

2006

John K. Crowley v. Chris Black : Brief of Appellee

Utah Court of Appeals

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JOHN K. CROWLEY,

Plaintiff/Appellant,

VS.

CHRIS BLACK.

Defendant/Appellee.

BRIEF OF THE APPELLEE

Case No. 2006-0712 CA

An Appeal from the a final Judgment and Order of the
Third District Judicial District Court – Salt Lake Department, Salt Lake County, State of Utah

The Honorable Glenn K. Iwasaki,
Presiding Judge

District Court Case No. 02-090-4266

BRIEF OF THE APPELLEE

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Defendant does not requests Oral Argument.

FILED

UTAH APPELLATE COURTS

FEB 15 2007

IN THE UTAH COURT OF APPEALS

JOHN K. CROWLEY,)	BRIEF OF THE APPELLEE
)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

JOHN K. CROWLEY,)	
)	
Plaintiff/Appellant,)	BRIEF OF THE APPELLEE
vs.)	
)	
CHRIS BLACK,)	Case No. 2006-0712 CA
)	
Defendant/Appellee.)	

SUBJECT MATTER AND APPELLATE JURISDICTION

The Court has jurisdiction from this appeal of a final order based upon Rule 3 of the *Utah Rules of Appellate Procedure*.

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES,
AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF
THE APPEAL**

Utah Code Annotated 15-1-1. Interest rates -- Contracted rate -- Legal rate.

- (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
- (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.
- (3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

STATEMENT OF THE CASE

Nature of the case

This is an appeal from a final Judgment and Order denying the Plaintiff's Motion for New Trial and granting the objection to pre-judgment interest filed by the Defendant after trial before the Third District Court – Salt Lake Department, Salt Lake County, State of Utah, assigned to the Honorable Judge Glenn K. Iwasaki, Judge Presiding (Case No. 02-090-4266 CV).

STATEMENT OF FACTS AND TESTIMONY AT TRIAL

1. The Defendant entered into a written lease with John Crowley, the Plaintiff, for the subject premises from July 1996 to December 2001. (R. 154 Transcript of Trial, page 60)

2. The Defendant acknowledged that he did not pay the last months rent but it was his understanding that he had a security deposit of one months rent paid in advance which should have been applied to the last months rent as customary in prior leases in Salt Lake County, Utah. (Transcript of Trial, page 91)

3. Mr. Black testified that during the course of the lease the property was damaged and listed the manner in which the property was damaged, but testified the damages were due to the failure of the owner to provide appropriate maintenance, repair and upkeep. (Transcript of Trial, page 70 to 96)

4. Mr. Black testified that when he moved out of the residence he had the

residence professionally cleaned. After the cleaning, the premises were inspected and any damage was minor and consistent with wear and tear of the residence. (Transcript of Trial, page 87)

5. Mr. Black stated that he repaired some of the blinds which were on the windows in the residence. When Mr. Black moved in the blinds were very old and the blinds were repaired to the best of his ability. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.) (Transcript of Trial; page 73, 91.)

6. Concerning exterior stairs of the residence, when Mr. Black moved into the residence the stairs were structurally unsound and were unuseable and any damage to the stairs was due to the failure to maintain and properly keep up that area by the owner or the company in charge of the maintenance. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.) (Transcript of Trial; page 73, 91.)

7. Mr. Black stated that in the downstairs bathroom there was constant problems with leaks which needed to be repaired or were never repaired correctly. To the best of his recollection, the company “Pro-Active Property” was contacted concerning the plumbing leaks and repairs. The damages were caused by the failure to properly take care of the leaks by the repair company and these damages should have been repaired during the term of the lease. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.) (Transcript of Trial; page 73, 91.)

8. When Mr. Black left he left a refrigerator in the residence which he had

purchased within two years from the date of his leaving and which was purchased for over \$800.00 and the amount of that credit would have paid for any incidental small damages that occurred to the residence. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.) (Transcript of Trial; page 91.)

9. Prior to trial and at trial, Mr. Black testified that during the rental the back yard was filled with scrub oak and was not used. Any damages alleged to the back yard would have occurred prior to the time Mr. Black was in the property during his lease. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.) (Transcript of Trial; page 91.)

