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NO. 74623-5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

After this Court ruled that respondent Pacific Market International, LLC (“PMI”) is obligated to pay for parking under its lease with appellant TCAM Core Property Fund Operating LP (“TCAM”), PMI refused to pay in bold defiance of this Court’s holding. Despite the uncontestable fact that PMI has not paid TCAM in full for the parking charges it is obligated to pay under the lease, PMI misled this Court and the superior court into believing that TCAM had been paid in full. Never, in any pleading, motion, declaration, brief, or other paper filed with either court, nor in any oral statement to either court, did TCAM ever say that it was not injured, that it had incurred no damages, or that it was not owed money for parking charges by PMI. Yet, PMI has weaved an intricate lie by manufacturing supposed “representations” by TCAM that it had not been damaged, and blatantly misinforming this Court during oral argument that it had paid TCAM in full, when it certainly had not. As a result, TCAM has been denied a remedy to which it is entitled under this Court’s prior holding. In fact, using its deceptive and highly technical arguments, PMI has managed to shut the courthouse doors on TCAM, preventing it from having any forum or hearing to present its claim for unpaid parking charges.

This second appeal is necessary because the superior court denied TCAM every available option to enforce this Court’s holding in its favor.

Approximately a year ago, this Court held that TCAM's tenant, PMI, is obligated "to pay for a certain number of spaces every month whether or not the tenant actually needs them." When TCAM sought a money judgment for the amounts PMI failed to pay, PMI objected, claiming that this Court had held that TCAM "has not been injured," even though there is absolutely no evidence of such in the record and damages have never been the subject of any trial court hearing. The source of the Court's dicta was explained in the following sentence of the opinion: "PMI has been paying under protest for the parking spaces it does not use." Although PMI had made several payments under protest, counsel for PMI misinformed this Court during oral argument that it had paid TCAM in full. PMI then parlayed this Court's misinformed dicta into a "holding" that it argued precluded any remedy for TCAM. Surprisingly, in its Order Re Motion for Reconsideration, the superior court stated that "TCAM evidently represented to the Court of Appeals that at least as of the date of argument remand to determine any amounts due was not appropriate or necessary because it had been compensated (incurred no damages)." In reliance on this blatant fallacy, the court denied TCAM any opportunity to seek entry of a money judgment, and even the opportunity to amend its pleading to litigate the unpaid parking charges. Throughout all of this, neither PMI nor the superior court ever identified any such representation

by TCAM. The trial court effectively overruled this Court's holding by denying TCAM any opportunity to enforce PMI's obligation to pay for parking. In order for true justice to be served, the incomplete judgment and orders entered by the superior court should be reversed, and the case remanded for entry of a money judgment, or at least a hearing on damages.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering a judgment in which it denied TCAM's motion for further relief under RCW 7.24.080 in the form of a money judgment.
2. The trial court erred in denying TCAM relief in the form of a money judgment pursuant to CR 54(c).
3. The trial court erred in denying TCAM leave to amend its pleading to assert a claim for breach of contract.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is TCAM entitled to entry of a money judgment in the amount of the unpaid parking charges, interest, and late fee, when this Court ruled that PMI is obligated to pay for all of its allotted parking spaces but PMI has failed to do so and the Declaratory Judgment Act (RCW 7.24.080) and Court Rule 54(c) provide that a party is entitled to whatever relief it is entitled to or is necessary or proper? (Assignments of Error 1 and 2.)

If the answer to the foregoing question is “no,” should TCAM be granted leave to amend its pleading to assert a claim for breach of contract and damages based on the unpaid parking charges, interest, and late fee when this Court ruled that PMI is obligated to pay for all of its allotted parking spaces but PMI has failed to do so? (Assignment of Error 3.)

IV. STATEMENT OF CASE

Nearly a year ago, this Court issued an opinion holding that TCAM “agreed to provide parking on a ‘must take’ rather than an ‘as needed’ basis. The plain language of the agreement obligates the tenant to pay for a certain number of spaces every month whether or not the tenant actually needs them.” *PMI v. TCAM*, No. 71703-I, slip op. at 1 (Div. 1, 2015) (“Slip Op.”). This reversed the trial court’s declaratory judgment that “PMI is not obligated under its Lease with TCAM to pay for parking spaces it does not use in a given month.” CP 1096-1098 (Judgment); CP 2472-2474 (Amended Judgment).

After the case was remanded, TCAM sought, and obtained, entry of a declaratory judgment reflecting the Court of Appeals’ holding and an award of its attorneys’ fees as provided for by the lease. CP 2705-2710; CP 2792-2796. In addition, as PMI had not paid TCAM for all of its allotted parking spaces despite this Court’s recently issued opinion,

TCAM sought entry of a money judgment for the amount owed at that time, \$194,323.86. CP 2494-2704.

TCAM did so pursuant to a section of the Declaratory Judgment Act providing the trial court with the ability to grant relief beyond the declaratory judgment. *Id.* However, the trial court denied TCAM's request for a money judgment. CP 2792-2796.

TCAM filed a motion for reconsideration explaining why TCAM is entitled to a money judgment. CP 2797-2817. As an alternative, if the trial court were to deny that relief, TCAM filed a motion to amend its pleading. *Id.* PMI submitted a letter to the trial court regarding TCAM's request, and TCAM responded. CP 2822-2823; CP 2824-2825. The trial court denied the motion for reconsideration, but requested further briefing from the parties on TCAM's request for leave to amend. CP 2826. PMI submitted an opposition, in which it elaborated upon the arguments it made in its earlier letter to the trial court, and TCAM filed a reply. CP 2849-2859; CP 2860-2866. TCAM also filed a second motion for reconsideration. CP 2827-2840. Ultimately, the trial court denied this motion and TCAM's alternative request for leave to amend. CP 2867. TCAM appealed from the judgment and orders. CP 2868-2877.

To avoid undue repetition, TCAM incorporates the remaining facts into the body of the Argument section below.

V. ARGUMENT

This Court held that PMI is required to pay for all its allotted parking spaces, regardless of whether it uses them. Slip Op. at 1. Yet, PMI has refused to pay for all of its parking spaces. TCAM presented the trial court with three bases on which to grant TCAM a money judgment for the amount owed by PMI, thereby effectuating this Court's intent: (1) RCW 7.24.080 (the Declaratory Judgment Act), (2) CR 54(c) (Judgment and Costs), and (3) CR 15 (Amended and Supplemental Pleadings). The trial court denied every single basis. In doing so, the trial court erred.

A. Standard of Review

This case involves a mixed standard of review. While there is no Washington case specifically setting the standard of review for a trial court's denial of a motion for further relief pursuant to RCW 7.24.080, de novo review is appropriate as this is the standard applied in analogous situations, such as a request for relief under CR 54(c) and the interpretation of a statute to determine its applicability. *Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184, 186 (2011) (when an action turns on the correct interpretation of a statute, the standard of review is de novo).

The standard of review of a trial court's denial of the application of CR 54(c) is also de novo. *Kathryn Learner Family Trust v. Wilson*, 183

Wn. App. 494, 498, 333 P.3d 552, 554 (2014) (applying de novo review and analyzing CR 54(c) as a basis for awarding attorney fees provided for in a contract). However, the standard of review of a motion for reconsideration is abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175, 1180 (2002).

Finally, the standard of review of a trial court's denial of a motion to amend a pleading is abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316, 318 (1999); *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249, 252 (1987).

B. TCAM was Entitled to a Money Judgment Pursuant to the Declaratory Judgment Act

The trial court erred by denying TCAM its request for a money judgment. CP 2792-2796. The Declaratory Judgment Act provides a mechanism for a party such as TCAM to obtain a money judgment after entry of a declaratory judgment. The statute provides as follows:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

RCW 7.24.080.

