

2006

John Baxter v. Saunders Outdoor Advertising, Inc : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN BAXTER,

Plaintiff/Appellant,

vs.

SAUNDERS OUTDOOR

ADVERTISING, INC., a corporation)

Defendant/Appellee.)

APPELLEE'S BRIEF

Appellate Docket No. 20060820-CA
District Court No. 030925365

This appeal is from a final order of the Third District Court of Salt Lake County, State of Utah, the Honorable Sheila McCleve, presiding.

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UTAH APPELLATE COURTS

MAY 2 2007

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF FACTS	4
ISSUES	6
ARGUMENT I	6
ARGUMENT II	8
ARGUMENT III	10
ARGUMENT IV	10
SUMMARY	11
MAILING CERTIFICATE	12
ADDENDUM	13

TABLE OF AUTHORITIES

COURT CASES	PAGE
<u>Creer v. Thompson</u> 581 P2d 149.	8
STATE STATUTES	
Utah Code Ann. §78-36-3(e)1(c)	7
OTHER AUTHORITIES	
17 Am Jur 2d Section 321 and 751	8

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STATEMENT OF FACTS

The Appellant is the owner of certain real property which is located in Salt Lake County, State of Utah and Appellee is an advertising company which owns and leases outdoor advertising aka billboards along roads and freeways. (R.1)

That the parties hereto entered into a contract which was captioned "Lease Agreement" wherein it was agreed that for the consideration and subject to the terms and conditions contained in said agreement that Appellant would sell to the Appellee an existing sign structure on his property for the sum of \$5,000.00. Said structure was to be torn down and removed and a new structure (billboard) was to be built upon Appellant's property at a different location. (R.2, 4)

Appellee paid to Appellant \$5,000.00 for the existing structure and agreed to pay the sum of \$6,600.00 per annum commencing when the new billboard structure had been

built. (R.4)

In order to obtain the necessary permits to erect the new billboard, the existing sign had to be first torn down. (R.2, 3)

The Appellant later refused to allow Appellee to own any billboard permits for the new structure which was to be built. (R.23)

Appellee under these circumstances could not proceed as the parties had agreed with the result that the existing structure the Appellee purchased has not been torn down and removed and the new billboard has never been built. (R.23, 70-71)

That Appellee had been trying to negotiate a resolution to this impasse (R.70) when he was served with a Complaint for Unlawful Detainer (R.1 - 7) and was issued a 3-day Summons in this matter.

That Appellant contends that he is entitled to be paid rent for a billboard that he has prevented from being built. (R.1)

That the sole cause of action that Appellant brought before the District Court was the statutory cause of unlawful detainer. (R.1-3)

That the District Court allowed the parties ample time for discovery and to file any motions in this matter. (R. 61, 67)

That Appellant did not seek to assert any additional causes of action or request for relief from the District Court and relied solely on an action of unlawful detainer. (Record)

That the District Court properly denied Appellant's Motion for Summary Judgment and later granted Appellee's Motion for Summary Judgment. (R.176)

That Appellant filed several other motions thereafter in this matter which were properly denied as without merit or cause. (R179)

That the Appellant filed an appeal from the District Court's ruling. (R.265-266)

ISSUES

Did the District Court properly grant Appellee's Motion for Summary Judgment based upon an action for unlawful detainer where no rent charges due or owing?

ARGUMENT I

An action based upon unlawful detainer must meet each and every element of said action.

Appellant filed with the District Court a Complaint for Unlawful Detainer claiming that Appellee had failed to pay rent and was in arrears in rent in the amount of \$14,800.00 and unspecified additional damages and interest and costs. (R.1) That the basis for Appellants claim was the terms and conditions contained in the agreement which the parties had entered into on February 14, 2000, which is referred to herein as the "Lease Agreement". (R.1,2,3,4)

Based upon the notice served upon Appellee (R.6) and the language of the Appellant's Complaint (R.1-6), Appellant's unlawful detainer action was based upon U.C.A. §78-36-3(e)1(c) namely "when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring

in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;"

In order to maintain an action for unlawful detainer all of the necessary elements will need to be established by Appellant or the action should be properly dismissed.