10. In a Pretrial Affidavit, Mr. Black stated that he had not received any specific billing as to the total amount of any other damages which may have been caused during the time he was in the residence and he believes that the alleged damages of \$5,538.76 were excessive. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. at pages 34-36.)

11. During the terms of the lease, the Defendant was referred to several management companies including “Pro-Active Property Management” and “Harvard Place Management” concerning on-going problems with the premises. (Affidavit of Chris Black in Opposition to Motion for Summary Judgment: R. pages 34-36.) (Transcript of Trial; page 73, 91.)

12. At trial the Defendant testified as to the deposit for which he never received

credit. (Transcript of Trial, page 94)

13. The trial Court did not request closing arguments from the Attorneys and from the bench announced the rulings. (See Transcript of Trial, page 98-107)

14. Concerning attorney's fees, the Court ruled from the bench as follows:

THE COURT: All right. As to the issue of attorney's fees, the Court recognizes there's an attorney fees provision in there. However, that's what I want to know about what the difference is between your requested amount and what the court has granted to you.

(Transcript of Trial, page 103 -104, lines 23-2)

MR. HARRIS: My ballpark figure is \$4,236.00.

THE COURT: \$4,236.00 was the awarded amounts. Is that the amount you come up with -

MR. GAITHER: I came up with \$4,126.00

MR. HARRIS: I always go with the lesser.

(Transcript of Trial, page 104, lines 21-25)

THE COURT: And what was your requested amount? You were requesting pursuant to the testimony of Ms. Crowley, everything. What was your requested amount?

MR. HARRIS: I think it was around - I think in the Complaint - and I can look at the Complaint -

THE COURT: Please do.

MR. HARRIS: It was around \$5,000.00.

THE COURT: I think it was a little more than \$5,000.00 but . . . You're requesting \$4,500.00.

MR. HARRIS: The [inaudible] for admission today, he said \$5,538.76 in repairs to the home. That's in repairs to the home as to the damages.

MR. GAITHER: Total sum was \$9,295.00, but that included \$1,500.00 in attorney's fees.

THE COURT: Okay, minus \$1,500.00 attorney's fees. So it's 75. So you're talking six -

MR. HARRIS: Your Honor, I guess the parties didn't take into account the missing rent.

THE COURT: Well and that - and that's what I am going to do. Well he gets - he owes that \$970.25 for the rent - for nonpayment. He's made a deposit, however, that is and pursuant to your findings and proposed

findings he's to do a credit on that, right?

MR. HARRIS: That total is also included though the – in this thing.

(Transcript of Trial, page 105, lines 1-25)

THE COURT: Okay, so give me your total again then.

MR. HARRIS: \$9,295.01. That would be minus \$1,500.00 in attorney's fees. That would be minus the \$975.00 – the rent, and then we also – the breach of the lease for additional lost rent was \$1,281.25

THE COURT: And give me the testimony that you produced as to the lost rent.

MR. BARNARD: Testimony was Mrs. Crowley's testimony that – for the month that –

THE COURT: Yeah. They were repairing it. That's right. They were repairing it. They were unable to – but even in the normal – even in the normal wear and tear if you're going to be repairing, aren't you going to be downing some down time just in the normal wear and tear, Mr. Barnard?

MR. BARNARD: Yes, but hopefully not a month.

THE COURT: All right, I'm gonna give half month's rent on that. Based upon this analysis, the Court finds that while you may have prevailed on certain aspects of it, you certainly did not prevail to the total amount that you're asking for. The Court finds under these particular circumstances, there is no prevailing party. As such, no attorney's fees will be granted. However, it will be granted as to damages that I have added up here.

(Transcript of Trial, page 106, lines 1-25)

15. After trial, the Plaintiff submitted a judgment which included an award for pre-judgment interest in the amount of \$1,994.37 which was not included in the judgment from the bench. (See Proposed Findings of Fact and Conclusions of Law: R. paragraph 10, page 103.)

16. Counsel for the Defendant filed an objection to the pre-judgment interest. (R. page 110.)

17. The trial court denied the Motion for New Trial re-arguing the attorney's fees which were denied at trial and granted the objection to the pre-judgment interest. (R. page 115.)

SUMMARY OF ARGUMENT

The Plaintiff never sought pre-judgment interest or attorney's fees in the Complaint or at the time of the Motion for Summary Judgment. The Plaintiff never made any argument or claim at trial nor did they introduce any foundation upon which interest could be awarded with a mathematical certainty required of pre-judgment interest claim.