Forty years ago, the Washington Supreme Court explained the purpose of the statute:

This [combining declaratory and injunctive relief] merely carries out the principle that every court has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective. This principle is also codified in RCW 7.24.080.

Ronken v. Bd. of Cty. Comm'rs of Snohomish Cty., 89 Wn.2d 304, 311-12, 572 P.2d 1, 6 (1977). There are only a few cases interpreting RCW 7.24.080. This is likely because, “it is rarely conceivable that coercion to compel performance of that duty [imposed by the declaratory judgment] is required.” *Ronken*, 89 Wn.2d at 311. Yet, sometimes a party attempts to flout the obligations imposed by the court. In these situations, the cases make it clear: a trial court may award the relief that will effectively enforce its declaratory judgment.

Sometimes that relief may be injunctive relief. In *Ronken v. Bd. of Cty. Comm'rs of Snohomish Cty.*, the Washington Supreme Court affirmed the trial court’s holding that the Board of County Commissioners of Snohomish County’s practice of having road work and other public works projects done by county employees, rather than letting the work out to the private sector through competitive bidding procedures violated several statutes. 89 Wn.2d at 306. Despite the trial court’s holding,

“continuing abusive practices by Snohomish County, violative of the statutory mandate, caused the trial court to find it necessary to impose injunctive relief and to retain jurisdiction to assure that the practices cease.” *Id.* at 311.

Other times, the relief may be a money judgment. In *United Nursing Homes, Inc. v. McNutt*, the parties disputed whether a statute should be interpreted to require the Department of Social and Health Services (“DSHS”) to set rates in its reimbursement system that would reimburse nursing homes in full for their actual allowable costs or that would reimburse what DSHS deemed to be reasonable allowable costs. 35 Wn. App. 632, 634-35, 669 P.2d 476, 479 (1983). The trial court rendered a declaratory judgment interpreting the statute to require DSHS to set rates targeted to reimburse the actual allowable costs in full. *Id.* at 635. However, the court further held that DSHS’s failure to set the rates in this manner caused the nursing homes to be underpaid, and adopted a formula to calculate damages. *Id.* The appellate court affirmed. *Id.* at 635-636.

The appellate court rejected DSHS’s argument that the trial court erred in awarding damages in the declaratory judgment action. *United Nursing Homes, Inc.*, 35 Wn. App. at 640. The court explained that,

A person whose rights are affected by a statute may obtain a declaration of rights thereunder. RCW 7.24.020. Further relief based on a declaratory

judgment may be granted whenever necessary or proper. *See* RCW 7.24.080; *Ronken v. Board of Cy. Comm'rs of Snohomish Cy.*, 89 Wash.2d 304, 572 P.2d 1 (1977). It is generally held, under statutes similar to RCW 7.24, that declaratory and coercive relief may be combined in the same proceeding. Annot., 155 A.L.R. 501, 503 (1945). RCW 7.24 should be similarly construed to effectuate the general purpose of the Act: to make uniform the law of those states which enact it. *See* RCW 7.24.140.

Id. Applying these principles, the court held that,

The trial court has authority to order DSHS to comply with former RCW 74.09.590. *State ex rel. Living Services v. Thompson, supra*. The only purpose of the contract is to bind the homes to provide nursing services and to bind DSHS to pay for those services. The contract cannot provide for payment rates that violate former RCW 74.09.590 or any other statutory authority. *See Hederman v. George*, 35 Wash.2d 357, 212 P.2d 841 (1949). The trial court concluded DSHS misapplied the rate-setting statute and, as a result, the nursing homes were underpaid. Granting damages in the declaratory action saved time and money and resolved the entire dispute. The trial court did not err.

Id.

Since the *United Nursing Homes* case, other courts have affirmed a party's ability to combine a request for declaratory judgment with a request for other relief, including a money judgment. *See Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 989 P.2d 524 (1999) (declaratory judgment and injunction); *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987) (declaratory judgment and money judgment). In fact,

a party may seek an affirmative claim of relief even if the original pleadings only sought a judicial determination of the relationship between the parties. *See Chem. Bank v. Washington Pub. Power Supply Sys.*, 102 Wn.2d 874, 890, 691 P.2d 524 (1984) (summary judgment order did not exceed scope of declaratory judgment action even where original pleadings only sought a judicial determination rather than an affirmative claim of relief but opposing party expanded the scope by moving for summary judgment on a variety of issues, thereby inviting a determination of the parties' entire legal obligations, and when summary judgment was granted in its favor on these issues, it did not allege that the order exceeded the proper scope of the pleadings).

The federal Declaratory Judgment Act is similar to Washington's Act. *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 355, 989 P.2d 1187, 1190 (1999) *aff'd*, 143 Wn.2d 349, 20 P.3d 921 (2001). The corresponding provision to RCW 7.24.080, Section 2202, provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2202. Just as with the Washington statute, the further relief must be "necessary or proper" and a hearing is provided. The purposes of the statute, unsurprisingly, are the same: the expeditious and

just conclusion of the controversy. *Maryland Cas. Co. v. Boyle Const. Co.*, 123 F.2d 558, 565 (4th Cir. 1941). Federal courts have interpreted the statute to allow for entry of a money judgment as further relief to a declaratory judgment. *Hudson v. Hardy*, 424 F.2d 854, 855 (D.C. Cir. 1970) (“money damages may, of course, be awarded in an action for declaratory judgment”).

In *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, a commercial landlord filed a motion for further relief in a declaratory judgment action after the tenant's request for declaratory judgment was denied. 843 F.2d 546 (D.C. Cir. 1988). The tenant had sought a ruling that the landlord's terminations of three leases violated the leases. *Id.* at 547. The trial court and the appellate court upheld the landlord's right to terminate the leases. *Id.*

The landlord then brought an action for “further relief” under Section 2202 of the Declaratory Judgment Act. *Horn & Hardart Co.*, 843 F.2d at 547. Specifically, the landlord sought enforcement of the other provisions in the leases that triggered a payment obligation for the tenant upon termination. *Id.* As the landlord did not file an answer in the original action, it had not previously pled these damages. *Id.* at 549. The appellate court allowed that awarding the amount sought by the landlord under these provisions “may not be ‘necessary’ to effectuate the lease

termination ruling.” *Id.* at 548. However, it held that the award of money damages was “proper.” “[T]he only factual and legal predicate necessary for recovery” of the damages—valid notice of termination, was satisfied. *Id.* at 549. Further, the award “follows absolutely from, and is based on, the district court’s holding in *Horn & Hardart I* confirming Amtrak’s right to terminate the leasehold.” *Id.* at 548. Based on this analysis, the appellate court affirmed the trial court’s award of approximately \$335,000 in damages. 843 F.2d at 548.

The standard of whether to grant further relief—whether it is “necessary or proper,” is satisfied here. RCW 7.24.080. This Court held that, “the landlord [TCAM] agreed to provide parking on a ‘must take’ rather than an ‘as needed’ basis. The plain language of the agreement obligates the tenant [PMI] to pay for a certain number of spaces every month whether or not the tenant actually needs them.” Slip Op. at 1. PMI’s practice of paying for less than its share of parking spaces from the beginning of the term of the lease in 2010 resulted in considerable overdue parking charges, even taking into account PMI’s earlier sporadic payments under protest. CP 2513 (Glover Decl., ¶ 10); CP 2663-2669 (Glover Decl., Ex. D, Parking Charges Spreadsheet). PMI did not pay the amount owed after this Court’s opinion was issued. *Id.* A money judgment is not only “proper”—it will allow TCAM to recover the money owed by PMI, it

is “necessary” because without it this Court’s holding is effectively overturned.

