

1995

Julie Weaver and Catherine Palmer v. Brite Music Enterprises, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 950512-CA

JULIE WEAVER AND CATHERINE
PALMER,

APPELLANTS,

-VS-

BRITE MUSIC ENTERPRISES,
INC.,

APPELLEE.

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Case No. 950512-CA

REPLY OF APPELLANTS

On Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Glenn K. Iwasaki, District Judge

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Priority Classification: 15

FILED

FEB 20 1996

IN THE UTAH COURT OF APPEALS

JULIE WEAVER AND CATHERINE PALMER,	:	
	:	
APPELLANTS,	:	
	:	Case No. 950512-CA
-vs-	:	
	:	
BRITE MUSIC ENTERPRISES, INC.,	:	
	:	
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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	4
POINT I	5
<p>ASSUMING THAT THE CONTRACTUAL PROVISION AT ISSUE IS UNAMBIGUOUS, THE TRIAL COURT FAILED TO INTERPRET THE CONTRACT SO AS TO HARMONIZE ALL OF ITS PROVISIONS. THE APPEALS COURT IS TO GIVE NO DEFERENCE TO THE TRIAL COURT'S INTERPRETATION AND THE APPEALS COURT IS TO CONSTRUE THE CONTRACTUAL PROVISION AT ISSUE IN LIGHT OF THE PRINCIPLES OF CONSTRUCTION APPLICABLE TO UNAMBIGUOUS CONTRACTUAL PROVISIONS.</p>	
POINT II	9
<p>BY FAILING TO IDENTIFY WITH CERTAINTY THE PARTY WHO CAN EXERCISE THE CARRY-OVER POINT REDEMPTION PROVISION OF THE CONTRACT, BRITE HAS RENDERED THE PARAGRAPH UNCERTAIN AND AMBIGUOUS. THE CONTRACTUAL PROVISION AT ISSUE MUST THEN BE INTERPRETED IN LIGHT OF THE PRINCIPLES OF CONTRACT CONSTRUCTION APPLICABLE TO UNCERTAIN OR AMBIGUOUS CONTRACT PROVISION.</p>	
POINT III	16
<p>THE APPELLANTS PROPERLY RAISED THE ISSUE OF WAIVER AND ESTOPPEL BEFORE THE TRIAL COURT. THE ISSUES OF WAIVER AND ESTOPPEL HAVE NOT BEEN FIRST PRESENTED IN THIS MATTER ON APPEAL.</p>	
CONCLUSION	20

TABLE OF AUTHORITIES

CASES CITED	<u>Page</u>
<u>Abbott v. Christensen</u> , 660 P.2d, 254, 257 (Utah 1983)	12
<u>Buehner Block v. UWC Associates</u> , 752 P.2d 892 (Utah 1988)	7
<u>Canfield v. Albertsons</u> , 841 P.2d 1224 (Ut. App. 1992)	5
<u>Cruz v. Molina</u> , 788 F.Supp. 122 (D. Puerto Rico 1992) . .	10, 11
<u>Eie v. St. Benedict's Hospital</u> , 638 P.2d 1190 (Utah 1981)	15, 20
<u>Klienert v. Kimball Elevator Company</u> , 1995 WL 613775, 275 Utah Adv. Rep. 44, (Ut. App. 10/19/95)	6, 14, 21
<u>Matter of Estate of Justheim</u> , 824 P.2d 432 (Ut. App. 1991)	17
<u>Zions First National Bank v. Rocky Mountain Irrigation, Inc.</u> 795 P.2d 658, 663 (Utah 1990) . . .	19, 20
 STATUTES AND RULES CITED	
Section 70A-1-205(1) U.C.A.	15
Section 70A-2-102 U.C.A.	15
Utah Rule of Civil Procedure 15(b)	18, 19, 20
 ADDENDUM	
Exhibit A	Motion for New Trial
Exhibit B	<u>Cruz v. Molina</u> , 788 F.Supp. 122

JULIE WEAVER AND CATHERINE PALMER,	:	
	:	
APPELLANTS,	:	
	:	Case No. 950512-CA
-vs-	:	
	:	
BRITE MUSIC ENTERPRISES, INC.,	:	
	:	
APPELLEE.	:	

REPLY OF APPELLANTS

The matter before the Court relates to the construction of the following provision (the "Subject Paragraph") of the agreement between the Appellants, Julie weaver and Catherine Palmer, and the Appellee, Brite Music Enterprises, Inc. ("Brite").

As you continue to exceed 1200 points per month, the increasing carry-over points may accumulate for as long as you desire; however, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100. Redeeming points in this manner does not affect your life-time point accumulation or the benefits you may eventually derive therefrom. (emphasis added by Appellants)

The question to be answered by this Court is; did the trial court commit error by deciding, as a matter of law, who had the right to redeem the carry-over points?

The question of who had the redemption right is central to this case on appeal. The Appellate Court may answer this question

as a matter of law, if it determines that the Subject Provision is unambiguous; or, if the Court determines that the provision is uncertain or ambiguous, the Court should remand this question of law and fact to a jury to properly determine who had the right to redeem the carry-over points.

Because this matter was decided at the trial court on a Motion for Directed Verdict, the Appellate Court should give no deference to the factual findings or legal conclusions of the trial court. Canfield v. Albertsons, 841 P.2d 1224 (Ut. App. 1992).

POINT I

ASSUMING THAT THE CONTRACTUAL PROVISION AT ISSUE IS UNAMBIGUOUS, THE TRIAL COURT FAILED TO INTERPRET THE CONTRACT SO AS TO HARMONIZE ALL OF ITS PROVISIONS. THE APPEALS COURT IS TO GIVE NO DEFERENCE TO THE TRIAL COURT'S INTERPRETATION AND THE APPEALS COURT IS TO CONSTRUE THE CONTRACTUAL PROVISION AT ISSUE IN LIGHT OF THE PRINCIPLES OF CONSTRUCTION APPLICABLE TO UNAMBIGUOUS CONTRACTUAL PROVISIONS.

Both in the statement of Brite's first argument, and in its conclusion, counsel for Brite states that Appellants have failed to carry their burden of proof. Burden of proof is a factual analysis that cannot be determined on a Motion for Directed Verdict, if any evidence is presented in opposition thereto. Although a trial court can interpret an ambiguous contract as a matter of law, and thereby resolve a dispute, the trial court cannot take a factual issue (requiring a burden of proof analysis), away from a jury on a Motion for Directed Verdict.

In this Court's recent decision of Klienert v. Kimball Elevator Company, 1995 WL 613775, 275 Utah adv. Rep. 44, (Ut. App. 10/19/95), this Court held that:

On appeal from a directed verdict, 'we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained.' Gourdin v. Sharon's Cultural Educ. Rec. Ass'n., 845 p.2d 242, 243 (Utah 1992) (quoting Graystone Pines, 652 P.2d at 898). Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. See Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 246 (Utah 1992). (emphasis added)

The Brief of the Appellee is directed against the use of the principles of construction that relate to ambiguous provisions of a contract. Brite disregards the principles of construction that are applicable to contractual provisions that are not ambiguous. This portion of the Appellants' Reply Brief will address the construction of an unambiguous provision.

The Appellants and Brite have both made reference to the fact that there are three logical possibilities for the construction of the subject language (Appellants' Brief at p. 28, Appellee's Brief at p. 13), these are: (1) that only the sales representatives can exercise the redemption provision; (2) that both the sales representatives and Brite can exercise the redemption provision; or (3) that only Brite can exercise the redemption provision. To determine that the Subject Paragraph is not ambiguous, it is

necessary to conclude, as a matter of law, that one of the three possibilities is the proper construction.

In order for this Court to find that the provision is not ambiguous, it must find within the four corners of the Subject Paragraph something that establishes who had the right to exercise the redemption provision.

