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Aspen Alpine Equipment Ltd. v. District Court in and for Pitkin County

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IN THE SUPREME COURT
FOR THE STATE OF COLORADO

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

APR 1 1977

Louise Walsh

ASPEN ALPINE EQUIPMENT LTD.)
)
) Petitioner,)
)
) vs.)
)
) THE DISTRICT COURT IN AND FOR THE)
) COUNTY OF PITKIN, STATE OF)
) COLORADO and GAVIN D. LITWILLER,)
) a Judge of Said Court; SHERIFF,)
) PITKIN COUNTY; and CITY MARKET,)
) INC.,)
)
) Respondents)

AFFADIVIT IN SUPPORT
OF PETITIONER'S MOTION
FOR WRIT OF PROHIB-
ITION AND TEMPORARY
RESTRAINING ORDER

Richard Booth, being duly sworn, deposes and swears
as follows:

1. That I am President of the Petitioner corporation
and am fully familiar with the facts and circumstances as
stated herein.

2. That Petitioner, Aspen Alpine Equipment Ltd. entered
into a lease agreement with the Respondent, City Market, Inc.
on or about October, 1973, by which your Petitioner leased
space in the basement under the City Market retail outlet
in Aspen, Colorado.

3. By the terms of said agreement, specifically para-
graph 4, a copy of which is attached hereto as Exhibit 'C',
City Market Inc. was required to maintain and repair certain
areas and your Petitioner could make these repairs if City
Market Inc. failed to do so after written notice of the
repair required.

4. That City Market Inc. failed to maintain, heat,
and repair the premises leased by your Petitioner, causing
substantial damage to Petitioner.

5. That as the result of the aforesaid, a suit was
commenced approximately one year ago by City Market Inc.,
against Aspen Alpine Equipment Ltd in the District Court,
Pitkin County, Civil Action No. 5961.

6. That your Petitioner's answer to the abovementioned
suit included counterclaims for a total amount in excess of

the amount demanded by City Market Inc.

7. That because of the complexity of this litigation, and an extensive amount of discovery and motion practice, this matter had dragged on for approximately one year.

8. That on February 7, 1977, Respondent, District Court ordered a hearing for March 28, 1977, a copy of said Order being attached hereto as Exhibit 'B'.

9. That said Order required your Petitioner to post a bond or cash deposit in the amount of the rent claimed due by City Market Inc.

10. Said Order went on to state that in the event of a default by Petitioner as to deposit of the rent alleged owing, a hearing would be held "on the issue of possession only, all other issues to be tried at a later date."

11. That Petitioner's counsel has advised your Petitioners that the Court's requirement for posting of a bond or cash deposit for the entire amount alleged due and owing to City Market Inc. was improper because:

a. 1973 C.R.S. 13-40-114 allows for a bond when either party requests a delay in the trial longer than five days. Said bond is meant to secure the opposite party only as to "such sum as he may be damaged due to the delay." In the matter herein, the Court required Petitioner to post a bond or cash deposit for all rent claimed due and owing by City Market Inc.

b. The lease agreement between Petitioner and City Market Inc. provided that Petitioner could deduct from rents due those amounts expended in making repairs not made by City Market Inc., however the Respondent District Court did not take into account any set-off to which your Petitioner might be entitled in setting a cash deposit or bond amount and instead required Petitioner to post the entire amount of rent alleged due and owing by City Market Inc.

c. That the above violates Article V and Article XLV of the United States Constitution and Article 11, Section 25 of the Colorado Constitution in that your Petitioner has been deprived of private property without due process of law. Additionally, the Colorado Supreme Court, in Shanahan v. Collins, 539 P. 2d 1261 (1975) held that a tenant was entitled to a set off against rent for a landlord's failure to perform under the express covenant to repair.

12. That said Order, labeled Exhibit 'B' stated that a pre-trial conference and hearing on all pending motions would be continued to March 28, 1977.