The key to maintaining said action was the fact whether any lease payments were actually due and owing to Appellant from Appellee.

In reading the language of the "Lease Agreement" it is clear and unambiguous that the parties intended that an existing sign structure was to be torn down and a new billboard structure was to be built upon Appellant's property. (R.1,2,3) The language of the parties' agreement clearly indicates "that the terms of this "Lease Agreement" shall commence upon completion of the installation of the structures which is the subject matter of this lease agreement but not commencing later than pending permits 12-1-00 but longer if need be pending permits."(R.4)

It was undisputed that the billboard structure that the parties had agreed to be built had never been built, nor had there ever been any of the necessary permits obtained by either party in this matter. It was also undisputed that the existing sign structure had never been torn down by Appellee, as had been agreed to by the parties. (R.24, 39)

The commencement of paying rent to the Appellant was conditional upon the new billboard structure being erected. Then and only then would Appellant be entitled to rent pursuant to the terms of the "Lease Agreement". Since rent was conditioned upon the

new sign structure being built, rent was never due and owing to Appellant. If no rent was ever due, then an action seeking past due rents under the unlawful detainer action must fail and the Appellant's cause of action was properly dismissed through Appellee's Motion for Summary Judgment.

ARGUMENT II

That the "Lease Agreement" that the parties entered into contained conditions precedent to the payment of any rent due to Appellant.

Conditions precedent are, "A condition precedent to an obligation to perform calls for the performance of some act or the happening of some event after the contract is entered into upon the performance or happening of which the obligation to perform immediately is made to depend." (17 Am Jur 2d Section 321 and 751)

The condition precedent which are in the parties' "Lease Agreement" (R.4) are as follows quoting from the "Lease Agreement" with emphasis added:

1. The terms of this lease shall commence upon the completion of the installation of the structure which is the subject matter of this lease agreement. (Paragraph 1)
2. Pending permit 12-1-00 or longer if need be pending permits. (Paragraph 1)
3. The sign will be placed (rebuilt) on the southwest corner of the property. (Paragraph 2)
4. The lease shall be for a term of 15 (number of years) commencing on the date of the first payment described in paragraph 1. (Paragraph 3)
5. The lease is subject to Lessee obtaining state and local approval . . . (Paragraph 10)

A Court can read the clear and unambiguous terms and conditions from the agreement and determine from the language the intent of the parties. Creer v. Thompson,

The fair and reasonable construction of the parties' agreement contained in the "Lease Agreement" for which purpose the Appellee would desire to enter into any lease agreement would be to use the leasehold for advertising purposes. The Appellee wouldn't want to pay rent for a non-existing billboard structure. In light of the logical reason the Appellee would pay rent it is clear and unambiguous that the rent would not begin until the provisions of the "Lease Agreement" were fulfilled and that the new billboard structure was built.

It is undisputed that:

- a) the necessary State and local permits were never obtained by either party
- 2) the existing structure remains on Appellant's property and has not been torn down or removed and
- 3) that the new billboard structure which was the essence of the parties agreement has never been built. (R.23, 70-71)

Since payment of any rent was pre-conditioned upon at least these three events happening, Appellee had no obligation to pay rent to Appellant. Appellee was entitled to Summary Judgment as a matter of law, since Appellant's sole cause of action against Appellee was based upon a Complaint for Unlawful Detainer which required a rental obligation from Appellee. The District Court properly dismissed Appellant's complaint in this matter and granted Appellee his Motion for Summary Judgment.

ARGUMENT III

Appellant was given every opportunity by the District Court for a fair and complete hearing upon Appellee's Motion for Summary Judgment.