Because the party who may redeem the carry-over points is not expressly identified in the second sentence of the paragraph in question, the only analysis that is helpful to making this determination is one of harmonizing the subject paragraph as a whole, and giving effect to all of its terms. The Utah Supreme Court, in speaking of unambiguous contractual provisions which may be interpreted as a matter of law, stated in the case of Buehner Block v. UWC Associates, 752 P.2d 892, 895 (Utah 1988), that:

[t]he interpretation of a written contract may be a question of law determined by the words in the agreement. In this regard, a cardinal rule in construing such a contract is to give effect to the intentions of the parties, and if possible, these intentions should be gleaned from an examination of the text of the contract itself. Additionally, it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, and all of its terms should be given effect if it is possible to do so. (emphasis added)

It is compelling that the antecedent of every other phrase in the paragraph refers exclusively to the sales representative by the use of the pronouns "you" or "your". There is nothing in the language that possibly inserts the notion that Brite had the right to exercise the redemption provision, or any other right in the

Subject Paragraph. The only reference to Brite is to indicate that Brite is the source of the funds for the redemption of the carry-over points, if the person having the right to redeem exercises such right.

The fact that Brite is the source of the funds is totally unhelpful in answering the question of who had the right to exercise the redemption of the points. The fact that Brite was the source of the funds is completely consistent with the conclusion that the sales representative alone had the right to redeem the carry-over points, which Brite would pay for. As the sales representative continued "to exceed 1,200 points per month" and as the sales representative chose, in the alternative, to accumulate those points "for as long as you [the sales representative] desire", the redemption provision merely provided the sales representative with the option to redeem for cash instead of continuing to accumulate his or her carry-over points.

The second compelling argument based upon the objective of harmonizing, and giving effect to, all of the provisions of the paragraph is the expressly stated concept that the sales representative could accumulate the carry-over points for as long as the sales representative desired. This clearly stated right of the sales representative is contained in the first part of the single sentence describing the accumulation and redemption of the carry-over points. The sentence helps us to convincingly answer the question; "Who can redeem the points?"

It is logically inconsistent, and would totally disregard the notion of harmonizing all portions of this single sentence, to say that Brite could exercise the redemption provision when the contractual term clearly says that the sales representatives could accumulate the points for as long as they wanted to. Assuming that the trial court's construction of this provision is correct, Brite gave an unfettered right to the sales representative to accumulate carry-over points indefinitely, then took that right away in the very same breath.

When construed in the light most favorable to the Appellants, and construed in a manner to harmonize and give effect to the entire contractual provision, the Appeals Court should determine that the carry-over point redemption provision could only be exercised by the Appellant sales representatives.

POINT II

BY FAILING TO IDENTIFY WITH CERTAINTY THE PARTY WHO CAN EXERCISE THE CARRY-OVER POINT REDEMPTION PROVISION OF THE CONTRACT, BRITE HAS RENDERED THE PARAGRAPH UNCERTAIN AND AMBIGUOUS. THE CONTRACTUAL PROVISION AT ISSUE MUST THEN BE INTERPRETED IN LIGHT OF THE PRINCIPLES OF CONTRACT CONSTRUCTION APPLICABLE TO UNCERTAIN OR AMBIGUOUS CONTRACT PROVISION.

Brite argues in its Brief that several of the principles of construction urged by the Appellants are not applicable in this matter, because the trial court determined that the Subject Paragraph was unambiguous. As stated above, this Court can make its own determination regarding this conclusion without giving deference to the determination of the trial court. If, however, the identity of the person who can exercise the redemption clause

is at all uncertain or ambiguous, each of the legal principles referred to herein are applicable.

With regard to the ambiguity of this provision, Brite's own counsel acknowledges the uncertainty. During the examination of Mr. Vassel¹ at trial, the following discussion took place (Vassel p. 52). The questions are by Brite's counsel:

Q I want to clarify that we are not talking about accumulating points here. We are talking about redeeming those points?

A Okay.

Q Clearly, and I have no problem with the fact that a marketing associate [i.e. the sales representative] can elect to redeem if they choose to, right?

A Right.

Q Is there anything in this that says that the company cannot redeem also?

A Doesn't say either way.

Q Right. Just says they [the carry-over points] can be redeemed, doesn't it? (emphasis added)

Since it "doesn't say either way" whether or not Brite has the right to redeem the carry-over points, it is entirely appropriate for the Appellate Court to determine that the provision is uncertain or ambiguous.

A determination of ambiguity is particularly appropriate when there is uncertainty as to which party to a contract is empowered with a specific right. A case in point is that of Cruz v. Molina,

¹ Mr. Vassel was the former executive vice president of Brite.

788 F.Supp. 122, 124 (D. Puerto Rico 1992). A copy of the case is included as Exhibit "B" in the Addendum to this Reply Brief.

In the Cruz case, a written lease gave a right of termination to one of the parties. It was unclear, however, which party had the right to exercise the termination provision. Although the lease was in the Spanish language, the principle applied in the case had nothing to do with the language in which the lease was written. The court, however, determined that the provision was ambiguous, and stated as follows:

The clause is ambiguous because it is unclear who has the right to terminate upon advance notice. (emphasis added)

In construing the ambiguous provision now before this Court, the Appellate Court should consider (a) the testimony as to who was the scrivener of the document; (b) what the parol evidence was regarding the answer to the question of who had the right to exercise the redemption provision; and (c) what the course of dealing had been between the parties for more than eight years with regard to this provision. In fact, this testimony was received by the trial court and heard by the jury, without objection by counsel for Brite.

Based upon this testimony, and the uncertainty as to the central issue of this matter, it was error for the trial court to grant the Motion for Directed Verdict and remove these factual issues from the consideration of the jury.

The evidence was clear that the sole scrivener of the document was Brite and its agents (Brady p. 10, lines 8-16; quoted at page

24 of Appellants' original Brief). Because of the uncertainty as to who had the right to exercise the redemption provision, and the principle of law that the contract is to be interpreted against the scrivener, Abbott v. Christensen, 660 P.2d, 254, 257 (Utah 1983), the question of the interpretation of the contract should have been submitted to the jury, with a proper instruction regarding this principle of construction.

Extensive testimony was also introduced by the Appellants, including testimony of admissions made by Brite's executive officers, that only the sales representatives had the right to exercise the redemption provision (Palmer pp. 31-33; p. 86, lines 9-12; p. 90, lines 2-3; Vassel p. 39; and see the text of Catherine Palmer's testimony as quoted at pages 39 and 40 of the original Brief of the Appellants).

This parol evidence, and other testimony given at the trial, supported a long-standing course of dealing between the parties that only the sales representatives were entitled to exercise the redemption provision (Palmer p. 86, lines 9-12; p. 90, lines 2-3).

Further, the purpose of the carry-over points should be considered in harmonizing the language of the provision. The testimony received at trial regarding the purpose of the carry-over points was that the points were to be used to maintain the highest compensation level, at times when a sales representative devoted less time to personal sales activity. This use included retirement (Vassel P. 22, lines 9-13), maternity leave (Brady p. 18), sick leave (Brady p. 19), etc.

The former executive vice president of Brite explained these purposes in large sales meetings of 75 to 200 sales representatives in various states. At page 23 of his testimony, Mr. Vassel said that his discussions with sales representatives were as follows:

This month I will work hard, I will sell and sponsor and I will get points for both, but next month if I'm sick or next month if I, even though my business efforts don't hit 1,200, the company permits me to take the difference and get up to that 1,200 level.' And so, I mean, it was a marvelous plan and we openly extolled it, and we went around saying, look at Julie Weaver, look at Catherine Palmer, look at Nedra. These people have one or two or three years where they literally could retire or have a baby or whatever and the carryover points were still there for them.

These matters should have been properly submitted to the jurors to consider the inconsistency of stating that, on the one hand, the carry-over points could be accumulated by a sales representative for (a) years of retirement, (b) months of maternity leave, or (c) years of church missionary service, if it was Brite who could exercise the redemption provision and redeem the accumulated points for a few hundred dollars. The redemption payment would be totally inadequate to provide the benefits as represented by the President and other executive officers of Brite. Given three opportunities to explain such inconsistency, Mr. Brady²

² A founder and the president of Brite (Brady p. 5 and 6).

could not reconcile such diametrically opposed notions. At the trial, Mr. Brady testified as follows:

Q Now, if in drafting these terms that you've indicated so far, Mr. Brady, if Brite Music could redeem at will for \$100, wouldn't that be incon -- if the right was in Brite to redeem for \$100 wouldn't that be inconsistent with the term 'as long as you desire?' Wouldn't that be inconsistent?

