

1993

# Richard Barton v. MTB Enterprises : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Donald J. Winder; Robert D. Tingey; John W. Holt; Winder & Haslam; Attorneys for Plaintiff/Appellant.

Richard N. Cannon; Attorney for Defendant/Appellee.

---

## Recommended Citation

Brief of Appellant, *Barton v. MTB Enterprises*, No. 930807 (Utah Court of Appeals, 1993).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5708](https://digitalcommons.law.byu.edu/byu_ca1/5708)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

930807 CA

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

RICHARD BARTON dba	:	
SQUIRE'S ANTIQUES,	:	
	:	APPELLANT'S BRIEF
Plaintiff-Appellant	:	
	:	
-v-	:	
	:	Case No. 930807-CA
MTB ENTERPRISES, INC., a	:	(Third Circuit Court
Utah corporation,	:	Civil No. 920008772CV)
	:	
Defendant-Appellee.	:	Priority No. 15

-----oo0oo-----

APPEAL FROM JUDGMENT AND FINAL ORDER OF  
 THE THIRD CIRCUIT COURT,  
 SALT LAKE DEPARTMENT, COUNTY OF SALT LAKE  
 STATE OF UTAH  
 HONORABLE SHEILA K. McCLEVE

-----oo0oo-----

RICHARD N. CANNON, (#0566)  
 56 East Broadway, #600  
 Salt Lake City, Utah 84111  
 Telephone: (801) 363-3334  
 Attorney for Defendant/  
 Appellee

DONALD J. WINDER, (#3519)  
 ROBERT D. TINGEY, (#4776)  
 JOHN W. HOLT, (#5720)  
 WINDER & HASLAM, P.C.  
 175 West 200 South, #4000  
 Salt Lake City, Utah 84101  
 Telephone: (801) 322-2222  
 Attorneys for Plaintiff/  
 Appellant

**FILED**  
 Utah Court of Appeals

FEB 8 1994

*Mary T. Noonan*  
 Mary T. Noonan  
 Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

RICHARD BARTON dba	:	
SQUIRE'S ANTIQUES,	:	
	:	APPELLANT'S BRIEF
Plaintiff-Appellant	:	
	:	
-v-	:	
	:	Case No. 930807-CA
MTB ENTERPRISES, INC., a	:	(Third Circuit Court
Utah corporation,	:	Civil No. 920008772CV)
	:	
Defendant-Appellee.	:	Priority No. 15

-----oo0oo-----

APPEAL FROM JUDGMENT AND FINAL ORDER OF  
THE THIRD CIRCUIT COURT,  
SALT LAKE DEPARTMENT, COUNTY OF SALT LAKE  
STATE OF UTAH  
HONORABLE SHEILA K. McCLEVE

-----oo0oo-----

RICHARD N. CANNON, (#0566)  
56 East Broadway, #600  
Salt Lake City, Utah 84111  
Telephone: (801) 363-3334  
Attorney for Defendant/  
Appellee

DONALD J. WINDER, (#3519)  
ROBERT D. TINGEY, (#4776)  
JOHN W. HOLT, (#5720)  
WINDER & HASLAM, P.C.  
175 West 200 South, #4000  
Salt Lake City, Utah 84101  
Telephone: (801) 322-2222  
Attorneys for Plaintiff/  
Appellant

LIST OF PARTIES

Party

Counsel

Plaintiff-Appellant Richard  
Burton, dba Squire's  
Antiques

Donald J. Winder (#3579)  
Robert D. Tingey (#4776)  
John W. Holt (#5720)  
WINDER & HASLAM, P.C.  
175 West 200 South, #4000  
Salt Lake City, Utah 84101

Defendant-Appellee  
MTB Enterprises, Inc.

Richard N. Cannon (#0566)  
56 East Broadway, #600  
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	PAGE(S)
LIST OF PARTIES . . . . .	i
TABLE OF CONTENTS . . . . .	ii
TABLE OF AUTHORITIES . . . . .	iii
JURISDICTION . . . . .	1
ISSUE PRESENTED FOR REVIEW . . . . .	1
STANDARD OF REVIEW . . . . .	1
CITATION TO THE RECORD . . . . .	1
STATEMENT OF THE CASE . . . . .	2
A.    NATURE OF THE CASE . . . . .	2
B.    COURSE OF PROCEEDINGS AND DISPOSITION . . . . .	3
STATEMENT OF FACTS . . . . .	3
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT . . . . .	4
CONCLUSION . . . . .	9
APPENDIX . . . . .	10

