

1994

Living Scriptures v. Michael John Kudlik : Reply Brief

Utah Court of Appeals

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940200 CA

LIVING SCRIPTURES, INC., a
Utah corporation,

Plaintiff/Appellee,

vs.

MICHAEL JOHN KUDLIK,
individually and doing
business as CALIFORNIA
SUDS,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Case No. 940200-CA
(Priority No. 15)

Appeal from a Final Judgment
of the Second Judicial District Court
of Weber County, Utah.
The Honorable W. Brent West

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I.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS.

There are no constitutional provisions, statutes, ordinances, rules or regulations that are determinative of the issue on appeal.

II.

ARGUMENT

A. THE NO-WAIVER PROVISION IN THE PARTIES' MEMORANDUM COULD BE
WAIVED, AND WAS IN FACT WAIVED, BY THE LESSOR'S PERIODIC
ACCEPTANCE OF DELINQUENT RENT.

In an effort to justify its precipitous and unexpected decision to forfeit the Lease Agreement, the Lessor invokes the no-waiver provision of the Memorandum. (Appellee's Brief at 6, 13-20.) The Lessor's reliance on that provision, however, is misplaced. "It is a well-established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom." Prince v. R. C. Tolman Const., 610 P.2d 1267, 1269 (Utah 1980) (quoting Davis v. Payne & Day, 348 P.2d 337, 339 (Utah 1960)). As this court has stated, "[p]arties to a contract may, by mutual consent, modify any or all of a contract, even if the contract itself contains a provision to the contrary." Ted R. Brown & Assocs. v. Carnes Corp., 753 P.2d 964, 968 (Utah App. 1988).

The rationale for this principle is that ". . . there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification, extension or addition to their arrangement for doing business with each other that they may mutually agree." PLC Landscape Const. v. Picadilly Fish & Chips, Inc., 502 P.2d 562, 563 (Utah 1972). Thus,

While parties to a contract are free to [ignore its provisions], they must also understand that they may bear the consequences of such disregard when breach becomes a fact of life. As a general rule, if the parties mutually adopt a mode of performing their contract differing from its strict terms, or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter.

Quinn Blair Enterprises, Inc. v. Julien Const., 597 P.2d 945, 951 (Wyo. 1979) (emphasis in original).

Numerous commentators and other courts have recognized that contractual provisions that purport to eliminate the possibility of the parties' waiver are not enforceable. According to Professor Corbin:

In like manner, a provision that an express condition of a promise or promises in a contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the

same extent that he would have had this power if there had been no such provision.

3A Corbin on Contracts, § 763, p. 531 (rev ed. 1960).

The Utah Supreme Court endorsed this principle in Calhoun v. Universal Credit Co., 146 P.2d 284 (Utah 1944). In that case, the parties entered into a contract for the purchase and sale of an automobile. The contract contained both a time of the essence provision and a no-waiver provision. Several of the buyer's payments during the first twelve months of the contract were made as much as 30 days late. After accepting the first 12 payments, the seller rejected the next payment on the basis that it was too late. Shortly thereafter, the seller repossessed the automobile and sought a deficiency judgment against the buyer. In affirming the trial court's decision that the seller had waived strict compliance despite the existence of the no-waiver provision to the contrary, the court stated "the provision that a waiver of any breach of the contract shall not be deemed to be a waiver of any subsequent failure of strict compliance with any and every term of the contract, as well as any other term of the contract, could be modified by agreement of the parties." 146 P.2d at 286 (quoting

Beardslee v. North Pacific Finance Corp., 296 P. 155, 158 (Wash. 1931)).¹

Numerous other courts in a multitude of jurisdictions have reached the same result. Fisher v. Tiffin, 551 P.2d 1061, 1063 (Ore. 1976) (a "non-waiver provision of the contract can itself be waived by the conduct of the vendor."); Sagson Co. v. Weiss, 374 N.Y.S.2d 88, 89 (N.Y. 1975) ("a no waiver clause of this character does not apply to a claim of waiver by open possession."); Searod Shipping Co. v. E.I. DuPont DeNemours Co., 361 F.2d 833, 837, n.18 (5th Cir. 1966) ("Corbin makes very clear that neither the parol evidence rule [citation omitted], the statute of frauds [citation omitted], nor express provision in the written contract against waiver by subsequent oral agreement or conduct [citation omitted] prevent the introduction of evidence that a party to the contract by subsequent conduct or agreement -- oral or written -- waived a condition to its performance of the contract."); Bettelheim v. Hagstrom Food Stores, 249 P.2d 301, 305 (Cal. 1952) (presence of no-waiver provision in contract can itself be waived).