A I'm not sure I can answer that (Brady p. 29, lines 21-25, p. 30, lines 1-2).

Clearly, if Mr. Brady could not resolve this inconsistency, this matter should have been submitted to the jury to determine the proper meaning of the Subject Paragraph. This is particularly the case because Brite's Motion for a Directed Verdict must be judged in the light most favorable to the party opposing the Motion. Klienert v. Kimball Elevator Company, 1995 WL 613775, 275 Utah Adv. Rep. 44, (Ut. App. 10/19/95)

Because the Subject Paragraph is ambiguous, the principles of construction clearly compel submission of this matter to the jury, and preclude the determination of this case on a Motion for Directed Verdict.

The only other legal argument of Brite regarding the interpretation of the ambiguous language is Brite's assertion at page 14 of the Brief of Appellee that "course of dealing" are "commercial transaction terms governed by Article II of the Uniform Commercial Code". Brite then states that the matter before the Court is not a commercial transaction and that the application of such concept is not appropriate. This argument is without merit.

Appellants acknowledge that Article II of the Uniform Commercial Code is applicable to "transactions in goods" (see U.C.A. 70A-2-102), of which this case is not an example. However, the portion of the Code applicable to course of dealing is contained in Article I, not in Article II.

U.C.A. 70A-1-205(1) provides as follows:

A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Additionally, Appellants note that the concept of using the course of dealing between parties as a means of interpreting their contracts is a principle used in all aspects of the law and is not limited exclusively to the Uniform Commercial Code. An example of this is its application to contracts for services rendered, which contracts are without the scope of the Uniform Commercial Code. The application of this principle is found in the case of Eie v. St. Benedict's Hospital, 638 P.2d 1190, 1195 (Utah 1981).

The Eie case is based upon an agreement for services between the hospital and individuals providing paramedic services in the Ogden area. At page 1195 of its opinion, the Court interpreted the services contract in light of the course of dealing of the parties, and stated as follow:

Finally, the course of dealing of the parties gives some indication of their intentions. Throughout the entire time the agreement was in force, the hospital reimbursed to plaintiff 90% of the bill. At no time did it pay a flat \$90 fee. Furthermore, plaintiffs made no protest until after the contractual

relationship was terminated in February 1977. Though arguably clear on its face, where the parties demonstrate by their actions that to them the contract meant something quite different, the intent of the parties will be enforced. (emphasis added)

Based on the testimony given at trial on the three principles of judicial construction discussed in this section, the proper interpretation of the Subject Paragraph cannot be determined as a matter of law on a Motion for Directed Verdict.

POINT III

THE APPELLANTS PROPERLY RAISED THE ISSUE OF WAIVER AND ESTOPPEL BEFORE THE TRIAL COURT. THE ISSUES OF WAIVER AND ESTOPPEL HAVE NOT BEEN FIRST PRESENTED IN THIS MATTER ON APPEAL.

Attached as Exhibit "A" in the Addendum to this Reply Brief is a copy of the Appellants' Motion for a New Trial and to Amend the Findings of Fact and Conclusions of Law which was filed with the trial court (R. 697-699). This document was also attached as Exhibit "D" and incorporated into Appellants' trial court Memorandum in support of its post-trial motions (R. 726-752). The fourth numbered paragraph of the Motion urges the trial court to amend its findings to make them complete and address the matter of estoppel and waiver.

The issues of estoppel and waiver should have been submitted to the jury for the jurors' determination, because they were factual issues that could not be determined as a matter of law. The submission of these matters to the jury was urged by Appellants' counsel on the second day of the trial as counsel was arguing the Motion for Directed Verdict to the Court. When the

trial court asked Appellants' counsel about estoppel, Brite's counsel interrupted the argument to confirm that estoppel had not been pled. Counsel for Appellants stated "that's [estoppel] argument to the jury." Appellants' counsel continued; "The complaint doesn't have to plead estoppel or waiver . . . it is not a deficiency at all now" (R. 54).

Though perhaps not artfully stated, abundant testimony of waiver and estoppel had been submitted to the jury, without objection. There is no deficiency in pleadings when the issue has been presented in testimony to the jury. The matter was properly before the trial court and the jury, and the jury should have properly been instructed on these issues for their factual determination.

The case of Matter of Estate of Justheim, 824 P.2d 432 (Ut. App 1991), cited by the Appellee, is distinguishable from the matter now before the Appellate Court. In Justheim, the case had not been decided on a motion for directed verdict. The case had, in fact, been submitted to the jury. There had been no instruction to the jury, and no argument to the court or jury on the issue of estoppel before the matter was submitted to the jury. As stated by the Justheim Court, the estoppel theory was first mentioned in the post-trial motion of the Appellants.

In the matter now before the Appellate Court, the issues of waiver and estoppel were raised in the argument on the Motion for Directed Verdict, while the jury was waiting in the jury room outside of the hearing of the court. Counsel for Appellants argued

that the issues were to be properly submitted to the jury. These issues were again raised in the post-trial motions of the Appellants, all of which is timely before the submission of the case to the jury.

Ample evidence was admitted at trial that officers of Brite had stated, on several occasions, that (a) only the sales representatives had exercised the carry-over point redemption provision, and (b) that this right was that of the sales representatives (Palmer p. 86, lines 9-15, and quoted at p. 39 of Appellants' original Brief; Palmer pp. 31-33, quoting Mike Perry and quoted at p. 46 of the Appellants' original Brief; Bruno Vassel p. 39, and quoted at p. 41 of Appellants' original Brief).

This evidence and these admissions by its own officers demonstrate that Brite was estopped from denying the proper interpretation of the redemption provision. Brite had waived any position that it had that someone other than the sales representative could exercise the redemption provision. Whether the admitted testimony was totally dispositive of the issue, is irrelevant here. In all events, such testimony should have been submitted to the jury.

Rule 15(b) of the Utah Rules of Civil Procedure provide that "when issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings". A matter is tried by express or implied consent when testimony is admitted at

trial on the issues not raised in the original pleadings, without objection of opposing counsel.

In the case of Zions First National Bank v. Rocky Mountain Irrigation, Inc., 795 P.2d 658, 663 (Utah 1990), the Utah Supreme Court held that it was mandatory for the trial court to submit evidence to a jury on issues presented at trial when there was a failure to object to evidence which was outside the scope of the pleadings. In its holding, the Court stated:

Our rules of civil procedure require that the pleadings be conformed to the evidence presented at trial when no objection is made to the introduction of such evidence. Utah R.Civ.P 15(b); see *Poulsen v. Poulsen*, 672 P.2d 97 (Utah 1983) (mandatory for trial court to grant leave to amend to conform to evidence); *General Ins. Co. V. Carniecero Dynasty Corp.*, 545 P.2d 502, 505-06 (Utah 1976) (failure to object to evidence outside scope of pleadings is implied consent to try issue raised by such evidence). The trial court has no discretion to deny such an amendment. *General Ins. Co.*, 545 P.2d at 506. By not giving the proposed instructions on common law fraud and attempted theft by deception, the trial court failed to comply with Rule 15(b). Furthermore, our case law requires that the trial court instruct the jury on each party's theory of the case so long as it is supported by competent evidence. (citations omitted, emphasis is that of the Supreme Court)

It should be further noted that there is no requirement that a party make a motion to amend its pleadings to conform to the evidence. The express or implied consent to the consideration of an issue is sufficient for the presentation of the matter to a jury, or for the issue to be the basis of a judgment entered in a matter.

In the case of Eie v. St. Benedict's Hospital, 638 P.2d 1190, 1194 (Utah 1981), the Utah Supreme Court, citing other Utah authorities, stated that Rule 15(b) of the Utah Rules of Civil Procedure:

Further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require, 'failure so to amend does not affect the result of the trial of these issues.' This idea is confirmed by Rule 54(c)(1), U.R.C.P.: '[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'

In the Zions Bank case supra, the Supreme Court held that the trial court erred in not instructing the jury on the issues admitted pursuant to the testimony presented at trial. In the matter now before the Appellate Court, the trial court erred in failing to submit the case to the jury based upon the issues of waiver and estoppel.