Even if the Court considers factors beyond the “proper or necessary” standard set by the statute, the result should be the same. In *United Nursing Homes, Inc.*, the Court considered matters of efficiency: “[g]ranted damages in the declaratory action saved time and money and resolved the entire dispute.” 35 Wn. App. at 640. TCAM could have filed a new lawsuit asserting a claim for breach of contract for the parking charges PMI refused to pay. It could then have filed new lawsuits for the future owed parking charges, as frequently as every month. Another option was for TCAM to serve PMI with a 3 day Notice to Pay or Vacate. Either option was drastic and needlessly wasteful of judicial resources and the parties’ time and money. The most efficient and effective approach was using the mechanism provided by RCW 7.24.080.

Moreover, PMI would not be prejudiced. It cannot credibly claim that it was unaware of its unpaid parking charges. This obligation was the issue from the beginning of this case. CP 2700-02 (Peterson Decl., Ex. C, 2/14/2012 Notice of Default). *See Kahin v. Lewis*, 42 Wn.2d 897, 901, 259 P.2d 420 (1953) (discussing justiciable controversy requirement). Moreover, PMI’s actions in this case belie any claim of ignorance. Half way through the case, PMI apparently decided unilaterally to cease

making the payments under protest causing significant unpaid charges to accrue. See CP 2512-13 (Glover Decl., ¶ 8); CP 2590-95 (Glover Decl., Ex. B, Checks). In addition, after prevailing on summary judgment, PMI sought and received a judgment for the amounts it paid under protest, even though its complaint only sought declaratory relief. CP 1096-1098 (Judgment); CP 2472-2474 (Amended Judgment); CP 1-54 (Complaint).

Finally, the money judgment was not based on “speculation and conjecture,” an argument raised but rejected in the *United Nursing Homes* case. 35 Wn. App. at 640. The formula for determining the amount PMI owes to TCAM in unpaid parking charges is simple: subtract the amount paid from the total amount owed.¹ The calculation of the 18% interest per annum and 10% late fee is also simple. All of the information necessary to perform these calculations was in the record before the trial court: the lease itself, the garage operator’s invoices, the price per parking space, and the number of parking spaces paid for by PMI or its subtenants. CP 2511-2669 (Glover Decl.). See *United Nursing Homes, Inc.*, 35 Wn. App. at 640 (affirming trial court’s formula as it was “based on meticulous audits

¹ The steps in this calculation are as follows: (1) calculate number of stalls per time period; (2) determine rate for each stall per time period; (3) multiply number of stalls by rate to get total financial obligation; (4) calculate amounts paid; and (5) subtract amounts paid from total financial obligation. See CP 2513-14 (Glover Decl., ¶ 10); CP 2663-2669 (Glover Decl., Ex. D, Parking Charges Spreadsheet).

and a correct interpretation of the law” and noting that “[t]he fact that specific damages are not known until audits are completed does not make the damages speculative.”).

The trial court, eschewing the liberal application of the Declaratory Judgment Act, erred by refusing to grant TCAM further relief in the form of a money judgment. CP 2792-2796. RCW 7.24.080; RCW 7.24.120; *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984). That refusal undermined this Court’s intent and rendered the declaratory judgment ineffective.

C. TCAM was Entitled to the Money Judgment Pursuant to the Court Rules

The trial court also erred by refusing to award a money judgment on the independent basis of Court Rule 54(c).² CP 2867. The rule provides in pertinent part that:

Except as to a party against whom a judgment is entered by default, every 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.

² The Second Circuit, interpreting the corresponding Federal Rule 54(c) and Section 2202 of the federal Declaratory Judgment Act, explained that where the plaintiff relied on Section 2202 instead of Rule 54(c), “[t]he course plaintiff adopted was thus not unusual.” *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522-523 (2d Cir. 1958).

CR 54(c) is to be liberally applied except where substantial prejudice to the opposing party is shown. *Daves v. Nastos*, 39 Wn. App. 590, 593, 694 P.2d 686 (1985) *vacated on other grounds*, 105 Wn.2d 24, 711 P.2d 314 (1985). Moreover, the rule was “designed to avoid the tyranny of formalism that was a prominent characteristic of former practice and to avoid the necessity of a new trial which often follows a deviation from the pleadings.” *Daves*, 39 Wn. App. at 592-93.

CR 54(c) allows a party which brought a declaratory judgment claim to recover additional relief where appropriate. In *Kathryn Learner Family Trust v. Wilson*, a recent case which is procedurally similar to this one, the plaintiff, a trust, brought a declaratory judgment action concerning the parties’ lease, asking the court to interpret rent provisions of the lease to determine the amount the trust owed to the defendant, its landlord. 183 Wn. App. 494, 333 P.3d 552 (2014). The complaint stated it was not seeking a money award and did not include a demand for attorney fees. The landlord alleged a counterclaim and requested monetary damages and an award of attorney fees and costs as provided by the lease contract. *Id.* at 496-97.

In the trust’s motion for summary judgment on the declaratory relief claim, the trust still did not request attorney fees. *Id.* at 497. The trial court granted summary judgment in favor of the trust, adopting its

interpretation of the lease. *Id.* The trust thereafter filed a motion for attorney fees based on the provision in the lease entitling the prevailing party to its attorney fees. *Id.* The trial court denied the motion, despite finding that the lease provided for an award to the prevailing party and that the trust was the prevailing party. *Id.* The basis of the trial court's holding was that attorney fees are special damages that must be pleaded or deemed waived. *Id.* at 498. The trial court rejected the application of CR 54(c) because the rule "is reserved to save a defective complaint only when the unpleaded issue is actually litigated at trial." *Id.*

The appellate court reversed the trial court. It started its analysis with the general rule that, "a claim for contractual attorney fees generally must be pleaded for such relief to be granted." *Kathryn Learner Family Trust*, 183 Wn. App. at 501. However, it then analyzed and applied the exception created by CR 54(c), explaining that:

Under that rule, the trial court is obligated to award reasonable attorney fees when the issue is raised sufficiently before trial so that the nonprevailing party had sufficient notice to make an informed decision of the risks and benefits of continued litigation. It makes no difference which party raises the issue, because the requirement of notice to the nonprevailing party is fulfilled regardless.

Kathryn Learner Family Trust, 183 Wn. App. at 501-02. In other words, the court awarded the trust its attorney fees based on the prevailing party

lease provision despite the trust's failure to include such a claim with its declaratory judgment action because the landlord was clearly aware of the issue based upon its counterclaim relating to the same provision.

Two other appellate courts interpreted and applied CR 54(c) in the same way as the court in the *Kathryn Learner Family Trust* case. In the more recent case, *Bird v. Best Plumbing Grp., LLC*, the insured, Bird, sued Best Plumbing for common law trespass and negligence. 161 Wn. App. 510, 515, 260 P.3d 209 (2011) *aff'd*, 175 Wn.2d 756, 287 P.3d 551 (2012). *Id.* at 515. After Bird and Best Plumbing entered into a settlement agreement, Bird moved for a determination that the settlement was reasonable. *Id.* at 516. Best Plumbing's liability insurer, Farmers, appealed the trial court's determination that the settlement was reasonable. *Id.* One of Farmers' arguments on appeal was that the trial court erroneously concluded that Bird had a claim for statutory trespass that had substantial settlement value. *Id.* at 528. (The trespass statute provides for treble damages. RCW 4.24.630.) Specifically, Farmers argued that Bird did not plead and could not have pled or proved a statutory trespass claim. *Id.* The appellate court rejected this argument, explaining:

The trial court is directed by CR 54(c) to grant relief to a party entitled to relief even if the party has not demanded such relief in his pleadings. CR 54(c) provides, "Except as to a party against whom a judgment is entered by default, every 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.” Thus, if the trial court finds merit in a claim, the court is obligated by CR 54(c) to grant that relief even though the claim has not been included in the original pleadings.

Id. at 529. Applying this rule, the court found that the record showed substantial evidence to support the trial court’s finding that Bird had a significant chance of prevailing on a claim for statutory trespass, and affirmed the trial court’s finding of reasonableness.

