought a declaratory judgment quieting title to certain lands to plaintiff. This Court reversed because the action was "in effect" an action to quiet title and defendants were allowed to plead and present evidence on their counterclaims. While the instant complaint is in the form of a declaratory termination of the Master Lease, it should be recognized, "in

effect", as a summary eviction proceeding entitling Appellant to the restoration privilege of 78-36-10 Utah Code Anno., 1953 (as amended).

The similarity in nature between an unlawful detainer action and an attempted termination of a lease in a declaratory judgment proceeding requires equal treatment of applicable statutes and rules of law. In *Telegraph Avenue Corporation vs. Raentsch,* 269 P. 109 (Sup.Ct., Calif., 1928), the Court, in considering the California Statute comparable to Section 78-36-10 Utah Code Anno., 1953 (as amended), characterized the payment after judgment and restoration provisions as, "* * * A privilege granted to every defendant brought in under proceedings of this nature, and it is a substantial right of which he cannot be deprived by any action of the trial court."

A further consideration is that a post judgment payment may be made by any party interested in the continuance of the subject lease. In this instance, Respondents were paid the amount of $5,826.21 on July 1, 1971, by the corporation owning 80 percent of the stock of Appellant's Sublessee. This payment should be construed as a satisfaction of the delinquent rental amount entitling Appellant to restoration of the Master Lease.

D. THE LOWER COURT ERRED IN AWARDING THE AMOUNT OF $2,500.00 AS LIQUIDATED DAMAGES.

The record is completely devoid of any evidence that the amount of $2,500.00 is reasonably related to the actual damages sustained by Respondents. It is clear that a party may recover contractual amounts designated as liquidated damages only after a showing that the amount so designated is reasonably related to the actual damages resulting from the breach. Otherwise, such a provision, even if labeled "Liquidated Damages" by the parties, will be considered an illegal and unenforceable penalty.

This Court is committed to the rule that liquidated damages will be enforced, "if the amount stipulated is not disproportionate to the damages actually sustained." *Bramwell Inv. Co. vs. Uggla,* 81 Utah 85, 16 P. 2d 913 (1932), at 81 Utah 92.

In *Perkins et al vs. Spencer,* 121 Utah 468, 243 P. 2d 446 (1952), this Court stated at 121 Utah 475:

> " * * * where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery, *bearing no reasonable relationship to the actual damage suffered,* we have uniformly held it to be unenforceable." (Emphasis added)

The facts clearly show that on July 1, 1971, less than two months after the purported termination of the Master Lease on May 4, 1971, Respondents actually received an additional $971.03 per year for the exact

acreage included in the Master Lease by virtue of the execution of the lease with Life Resources, Inc.

Rather than showing the required reasonable relationship between the stipulated amount and actual damages, the evidence clearly establishes that Respondents did not sustain any actual damages. The lower courts award of $2,500.00 should be reversed.

E. THE GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT DESTROYS SEVERABLE AND DISTINCT PRIVILEGES INNURING TO APPELLANT THAT DO NOT EXPIRE UNTIL MARCH 31, 1977.

The Master Lease contains provisions relating to an Option to Purchase and Right of First Refusal that are supported by independent consideration. In 49 Am Jur 2d, *Landlord and Tenant,* Section 385, at 403, it is stated:

> "The determination of whether a breach of the lease by the lessee renders an option to purchase nugatory depends on whether the option and lease are one agreement or are independant. This resolves itself into a problem of construction of the instrument and of determining the intent of the parties."

The lower court, without the benefit of any evidence relating to the independant consideration or in-

tent of the parties with respect to the Option to Purchase and Right of First Refusal summarily destroyed said rights. The lower court did so without considering that independant equities may afford relief from termination of such options notwithstanding dependencies of other covenants with the option. 10 ALR 2d Anno., *Tenants Option to Purchase,* Section 9, p. 894 (1950).

The Option to Purchase and Right of First Refusal may not be taken from Appellant without a full hearing on the merits.

SUMMARY

Appellant respectfully submits that the lower court erred and the matter should be reversed and remanded for a full trial on the merits; or, in the alternative, this court should determine that Appellant is entitled to the post judgment payment and restoration privileges set forth in Section 78-36-10, Utah Code Anno., 1953 (as amended).

Respectfully submitted:

RICHARDS & RICHARDS

Gary A. Frank

Attorneys for Defendants-Appellants

900 Walker Bank Building
Salt Lake City, Utah 84111