CONCLUSION

If the Appeals Court determines that the Subject Paragraph is ambiguous, then this matter should be remanded to the trial court for submission to a jury with proper instruction to construe the Subject Paragraph in accordance with the principles of construction of ambiguous documents. In such event, the jury should rightfully determine the factual issues bearing on the construction of the agreement of the parties.

Further, if this Court, in de novo consideration of this matter, agrees that the issue of waiver and estoppel were properly

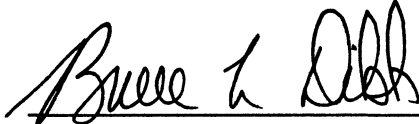
raised and argued to the trial court then, under the standard set forth in the Kleinert case, supra, there is clearly sufficient testimony of waiver and estoppel that would preclude the granting of a Motion for Directed Verdict by the trial court. In such event, the jury should rightfully determine the factual issues relating to waiver and estoppel, and this matter should be remanded for their consideration.

If this Court determines, however, that the Subject Paragraph is unambiguous, then the Appeals Court should analyze de novo, the Subject Paragraph and interpret the redemption provision in light of the principles of contract construction established by this Court. These principles provide that a contract should be interpreted so as to harmonize all of its provisions and all of its terms. Based upon the argument set forth in Point I of this Reply Brief, Appellants submit that the answer to the question; "Who can redeem the carry-over points?" is that only the sales representatives have this redemption right.

If the Appeals Court determines, as matter of law, that only the sales representatives can exercise the carry-over point redemption provision, then the trial court erred, and this matter should be remanded to the trial court with instructions that only Weaver and Palmer are able to exercise the redemption provision. Then the balance of the case, relating to the breach of the

contract by Brite and the damages suffered by the Appellants, should be submitted to the jury.

RESPECTFULLY SUBMITTED this 20th day of February, 1996.



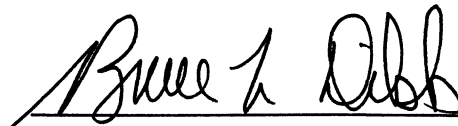
BRUCE L. DIBB
JENSEN, DUFFIN, CARMAN,
DIBB & JACKSON

Mailing Certificate

I hereby certify that I mailed two copies of the foregoing Reply of Appellants and attached Addendum to the counsel for the Appellee by placing true copies thereof in an envelope addressed to:

Rick J. Sutherland
P.O. Box 770
Park City, Utah 84060

postage prepaid, this 20th day of February, 1996.



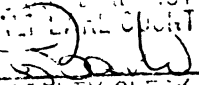
ADDENDUM

Exhibit A

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THOMAS A. DUFFIN (927)
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THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY 
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JULIE WEAVER and)	
CATHERINE PALMER)	
)	MOTION FOR A NEW TRIAL
)	AND TO AMEND THE FINDINGS OF
Plaintiffs,)	FACT AND CONCLUSIONS OF LAW
)	
vs.)	
)	
BRITE MUSIC ENTERPRISES, INC.,)	Civil No. 91093124CN
)	
Defendants.)	Judge Iwasaki

Pursuant to Rule 59(a), Utah Rules of Civil Procedure, New trials; amendments of Judgment, and more particularly pursuant to (a) Grounds, (6) and (7), the Plaintiffs, Julie Weaver and Catherine Palmer, move the Court to amend the findings of fact and conclusions of law and judgment entered on or about January 27, 1995, and direct the entry of a new judgment as follows:

1. That the Plaintiffs, Julie Weaver and Catherine Palmer, entered into a Sales Agreement with Defendant, Brite Music, Exhibit D7, in the years 1982 and 1983, which was drafted and prepared by Defendant, and provides for additional compensation to Plaintiffs in the form of carry-over points. The following language of the Brite Sales Agreement provided as follows:

000007

"As you continue to exceed 1200 points per month, the increasing carry-over points may accumulate for as long as you desire; however, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100. Redeeming points in this manner does not affect your life-time point accumulation or the benefits you may eventually derive therefrom."

2. The Court finds as a matter of law that the said language in the sales agreement was clear and unambiguous, and gave the right to Brite Music Enterprises, Inc., the Defendant, to redeem from Plaintiffs for \$100 each 5,000 carry-over points.

3. The Court finds as a matter of law that the language in the sales agreement is clearly ambiguous and that a proper finding of fact should be made by the jury as to the meaning of the ambiguous term by the jury making a determination by the representations of the Defendant's agents, the intent of the parties and such other and further evidence that will be necessary to give meaning to the terms of the agreement.

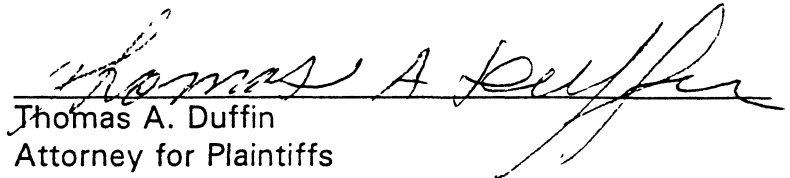
4. That at no time, as a matter of law, did the Defendant, Brite Music, by and through its agents, waive, alter, amend or make an independent agreement, or is Defendant estopped from denying, by its actions or its conduct, that the Plaintiffs had the sole right to exercise the redemption option.

Pursuant to the above-entitled matter, the Plaintiffs have ordered a transcript of the trial and therefore, respectfully request the Court to allow sufficient time for the court reporter to transcribe and testimony and then Plaintiffs will file a Memorandum in support of the Motion to amend the judgment within ten days after

the transcript is furnished in the above matter.

Dated this 3 day of February, 1995.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON


Thomas A. Duffin
Attorney for Plaintiffs

Mailing Certificate

I hereby certify that I mailed a copy of the foregoing Motion to the following parties by placing a true copy thereof in an envelope addressed to:

Rick J. Sutherland
Attorney for Defendant
P.O. Box 770
Park City, Utah 84060

postage prepaid, this 3 day of February, 1995.




Exhibit B

Jorge CRUZ, Plaintiff,
v.
Norberto MOLINA, Defendant.

Civ. No. 89-432 (PG).

United States District Court,
D. Puerto Rico.

March 27, 1992.

Tenant brought suit seeking damages for landlord's breach of lease agreement and negligence with regard to tenant's belongings. Landlord counterclaimed seeking recovery for breach of contract, damages to property, attorney fees and slander. The District Court, Gene Carter, Chief Judge, sitting by designation, held that: (1) tenant sustained no damage from being excluded from the leasehold; (2) tenant was not entitled to reimbursement for money spent prior to execution of lease on alterations to house; (3) even if landlord was negligent in his care of tenant's belongings on the property, tenant failed to prove damages; (4) tenant was not entitled to damages for severe mental anguish allegedly suffered when landlord locked him out; (5) tenant was obligated to continue paying rent until landlord excluded him from the property; (6) tenant was responsible for extermination expenses; and (7) landlord was not entitled to damages for mental anguish and emotional distress caused by tenant's lawsuit and destruction of landlord's property.

Ordered accordingly.

[1] LANDLORD AND TENANT ⇌ 94(6)
233k94(6)

Although notice had been given that tenant planned to leave the premises at some indeterminate time after Christmas, lease had not terminated under Puerto Rico law, where landlord had asked tenant to inform him before tenant left the property and no such notification was given, and although tenant was in the process of moving out, he had not moved out.

[2] LANDLORD AND TENANT ⇌ 110(1)
233k110(1)

Under Puerto Rico law, abandonment of leasehold requires both act and intention of relinquishing premises absolutely.

[3] LANDLORD AND TENANT ⇌ 130(2)
233k130(2)

By locking tenant out of the leasehold, landlord breached both his obligation under Puerto Rico law to maintain tenant in peaceful enjoyment of leasehold and his obligation not to deprive tenant of leasehold without assistance of law, but tenant sustained no damages where he was in the process of moving out.