In the other case, *Allstot v. Edwards*, the plaintiff, a retired police officer, brought an action against the Town of Coulee Dam for wrongful termination, among other claims, and sought back wages. 114 Wn. App. 625, 629, 60 P.3d 601 (2002). The jury awarded him back wages but he appealed the trial court’s refusal to instruct the jury that it was authorized by statute to award double damages for the town’s willful refusal to pay back wages. *Id.* at 631. The town argued that the issue of double damages was not pleaded and was untimely included in the plaintiff’s trial brief just two weeks before trial. *Id.* at 632. The appellate court rejected this argument, explaining that “the trial court is also directed by CR 54(c) to grant relief to the entitled party ‘even if the party has not demanded such relief in his pleadings.’” *Id.*

Applying CR 54(c), the court held that, “if the trial court had found merit in Mr. Allstot’s statutory claim for double damages, it was obligated by CR 54(c) to grant that relief, even though the claim had not been included in the original pleadings.” *See also Kelly v. Powell*, 55 Wn. App. 143, 776 P.2d 996 (1989) (affirming doubling of unpaid rent not specifically requested in the complaint in an unlawful detainer action based upon CR 54(c)).

The corresponding federal rule, FRCP 54(c), is substantially the same, making federal cases persuasive authority.³ *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 542, 248 P.3d 1047 (2011). Federal cases have similarly applied CR 54(c) in declaratory judgment actions. *United States v. Marin*, 651 F.2d 24, 30 (1st Cir. 1981) (although complaint requested a declaration that the leases were void or the leasehold interests were subordinate, award of damages upheld). In *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, the Second Circuit reversed an order denying the plaintiff’s motion for further

³ FRCP 54(c) currently provides that, “A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” However, it previously used the word “shall” (as does CR 54(c)) instead of “should.” *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 901 (4th Cir. 1996).

relief under the Declaratory Judgment Act, 28 U.S.C. § 2202. 255 F.2d 518 (2d Cir. 1958). The plaintiff sought a declaratory judgment that it was the sole owner of copyrights in a number of songs and an injunction restraining defendant from infringing on its copyrights. *Id.* at 520. The defendant asserted a counterclaim for like relief in its favor. *Id.* After trial, the district court declared the defendant the sole owner of copyrights in 28 songs and the plaintiff the sole owner of copyrights in 154 songs. *Id.* The court also provided injunctive relief. *Id.* Thereafter, the plaintiff moved for an adjudication of infringement and an accounting as further relief based upon the declaratory judgment. *Id.* The defendant argued that the plaintiff should not be allowed to demand damages in addition to the awarded declaratory and injunctive relief. *Id.* at 522. The Second Circuit rejected this argument, explaining that the plaintiff would be entitled to damages under FRCP 54(c) if the infringement was proven. *Id.* at 522-23.

Similarly, here, TCAM is entitled to a money judgment pursuant to CR 54(c). First and foremost, the trial court, by the entry of the declaratory judgment (after remand) that PMI is obligated to pay for all of its parking spaces, necessarily found merit to TCAM's claim for payment of the overdue parking charges, interest, and late fee. CP 2792-2796. The record regarding these amounts was fully developed at the time of TCAM's request for a money judgment. After PMI was credited for its

payments under protest and the payments by PMI's subtenants, PMI owed TCAM \$148,299.24 in parking charges through September 2015. CP 2513 (Glover Decl., ¶ 10). In addition, PMI owed TCAM interest in the amount of \$31,194.70 on the parking charges through September 2015, and a late fee in the amount of \$14,829.92 on the parking charges through September 2015. CP 2718 (Peterson Decl., ¶¶ 15-16); CP 2703-04 (Peterson Decl., Ex. D). PMI did not dispute the calculation of these amounts.

Second, PMI would not have been prejudiced by the application of CR 54(c) as it was aware of the disputed financial obligation and fully prepared to present its evidence regarding mitigation. PMI was aware that money was at stake from the beginning of this lawsuit: PMI filed its complaint after TCAM issued a letter demanding payment for outstanding parking charges. CP 2700-02 (Peterson Decl., Ex. C, Notice of Default). In its counterclaim, TCAM included allegations about TCAM's demand to PMI to pay overdue parking charges. CP 57 at ¶ 1.14; CP 59 at ¶ 3.10. PMI was put on notice of how TCAM calculated the overdue parking charges at the latest in January 2014, when TCAM presented testimony in connection with its cross-Motion for Summary Judgment that PMI owed TCAM a certain dollar amount for parking charges. CP 69 (Awad Decl., ¶ 12). In fact, PMI knew when it stopped making payments under protest in

August 2013 that, should the court disagree with its interpretation of the lease, it was causing TCAM significant damages. *See* CP 2512-13 (Glover Decl., ¶ 8). Indeed, after the cross-summary judgment motions were ruled in favor of PMI, PMI obtained a judgment for the amount it had paid to TCAM under protest. CP 1096-1098; CP 2472-2474. This notice was sufficient to give PMI not only a meaningful opportunity to meet the merits of TCAM's claim, but also a chance to make an informed decision to undergo the risks of litigation.

Moreover, PMI developed the record for its argument regarding mitigation. Prior to the discovery cut-off, it elicited testimony of deponents related to the issue and then used this testimony in its summary judgment briefings. CP 527-551 (Motion for Summary Judgment); CP 952-977 (Opposition); CP 1037-1042 (Reply). To the extent PMI thought it was relevant, it could have simply provided this evidence in its response to TCAM's request for entry of a money judgment. There would have been no prejudice to PMI if the trial court allowed TCAM to rely on CR 54(c) to obtain a money judgment.

Thus, the trial court erred by refusing to apply CR 54(c) and grant TCAM the money judgment for the overdue and unpaid parking charges, interest, and late fee. CP 2867.

D. If Nothing Else, TCAM was Entitled to Amend its Counterclaim

At the very least, even if the trial court properly disallowed entry of a money judgment under RCW 7.24.080 and CR 54(c), it should have granted TCAM leave to amend its complaint to assert a claim for breach of the lease. TCAM proposed this alternate solution, but it was also denied. CP 2797-2817; CP 2826. This left TCAM with no recourse to obtain payment of the unpaid parking charges, interest, and late fee, despite this Court's holding that PMI was obligated to pay for such charges.⁴ This was an abuse of the discretion.

An abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Walla v. Johnson*, 50 Wn. App. 879, 882, 751 P.2d 334, 336 (1988) (holding that trial court abused its discretion). However, leave to amend should be “freely given when justice so requires” under Court Rule 15(a). This rule

⁴ TCAM could also file an entirely new lawsuit against PMI for its default under the lease for non-payment of parking charges. However, PMI would surely argue (incorrectly) that the claim is barred by *res judicata*. Of course, the claim is not barred by *res judicata* because the issue of TCAM's damages has never been litigated. *Horn & Hardart Co.*, 843 F.2d 546 at 549 (discussing the declaratory judgment exception to the doctrine of *res judicata*). However, if TCAM is denied its rightful opportunity to pursue its damages in this litigation, and a later court agrees with PMI that the claim is barred by *res judicata*, there will be no way to go back at that time and correct the error created by PMI's deceptive litigation tactics.

“serves to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party.” *Chadwick Farms Owners Ass’n v. FHC, LLC*, 139 Wn. App. 300, 313, 160 P.3d 1061, 1067 (2007) *aff’d in part, rev’d in part on other grounds*, 166 Wn.2d 178, 207 P.3d 1251 (2009), *as corrected* (Sept. 14, 2009).

This Court already determined the merits: PMI is obligated to pay TCAM for all of its parking spaces. Slip Op. at 1. As discussed above in Section C, PMI not only had notice of TCAM’s claim for the unpaid parking charges, but unilaterally decided to stop making payments under protest, causing the charges to accrue.

