1995

Crescentwood Village v. June Johnson : Reply Brief

Utah Court of Appeals

Ashton, Braunberger, Poulsen & Boud; James R. Boud; Attorneys for Appellee.
Anderson & Karrenberg; John T. Anderson; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

CRESCENTWOOD VILLAGE, INC., Plaintiff/Appellee, v. JUNE JOHNSON, Defendant/Appellant.	**REPLY BRIEF OF APPELLANT** Case No. 950128-CA (Priority No. 15)

Appeal From a Final Judgment
of the Third Judicial District Court
of Salt Lake County, Utah.

The Honorable Tyrone E. Medley

ANDERSON & KARRENBERG
John T. Anderson (#0094)
Attorneys for Appellant,
June Johnson
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2006
Telephone (801) 534-1700

ASHTON, BRAUNBERGER, POULSEN & BOUD
James R. Boud, Esq.
Attorneys for Appellee,
Crescentwood Village, Inc.
302 West 5400 South, Suite 103
Murray, Utah 84017
Telephone (801) 263-0300

IN THE UTAH COURT OF APPEALS

CRESCENTWOOD VILLAGE, INC.,	)	
	)	**REPLY BRIEF OF APPELLANT**
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	Case No. 950128-CA
JUNE JOHNSON,	)	(Priority No. 15)
	)	
Defendant/Appellant.	)	

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TABLE OF CONTENTS

		Page
I.	DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	1
II.	ARGUMENT	1
	A. CVI'S FAILURE TO PROVIDE MRS. JOHNSON WITH REASONABLE ADVANCE NOTICE OF ITS INTENT TO REQUIRE STRICT COMPLIANCE WITH THE TERMS OF ITS NOTICE OF DEFAULT IS FATAL TO ITS ABILITY TO SUMMARILY FORFEIT MRS. JOHNSON'S INTEREST IN THE LEASE AGREEMENT	1
	1. The No-Waiver Provision in the Lease Agreement Could Be Waived, and Was in Fact Waived, By CVI	1
	2. None of the Cases on Which CVI Relies to Justify Its Forfeiture of Mrs. Johnson's Interest in the Lease Agreement on Less than Five Days Advance Notice Remotely Supports the Trial Court's Decision	5
CONCLUSION	. . . . .	6

TABLE OF AUTHORITIES

Cases	Page
Adair v. Bracken, 745 P.2d 849 (Utah App. 1987)	6
Bettelheim v. Hagstrom Food Stores, 249 P.2d 301 (Cal. 1952)	4
Ted R. Brown & Assocs. v. Carnes Corp., 753 P.2d 964 (Utah App. 1988)	2
Calhoun v. Universal Credit Co., 146 P.2d 284 (Utah 1944)	3
Fisher v. Tiffin, 551 P.2d 1061 (Ore. 1976)	4
Fuhriman v. Bissegger, 375 P.2d 27 (Utah 1962)	6
Morris v. Sykes, 624 P.2d 681 (Utah 1981)	6
PLC Landscape Constr. v. Piccadilly Fish & Chips, 502 P.2d 562 (Utah 1972)	2
Pacific Dev. Co. v. Stewart, 195 P.2d 748 (Utah 1948)	5, 6
Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976)	5
Prince v. R.C. Tolman Constr. Co., 610 P.2d 1267 (Utah 1980)	2
Quinn Blair Enterprises, Inc. v. Julien Const., 597 P.2d 945, 951 (Wyo. 1979)	2

Cases **Page**

Sagson Co. v. Weiss,
374 N.Y.S.2d 88 (N.Y. 1975) 4

Searoad Shipping Co. v. E. I. Dupont De Nemours & Co.,
361 F.2d 833 (5th Cir. 1966) 4

Tanner v. Baadsgaard,
612 P.2d 345 (Utah 1980) **6**

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

I.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

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

II.

ARGUMENT

A. CVI'S FAILURE TO PROVIDE MRS. JOHNSON WITH REASONABLE ADVANCE NOTICE OF ITS INTENT TO REQUIRE STRICT COMPLIANCE WITH THE TERMS OF ITS NOTICE OF DEFAULT IS FATAL TO ITS ABILITY TO SUMMARILY FORFEIT MRS. JOHNSON'S INTEREST IN THE LEASE AGREEMENT.

1. The No-Waiver Provision in the Lease Agreement Could Be Waived, and Was in Fact Waived, By CVI.

CVI concedes that it agreed to relax, and in fact relaxed, the fifteen day cure period specified by its Notice of Default. (Response Brief at 8, 9 and 13.) It does so by acknowledging that it accorded Mrs. Johnson "a tremendous amount of indulgence," engaged in a "pattern" of "try[ing] to work with [Mrs. Johnson]," and "allowed Mrs. Johnson a degree of tolerance." (Id.) In an effort to escape the obvious characterization that its agreed-upon forbearance constitutes a waiver of its right to require strict and immediate compliance with the Notice of Default, CVI invokes the no-waiver provision of the Lease Agreement. (Id. at 13, 14.) CVI'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 Constr. Co., 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 Constr. v. Piccadilly Fish & Chips, 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)).