[3] LANDLORD AND TENANT ⇌ 130(4)
233k130(4)

By locking tenant out of the leasehold, landlord breached both his obligation under Puerto Rico law to maintain tenant in peaceful enjoyment of leasehold and his obligation not to deprive tenant of leasehold without assistance of law, but tenant sustained no damages where he was in the process of moving out.

[3] LANDLORD AND TENANT ⇌ 275
233k275

By locking tenant out of the leasehold, landlord breached both his obligation under Puerto Rico law to maintain tenant in peaceful enjoyment of leasehold and his obligation not to deprive tenant of leasehold without assistance of law, but tenant sustained no damages where he was in the process of moving out.

[4] LANDLORD AND TENANT ⇌ 152(11)
233k152(11)

Under Puerto Rico law, tenant was not entitled to reimbursement for money spent on alterations to house prior to execution of lease, absent adequate proof of how much tenant spent on repairs.

[5] LANDLORD AND TENANT ⇌ 161(3)
233k161(3)

Even if landlord was negligent, under Puerto Rico law, in his care of tenant's belongings on the property, tenant failed to prove damages.

[6] DAMAGES ⇌ 49.10



115k49.10

Under Puerto Rico law, tenant was not entitled to damages for severe mental anguish allegedly suffered when landlord locked him out of the property, absent showing that tenant's health, welfare and happiness were affected in an appreciable manner.

[7] LANDLORD AND TENANT ⇨ 190(1)

233k190(1)

Under Puerto Rico law, tenant was obligated to continue paying rent until landlord excluded him from the property. 31 L.P.R.A. § 4052.

[8] LANDLORD AND TENANT ⇨ 55(1)

233k55(1)

Under Puerto Rico law, tenant was liable for extermination expenses incurred by landlord due to infestation caused by tenant leaving the house dirty. 31 L.P.R.A. § 4060.

[9] FEDERAL CIVIL PROCEDURE
⇨ 2742.5

170Ak2742.5

Issue of whether landlord was entitled to attorney fees under clause in contract requiring tenant to pay reasonable expenses arising out of legal action due to breach of contract was waived, where landlord presented no evidence on this claim and had not addressed it in his brief.

[10] DAMAGES ⇨ 49.10

115k49.10

Landlord did not make showing of mental distress caused by tenant's lawsuit and destruction of landlord's property adequate to require compensation in damages under Puerto Rico law.

[10] DAMAGES ⇨ 55

115k55

Landlord did not make showing of mental distress caused by tenant's lawsuit and destruction of landlord's property adequate to require compensation in damages under Puerto Rico law.

[11] FEDERAL CIVIL PROCEDURE ⇨ 2011
170Ak2011

Counterclaim for slander was waived, where

defendant presented no evidence or argument on such counterclaim.

*123 Raul Barrera Morales, Santurce, P.R.,
for plaintiff.

Ivan Duarte Sierra, Aida Tolentino Medina,
Bayamon, P.R., for defendant.

OPINION

GENE CARTER, Chief Judge. [FN1]

FN1. District of Maine, sitting by designation in the
District of Puerto Rico.

In this diversity action brought under Puerto Rican law, Plaintiff seeks recovery for damages allegedly caused by Defendant's breach of a lease agreement and by Defendant's negligence with regard to Plaintiff's belongings. Defendant has counterclaimed seeking recovery for breach of contract, damage to the property, attorney's fees, and slander. Both parties have claimed damages for mental distress. The Court conducted a bench trial on February 3-5, 1992. The Court finds the following facts.

On October 8, 1987, Plaintiff and Defendant entered into a lease agreement under which Plaintiff would rent Defendant's house in the Canovanillas ward of Carolina. Defendant was a resident of New York. The lease agreement was evidenced in part by a written document submitted in evidence as Jt.Ex. I. It is clear from all the testimony, [FN2] however, that other oral terms were agreed to by the parties.

FN2. Under Puerto Rican law, "[i]f the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed. If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail." 31 L.P.R.A. § 3471. The document here does not indicate that it contains all the terms of the agreement, and the testimony of both parties makes clear that there were other terms included in the agreement.



Under the contract Plaintiff agreed to pay Defendant \$150 dollars a month for the term of the lease, which was to end on June 30, 1988. The rent was payable in advance monthly, beginning on October 15, 1987. Bills for electricity, water, minor repairs and maintenance of the property were to be paid by Plaintiff, the lessee. Plaintiff also was charged with taking care of the property with the necessary zeal and with responsibility for damage to the property due to his negligence. For violation of the terms of the lease by Plaintiff, Defendant, the lessor, could terminate the lease and demand vacation of the premises and compensation for damages, all pursuant to law. Jt.Ex. I.

The lease contains an ambiguous phrase concerning termination before its expiration date. [FN3] The parties' testimony and the *124 documents in evidence make clear that the parties intended that the lessee, Plaintiff, be able to terminate in advance of the lease's expiration date. Jt.Exs. III and IV; see also *infra*. The most important oral term agreed upon by the parties was that one of the bedrooms of the house would be available to Defendant for his use when he came to Puerto Rico from New York.

FN3. Paragraph J of the Spanish version of the lease mistakenly states that the "arrendadora" must notify the "arrendadora" one month in advance if he wishes to terminate the lease before its expiration date. Although the official translation translates the first "arrendadora" in paragraph J as lessor and the second as lessee, a different term "arrendataria" or "arrendatario" has been used on all other occasions in the lease to designate the lessee. The Court finds, therefore, that the translation is in error. The clause is **ambiguous** because it is unclear **who has the right** to terminate upon advance notice.

Plaintiff entered the leasehold in October 1987. He paid Defendant \$300, which comprised the first month's rent and a security deposit. Prior to his taking possession, certain alterations and repairs had been made to the house. Among other things three small bedrooms had been reconfigured to make two larger bedrooms with closets, and washbasins and a medicine cabinet were added. Plaintiff

testified that he paid about \$1000 for materials for this work. Defendant admits that Plaintiff paid for some materials, estimating the cost to Plaintiff at \$48. Defendant testified that he did not know if certain doors used belonged to Plaintiff. The Court finds that although Plaintiff incurred some indeterminate expense for materials used to renovate the house before the lease took effect, it seems unlikely that Plaintiff would have incurred expenses of \$1000 for a leasehold which, when it came into existence, was for less than a year. There is no evidence of any agreement between the parties or promise by the Defendant to the effect that he would pay for such repairs.

In November, 1987 Plaintiff submitted notice by letter that he intended to begin looking for another place to live "after the Christmas holidays." Jt.Ex. III. He testified that the letter was intended to comply with the requirement of notifying Defendant. *Id.* Defendant's letter in response, Jt.Ex. IV, dated November 1987, shows that he joined in Plaintiff's interpretation. Rather than complaining that Plaintiff was trying to terminate illegally, Defendant asked Plaintiff in a postscript to the letter to please inform Defendant "before you leave the property." *Id.* Defendant never heard from Plaintiff that he was leaving the property.

Defendant returned to Puerto Rico early on the morning of January 27, 1988 to check on his property. He tried to gain admittance to his house then and again at 7 a.m. without success. Finally, at around 5 p.m. he obtained the key to the gate from neighbor David Loperena. Defendant spent a short time in the house, and then left to stay with friends, having changed the padlock on the gate to the fence which surrounds the property. Although Defendant testified that he did not change the padlock until February 28, when he left for New York, the Court does not believe him on this point.

Plaintiff testified quite credibly that he arrived at the house in the early evening of January 27 and could not open the gate. The Court credits this testimony because it is



corroborated by the testimony of another witness, David Loperena, [FN4] and by a complaint filed in court by Plaintiff. PX 6. David Loperena testified that Defendant said he was going to change the locks to keep Plaintiff from getting the rest of his things out because Plaintiff had to answer to him for not paying the electric bill. Plaintiff later came to Loperena's house saying he had been locked out. Although Loperena admitted he had been drinking when Defendant came to his house to get the key, the Court found his memory of the events to be credible and detailed. On February 23, 1988 prior to the date on which Defendant admits changing the locks on the house and going back to New York, Plaintiff also filed a complaint in the Municipal Court in Carolina in which he recited that he had found himself locked out of his house.