TABLE OF AUTHORITIES

<b>CASES</b>	<b>PAGES</b>
<u>Armory Park Neighborhood Assn'n v. Episcopal Community Serv. in Ariz.</u> , 712 P.2d 914, 920 (Ariz. 1985) . . . . .	6
<u>Brugger v. Fonoti</u> , 645 P.2d 647 (Utah 1982). . . . .	4
<u>Ron Case Roofing and Asphalt, Inc. v. Blomquist</u> , 773 P.2d 1382 (Utah 1989). . . . .	1
<u>Dobbins v. Paul</u> , 321 S.E.2d 540 (N.C. App. 1984) . . . . .	7
<u>Kenyon v. Regan</u> , 826 P.2d 140, 142 (Utah App. 1992) . . . . .	5
<u>Routal Corp., N.W., Inc. v. Ottati</u> , 391 So.2d 308 (Fla. App. 1980) . . . . .	7
<u>State Nat'l. Bank v. Farah Mfg. Co.</u> , 678 S.W.2d 661, 691 (Tex. App. 8th Dist. 1984) . . . . .	6
 <b>RULES OF PROCEDURE</b>	
<u>Utah Code Ann. § 78-2a-3(2)(d)</u> . . . . .	1
<u>Utah R. App. P. Rule 3(a)</u> . . . . .	1

**JURISDICTION**

This court has jurisdiction pursuant to Rule 3(a), Utah R. App. P. and Utah Code Ann. § 78-2a-3(2)(d)

**ISSUE PRESENTED FOR REVIEW**

The legal issue presented for review is one of first impression in the State of Utah: Should a landlord who serves a notice to pay rent or quit upon its tenant when the tenant is not in default of its rental obligations be held responsible for damages sustained by the tenant who vacates the premises pursuant to the notice to quit?

**STANDARD OF REVIEW**

Only one question of law is on review in this case. The appropriate standard of review is that where the issue on appeal is one of law, the appellate court need not accord any deference to the trial court's view of the law. See, e.g., Ron Case Roofing and Asphalt, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989).

**CITATION TO THE RECORD**

Citations to the record herein will be as follows: "R" followed by the page number in the record where the reference can be located.

## STATEMENT OF THE CASE

### A. Nature of the Case:

This appeal is from a final judgment and order of the Third Circuit Court, Salt Lake County, Salt Lake Department, State of Utah. The case arose from the following background. Plaintiff was leasing property from defendant to operate an antique shop in Salt Lake City. R. at 157. Defendant served upon plaintiff a three-day notice to pay rent or quit on November 20, 1991. R. at 159. The notice to quit was served despite the fact that no rent was due at the time. R. at 148. It is plaintiff's position that it had pre-paid rent through December 21, 1991. R. at 158 and 159. It is undisputed that no rent was due as of November 20, 1991 when the notice to quit was served. See, e.g., R. at pp. 70 and 71. In response to the notice to quit, plaintiff began vacating the premises by removing inventory. R. at 256.

Plaintiff's complaint alleges that the notice to quit constitutes a constructive or wrongful eviction; that it would not have left the premises when it did if the notice had not been served; that it suffered damages as a result of the wrongful eviction and that punitive damages should be assessed against defendant. See R. at pp. 1 - 5.

### B. Course of Proceeding and Disposition

A motion for summary judgment was filed by defendant arguing, inter alia, that the service of a notice to pay rent or quit

upon a tenant who is not in default in its rental obligation cannot constitute a wrongful eviction. The court ultimately granted defendant's motion for summary judgment expressly ruling that a notice to pay rent or quit cannot, without more, constitute a wrongful eviction even though the rent may have been paid, since the eviction notice sets forth alternatives (i.e., pay rent or leave the premises within three days) and it was plaintiff who chose to vacate the premises. R. at pp. 340 and 341.

#### **STATEMENT OF FACTS**

Due to the court's summary judgment which was based upon its interpretation of the law rather than an evaluation of facts, the basic facts relevant for this appeal appear to be as follows:

1. Plaintiff was leasing the subject property from defendant to conduct a retail business. R. at p. 157.

2. On November 20, 1991, plaintiff was served with a three-day notice to pay rent or quit. R. at p. 159.

A true and correct copy of the notice to pay rent or quit is included in the appendix hereto.

3. At the time the notice to pay rent or quit was served, there was no rent due and owing. R. at pp. 158 and 159. (It is plaintiff's position that rent had been paid through December 21, 1991. R. at pp. 158 and 159.)

4. In response to the notice to quit, plaintiff immediately began moving its inventory from the premises in order to comply with the notice to quit (R. at p. 256) and suffered damages as set forth in its complaint.