The question of awarding of attorney's fees and pre-judgment interest were the province of the trial court to make a ruling based upon the findings of fact made by the trial court. At the trial, Counsel for the Defendant argued that no attorney's fees should be awarded because of the excessive claims made by the Plaintiff and cross examined a witness, the wife of the Plaintiff, who on the stand at trial admitted that the Plaintiff owed damages which the Plaintiff's own expert witness said should be costs of the landlord.

The trial judge entered into a total evaluation of the entire case including the amount claimed and the amount awarded and ruled in his sound discretion that there should not be attorney's fees awarded in light of the totality of all issues.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED ATTORNEY'S FEES TO THE PLAINTIFF IN LIGHT OF ALL THE EVIDENCE INTRODUCED AT TRIAL.

The award of attorney's fees is . . . in the 'sound discretion of the trial court.'"

Willey v. Willey, 951 P.2d 226, 230 (Utah 1997) (quoting *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)). The Court said this is based on the trial judge's familiarity with the particular litigation and with attorney's fees in general. A trial court is much better suited to determine reasonable attorney's fees than is an appellate court, which can only consider evidence that is in the record. *Willey v. Willey*, 951 P.2d 226, 232 (Utah 1997)

Significantly during the course of the trial, Nancy Crowley, the wife of the Plaintiff and one of the owners of the property testified as follows on cross-examination:

Q. [*Randall Gaither, Attorney for the Defendant*] Now you've heard the testimony here concerning – by Mr. Reynolds, indicating that some of these damages, say the master bathroom, were responsibilities of the owner, and some were the responsibilities of the tenant. You heard him make those statements?

A. [*Nancy Crowley*] I did, sir.

Q. [*Randall Gaither, Attorney for the Defendant*] Isn't it correct that prior to today, you were insisting on Mr. Black paying all the damages for the master bathroom and everything you paid Mr. Reynolds?

A. [*Nancy Crowley*] Yes, sir.

Q. And so you were actually asking Mr. Black before the testimony here today at trial, to pay excessive damages and demanding that he pay excessive damages for items which your own property manager has said that you have to pay?

A. Yes, sir. (Transcript of Trial, page 54, lines 1-15)

A review of the Affidavit of Chris Black, filed in opposition of the Motion for

Summary Judgment will indicate that Mr. Black had received a billing as early as February of 2003, over three years prior to trial, he insisted that the Plaintiff was asking for excessive damages. (See Affidavit of Chris Black in Opposition to Motion for Summary Judgment. R. page 30, paragraph 10. R. page 36.) In that same Affidavit, Mr. Black indicated that he did not receive sufficient credit for his deposit which he was finally granted at trial. (See Affidavit of Chris Black in. R. page 30, paragraph 11. R. page 36). If the damages were subject to mathematical certainty and not excessive, the Court would have granted the summary judgement.

At the trial in this matter, the trial judge at the hearing heard and carefully balanced all claims and weighed all of the evidence at trial. (See Oral Findings from the bench set forth in *Statement of Facts* in this Brief at page 4-6.) The Plaintiff had been demanding excessive amounts of damages which was validated by the expert witness called by the Plaintiff at trial. In the expert testimony, he allocated many billed costs to the landlord. The unreasonable position of the Plaintiff as to excessive damages for matters not attributable to the tenant was one of the basis for the denial of attorney fees at trial. After trial, a Motion for New Trial was filed by the Appellant on this same issue and the trial Judge again ruled that the prior finding and judgement requiring each party to pay their own attorney's fees did not warrant a new trial.

Mr. Black testified that during the course of the lease the residence was damaged, but the damage was due to the failure of the owner to provide appropriate maintenance,

repair, and upkeep. When Mr. Black moved out of the residence he testified that the residence was professionally cleaned and after the cleaning the premises were inspected and any damage was minor and consistent with wear and tear of the residence.