The Court entered a scheduling order (R.61, 67) in which it allowed the parties four (4) months to complete all discovery and file any motions so that they could be scheduled for hearing at the next pre-trial hearing date which was set for November 1, 2004, at 2:00 p.m. Even though Appellant failed to appear on the said date (R.102, 133) even after the Court Clerk had called his attorney, the Court allowed Appellant to file and argue before it, its responses to Appellee's Motion for Summary Judgment. (R.103, 108, 112, 125) The Court then made its ruling in this matter, granting Appellee's Motion for Summary Judgment. (R.133)

ARGUMENT IV

Appellant had every opportunity to amend its cause of action or seek relief before the District Court.

Appellant had every opportunity to amend its complaint or any other cause of action or relief but failed to do so. The lower Court had allowed four months for discovery to be completed and for the parties to file any motions they desired. (R.67) Appellant never filed any motions to amend its complaint or ask for any other relief and relied solely on a single cause of action based upon unlawful detainer. (Record) Appellant appears to be requesting that this Court grant to it relief it failed to seek in the District

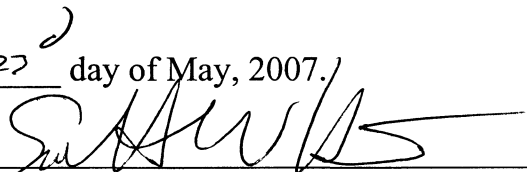
Court. It would only be appropriate that any such additional relief should not be granted, since none was sought in the District Court when every opportunity was given to Appellant to do so.

SUMMARY

The Motion for Summary Judgment was properly granted in the District Court. A Complaint for Unlawful Detainer must establish that there is an existing obligation to pay rent and that said rent has not been paid. If there is no obligation to rent, none is due and an unlawful detainer action must fail. The conditions precedent to Appellee's obligation to pay rent have never been satisfied. The unlawful detainer action was wrongfully sought. Appellant sought no other relief in its action against the Appellee and was properly dismissed.

Wherefore, Appellee requests that this Court sustain the action and decision of the District Court in this matter.

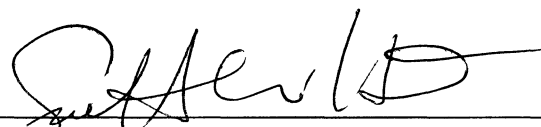
RESPECTFULLY SUBMITTED this 27th day of May, 2007.



SCOTT W. HOLT
Attorney for Respondent/Appellee

CERTIFICATE OF DELIVERY

I, Scott W. Holt, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, Street, Salt Lake City, Utah 84114-0230, and two copies mailed by depositing in the U.S. Mail postage prepaid to the Attorney for Appellant, Gregory B. Wall and Kimberly M. Hammond, Wall & Wall, 2168 E Fort Union Blvd. Salt Lake City, Utah 84121, this 23^d day of May, 2007.


SCOTT W. HOLT

DELIVERED to the Utah Court of Appeals and the Appellant as indicated above
this 23^d day of May, 2007.


SCOTT W. HOLT

ADDENDUM

EXHIBIT "A"

Lease Agreement signed by the parties February 14, 2000

EXHIBIT “A”



Saunders
OUTDOOR ADVERTISING INC.

3133 Lincoln Avenue
P.O. Box 708
Ogden, Utah 84402-0708
(801) 621-2350

LEASE AGREEMENT

The undersigned (hereinafter referred to as "Lessor") in possession or control of the premises described below and having full right and authority in said premises, hereby grants to LESSEE; Saunders Outdoor Advertising, Inc. (hereinafter referred to as "Lessee"), the exclusive right to use said premises for the purpose of erecting and maintaining outdoor advertising signs and other advertising media thereon, with or without illumination, and further grants to Lessee during the terms of this lease and for a reasonable period thereafter an easement across said premises as may be reasonably necessary for the ingress and egress of Lessee's men and equipment to erect, illuminate, repair, maintain and remove said structure outdoor advertising signs or other advertising media.