#### **SUMMARY OF ARGUMENT**

Service of a notice to pay rent or quit upon a tenant who has already paid rent and is not in breach of its rental obligations constitutes a constructive or wrongful eviction if the tenant responds to the three-day notice to quit by vacating the premises. A landlord should not be permitted to escape responsibility when it wrongfully serves a notice to quit and the tenant reacts to that notice to its detriment.

#### **ARGUMENT**

Under Utah's traditional definition of constructive eviction, such an eviction occurs when a tenant's right of possession and enjoyment of the leased premises is interfered with by the landlord so as to render the premises or part thereof unsuitable for the purposes intended. See Brugger v. Fonoti, 645 P.2d 647 (Utah 1982). "The whole point of 'constructive eviction' is that the landlord basically drove the tenant out through the landlord's action or inaction . . ." Kenyon v. Regan, 826 P.2d 140, 142 (Utah App. 1992)

The issue in this case is one of first impression in Utah: Should a landlord who serves a notice to pay rent or quit upon a tenant be excused of liability for damages sustained by the tenant who vacates the premises pursuant to the notice to quit when the tenant is not in default of its rental obligations. Plaintiff submits that a landlord should be held liable. However, the trial court in this case ruled, as a matter of law, that plaintiff had no constructive eviction claim against defendant. The court held that because the notice to pay rent or vacate gives the tenant alternative courses of action ((1) stay and pay rent or (2) vacate), defendant was not liable for constructive eviction.

The fundamental questions to be analyzed in this case is as follows: As between the landlord and tenant, who should bear the risk of an improper notice to quit? Plaintiff submits it is consistent with sound public policy to make the landlord bear the risk. Otherwise, the tenant is forced to make the choice of either (1) staying on the premises and hoping that it is correct in believing that the rent has been paid, or (2) leaving the premises in order to avoid the threats of the three day notice (treble damages, costs, attorney's fees and forced eviction). In either event, the tenant is forced to make a determination due to the conduct of the landlord and suffers the consequences of

making the wrong choice. A tenant should not be faced with such a dilemma.

Perhaps this issue can be analogized to tort law principals. General tort law has long recognized that one who sets in motion the forces which cause the harm will be held responsible. See Armory Park Neighborhood Assn'n v. Episcopal Community Serv. in Ariz., 712 P.2d 914, 920 (Ariz. 1985). See also State Nat'l. Bank v. Farah Mfg. Co., 678 S.W.2d 661, 691 (Tex. App. 8th Dist. 1984) (where damage has resulted from a wrongful act which is the original cause of an event, in that such event is a part of a chain of events set in motion by a party, such party may be held responsible for the total results) (citations omitted).

This same rationale should apply to a landlord who wrongfully or negligently serves a three-day notice to pay rent or quit upon a tenant who is not in breach of its obligation to pay rent. The landlord sets events in motion by serving the notice to quit. The notice itself tells the tenant to get out in order to avoid a parade of horrors (forced eviction, treble damages, attorney's fees and costs). The defense that the tenant was unreasonable in choosing the alternative to vacate the premises is not compelling. Tenants may be inexperienced, uneducated, unsophisticated or financially unable to seek legal help when served with a notice to quit. The language of a notice to quit can be very threatening and intimidating. Therefore, it is

clearly foreseeable that a tenant may vacate the premises pursuant to a notice to quit even when there has been no breach to justify a notice to quit.

The law should place the risk on the landlord who serves an improper notice to pay rent or quit. It makes no sense for the tenant to pay for a landlord's negligent mistake, or even worse, intentional wrongful conduct.

In the present case, it is undisputed that on November 20, 1991, plaintiff was served with a notice to pay rent or quit despite the fact that no rent was then due and owing. Plaintiff argues that such conduct should be considered a basis for a claim of constructive eviction. Case law from other jurisdictions lends support to plaintiff's claim that notices to pay rent or quit provide a basis for a claim of constructive eviction. See Dobbins v. Paul, 321 S.E.2d 540 (N.C. App. 1984) (When a wrongful demand or notice to quit or vacate leased premises is made by a lessor or landlord and it is followed by immediate surrender of possession by the lessee or tenant, a constructive eviction has been accomplished). See also Rotal Corp., N.W., Inc. v. Ottati, 391 So.2d 308 (Fla. App. 1980).

Plaintiff submits that Utah law should likewise provide a cause of action for constructive eviction when notices to pay rent or quit are served when there is no rent due and owing. A

standard that permits a claim for constructive eviction based on a wrongful notice to quit is consistent with sound public policy.

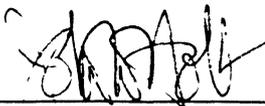
This court, if it upholds the trial court's ruling, will send a message to landlords that they can harass, intimidate, manipulate and threaten their tenants with notices to pay rent or quit even if the tenants are not in breach of their rental obligations.