13. On February 6, 1977, Petitioner's counsel, whom Petitioner had just engaged, was involved in an automobile accident.

14. It was subsequently discovered that counsel's injuries were quite serious and your Petitioner found out on or about mid-March that this counsel would have to withdraw representation, a copy of said Motion to Withdraw being attached hereto as Exhibit 'D'.

15. Your Petitioner then sought to retain new counsel, in particular Mr. David Slemon.

16. However, this proved to be unsuccessful and on or about March 23, 1977, your Petitioner called Judge Litwiller to request some additional time to seek counsel for this complicated and extensive litigation.

17. Your Petitioner was denied this request and was in fact unable to retain counsel until 4 P.M. on March 31, 1977, after a verdict had been entered against Petitioner.

18. Upon information and belief, an Order and Judgment will be signed this day by Respondent, Judge Litwiller, a copy of said Order and Judgment being attached hereto as Exhibit 'E'.

19. That Petitioner may be evicted at any time as a

Writ of Restitution has issued and your Petitioner will suffer immediate and irreparable harm if the relief requested herein is not granted.

20. Should an eviction take place, your Petitioner will stand to lose everything he has built up and will face bankruptcy.

21. City Market Inc. will not suffer any injury by the issuance of a restraining order in that they may still recover damages for a wrongful holdover.

WHEREFORE, your Petitioner respectfully requests that the relief requested herein be granted along with such other and further relief as this Court may deem just and proper.

Richard Booth

Sworn to and subscribed before me this _____ day
of _____, 1977.

Notary Public

My commission expires: _____

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF PITKIN AND STATE OF COLORADO

Civil Action No. 5961

CITY MARKET, INC.,)
)
Plaintiff,))
)
vs.))
))
ASPEN ALPINE EQUIPMENT,)
LIMITED,)
))
Defendant.))

ORDER

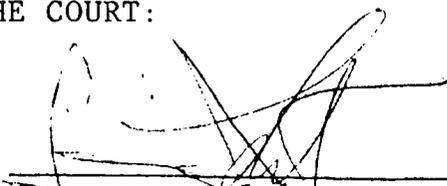
This matter came before the Court for pre-trial conference and hearing on all pending motions, whereupon the defendant advised the Court that new counsel will be appearing for the defendant and moved for a continuance.

IT IS THEREFORE ORDERED:

1. That the pre-trial conference and hearing on all pending motions shall be continued to March 28, 1977, at 1:00 o'clock P.M., at Glenwood Springs, Colorado.
2. That the motion of Kenneth Senn to withdraw shall be granted at such time as substitute counsel shall enter his appearance on behalf of the defendant and until such time Kenneth Senn shall remain as counsel of record for the defendant.
3. That any additional motions to be heard on March 28, 1977, shall be filed on or before February 21, 1977.
4. That on March 28, 1977, the defendant shall post a bond or cash deposit in the amount of the rent then claimed to be due, in default of which this matter shall be heard on said date without further notice on the issue of possession only, all other issues to be tried at a later date.

Dated: February 7, 1977.

BY THE COURT:



Judge

EXHIBIT 'B'

Lessee's employees shall not have the right to use the parking area adjoining the building in which the Leased Premises are located.

2. Term. This lease shall commence October 1, 1973, at 12:01 o'clock a.m. Lessee's occupancy of the premises shall be deemed to be a tenancy, on a month to month basis, only. *A 90-day notice in writing, shall be considered sufficient for: (a) vacating Leased Premises by Lessee or (b) terminating said Lease Agreement by Lessor.

3. Rental. Lessee agrees to pay City Market as rental for the first 12 months hereof the amount of \$250.00 per month. Effective October 1, 1974 the monthly rent shall be increased to \$350.00 per month. All rents shall be due and payable on or before the first day of each such month.