These principles belie the Lessor's assertion that "[a]ny inference of intent by [the Lessor] to waive its right to timely

¹ In light of Calhoun, there is no basis for the Lessor's assertion that the Utah Supreme Court's decision in Pacific Development Co. v. Stewart, 195 P.2d 748 (1948) ". . . is consistent, however, with the conclusion that such a provision would have been given effect." (Appelle's Brief at 15, n.10.)

performance of the Lease and the Memorandum is precluded by the existence of the no-waiver provision in the parties' agreement." (Appellee's Brief at 20.) Moreover, there is no evidence in the record to support the Lessor's suggestion that it ". . . relied on the above no-waiver provision in an attempt to work with [the Lessee] instead of immediately terminating the Lease and acting to evict him. . . ." Id. In the final analysis, the no-waiver provision cannot be used as a type of legal alchemy to magically transform conduct that plainly constitutes waiver to conduct that the law overlooks.

B. THE LANDLORD BOTH FACTUALLY AND LEGALLY WAIVED ITS RIGHT TO INSIST ON TIMELY PAYMENTS UNDER THE LEASE AND THE MEMORANDUM.

A party can waive its rights, or may demonstrate its intention to relinquish its rights, either by actions or conduct that evidences an intent to waive, or by actions that are inconsistent with any other intent. E.R. Woodward Marketing v. Collins Food Service, 754 P.2d 99, 101 (Utah App. 1988). Whether waiver will be found in a particular case does not depend upon the secret intention of the waiving party, but on the effect its actions have on the other party. Id. at 103. A party cannot prevent a waiver by a mental reservation to the contrary when its conduct expresses an intent to waive. Id.; 28 Am.Jur.2d Estoppel and Waiver, § 158.

In this case, the conduct that evidences the Lessor's waiver of its right to insist on strict performance is compelling. That conduct includes:

(1) For the five-month period ending August 31, 1993, the Lessor allowed the Lessee to be an average of 55 days late in the payment of required rent (Trial Exh. 6).

(2) During that five-month period, the Lessor allowed the age of the delinquency to accelerate from an average of 23 days, to 56 days, to 60 days, to 80 days. Id.

(3) Although the parties' Memorandum undeniably apprised the Lessee of the Lessor's contractual expectation of receiving payments "in full and on time," Memorandum ¶ 2, the parties mutually relaxed their adherence to that requirement. Id.

(4) There is no evidence that the Lessor ever objected to the Lessee's late rent payments at any time between March 1 and August 1, 1993.²

² Although the Lessor claims that it "continually 'bird-dogged' the Lessee to 'make his payments and honor his agreement,'" see Appellee's Brief at 6, 23, the Lessor's use of the term "bird-dogged" is a hopelessly confused and confusing means of describing its own conduct. Fairly viewed, the term means nothing more than the proposition that the Lessee closely monitored the sequence and timing of the Lessee's payment of rent. The term, however, does not connote an actual objection to the sufficiency of the Lessee's payment obligations.

To the extent the Lessor now claims that the term somehow includes the concept of objection, that interpretation distorts the reality of what actually occurred. As a commercially sophisticated
(continued...)

(5) When the Lessor's lawyer demanded that the Lessee bring the Lease Agreement "current" and do so "immediately," the Lessee did not pay "immediately" and did not pay in "full." Rather, 16 days later, on August 19, 1993, the Lessee made only the delinquent June rent payment, rather than the two months of delinquent rent demanded on August 2 and August 3, 1993.

(6) On August 20, 1993--one day after accepting the 80-day delinquent June rent payment--the Lessor filed its complaint to forfeit the Lease Agreement.