In addition, PMI would not be prejudiced by the amendment. Prejudice is determined by “the possible undue delay, unfair surprise, and the futility of amendment.” *Watson v. Emard*, 165 Wn. App. 691, 699, 267 P.3d 1048, 1052 (2011). TCAM’s request was not unduly delayed. Throughout much of the litigation, PMI paid under protest and did not owe TCAM anything. CP 2512-13 (Glover Decl., ¶ 8); CP 2663-2669 (Glover Decl., Ex. D, Parking Charges Spreadsheet). After TCAM lost in superior court, it could not amend its pleading to assert a claim it did not have under the trial court’s interpretation of the lease. TCAM sought

leave to amend when PMI failed to pay, despite this Court's opinion, the parking charges that accrued since its last payment under protest, and the trial court denied its motion for further relief. This was the first instance in which the need for amendment arose.

Nonetheless, the amendment would not be an unfair surprise to PMI. PMI knew that as soon as it decided to stop making payments under protest, the parking charges would accrue, and that TCAM would be entitled to payment if it prevailed on its interpretation of the lease. The fact that it took an appeal to prevail does not change this. Moreover, PMI had itself sought and received, without any objection from TCAM, a judgment with an award for the amount it had paid under protest even though it did not plead a claim for such relief. CP 1096-1098. It could only expect that TCAM would do the same.

Lastly, the amendment would not be futile. TCAM expects that PMI will argue that the claim would be barred by equitable estoppel. This is without merit, for the reasons discussed below in Section E.

The superior court abused its discretion in denying TCAM's request for leave to amend its counterclaim. *Walla*, 50 Wn. App. at 882. The denial was manifestly unreasonable because it left TCAM with no recourse to recover payment of the unpaid parking charges this Court held PMI is obligated to pay. It was also based on untenable reasons or

grounds because the superior court's explanation for the denial, that "it is not appropriate nor does it do substantial justice," does not reflect the correct analysis. CP 2867. There is no mention of prejudice, whether by undue delay, surprise, or futility. Even if there were, as explained above, these factors are not present.

E. PMI's Expected Arguments are Without Merit

TCAM expects PMI to argue that the trial court did not err because TCAM stated it has no damages, and cannot now reverse course. This is entirely false and misleading. TCAM did not state that it had no injury or damages in any filing with the superior or appellate courts; rather, PMI has falsely stated that, repeatedly. CP 2750-52 (PMI's Response to Motion for Further Relief at 1-3: "TCAM urged the court to take the no-injury position"; the Court "took TCAM at its word that it had suffered no injury"); CP 2849-51 and 2857 (PMI's Response to Motion to Amend at 1:22; 1:27-2:1; 3:18-29; 9:17-18: "the very damages it made a strategic choice to disclaim"; "Having convinced the appellate court...it had not been injured"; "TCAM made a strategic choice to disavow any claim for money damages"; "TCAM encouraged the Court of Appeals to find that it did not suffer an injury"). Not only did TCAM never state that it had incurred no injury, but the actual record shows that TCAM offered evidence of its damages in its motion for summary judgment. CP 69

(Awad Decl., ¶ 12). How can PMI possibly contend that TCAM stated it had no damages when TCAM offered this evidence of its damages?

PMI purports to quote a section of TCAM's Reply Brief in support of its claim that TCAM stated it incurred no injury. However, the quoted section says no such thing. PMI argues:

Throughout the trial court and appellate court proceedings, TCAM repeatedly urged the court to accept its "no injury" premise. In its appellate reply brief, TCAM represented that "[t]he **only claims** asserted in the complaint and counterclaim **were for declaratory judgment regarding the meaning of the Lease.**" App.'s Reply Br., at 22 (emphasis added). According to TCAM, mitigation of damages "is only an affirmative defense to a claim for damages and is not applicable to a claim for declaratory judgment." *Id.* Because there are no damages, mitigation is not relevant.

CP 2755. The last sentence of the above quotation is PMI's faulty conclusion regarding the previously quoted statements. TCAM merely points out that the *pleaded* claims are limited to declaratory judgment. The quoted statement says nothing about a lack of injury and PMI's conclusion to the contrary is a giant illogical leap. TCAM's position has been consistent throughout this case.⁵

⁵ PMI cannot establish equitable estoppel because TCAM's position in this case has always been consistent and it did not mislead the trial court or this Court. *Arkinson v. Ethan Allan, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).

1. The Only Claims Asserted by PMI and TCAM Were for Declaratory Judgment.

This case began as a dispute about the meaning of a lease provision. TCAM, the landlord, understood the lease to require PMI, the tenant, to pay for all of the parking spaces allocated to it under the lease. PMI, on the other hand, contended it only had to pay for those parking spaces it actually used. The disagreement arose immediately after the lease was executed when PMI did not pay for all of its parking spaces. When informal negotiations had stalled, and the accrued unpaid parking charges amounted to nearly \$75,000, TCAM's counsel sent PMI a demand letter. CP 2700-02 (Peterson Decl., Ex. C, Notice of Default). Within a week, PMI paid the full amount owed to TCAM, but added a notation on the check that the payment was "under protest." CP 2591 (Glover Decl., Ex. B, 2/20/2012 Check).

Three days after PMI brought its account current, it initiated this case by filing a complaint for declaratory judgment. CP 1-54. PMI sought a determination that the lease provided that, "PMI has the *right* to the nonexclusive use of up to 34 Garage parking spaces on a monthly basis, but not the *obligation* to pay for Garage parking spaces not used." *Id.* Despite the fact that its payment was "under protest," PMI did not allege any damages in its Complaint. *Id.* It did not even request

reimbursement of the payment under protest in the event that it prevailed on its declaratory judgment action. *Id.*

TCAM filed a counterclaim, asking for the opposite determination: that PMI has the obligation to pay for its allotted parking spaces, regardless of whether it uses them. CP 55-62. As PMI had paid for all of its parking spaces, no amount was owed that could support a claim for damages. Moreover, for all intents and purposes, PMI had indicated that it would keep current by paying “under protest.” Consequently, TCAM did not assert a breach of contract claim.

Indeed, PMI made four more payments “under protest” over the following year and a half, while the parties engaged in litigation. CP 2512-2513 (Glover Decl., ¶ 8). The last payment PMI made was on August 1, 2013, during the discovery phase. *Id.* However, this check does not indicate, and there is no evidence in the record, that PMI intended to make no further payments under protest. TCAM could not know whether PMI would make another payment later in the case. TCAM’s reasonable expectation was that it would continue to do so until the trial court resolved the lease interpretation issue.

2. On Summary Judgment, the Superior Court Ruled that PMI Only Had to Pay for Those Parking Spaces it Used.

On summary judgment, the superior court held that PMI's interpretation prevailed over TCAM's, and PMI was only required to pay for those parking spaces it used. CP 1093-1095; CP 1096-1098. The practical consequence of the court's ruling was that PMI was entitled to the return of its payments "under protest." Unsurprisingly, PMI thereafter sought entry of a judgment that included not only a declaratory judgment but also a money judgment. CP 1096-1098. The money judgment was for the amount PMI had paid under protest, which totaled \$174,830.60. *Id.* TCAM did not object to the entry of the declaratory judgment and money judgment, as the judgments comported with the trial court's ruling regarding the meaning of the lease.

3. TCAM Appealed.

However, TCAM appealed the trial court's summary judgment order and the judgment which declared the meaning of the lease and awarded PMI a money judgment in the amount of its payments under protest and its attorneys' fees and costs. In its opening brief, TCAM focused on the lease interpretation issue, arguing that PMI was obligated to pay for all of its parking spaces.

Most of PMI's opposition brief was dedicated to directly responding to TCAM's arguments about the interpretation of the lease.