The Court have held that the calculation of reasonable attorney's fees is within the sound discretion of the trial court and will not be overturned absent a clear showing of abuse of discretion. *Dixie State Bank*, 764 P.2d at 988 (Utah 1992) The standard of review on appeal of [the amount of] a trial court's award of attorney's fees is patent error or clear abuse of discretion." *Valcarce v. Fitzgerald*, 961 P.2d 305 at page 316 (Utah 1998)

The determination of which party is the prevailing party for purposes of an attorney fee award is an appropriate question for the trial court. This question depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court. On appeal, this Court reviews the trial court's determination as to who was the prevailing party under an abuse of discretion standard. *Chang v. Soldier Summit Development*, 82 P.3d 203, 2003 UT App 415 (Utah App. 12/04/2003) Otherwise, this Appellate Court will have to reconsider all issues concerning leaking plumbing, damaged paint, and claims of damage or offsets and essentially retrying this case.

Which, if any, party is the prevailing party is an appropriate question for the trial court. *R.T. Nielson Co. v. Cook*, 2002 UT 11 (Utah 01/25/2002) In this decision, the

Court set forth findings to be applied in the context of each case. The discretion of the trial court allows for the balancing as to who was the prevailing party. Appropriate considerations for the trial court here were the number of claims and the importance of the claims relative to each other in the context of the lawsuit considered as a whole. Here, Judge Iwasaki specifically questioned the dollar amounts if attorney's fees proffered attached to and awarded in connection with the various claims as well as the total award. Based on these and other relevant factors, the trial court ruled:

THE COURT: Yeah. They were repairing it. That's right. They were repairing it. They were unable to – but even in the normal – even in the normal wear and tear if you're going to be repairing, aren't you going to be downing some down time just in the normal wear and tear, Mr. Barnard?

MR. BARNARD: Yes, but hopefully not a month.

THE COURT: All right, I'm gonna give half month's rent on that.

Based upon this analysis, the Court finds that while you may have prevailed on certain aspects of it, you certainly did not prevail to the total amount that you're asking for. The Court finds under these particular circumstances, there is no prevailing party. As such, no attorney's fees will be granted. However, it will be granted as to damages that I have added up here.

(Emphasis added)

(Transcript of Trial, page 106, lines 1-25)

The Court should note that in the Appellant's Brief, the Appellant asserts that it prevailed on "the bulk" of damages which he had sought in his Complaint. (See Brief of the Appellant, page 24.) But in this matter, the Defendant prevailed on issues such as awarding him credit for deposits and avoiding unnecessary claims by the landlord which were made in pre-trial motions, including a Motion for Summary Judgment. A review of the Motion for Summary Judgment will show that the damages sought in the Complaint and Motion for Summary Judgment are substantially more than were actually awarded at

trial. Therefore, the ruling of the trial court as to attorney's fees should not be reversed.

POINT II

THE PLAINTIFF DID NOT CLAIM PRE-JUDGEMENT INTEREST AT TRIAL OR PRODUCE SUFFICIENT EVIDENCE TO OBTAIN A JUDGMENT FOR PRE-JUDGMENT INTEREST.

A review of the record in this case will indicate that there is no complaint for pre-judgment interest set forth in the Complaint filed in May, 2002 by the Plaintiff. (See R. page 1, 2 & 3.) Later, the Plaintiff filed a Motion of Summary Judgement and there was no claim made at that time for any prejudgment interest. (See Motion for Summary Judgement.) The record will reflect that there was no opening or closing statements made at trial in which the Attorney's for the Plaintiff asked for or claimed pre-judgment interest. (See Transcript of Trial: R. page 154, page 1 & 98.) The Defendant submits that no factual foundation was made for any claim.

The trial Court, in the ruling made no mention of pre-judgment interest. (See Minutes of Bench Trial, page 80-81.) After the trial, Counsel for the Plaintiff prepared a proposed Judgment and included the "pre-judgment interest". This was the first time that the issue of pre-judgment interest appears in any manner in the record or transcript. Counsel for the Defendant filed an Objection to the proposed Judgment based upon the fact that there was no award of pre-judgment interest in the ruling of the trial court. (See Objection to Order and Judgment: R. page 110.) After the trial, the Plaintiff attended to

re-argue the specific ruling denying attorney's fees by filing a Motion for New Trial on the issue of attorney's fees. (See Motion for New Trial: R. pages 90-91.) The Motion for New Trial and the objections to the Judgment as to pre-judgment interest came before the Court on June 9, 2006 and the trial Judge denied the Motion for New Trial and denied the objections as to interest. (See Minutes of Law and Motion; page 116.)