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."); Searoad Shipping Co. v. E. I. Dupont De Nemours & 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 CVI's claim that because the Lease Agreement contains "an unequivocal non-waiver provision," CVI was incapable of waiving its right to require Mrs. Johnson to comply strictly with the Notice of Default. (Response Brief at 7, 13.) The mere presence of the no-waiver provision cannot insulate CVI from the reality that by its conduct CVI relaxed -- waived -- its right to require Mrs. Johnson to comply strictly and immediately with the terms of the Notice of Default. 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. The district erred in failing to recognize this principle.

2. None of the Cases on Which CVI Relies to Justify Its Forfeiture of Mrs. Johnson's Interest in the Lease Agreement on Less than Five Days Advance Notice Remotely Supports the Trial Court's Decision.

The record in this case is undisputed that "right around the end of July [1993]", CVI's manager told Mrs. Johnson ". . . we could not work with her any longer and that we would be evicting if things didn't get going at the end of July," see Tr. at R. 750, 751, and that less than five days later on August 3, 1993 -- one day after it accepted Mrs. Johnson's rent payment check -- CVI served Mrs. Johnson with its Notice of Termination. (Tr. at R. 655, 700, 704, 706.) In an effort to justify the legal sufficiency of this plainly limited amount of time, CVI cites two principal cases which it contends supports its position. Those cases, however, either actually support Mrs. Johnson's claim or are readily distinguishable from the facts of this case.

For example, CVI places considerable reliance on Pacific Dev. Co. v. Stewart, 195 P.2d 748 (Utah 1948) (Response Brief at 9-15.) However, in that case, the Utah Supreme Court held that a period of twenty-three days for a buyer to finally cure its default after a two year period of "many lenities" from the seller was reasonable. 195 P.2d at 751. By contrast, in the case at bar, Mrs. Johnson had less than five days to cure after the previous seventy days of "lenities." There is no Utah case that upholds the legal sufficiency of such a brief final cure period.

Moreover, nothing in Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976) supports CVI's position. (Response Brief at 15, 16.) There is no indication that the

lessee in that case ever raised the claim or defense that the notice of forfeiture that the lessor served five months after the expiration of the initial thirty day cure period violated the legal requirement that the lessor provide reasonable advance notice of its intent to require strict performance.[1] In the case at bar, Mrs. Johnson has in fact raised this issue.[2] The district court erred in not applying it to the undisputed facts of this case.

CONCLUSION

For nearly fifty years, the Utah Supreme Court has repeatedly held that once a promisee relaxes the requirement of strict compliance, it cannot insist unilaterally on such performance without providing its promisor with reasonable advance notice. (See Opening Brief at 8-11). This settled principle of contract law has been applied consistently to prevent a promisee from unfairly exploiting its promisor by suddenly and unexpectedly demanding immediate strict performance after a lengthy period of forbearance. Adair v. Bracken, 745 P.2d 849, 852 (Utah App. 1987); Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981); Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980); Fuhriman v. Bissegger, 375 P.2d 27, 28 (Utah 1962); Pacific Dev. Co.

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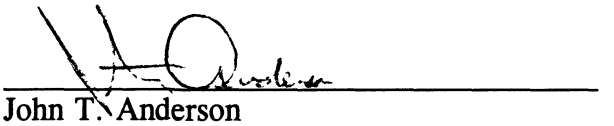
[1] CVI itself recognizes that the lessee in that case never raised the claim that Mrs. Johnson has asserted in this case when it states "[i]t must be assumed that the lessor in Pingree neither intended nor indicated that it would waive its right to declare forfeiture." (Response Brief at 15) (emphasis added). Nothing in Pingree supports that assumption.

[2] CVI appears to imply that Mrs. Johnson never adequately raised or preserved this issue for appeal. (Response Brief at 8, n.4). That implication is unfounded. The trial transcript clearly reflects that this issue was the principal focus of Mrs. Johnson's case at trial. (See generally Tr. at R. 687-704, 746-760.) It also reflects that it was the principal focus of Mrs. Johnson's counsel's motion to dismiss after the completion of CVI's case in chief and his summation. (See generally R. at Tr. 764-74, 791-94.) The issue was preserved in both Mrs. Johnson's Docketing Statement and in her response to CVI's Motion for Summary Affirmance. Finally, it was clearly identified in Mrs. Johnson's Opening Brief. (Opening Brief at 7-11.)

v. Stewart, 195 P.2d 748, 750 (Utah 1948). The trial court committed reversible error in refusing to apply this fundamental principle of contract law to the undisputed facts of this case. This Court accordingly should reverse and vacate CVI's Judgment and remand the case with instructions to enter Judgment in favor of Mrs. Johnson for all attorneys' fees and costs that she incurred to enforce her rights under the Lease Agreement.

DATED this 14 day of July, 1995.

ANDERSON & KARRENBERG

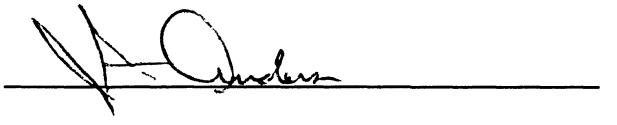


John T. Anderson
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of July, 1995, I caused two true and correct copies of the foregoing **Reply Brief of Appellant** to be mailed, via first-class, postage prepaid, to the following:

James R. Boud, Esq.
302 West 5400 South, Suite 103
Murray, Utah 84107



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