But PMI added a section at the end regarding mitigation. This must have seemed strange to the Court as PMI did not explain why mitigation was relevant. PMI only made the missing context known after the case was remanded. PMI apparently decided to cease to make payments under protest and, more importantly, it decided that if it lost on appeal, it would oppose a money judgment for the amount in dispute. TCAM did not know this was PMI's strategy at the time. TCAM operated under the good faith belief that PMI would accept a money judgment just as TCAM had done after it lost at the summary judgment hearing.

Operating on this assumption, TCAM addressed the issue as it had in the summary judgment briefing. TCAM's position has always been that mitigation does not affect in any way the ability of the court to enter a declaratory judgment. It is simply irrelevant to how the lease is interpreted. TCAM then refuted the factual allegations PMI made regarding mitigation. TCAM never stated in any court filing that it had not incurred any damages. TCAM did not know that PMI was alleging that TCAM did not have any damages, in other words that it had paid all the amounts owed under protest, or that PMI would oppose entry of a money judgment if it lost on appeal.

4. Counsel Argued the Case Before the Court.

In its Order Re Motion for Reconsideration, the superior court stated that “TCAM evidently represented to the Court of Appeals that at least as of the date of argument remand to determine any amounts due was not appropriate or necessary because it had been compensated (incurred no damages).” CP 88. At no time did TCAM ever represent to the Court of Appeals (or the superior court) that it had incurred no damages. Such a statement cannot be found in any brief filed by TCAM nor did counsel for TCAM make such a statement during oral argument. Because the superior court made TCAM’s alleged statements to the Court of Appeals the basis of its ruling, on February 16, 2016, TCAM filed with the Court of Appeals Appellant’s Motion for Leave to Cite Oral Argument. PMI, not wanting this panel to know what its own counsel had said to the Court, filed a five-page brief opposing TCAM’s motion. The same day, without permitting a reply by TCAM, the Court Administrator denied the motion stating as follows: “The Court of Appeals is not a court of record. The oral argument recording of proceedings before this court are available should the assigned panel choose to review them.”

TCAM respectfully requests that the panel review the recording of the oral argument. It will show two things critical to this appeal: 1) that, as with its briefs, TCAM made no statement to the Court indicating that it

had incurred no damages, contrary to PMI's false representations to the superior court; and 2) PMI's counsel did state, in response to a question by Judge Becker, that PMI was paying for the unused parking spaces.⁶ TCAM has had the hearing recording transcribed and would be happy to provide the transcript to the Court upon its request.

In fact, the trial court record establishes that PMI did not pay the full amount it owed for parking. TCAM submitted a declaration in support of its cross-motion for summary judgment that identified the amount owed. CP 69 (Awad Decl., ¶ 12). Both parties acknowledged that PMI made five payments, the last being in August 2013. CP 1096-1098 (Judgment); CP 2512-13 (Glover Decl., ¶ 8). At some point in time, PMI knew that it would not make another payment under protest, thereby causing TCAM damages in the amount of the unpaid parking charges. Yet it did not make this known until it was too late for TCAM to address it.

⁶ PMI's counsel's statement may have been inadvertent rather than an intentional effort to deceive the Court. However, PMI's attempt to attribute the Court's misunderstanding of the facts to TCAM is reprehensible and PMI's ongoing effort to promote this falsehood as if it were a proven fact, or admission, should be sanctioned under CR 11. CP 2750-52 (PMI's Response to Motion for Further Relief at 1-3: "TCAM urged the court to take the no-injury position"; the Court "took TCAM at its word that it had suffered no injury").

5. The Court Ruled in Favor of TCAM.

Nonetheless, PMI's out-of-place argument regarding mitigation, together with PMI's counsel's misrepresentations regarding PMI's payments under protest, led to the inclusion of a section in this Court's Opinion that the trial court relied on to effectively eviscerate the Court's holding in favor of TCAM.

This Court held that the lease requires PMI to pay for its allotted parking spaces, regardless of whether it uses them or not. Slip Op. at 1. This is the interpretation sought by TCAM in the declaratory judgment action. The Court also addressed PMI's argument regarding mitigation. In a short paragraph, the Court disposed of PMI's argument by stating that "TCAM has not been injured. PMI has been paying under protest for the parking spaces it does not use." Slip Op. at 10. (Emphasis added.)⁷

⁷ This statement is dicta. It "is not necessary to the court's decision in a case and as such is not binding authority." *Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 239, 328 P.3d 1008, 1019 (2014). See Black's Law Dictionary (10th ed. 2014) (defining *gratis dictum* as "1. A voluntary statement; an assertion that a person makes without being obligated to do so. 2. A court's stating of a legal principle more broadly than is necessary to decide the case. 3. A court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar."). PMI's argument regarding mitigation is entirely irrelevant to the bilateral claims for declaratory judgment regarding the interpretation of the lease that were the sole focus of the superior court action and appeal. The portion of the opinion in which the Court addressed whether TCAM had a duty to mitigate was not necessary to the Court's interpretation of the lease and is not binding authority.

PMI sought reconsideration of the Court's holding, arguing that the trial court interpreted the lease correctly. The Court did not request a response from TCAM. And TCAM, still in the dark about PMI's plan to refuse to make any further payments, did not file a motion for reconsideration itself. Furthermore, it would have been anomalous and foolhardy for the prevailing party to move for reconsideration because of a seemingly minor misstatement that the opposing party later latched onto and blew totally out of proportion.

6. The Trial Court Denied TCAM's Requests After Remand.

As described above, after the Court issued its mandate, TCAM sought entry of a declaratory judgment memorializing this Court's holding. CP 2705-2710. It also sought a money judgment for the unpaid charges for the parking spaces allotted to PMI, or in the alternative, leave to amend. CP 2494-2510; CP 2707-2817.

The trial court's basis for denying TCAM's requests was that:

The defendant evidently represented to the Court of Appeals that at least as of the date of argument remand to determine any amounts due was not appropriate or necessary because it had been compensated (incurred no damages). Based on that, the Court of Appeals refused the Plaintiff's request for remand. Therefore, it is not appropriate nor does it do substantial justice under these circumstances to re-open the case and allow defendants [sic] to amend their [sic] pleadings and their [sic] position with the Court of Appeals.

CP 2867. TCAM made no such representation during the summary judgment proceeding, in the appellate briefing, or during the oral argument before this Court. To the contrary, the record reflects that PMI owed TCAM for the parking spaces. PMI created the problem at the heart of this appeal by failing to continue to make payments under protest yet letting it be assumed that it had or would make those payments.

F. PMI Can Present its Evidence Regarding Mitigation

Granting TCAM's request would not have prevented PMI from having an opportunity to present its evidence regarding mitigation. RCW 7.24.080 requires the trial court to have a show cause hearing before granting a request for further relief. Indeed, the *United Nursing Homes, Inc.* court stated that

As an overall safeguard, we expect the trial court to afford the parties a further hearing after the dollar amounts have been computed by the court's formula but before final judgment is entered.

United Nursing Homes, Inc., 35 Wn. App. at 642.

PMI could have presented its evidence and argued the quantum of the money judgment at that time. The trial court would have been empowered to make factual determinations in this regard. *Trinity Universal Ins. Co.*, 13 Wn.2d 263, 268, 124 P.2d 950, 953 (1942) (“[T]he courts have the power to determine questions of fact when necessary or

incidental to the declaration of legal relations.”); *United Nursing Homes, Inc.*, 35 Wn. App. at 642 (“we expect the trial court to afford the parties a further hearing after the dollar amounts have been computed by the court’s formula but before final judgment is entered.”). PMI also would have had such an opportunity if TCAM were given leave to amend its pleading.

Even assuming, for the sake of argument, that mitigation is relevant to the calculation of TCAM’s money judgment, PMI’s claim that TCAM should and could have mitigated its damages is not only not supported by Washington law but it is nonsensical. “[A] plaintiff has no ‘duty’ to mitigate where the defendant has equal opportunity to do so.” *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 405-407, 828 P.2d 621 (1992) (holding that a deed of trust beneficiary and her title insurer had equal opportunity to pay off the senior lien by bidding at the senior lienholder’s foreclosure sale or otherwise, so neither had a duty to mitigate).