**CONCLUSION**

Based upon the foregoing, plaintiff respectfully requests this Court to rule that the trial court erred in holding a notice to quit, without more, cannot constitute constructive eviction, even when the rent has been paid and there is no rent due and owing. This Court should hold that service of a notice to pay rent or quit when rent is not due constitutes a constructive or wrongful eviction. Furthermore, the order of the trial court requiring plaintiff to pay costs should be reversed.

DATED this 5<sup>th</sup> day of February, 1994.

WINDER & HASLAM, P.C.  
Attorneys for Plaintiff-Appellee

By   
Donald J. Winder  
Robert D. Tingey  
John W. Holt

APPENDIX

Three Day Notice to Pay Rent or Vacate . . . . . Exhibit A

TO: SQUIRE ANTIQUES/AXA DICK BARTON AS CALIFORNIA PACKAGING  
526 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84102

You are hereby notified that you are in default for non-payment of rent for the premises occupied by you at the address shown above.

You are further notified that you are to do one of the following:

1. WITHIN THREE DAYS after service of this notice upon you, you are hereby required to pay in full the rent now owing on the premises at the above address, which you now occupy.

The total rent due is \$3,500.00; being rent for the period(s) commencing 15 NOV. 1991, and ending 15 DEC. 1991, payable monthly in advance, computed at the rate of \$ 3,500.00, per month, plus a late fee of \$ 250.00 per month, amounting to the sum of \$ 3,750.00, less \$ "0" paid on account to date: 20 NOV. 1991. AND AS PER YOUR OFFICIAL NOTICE, FAXED TODAY, NOW ATTACHED AND A PART OF THIS NOTICE.

OR

2. YOU ARE REQUIRED TO VACATE SAID PREMISES WITHIN THREE DAYS and surrender possession of said premises with keys to the undersigned Owner or his duly authorized agent.

IN THE EVENT of your failure to pay the said rent or to vacate the said premises within such period of THREE DAYS, you will be unlawfully detaining possession of said premises. In accordance with the provisions of Section 78-36-10, Utah Code Annotated, 1953, you will be liable for treble damages for such unlawful detainer, and action will be commenced against you to evict you from said premises and to take judgment against you for the rent accrued plus damages of three times the rent for the period you are unlawfully detaining possession of said premises, together with any damages to said premises, court costs, and attorney's fees.

Please immediately notify the undersigned of your intentions.

Dated this 20TH day of NOVEMBER 1991

Jack Keller  
Owner or Authorized Agent's Signature  
455 EAST SOUTH TEMPLE, SUITE 300  
Address  
SALT LAKE CITY, UTAH 84111  
City  
(801) 363-8811

Municipal ordinances provide:

It shall be unlawful for any person, upon vacating or removing from dwellings, store rooms, or any other building, to fail to remove all garbage, rubbish, and ashes from such building and premises and also the ground appertaining thereto, or to fail to place same in a thoroughly sanitary condition 24 hours after said premises shall be vacated.

#### RETURN OF SERVICE

I certify that service of this notice was completed in accordance with the provisions of Section 78-36-3 and Section 78-36-6, Utah Code Annotated, 1953, on (date) 20 NOV 91 at (place) 526 EAST 300 SOUTH

by: JACK KELLER AND AS BOLDU

delivering a copy to the tenant personally, OR

sending a copy through certified or registered mail, addressed to the tenant at his place of residence, OR

leaving a copy with \_\_\_\_\_ a person of suitable age and discretion at the tenant's residence or place of business, and by mailing a second copy to the Tenant at said residence, or place of business, OR

affixing a copy in a conspicuous place on the rented premises, after failing to find anyone there.

faxing a copy to DICK BARTON at CALIFORNIA PACKAGING @ (310) 698-0998.

Jack Keller  
Signature of Server

Date

Subscribed and sworn to before me on this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

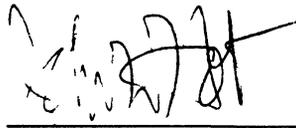
\_\_\_\_\_ residing at \_\_\_\_\_

My commission expires \_\_\_\_\_ **EXHIBIT A** \_\_\_\_\_

CERTIFICATE OF MAILING

I hereby certify that I caused four copies of the foregoing APPELLANT'S BRIEF to be mailed, postage prepaid, on this 2<sup>th</sup> day of February, 1994, to:

Richard N. Cannon, Esq.  
56 East Broadway, #600  
Salt Lake City, Utah 84111



---

2342\mtb\brief2 app