4. Care and Maintenance of Subleased Premises.

During the term hereof, City Market shall make required structural repairs and maintain in good condition the roof, walls, foundation, sidewalks, and all utility lines required by Lessee in connection with its use and occupancy of the Leased Premises, including, but not limited to, water lines, sewer lines, gas lines, and electrical transmission lines; provided, however, City Market shall not be required to repair any damage to the Leased Premises caused by the acts or negligence of Lessee, its agents or employees, not shall it be required to replace floor covering resulting from ordinary wear and tear, any replacement in that regard to be at the sole cost and expense of Lessee. Lessee shall make and pay for all other necessary repairs to the Leased Premises. City Market shall have the right of ingress and egress to the Leased Premises to maintain, repair, or replace any equipment accessible through the Leased Premises.

Lessee shall give written notice to City Market of all repairs required hereunder to be made by City Market, and City Market shall have a reasonable time after the receipt of such notice to make such repairs. If City Market should fail to make such repairs within a reasonable time, Lessee may, but shall not be obligated to, repair such facilities, or any part thereof, and deduct its expenses incurred from any accrued or subsequently accruing rentals hereunder.

EXHIBIT 'C'

* Note: As per Alpine Equipment has a standing agreement with the management of City Market that under no circumstances will station fall

during the term & with reason

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF PITKIN
STATE OF COLORADO
Civil Action No. 5961

Boyle

CITY MARKET, INC.,)
)
Plaintiff,)
)
vs.) MOTION TO WITHDRAW AS
) ATTORNEY FOR DEFENDANT
)
ASPEN ALPINE EQUIPMENT, LTD.,)
)
Defendant.)

COMES NOW, Gail L. Ireland, attorney of record for Defendant, and moves this Honorable Court for an Order permitting him to forthwith withdraw as attorney of record for such Defendant and as grounds therefor states:

1. That he had, just prior to February 6, 1977, decided to appear for Defendant in this cause and a Motion to such effect had been prepared in his office and on February 7, 1977, it was mailed to the Clerk of this Court and to all proper parties involved.

However, on February 6, 1977 he, as a passenger, was involved in an automobile accident in Denver, Colorado, taken to St. Luke's Hospital immediately but it was not decided until sometime after February 6, 1977 that his injuries were extremely serious. That he was in said hospital until March 3, 1977 and since such date he has been confined to his bed at home with nurses with his left leg in a hip-to-toe cast that cannot be removed for several more weeks and he will have to again enter St. Luke's Hospital sometime in April, 1977 and it is anticipated that he will not be able to return to his office until sometime in May, 1977. The worst of his injuries is a crushed lower leg.

2. Realizing that Defendant needs immediate and continuous legal help, he has advised Defendant of his inability

EXHIBIT 'D'

to represent it now or for sometime in the future and has urged Defendant to obtain other legal representation as soon as possible.

3. That since he was injured he learns that the Plaintiff has instituted in the Colorado Supreme Court an original proceeding in the nature of mandamus against the Honorable Judge who is in charge of this case in Pitkin County and that the disposition of such proceeding might have a material effect on this case and it is obvious that the Defendant now needs further and immediate legal help because of said original proceeding.

4. The undersigned is a sole practitioner and has no connection with the legal firm of Yegge, Hall & Evans except that he offices in its suite and is designated as "Of Counsel" for said firm. After lengthy study of this case, said firm has decided that it cannot, at this time, take on any other out-of-Denver legal work and Ireland has not been able to find any other attorney to accept such work.

5. Ireland deeply regrets his inability to continue to represent said Defendant and also is deeply concerned that this unfortunate incident has placed Defendant in a precarious and helpless position and prays that this Court will afford Defendant a reasonable time to obtain new counsel and to provide new counsel adequate time to become acquainted with the above-mentioned proceedings to the end that Defendant will not be endangered or otherwise deprived of all reasonable rights in this matter.

6. That Defendant has been fully advised of the situation and of the undersigned's inability to futher represent it.

WHEREFORE, it is respectfully moved that this Motion be granted and Defendant be protected in all respects.