FN4. Plaintiff's testimony was also corroborated by that of Edwin Castro who was engaged to help Plaintiff move.

When Defendant entered the house on January 27th, he found that Plaintiff had *125 removed some of his furniture, but that there remained some furniture, clothing, books, personal effects, and boxes of kitchen utensils and food belonging to Plaintiff. The furniture remaining included a locked file cabinet, a dresser, a sofa, and a table and chairs. Defendant testified that the house was in shocking condition, that the dining room table was covered with dust, garbage was lying around, grapes were lying out on a table, the stove was filthy and in deplorable condition, window cranks were broken, the lawn was rutted, and there were rats.

Defendant testified that from the condition of the house, he thought Plaintiff had abandoned it. The Court finds that that conclusion was unwarranted. Many of Plaintiff's belongings and furniture were still in the house. Although David Loperena's mother told Defendant she had not seen Plaintiff for a few days, Loperena testified that he told Defendant that Plaintiff was in the process of moving out and to let him go. [FN5] Although Plaintiff testified that he was still living in the house at the time Defendant

returned, the Court finds that he was not occupying the premises, but was in the process of moving out.

FN5. There was a conflict between the testimony of Defendant and David Loperena. Defendant testified that he did not speak to Loperena because Loperena was drunk. Witness Rodolfo Ortiz, who went with Defendant to Loperena's house, testified that he does not recall if the two talked. Loperena admitted he had been drinking when Defendant arrived to get the key, but described in detail a conversation they had had concerning, among other things, nonpayment of the electric bill for Defendant's house. Because Defendant and Loperena had dealings concerning Defendant's truck, about which Defendant testified that he was very angry, the Court finds it highly improbable that Defendant did not speak to Loperena when he went to his house to get the key after being in New York for several months. The Court also found Loperena's version of the conversation convincing because of the detail provided and because it seems to make sense in the context of what was then otherwise occurring.

Defendant testified that he spent about \$1000 putting the house back in order. He states that he spent \$300 to replace the stove, \$100 to replace the window cranks, about \$700 for extermination services, and some money for reseeding the grass. Photographs which purportedly document the condition of the house prior to Plaintiff's tenancy and as Defendant found it in January 1988 were admitted as DX 40-92. Plaintiff testified that the photos represented as showing the house before he moved in also show it as he left it and that the photos showing slovenly housekeeping and disarray do not represent the house as he left it. He testified that he never used the stove.

Defendant's testimony that the house was messy and dirty on January 27 had the ring of truth and was corroborated by the fact that David Loperena testified that Defendant wanted him to see the bad condition of the house. The Court believes Defendant's testimony that the house had become infested with roaches and rodents, requiring the ministrations of an exterminator. Since the house was in the possession of Plaintiff until



Defendant arrived, the Court finds that condition of the house was due to Plaintiff's lack of care for it. The Court does not believe that the photographs all represent the condition of the house as Defendant found it, however. For example, Defendant testified that the photographs numbered 46, 47, 83, and 92 all show what he saw when he got to the house. That is impossible since the stove is pictured in the kitchen in two of the photographs, DX 83 and 92, and outside on the porch in another. DX 47. Clearly, someone had moved the stove before some of the pictures were taken. This lends some credence to Plaintiff's testimony that the house as depicted in the photographs was not as he had left it.

After Plaintiff found that he could not get into the house on January 27, he did not return again to ask Defendant to let him remove his belongings but rather sought to initiate legal proceedings to gain admittance. Defendant remained in the house throughout most of February without hearing from Plaintiff. Plaintiff claims that he was afraid of Defendant because Defendant had threatened to pay to have Plaintiff's head ripped off. David Loperena testified that the threats were made in *126 his presence. Defendant denies having made the threats.

On the 24th of February Plaintiff saw Defendant at a local store and Defendant told him he should remove his belongings from the house by 6 p.m. that evening. Plaintiff did not do so and persisted with his legal proceedings. He testified that he did not want to go to the house alone and that he had sought police accompaniment, but that by the time he arrived Defendant had left.

Plaintiff's attorney prepared an application for a possessory injunction, but Plaintiff decided not to file it because he did not want to move into the house again. Plaintiff continued his other legal proceedings to retrieve his belongings, and Defendant returned to Puerto Rico at the end of March in response to a summons. Plaintiff and Defendant met with a judge on April 8 and arranged for Plaintiff to enter the house and

get his remaining property. On April 15, Plaintiff, his attorney, Castro, Defendant and a few others met at the house. They entered the house [FN6], Plaintiff and Defendant each identified his property, and the attorney detailed the contents of the house in a notarial act. *Jt.Ex. II*. Plaintiff's clothing was found in Defendant's bedroom, and Defendant's clothing was found in Plaintiff's room. Plaintiff stated that a twelve carat emerald, \$2500 to \$3000 in cash, and "two pieces of steel, eight feet long with their base" were missing. He seeks recovery here for the emerald and the cash.

FN6. Plaintiff opened the gate and the house with his keys. Although Plaintiff was able to enter in April, the Court does not find that he was equally able to enter the house on January 27. The locks were padlocks and easily changeable, and the Court finds that while on January 27 Defendant had put in place on the gate a padlock which Plaintiff could not open, he had at some time before the April 15 meeting of the parties and counsel on the premises switched padlocks so Plaintiff could enter.

The Court finds that Plaintiff has not met his burden of showing he left either an emerald or any significant amount of cash in the house. Plaintiff testified that he had left a 12 carat emerald, valued at \$65,000, in the pocket of his tuxedo in the closet of the house he rented from Defendant. The only corroborating evidence was provided by Plaintiff's attorney, Wilfredo Picorelli, who testified that at his initial interview with Plaintiff, Plaintiff told him he could not get into the house and he had left clothing and some jewelry there, including an emerald. Picorelli's notes of that meeting refer to valuables and money, but not specifically to an emerald. *Ex. K*.

Plaintiff may, at one time, have possessed an emerald. A photograph of what could be either an emerald or green glass was admitted as an exhibit. Plaintiff also told an engaging tale of how he had acquired the stone in the photograph from a friend for whose hotel he had provided free laundry service over a period of years. Plaintiff further testified that the emerald had been photographed for him



by a photographer who usually documented hair transplants. Even if the Court believed that Plaintiff had an emerald and that it is represented in the photograph, those facts merely show that he had an emerald in 1980 or 1981. The record is notably devoid of any evidence, other than Plaintiff's testimony, showing that Plaintiff had an emerald in his possession around the time he says it was lost. While Plaintiff testified that he usually left the emerald in his daughter's care and that he had retrieved it from her possession to show to David Loperena's mother, neither the daughter nor Mrs. Loperena testified. In fact, no one testified who had ever seen an emerald in Plaintiff's possession. This leads the Court to believe that no one could testify to having seen Plaintiff with an emerald around the pertinent time. There was no evidence of any insurance held for such a valuable item.

Moreover, Plaintiff's other behavior was also not consonant with that of someone who is concerned about a very valuable possession. After Plaintiff gained access to the house and asserted that the emerald and a large amount of cash were missing, he did not report them to the police as stolen items. Given the asserted value of the emerald and the money, it seems unlikely *127 that an owner would have left them in the pocket of his tuxedo. Moreover, the tuxedo seems an unlikely storage place when Plaintiff had a locked file cabinet on the premises.

Plaintiff also made only desultory attempts to get whatever property might be in the house. After the first rebuff at the locked gate, he did not attempt to go to the house for the whole month of February while Defendant was in Puerto Rico. Rather, Plaintiff seemed perfectly willing to let the court proceedings he had initiated run their course. Although he professed to be worried about alleged threats made by Defendant against him, the Court does not believe Plaintiff's testimony that fear kept him from more actively seeking the return of his property. It is conceivable that Defendant used idle threatening language in his anger about the condition of the house; however, the Court does not believe either from Plaintiff's demeanor and

expression during his testimony or from his conduct that Plaintiff interpreted Defendant's words as serious threats. As both an attorney and a mature man, Plaintiff would have construed Defendant's angry language as the posturing that it was.