Here, TCAM and PMI had, at the very least, equal opportunity to mitigate, so TCAM simply did not have a duty to mitigate. As a preliminary matter, PMI never surrendered any parking spaces to TCAM. CP 951 (2d Awad Decl., ¶ 8). Moreover, as shown on the invoices from the garage operator, Republic Parking, the number of parking spaces PMI used varied between 13 and 21 (31 counting subtenants). CP 2592-2662

(Glover Decl., Ex. C, Republic Parking Invoices). How could TCAM know how many parking spaces it could sublease on PMI's behalf? Instead, the reasonable approach was what actually took place: PMI subleased parking spaces to its subtenants. CP 2512 (Glover Decl., ¶ 7). Nonetheless, TCAM did seek to assist PMI with its extra parking spaces. TCAM's standard practice is to connect tenants that have extra parking spaces with interested third parties. CP 941 (2d Peterson Decl., Ex. PP, Awad dep. at 32:4-33:7). On the other hand, PMI was aware of individuals interested in purchasing monthly passes but provided no evidence that it pursued them. CP 531 (PMI's Motion for Summary Judgment at 5:15-17). Further, PMI provided no evidence that it encouraged its employees, to whom PMI passes the cost of the parking spaces, to use the extra parking spaces.

G. TCAM is Entitled to Attorneys' Fees and Costs

TCAM seeks an award of attorneys' fees on appeal pursuant to RAP 18.1. In Washington, a prevailing party may recover attorneys' fees if authorized by statute, equitable principles, or by agreement between the parties. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). Here, TCAM's lease provides for fees and costs to the prevailing party. CP 136 (Executed Lease, Paragraph 19(a)). Therefore, if TCAM

prevails on appeal it is entitled to costs and its reasonable attorneys' fees incurred at the trial court level and in its appeal.

VI. CONCLUSION

The premise of PMI's opposition to a monetary judgment in favor of TCAM, or even a hearing on the issue, is false. The evidence in the record is un rebutted that PMI has not paid for the parking spaces that this Court declared it was obligated to pay for under the terms of the lease. Moreover, there is absolutely nothing in the record in the nature of a representation by TCAM that it has not incurred damages. There are three perfectly acceptable methods available for TCAM to seek a judgment for the parking charges owed to it by PMI under the circumstances of this case: 1) a motion for further relief under RCW 7.24.080, 2) a motion for relief under CR 54(c); and/or 3) leave to amend its pleading under CR 15(a). The superior court erred by denying TCAM any opportunity to obtain the relief to which it is entitled. TCAM respectfully requests that this Court reverse the superior court's judgment and orders and allow TCAM to obtain a money judgment for the unpaid parking charges, interest, and late fees. If the Court does not find that TCAM is not so entitled based on the record, TCAM should be granted leave to amend its pleading.

Respectfully submitted this 1st day of April, 2016.

SOCIUS LAW GROUP, PLLC

By 

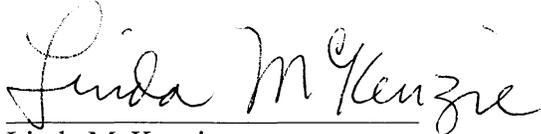
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VII. CERTIFICATE OF SERVICE

I certify that on the 1st day of April 2016, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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Linda McKenzie

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~~917023~~
NO. ~~74623-5~~ 74623.5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

PACIFIC MARKET INTERNATIONAL, LLC,

Respondent,

v.

TCAM CORE PROPERTY FUND OPERATING LP,

Appellant.

APPELLANT'S INDEX TO FEDERAL CASES CITED IN ITS BRIEF

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INDEX TO FEDERAL CASES

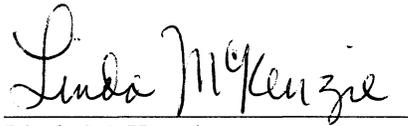
1. *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518 (2d Cir. 1958)
2. *Gilbane Bldg. Co. V. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895 (4th Cir. 1996)
3. *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546 (D.C. Cir. 1988)
4. *Hudson v. Hardy*, 424 F.2d 854 (D.C. Cir. 1970)
5. *Maryland Cas. Co. v. Boyle Const. Co.*, 123 F.2d 558 (4th Cir. 1941)
6. *United States v. Marin*, 651 F.2d 24 (1st Cir. 1981)

CERTIFICATE OF SERVICE

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KeyCite Yellow Flag - Negative Treatment

Distinguished by Siegel v. National Periodical Publications, Inc.,
S.D.N.Y., October 18, 1973

255 F.2d 518

United States Court of Appeals Second Circuit.

EDWARD B. MARKS MUSIC
CORPORATION, Plaintiff-Appellant-Appellee,

v.

CHARLES K. HARRIS MUSIC PUBLISHING
CO., Inc., Defendant-Appellee-Appellant.

No. 276, Docket 24042.

|
Argued March 25, 1958.

|
Decided May 16, 1958.

Action for a declaratory judgment that plaintiff is the sole owner of copyrights in certain songs. From a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., plaintiff appealed from an order denying its motion for further relief and defendant appeals from the judgment declaring plaintiff to be the sole owner of the copyrights. The United States Court of Appeals, Clark, Chief Judge, held that the evidence established the plaintiff's claim of ownership to renewals of the copyrights, and that an adjudication for infringement and for an accounting was not barred by laches.

On defendant's appeal judgment affirmed; on plaintiff's appeal judgment reversed and remanded for further proceedings.

West Headnotes (11)

[1] **Copyrights and Intellectual Property**

— Duration

Copyrights and Intellectual Property

— Construction and operation

A copyright renewal creates a separate interest distinct from the original copyright and a general transfer by an author of the original without mention of renewal rights conveys no interest in

the renewal rights without proof of a contrary intention.

11 Cases that cite this headnote

[2] **Copyrights and Intellectual Property**

— Construction and operation

Where there was a general transfer of copyrights to songs to the defendant's predecessor making no mention of renewal rights and extrinsic evidence concerning intent of composer to include renewal rights was ambiguous, evidence was insufficient to establish that composer intended to transfer renewal rights of the copyrights to the defendant's predecessor. 17 U.S.C.A. § 30.

7 Cases that cite this headnote

[3] **Copyrights and Intellectual Property**

— Recording

Where plaintiff's claim of ownership of copyrights to songs was placed on an unambiguous agreement with the composer clearly conveying to it all renewal rights in the songs and claim of ownership brought by the defendant was based on separate assignments executed by the composer in 1936, plaintiff's failure to record the 1933 agreement within three months of its execution vested no rights in the defendant. 17 U.S.C.A. § 30.

12 Cases that cite this headnote

[4] **Copyrights and Intellectual Property**

— Duration

Although a promise to pay royalties in the future coupled with notice of a prior claim before payment might deprive a subsequent purchaser of the status of a bona fide purchaser of rights to renewals of the copyright, doctrine has no application to a prior purchaser. 17 U.S.C.A. § 30.

1 Cases that cite this headnote

[5] **Declaratory Judgment**

— Supplemental relief

The statute providing that further relief based on a declaratory judgment may be granted after reasonable notice and hearing against adverse party whose rights were determined by the judgment means that the further relief sought need not have been demanded or even proved in the original action for declaratory relief, and the statute authorizes further relief based on the declaratory judgment and any additional facts which might be necessary to support such relief can be proved on the hearing provided in the statute or in an ancillary proceeding if that is necessary. 28 U.S.C.A. § 2202.

16 Cases that cite this headnote

[6] **Declaratory Judgment**

— Supplemental relief

In action for declaratory relief where judgment declared plaintiff to be the sole owner of copyrights in certain songs, relief to plaintiff on motion for an adjudication of infringement and for an accounting was proper. 28 U.S.C.A. § 2202.