These facts are abundant evidence of the Lessor's intent to waive strict performance of the rent payment obligations. They further demonstrate the extraordinary unfairness that would be imposed on the Lessee by allowing the Lessor to pull the forfeiture trigger without reasonable advance notice. Utah law requires the

²(...continued)
contracting party ably represented by competent legal counsel, the Lessor knew how to adduce evidence to establish the proposition that it actually objected to the Lessee's laxity in making rent payments on time. It failed to adduce such evidence. Even assuming, however, that the term "bird-dogged" can be stretched to include the proposition that the Lessor actually objected to the delinquent payments, it is still clear that after each such "objection," the Lessor never took any definitive action from March 1 to August 1, 1993 to put the Lessee on notice that further late payments would not be tolerated and, if not rectified, would place the Lessee in jeopardy of forfeiture.

Finally, a careful reading of the text and context of the "bird dog" reference discloses that it refers to the point at which the Memorandum was actually signed on January 25, 1993, not the "March or April" 1993 period that the Lessor's counsel mistakenly identified. (Tr. of September 8, 1993 Hearing at 7.)

Lessor to provide the Lessee with unequivocal advance notice of its decision to tolerate no further delinquencies. "Repeated warnings without their strict enforcement are, of course, indicative of a willingness to waive that strict performance" Pacific Development Co. v. Stewart, 195 P.2d 748, 751 (Utah 1948).

Moreover, "if the lessor receives rent from the lessee after full notice or knowledge of the broken covenant or condition, he cannot thereafter assert his rights of forfeiture given by the lease, notwithstanding express denial of the waiver upon acceptance of the rent." Woodland Theaters, Inc. v. ABC Intermountain Theaters, Inc., 506 P.2d 700, 702 (Utah 1977). "The acceptance of even a part payment [such as the Lessee's payment of the June 1993 installment] is a recognition of and reinstatement of the lease." Gay v. American Oil Co., 133 So.2d 612 (Ga. 1967). Accord Babb's, Inc. v. Babb, 169 N.W.2d 211 (Iowa 1969); Credit, Inc. v. Kutzik, 159 N.W.2d 277, 279 (Minn. 1966). The Lessor's casual assertion that the Lessor ". . . accepted [the June 1993 installment] in mitigation of its damages," (Appellee's Brief at 23, n.15) ignores the clear significance of this principle. The Lessor's acceptance of the June installment is, as a matter of law, conclusive evidence of a continuation of the parties' Lease Agreement--a continuation that could be terminated only through reasonable advance notice.

C. THE LESSOR DID NOT PROVIDE THE LESSEE WITH REASONABLE NOTICE OF ITS INTENT TO REQUIRE COMPLIANCE WITH THE PAYMENT TERMS OF THE LEASE AND MEMORANDUM.

The Lessor suggests that even if it temporarily waived its right to timely payment under the Lease Agreement and the Memorandum, it subsequently provided--through its Notice to Quit and unlawful detainer complaint--reasonable notice of its intent to require strict compliance in the future. (Appellee's Brief at 28-30.) That argument, however, misconceives controlling Utah law.

Utah law requires a promisee who has induced its promisor to believe that strict performance will not be required to provide the promisor with reasonable, advance notice before it can insist on strict performance. (See Appellant's Brief at 8-11, and Reply Brief at 8, supra.) This is designed to prevent the promisee from suddenly and unexpectedly requiring strict performance with contractual terms that historically have been waived by action or inaction. Id. The law, therefore, focuses on the safeguards that the promisee must employ before forfeiture is sought to assure that the promisor is not unfairly prejudiced by the lessee's departure from previous practice. Id. For that reason, once the promisee decides, without advance warning, to require strict compliance, the limited cure period available to the promisor after that decision is made is legally irrelevant. Under Utah law, the Lessee was and is entitled to reasonable advance notice before the Lessor elected

to pull the forfeiture trigger. The Lessor's failure to provide such notice is fatal to its forfeiture claim. The district court's decision to the contrary must be reversed.


III.

CONCLUSION

The trial court erred in ruling that the Lessor did not waive its right to require strict performance in the Lessee's payment of rent. This Court should hold the Lessor to the clear intent of its own conduct by vacating the trial court's Order of Restitution and Final Judgment.

Respectfully submitted this 17 day of June, 1994.

ANDERSON & KARRENBURG

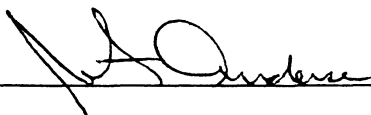


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CERTIFICATE OF SERVICE

On this 17 day of June, 1994, I hereby caused to be mailed via U.S. first-class mail, postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the following:

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