Conclusions of Law A. Plaintiff's Claims

The Court finds that on January 27, 1988, when Defendant returned to Canovanillas from New York, the lease between him and Plaintiff was still in effect. Although the lease provided for thirty-day advance notice of termination, that clause is ambiguous, as described above, and can be interpreted with the aid of extrinsic evidence. The evidence here shows that the parties intended that the lessee should give at least 30 days notice to lessor before terminating the lease. As discussed above Plaintiff and Defendant both interpreted the clause as allowing Plaintiff to terminate early, and both Plaintiff's notice letter and Defendant's response to the notice indicate that neither party considered the lease to be terminated thirty days from the date of the notice. [FN7]

FN7. In his brief Defendant appears to argue two conflicting positions. First, he argues that the termination became effective on December 15, 1987, thirty days after Plaintiff's notice was sent. This is clearly not what was intended by the parties since Plaintiff said he planned to begin looking "after the Christmas holidays," and Defendant by return letter acknowledged the notification. Defendant also argues that the termination must have occurred on December 31, 1987 because every reasonable person knows that Christmas is over on December 31. Again, this is not persuasive since Plaintiff's letter said he would begin looking for a new place after the holidays. Defendant clearly accepted the indefinite nature of this, asking to be informed with more specificity before Plaintiff actually surrendered possession. Moreover, Defendant asked Plaintiff to "discontinue" discounting his rent payment, which strongly indicates that Defendant expected Plaintiff to remain in the house, thus requiring more rent payments.

[1] Although notice had been given that

Plaintiff planned to leave the leased premises at some indeterminate time after Christmas, the Court concludes for two reasons that the lease had not terminated. First, Defendant had asked Plaintiff to inform him before Plaintiff left the property and no such notification was given, indicating that Plaintiff, who appeared punctilious about such matters, given the tone of the first notification letter, was not yet ready to surrender possession. Second, although Plaintiff was apparently in the process of moving out on January 27, he had not moved out.

[2] Although neither party has cited any Puerto Rican law of abandonment, the Court is satisfied that abandonment of a leasehold in Puerto Rico, as elsewhere, requires both the act and intention of relinquishing the premises absolutely. Black's Law Dictionary (5th ed.), at 2. Plaintiff's and David Loperena's testimony and the presence of a significant quantity of Plaintiff's belongings in the house make clear that on January 27 Plaintiff had not abandoned the leased premises, for he had not intended at that point to relinquish the premises absolutely.

Defendant had an obligation under the Puerto Rican Civil Code "to maintain the lessee in the peaceful enjoyment of the lease during all the time of the contract." 31 L.P.R.A. § 4051. If Defendant believed *128 that Plaintiff had breached the lease, had not paid the rent or was not taking care of the property, he had legal recourse. Article 1459 of the Puerto Rican Civil Code, 31 L.P.R.A. § 4066, provides a forcible entry and detainer action by which Defendant could have sought to oust Plaintiff. Article 370 of the Civil Code, 31 L.P.R.A. § 1444, also states specifically that "[i]n no case can possession be forcibly acquired so long as a possessor is opposed thereto. Any person who believes that he has a right or action to deprive another of the holding of a thing, shall petition the assistance of the competent authorities, provided the holder refuses to deliver up the said thing."

[3] By locking Plaintiff out of the leasehold on January 27, Defendant breached both his

obligation to maintain Plaintiff in the peaceful enjoyment of the leasehold and his obligation not to deprive Plaintiff of the leasehold without the assistance of law. Defendant is thus responsible to Plaintiff for any harm caused to him by the disturbance. *Goenaga v. West Indies Trading Corp.*, 88 P.R.R. 847 (1963).

The Court finds that Plaintiff has not adequately proved that he sustained any damages when he was excluded from the leasehold by Defendant. Although Plaintiff testified that he was still living at the Canovanillas house when Defendant changed the lock, the Court disbelieves that testimony. When Defendant arrived, a close neighbor, Mrs. Loperena, told him that she had not seen Plaintiff for a few days. His bed was no longer on the premises. Moreover, Defendant testified convincingly that he had gone to the house in the middle of the night and in the early morning of January 27th, finding Plaintiff's car gone both times and being unable to rouse anyone on the premises. The Court finds it more likely than not, therefore, that Plaintiff was, as David Loperena testified he told Defendant, in the process of moving out and that he was not staying in the house.

Although Plaintiff was wrongfully excluded from the property while the leasehold was still in effect, the Court cannot find that he incurred the damages he claims for having to find a more expensive furnished apartment quickly and for extra expenses for himself and his son due to the distance of the new lodgings from their activities. Clearly, Plaintiff had been planning to move out since November. Plaintiff also testified that if Defendant had waited a few more days, Plaintiff would have been out. These facts, coupled with the fact that Plaintiff was apparently moving and not still staying in the house, lead the Court to believe that Plaintiff had made prior arrangements, contrary to his testimony. Again, Plaintiff failed to provide corroborative evidence which might have made his claim more credible. Plaintiff has not submitted evidence from which the Court might determine damages caused by Plaintiff's loss of use of the property he had left in the house



between the date he was locked out in January 1988 and the date on which he was able to reclaim the property in April 1988.

[4] As discussed above, although Plaintiff has made claims to be reimbursed for money he spent on alterations to Defendant's house the Court finds no clear agreement under which Defendant is obligated to pay. Clearly, since the expenditures occurred prior to execution of the written lease, that document cannot provide the basis for Defendant's obligation to pay. Plaintiff testified that there were verbal agreements between Defendant and David Loperena and Norberto Rohena and himself concerning the repairs to be made to Defendant's house, but the Court has not heard testimony concerning the nature of all of these agreements. Plaintiff testified that the repairs on Defendant's house were to be performed by Rohena in return for money Rohena owed Plaintiff. Plaintiff has not testified to any undertaking by Defendant to pay for the expenses incurred by Plaintiff.

"Unless damages actually exist and are sufficiently proved, there can be no compensation, since Puerto Rico law does not sanction punitive damages." *Riofrio Anda v. Ralston Purina Co.*, 772 F.Supp. 46, 52 (D.P.R.1991). Even if Defendant in *129 this case were under some duty to pay Plaintiff for his expenditures, Plaintiff has not submitted adequate proof of how much he spent on the repairs. Specifically, Plaintiff testified that he spent close to or over \$1000 for a medicine cabinet and materials purchased by David Loperena for the repairs. There was no breakdown of the expenditures provided. David Loperena testified, however, that Plaintiff paid \$1500 for the improvements, again with no itemization of the costs. Defendant testified that Plaintiff might have paid \$48 for certain lumber for the project. On this record, the Court could not reach any determination of Plaintiff's out of pocket expenses.

[5] Plaintiff has further alleged that Defendant was negligent in his care of Plaintiff's belongings on the property, and he claims damages for the loss, through this

alleged negligence, of the emerald and \$2500 or \$3000 in cash. As discussed above, Plaintiff has not met his burden of showing that he had an emerald and a large amount of cash on the premises when Defendant locked him out. Therefore, even if Defendant had been shown to be negligent, which he has not, Plaintiff has not proven the damages which he seeks.

[6] Finally, Plaintiff claims that he has suffered severe mental anguish because Defendant locked him out of the rented property. As the Court said in *Riofrio Anda v. Ralston Purina Co.*, 772 F.Supp. at 53: "Although Puerto Rico recognizes moral damages for breach of contract, ... moral damages for emotional distress will not be awarded unless evidence establishes that the mental condition of the claimant has been considerably affected." As the court also noted, even under the more liberal standard for awarding such damages under Puerto Rican tort law, there must still be "a showing that in 'some appreciable measure the health, welfare and happiness of the claimant were really affected.' " The Court finds that the proof here does not meet either standard.