1. It is agreed that the terms of this lease shall commence upon completion of the installation of the structure which is the subject matter of this lease agreement but not commencing later than Rebuilding Premises 12-1-00 or longer if need be pending permits

2. The premises are located in the County of Salt Lake, State of Utah, and more particularly described as follows:
1615 South State Street Salt Lake City, UT 84111. The sign will be placed (rebuild) on the South West corner of the property.

3. The lease shall be for a term of 15 (# of years) commencing on the date of the first payment described in paragraph 1. The lease shall be automatically renewed for an additional term of the same length, subject to all of the terms and conditions contained herein unless Lessee gives written notice of its intention to terminate at least one hundred twenty (120) days prior to the end of said period. Thereafter, the lease shall be automatically extended for additional periods of the same length subject to all of the terms and conditions contained herein unless either party hereto gives one hundred twenty (120) days written notice of their intent to terminate prior to the end of such renewal period. In the event that Lessor shall terminate this lease, Lessor agrees not to lease said premises for advertising purposes to any other party other than Lessee for a period of three (3) years after the date of termination.

4. The annual rental for the premises above described shall be \$6,600.00 (Six thousand Six Hundred) DOLLARS (\$6,600.00) which shall be payable to Lessor at the address shown below in 12 payments of Five Hundred Fifty DOLLARS (\$550.00) each.

Special Terms: Saunders agrees to pay \$500.00 (Five Hundred Dollars) upfront for the right to tear down existing sign and also the monthly lease payments. After the first five years the lease rent will increase by 10%. Thereafter each year every five years, in 5 yr. increments, the lease rate will increase by 10%. At the end of this 30 yr. contract, Saunders will be rebuilding the present sign onto a 14' x 49' billboard sign. John Barker will be rebuilding a billboard on the Northwest corner.

5. Lessor will not permit any other advertising media to be placed within 500 feet of the premises.

6. Lessor will not allow anything upon the premises which would interfere or obstruct Lessee's structure.

7. The parties hereby specifically agree that all signs, billboards, or other advertising media placed upon the described premises shall remain the property of Lessee and may be removed at any time and in no event be considered fixtures and a part of the realty even though a portion of same might be affixed to real property.

8. Lessor acknowledges and agrees that Lessee shall be entitled to, but not obligated to defend, prosecute or otherwise participate in any litigation respecting said advertising structure or media and Lessor agrees to give Lessee notice of all such proceedings served upon it.

9. No party hereto is bound by any warranty, stipulation, representation or agreement not contained herein. This lease shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

10. This lease is subject to Lessee obtaining state and local approval for location of advertising structures and is cancelable by Lessee if such consent is not obtained. If during the term of the Lease, the Lessee, at its sole discretion, determines the premises to not be sufficiently suitable for its advertising purposes, Lessee may terminate this lease upon 30 days written notice.

RIGHTS OF FIRST REFUSAL: in the event Lessor shall decide during the term of this lease to sell the premises described herein, Lessor shall give written notice to Lessee of the terms and price offered by a third party. Lessee shall be entitled for thirty (30) days to acquire the premises on the terms and conditions in said notice. If Lessee does not exercise said right of purchase, the Lessor shall not sell the premises on other terms for six (6) months. Thereafter Lessee shall have the same right as to any subsequent offer to purchase.

DATED: 2-14-2000

ACCEPTED:

Lessee

By [Signature]

Address: 3133 Lincoln Ave Ogden, UT 84401

(Owner or Owner's agent)

[Signature]

JOHN BARKER

(Lessor's Printed Name)

1615 SO STATE STREET SALT

(Lessor's Address)

87-0302468

(I.D. or Social Security Number)

ACKNOWLEDGEMENT

STATE OF _____)

) ss.

COUNTY OF _____)

On the _____ day of _____, 19____, personally appeared before me _____, the signer of the above instrument, who duly acknowledged to me that he executed the same and was duly authorized to do so.

NOTARY PUBLIC

My Commission Expires