Without any clear factual information, Plaintiffs' alleged damages could not be measured by "facts and figures" or "calculated with mathematical accuracy". *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989) Under these circumstances, the trial court correctly denied plaintiffs prejudgment interest. *First Sec. Bank of Utah v. J.B.J. Feedyards, Inc.*, 653 P.2d 591, (Utah 1982); see also *Bellon v. Malnar*, 808 P.2d 1089, 1097 (Utah 1991).

A court can award pre-judgment interest only when the loss is fixed at a particular time and the amount can be fixed with accuracy." *Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207 (Utah App. 1992). *Smith v. Linmar Energy Corp.*, 790 P.2d 1222 (Utah App. 1990). If the finder of fact must determine the loss by using its best judgment as to valuation rather than fixed standards of valuation, prejudgment interest is inappropriate. *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah) cert. denied, 431 U.S. 930, 97 S. Ct. 2634 (1977) (where the Court indicated damages cannot be calculated with mathematical accuracy, the amount of the damage must be ascertained and assessed by the trier of fact and prejudgment interest is not allowed).

As set forth, a review of the proceedings in this matter will indicate that the Defendant failed to request pre-judgment interest prior to trial or at trial. Only after the trial did the Plaintiff attempt to submit a Judgment seeking the pre-judgement interest.

There were never any specific dates and time introduced at trial or found by the court which would apply the mathematical formula for pre-judgment interest. This was a matter where a review of the Complaint will indicate that the Plaintiff was asking for costs, damages, expenses, lost rent and other matters totaling an amount which was substantially more than the Plaintiff was awarded at trial when the Court sorted the case out issue by issue. This is not a pre-judgment case and the Plaintiff failed to request pre-judgment interest in any manner and only belatedly attempted to tack pre-judgment interest on after the ruling of the trial Judge.

CONCLUSION AND REQUEST FOR RELIEF


This matter was submitted on all issues to a bench trial to the Third District Court. The Court in ruling from the bench considered all issues and took into account all of the evidence at trial and reached a verdict as to attorney's fees appropriate in light of the Court's findings at trial.

The issue of attorney's fees and pre-judgment interest were the province of the trial court to make a ruling based upon the findings of fact made by the trial court. At the trial, Counsel for the Defendant argued that no attorney's fees should be awarded because

of the excessive claims made by the Plaintiff and in fact called a witness, the wife of the Plaintiff, who on the stand at trial insisted that the Plaintiff owed damages which the Plaintiff's own expert witness said should be costs of the Plaintiff. This clearly demonstrated to the trial court an attitude of the Plaintiff which caused unnecessary and unreasonable attorney's fees based upon unreasonable pretrial demands.

The trial judge after hearing all the witnesses in person and reviewing all pictures and documents entered into a total evaluation of the entire case in which in his sound discretion ruled that there should not be attorney's fees awarded. This sound discretion was re-affirmed when the Plaintiff made a Motion for New Trial which the trial Court denied and should be reaffirmed on appeal.

DATED this 15 day of February, 2007.



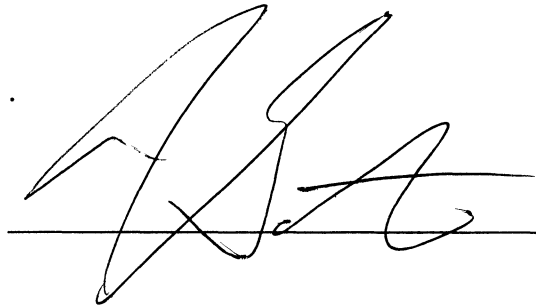
RANDALL GAITHER
Attorney for the Appellee

MAILING CERTIFICATE

I hereby certify that on the 15 day of February, 2007, two true and correct copies of the foregoing BRIEF was mailed First Class, postage prepaid to:

BRIAN M. BARNARD
UTAH LEGAL CLINIC
ATTORNEY FOR THE PLAINTIFF/APPELLANT
214 EAST FIFTH SOUTH STREET
SALT LAKE CITY, UTAH 84111-3204

DATED this 15 day of February, 2007 .

A handwritten signature in black ink, appearing to be "B. Barnard", is written over a horizontal line.