Plaintiff testified that finding himself locked out of his house, he was terribly anguished and in a state of nerves, and his blood pressure became and remained high. The Court does not accept Plaintiff's uncorroborated testimony as proving 1) that his blood pressure increased at the time of the lockout, and 2) that the increase was caused by Defendant's conduct. Plaintiff is not a physician, and he did not testify to having visited a physician. If Plaintiff's statement was intended not to prove medical fact but to be merely colloquially descriptive of his state of distress, the Court did not find it very persuasive. The testimony was delivered in a perfunctory manner and the Court was not left with the belief that Plaintiff had been considerably affected. The Court has found that Plaintiff was not staying in the house at the time he found himself locked out and that he had left his belongings there until he could move them. Thus, being locked out merely continued a situation which Plaintiff had begun and was not likely to have caused



terrible anguish. David Loperena testified that Plaintiff was very worried because all of his property was in the house. Plaintiff, however, immediately acted on his worry by instituting legal proceedings, which seemed likely to get his belongings back shortly.

Other testimony, by Plaintiff and Edwin Castro [FN8], indicated that Plaintiff was in mental distress because of the alleged threats by Defendant. As previously stated, the Court finds that Plaintiff was not as distressed by the threats as he has testified. On the basis of the record before it, the Court finds that Defendant did interfere with Plaintiff's peaceful enjoyment of *130 his leasehold and that Plaintiff did suffer some slight mental anguish because of being prevented from entering his house. The Court does not find, however, that this mental distress was significant enough to warrant an award of damages.

FN8. Edwin Castro's testimony was not particularly credible in its entirety because he seemed to be reciting events by rote without having a real memory of them. His memory of dates of certain events does not coincide with that of any of the other witnesses, and when he was pressed his story became much more confused. In any event, Castro testified that as he and Plaintiff were driving, they were flagged down by Defendant and Plaintiff did not want to stop because he was fearful. Plaintiff did stop, however, and engage in conversation with Defendant, leading the Court to believe that even if Castro were telling the truth about Plaintiff's state of mind, Plaintiff was not so fearful that his anxiety affected him in any considerable manner.

B. Counterclaims

Defendant has filed a counterclaim in this suit seeking payment of rent. The record shows clearly that Plaintiff paid \$300 at the inception of the lease for the first month's rent and a security deposit. Plaintiff also sent Defendant a check for \$125 for the second month's rent, representing the second monthly payment minus \$25 for cutting the grass. Defendant informed Plaintiff that he should "discontinue" this reduction in the rent, because he does "not agree with that

discount." The Court finds that Defendant by the terms of his reply letter accepted the reduced payment for the second monthly payment, but indicated that he did not agree to it for future payments. The Court bases this finding both on Defendant's use of the word "discontinue" and on his failure to request that Plaintiff pay him the deducted \$25. The Court finds, therefore, that taking into account the security deposit, Defendant had received the equivalent of three months rent, which would have covered Plaintiff's occupancy through mid-January. [FN9]

FN9. Plaintiff testified that in October he loaned Defendant another \$300 to buy airline tickets to New York and that Defendant said to deduct that amount from the rent. David Loperena also testified to the loan, but he placed the date in February. The Court does not believe that such a loan and agreement took place. First, if Plaintiff had made such a loan in October, to be credited to rent, he would have been unlikely then to have remitted the November rent for it would have been paid by the credit. The Court does not believe that the loan occurred in February because Plaintiff and Defendant were on very bad terms at that point and it would not have been contemplated by either party that Plaintiff would continue to stay in the house and pay rent against which the loan could be credited.

[7] Under the terms of the lease and the civil code, 31 L.P.R.A. § 4052, Plaintiff was obligated to continue paying rent as long as he remained in possession, and he was in arrears as of the time of Defendant's arrival. He clearly was not obligated, however, to pay rent for the period after he was excluded from the property. Taking into account the rent and security deposit paid by Plaintiff, the Court finds, therefore, that Plaintiff owes Defendant \$60 for rent for the period between January 15th and 27th, during which he was in possession. Defendant is not entitled to collect rent for the period after January 27, 1988 during which Plaintiff was seeking through the legal process to regain access to the property.

[8] Defendant also seeks \$1000 for damages to the house caused by Plaintiff's negligence



and failure to maintain the property in good condition. Under the lease itself and under the Puerto Rican Civil Code, the lessee has a duty to use the leasehold as would a diligent father of a family. 31 L.P.R.A. § 4052. The Code also makes the lessee liable for the deterioration suffered by the thing leased, unless he proves that it took place without his fault. 31 L.P.R.A. § 4060; see *Cabinero v. Cobian*; *Hanover Fire Ins. Co.*, 81 P.R.R. 926 (1960). The Court has found that Plaintiff left the house dirty and that his lack of care had caused it to become infested. Defendant testified that he spent about \$700 for an exterminator's services. Plaintiff is responsible for this expense.

Although Defendant testified that Plaintiff had ruined the stove, the Court cannot award the \$300 damages Defendant seeks for having replaced it. First, although the photographs of the stove show a degraded kitchen appliance, as described above, the Court cannot have complete confidence in the photographs as showing the condition of the stove when Defendant arrived. If the photographs are accurate, it seems very unlikely that the stove could have been in perfect condition and arrived in such a state in the three months of Plaintiff's tenancy. In the pictures it appears very rusty and old looking as well as dirty. David Loperena's testimony confirms this observation. He stated, and the Court believes his testimony over that of Defendant on this point, that when Plaintiff moved in *131 there was an old, run down stove in the house with only two working burners. Although Defendant testified to the stove being dirty and encrusted with grease, that in itself would not require its replacement. The Court cannot find, therefore, that the stove, was ruined during Plaintiff's tenancy so that it required replacement.

Defendant also testified that he had to replace cranks on the windows in the house. Defendant could not recall how many cranks he replaced, but he estimated that he replaced ten at \$10 apiece. There was no testimony that all the cranks were in working order when Plaintiff entered the leasehold, and given the photo showing damage to one crank,

the Court finds it unlikely that Plaintiff broke ten in the course of a three month tenancy. The Court is not satisfied from the evidence before it that ten window cranks worth \$100 were destroyed during Plaintiff's tenancy.

Defendant also testified that he bought grass seed to reseed the lawn. He did not testify how much it cost, so he has not proved that element of damage. Also, while Defendant testified that he did most of the work required to put the house back in proper condition, there is no evidence from which the Court might translate this testimony into a damages award.

[9] Defendant's third counterclaim seeks attorney's fees under a clause in the contract requiring Plaintiff to pay reasonable expenses arising out of a legal action due to a breach of contract. Defendant presented no evidence on this claim and has not addressed it in his brief. The issue is, therefore, waived. *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n. 9 (1st Cir.1990) ("It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by any effort at developed argumentation are deemed waived.")

[10] Defendant also seeks \$200,000 for mental anguish and emotional distress caused by Plaintiff's lawsuit and the destruction of Defendant's property. Although the Court has found no damages for Plaintiff, it did find that Defendant had wrongfully interfered with Plaintiff's peaceful enjoyment of the leasehold. The suit is, therefore, not frivolous. The asserted "destruction" of Defendant's property has turned out to be merely that Plaintiff left the house dirty, a condition remediable by Defendant in a few days. The Court is not persuaded by Defendant's testimony that because he was very "disappointed" and angry at the condition of his "dream" house, his mental condition has been considerably affected or that in " 'some appreciable measure the health, welfare and happiness of the claimant were really affected.' " *Riofrio Anda v. Ralston Purina Co.*, 772 F.Supp. at 53. Since Defendant was willing to rent the house in the first place, his

tie to it could not have been such that he could not bear any change in its condition. Moreover, since he required a security deposit, he must have contemplated and accepted the possibility of an outcome of the rental situation similar to that which occurred. Defendant has not made a showing of mental distress adequate to require compensation in damages.

[11] Finally, Defendant has not presented evidence or argument on his counterclaim for slander. That counterclaim is therefore deemed waived. *Collins v. Marina-Martinez*, 894 F.2d at 481 n. 9.

Accordingly, the Court finds that Plaintiff is liable to Defendant in the amount of \$760 for unpaid rent and for his failure to care for Defendant's property as required by law.

SO ORDERED.

END OF DOCUMENT