Gail L. Ireland - No. 201
Attorney for Defendant
1340 Denver Club Building
Denver, Colorado 80202
573-5022

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF PITKIN AND STATE OF COLORADO

Civil Action No. 5961

CITY MARKET, INC.,)
)
) Plaintiff,)
))
))
) vs.) ORDER & JUDGMENT
))
ASPEN ALPINE EQUIPMENT,)
LTD.,)
))
) Defendant.)

THIS MATTER coming on to be heard on this 28th day of March, 1977, and plaintiff being represented by counsel, and defendant not being represented by counsel, and there being in attendance Richard Boothe, President of the defendant corporation, and Peter Jones, an attorney for Yegge, Hall, & Evans, and the Court being fully advised in the premises and having heard testimony, reviewed exhibits, and having heard the arguments of counsel,

THE COURT makes the following findings of fact:

A. Defendant is a lessee under a written lease agreement with plaintiff, lessor of a certain space in the basement of the City Market building in Aspen, Colorado.

B. Defendant was served by personal service on Richard Boothe, President of the defendant corporation, with a Notice to Quit the subject premises and a Demand for Payment of Rent or Possession in the Alternative of the subject premises on September 17, 1976. Pursuant to the Notice to Quit, as amended, defendant was requested to vacate said premises on December 17, 1976. Pursuant to the Demand for Rent or Possession in the Alternative, defendant was requested to pay the rent within 15 days of September 17, 1976.

C. Defendant was also served with a similar Notice to Quit and Demand for Payment of Rent by certified mail which was forwarded to and received by Richard Boothe on September 11, 1976.

EXHIBIT 'E'

D. The service of these notices was timely both with respect to the law and to the lease agreement.

E. Defendant is presently in possession of the premises which are the subject of the complaint.

F. Defendant has not paid the rent for August 1975, any month in 1976, or January, February, and March, 1977.

G. Defendant owes plaintiff rent in the accrued amount of \$5,600.00, which sum is the product of the \$350 monthly rental times the 16 months for which defendant has failed to pay plaintiff rent for the premises.

H. Defendant owes plaintiff \$11,305.43 for reasonable attorneys' fees and expenses incurred by plaintiff in pursuing its eviction remedies.

I. The Court offered defendant an opportunity to tender a bond in this matter; Defendant refused to tender a bond in any amount.

THE COURT makes the following conclusions of law:

A. Plaintiff is entitled to immediate possession of the premises.

B. Defendant owes plaintiff the sum of \$16,905.43 for rent due and owing on the subject premises and reasonable attorneys' fees and expenses incurred in this action.

C. There is no just reason for delay in entering judgment for plaintiff and against defendant in the amount of \$16,905.43 and the issuance of a writ of restitution restoring possession of the premises to plaintiff.

THE COURT HEREBY ORDERS, ADJUDGES and DECREES:

1. The firm of Yegge, Hall, & Evans is allowed to withdraw their appearance in this case.

2. Attorney Gail L. Ireland, who had entered an appearance on behalf of the defendant corporation, is hereby allowed to withdraw his appearance as attorney for defendant in this case.

3. The Court denies plaintiff's Motion to Strike Defendant's Counterclaims. The Court orders that production of

the documents requested by plaintiff in its Request for Production of October 26, 1976, be made within 30 days from March 28, 1977. In default of such production by defendant, the Court will consider another motion to strike defendant's counterclaims. In that event, the Court will require briefs to be filed concerning the dismissal of the counterclaims and any future motion to dismiss counterclaims for failure to discover shall be considered on the briefs alone, unless a demand for oral argument is made by either party.

4. The Court sets the counterclaims of defendant for trial on July 19, 1977, at 10:00 a.m. in Aspen. The trial is scheduled for four days.

5. The Clerk is ordered to enter judgment in favor of plaintiff and against defendant in the amount of \$16,905.43.

6. The Clerk is ordered to enter judgment restoring possession of the subject premises to plaintiff and to issue a writ of restitution concerning the same on April 1, 1977.

DONE BY THE COURT as of the 28th day of March, 1977.

District Judge