Cases that cite this headnote

[7] **Copyrights and Intellectual Property**

— Limitations and laches

In action for declaratory relief that plaintiff was the sole owner of the copyrights in certain songs, motion for an adjudication of infringement and for an accounting was not barred by laches where the action was instituted in 1944 some six years after the plaintiff had notice of the threatened infringement by the defendant's predecessor. 17 U.S.C.A. § 30; 28 U.S.C.A. § 2202.

Cases that cite this headnote

[8] **Equity**

— Prejudice from Delay in General

Failure to prosecute a suit diligently resulting in substantial delay causing actual prejudice to the adverse party can constitute "laches."

3 Cases that cite this headnote

[9] **Declaratory Judgment**

— Supplemental relief

In action for declaratory relief that plaintiff was the sole owner of copyrights in certain songs, plaintiff was not barred from relief of infringement and accounting by failing in its complaint to allege infringement and consequent damages, since under the Declaratory Judgment Statute, it was not compelled to take such course. 28 U.S.C.A. § 2202; Fed.Rules Civ.Proc. rule 54(c), 28 U.S.C.A.

4 Cases that cite this headnote

[10] **Declaratory Judgment**

— Supplemental relief

In action for declaratory relief that plaintiff was the sole owner of copyrights in certain songs, defendant could not assume from absence of a plea for damages, that plaintiff would not seek them at trial, or that plaintiff would not seek damages after trial and entry of the judgment because the complaint ended with the prayer "that upon application therefor, plaintiff be granted such further relief based on said declaratory judgment as may be necessary or proper." 28 U.S.C.A. § 2202.

9 Cases that cite this headnote

[11] **Declaratory Judgment**

— Limitations and laches

In action for declaratory relief that plaintiff was sole owner of copyrights in certain songs, 11-year delay did not bar right to an adjudication of infringement and for an accounting where defendant consented to the delays and showed no specific prejudice therefrom. 28 U.S.C.A. § 2202.

Cases that cite this headnote

Attorneys and Law Firms

*520 Julian T. Abeles, New York City, for plaintiff-appellant-appellee.

Maxwell Okun, of Fishbein & Okun, New York City (Arthur L. Fishbein, of Fishbein & Okun, New York City, on the brief), for defendant-appellee-appellant.

Before CLARK, Chief Judge, LUMBARD, Circuit Judge, and DIMOCK, district judge.

Opinion

CLARK, Chief Judge.

Plaintiff instituted this action in 1944 for a declaratory judgment that it was the sole owner of the renewed copyrights in a number of songs written by Joseph E. Howard and for an injunction restraining defendant from infringing its copyrights. Defendant asked by way of counterclaim for like relief in its favor. After numerous delays the case came to trial in 1955. The district court's judgment declared the defendant the sole owner of the renewed copyrights in 28 of the songs, and the plaintiff the sole owner of the renewed copyrights in 154 of the songs. In addition it provided appropriate injunctive relief. Thereupon plaintiff moved for an adjudication of infringement and for an accounting as further relief based on the declaratory judgment.¹ The district court denied the motion. Plaintiff appeals from this denial, and defendant appeals from that part of the judgment which declared the plaintiff to be sole owner of the renewed copyrights in the 154 songs.

We deal first with the defendant's appeal. Defendant's interest in the renewed copyrights depends on an unrecorded conveyance executed in 1916 by Howard to defendant's predecessor, Charles K. Harris, the original publisher of Howard's songs. The conveyance, which makes no mention of renewal rights, states in part that in consideration of \$150 Howard conveys to Harris all his 'right, title and interest by way of copyrights or otherwise * * * in and to all my musical compositions published by Chas. K. Harris of New York City.' Plaintiff's claim of ownership is based on an agreement between it and Howard executed on June 6, 1933 (prior to the end of the original copyright terms), which clearly provided for the assignment of the renewal copyrights in Howard's songs. This agreement, recorded in the Copyright Office ten months after its execution, was followed by specific assignments from Howard to plaintiff of each of the litigated songs after the copyrights were renewed. Each such assignment provided that it was made pursuant and subject to the agreement of *521 June 6, 1933, and each was duly recorded within the statutory period provided in 17 U.S.C. § 30.

In 1936, Howard executed seventeen separate assignments of the renewal rights to the songs in issue to defendant's predecessor which subsequently were recorded. But these are of no help to defendant unless the instrument executed by Howard in 1916 conveyed to Harris the renewal rights, for, prior to the 1936 assignments, plaintiff had recorded the valid agreement assigning to it the renewal rights to the songs, as we have just stated.

[1] [2] The cases are clear that a copyright renewal creates a separate interest distinct from the original copyright and that a general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention. *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 2 Cir., 189 F.2d 469, certiorari denied 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641; *Rossiter v. Vogel*, 2 Cir.134 F.2d 908. Here we have a general transfer to defendant's predecessor which make no mention of renewal rights. But to show that Howard intended to include the renewal rights in the grant, defendant produced the deposition of Isabelle B. Monroe, who was Harris' secretary in 1916. She testified that after Howard had signed the conveyance, and in his presence, Harris stated that 'all the property was ours and all the renewals became part of our catalogue.' The district court rejected this deposition as determinative of Howard's intent to include the renewal rights, and we agree. It is surely tenuous at best to conclude that Howard really intended to strip himself of his separate interest in the renewals by merely saying nothing (if he heard) in response to Harris' somewhat ambiguous self-supporting statement. Actually the deposition was taken 39 years after the alleged conversation, and it is quite inconceivable that the witness remembered in detail all the relevant circumstances surrounding the event. Moreover, it is quite probable that the whole purpose of the 1916 conveyance was to extinguish Harris' liability to pay royalties to Howard pursuant to prior contracts between the principals. This is supported by one part of the conveyance which provided that Howard released Harris 'from payment of royalties or otherwise by reason of any contract or understanding had between the parties concerning said musical compositions.' At best, then, we have a situation where the conveyance is silent as to renewal copyrights; and the extrinsic evidence concerning intent is ambiguous. This is insufficient to support defendant's claim.

[3] [4] On the other hand, plaintiff's claim of ownership is based on an unambiguous agreement with Howard which clearly conveyed to it all renewal copyrights in the songs at issue and which provided that Howard would execute all necessary renewals for plaintiff's benefit. Defendant's

objections to the validity of this agreement are not well taken. Most of them erroneously presume that the 1916 instrument effectively conveyed renewal rights to Charles K. Harris and that the plaintiff's alleged failure to comply with 17 U.S.C. § 30 stripped it of any rights as a bona fide purchaser for value. But as we have shown, the 1916 conveyance gave defendant no interest in the renewal rights; and hence its claim of ownership must be based on the seventeen separate assignments executed by Howard in 1936. Under this analysis it is evident that plaintiff's failure to record the 1933 agreement within three months of its execution vests no rights in defendant. For defendant to prevail under § 30 it had to be a subsequent purchaser without notice, and admittedly in 1936 it had notice of plaintiff's interest. Conversely, it matters little that in 1933 plaintiff might have had notice of defendant's claim, for this could have been notice only of an invalid claim. Finally, defendant says that plaintiff was not a purchaser for a valuable consideration, because the 1933 agreement provided for royalties, including an advance of \$200. Although a promise to pay royalties in *522 the future, coupled with notice of a prior claim before payment, might deprive a subsequent purchaser of the status of a bona fide purchaser under § 30, *Rossiter v. Vogel*, supra, 2 Cir., 134 F.2d 908, 911, the doctrine has no application to a prior purchaser, which is what plaintiff is here. Thus in order to upset the 1933 agreement, defendant must show the lack of any consideration, which obviously is out of the question. Plaintiff's ownership, therefore, is well supported by the record, and the district court correctly rejected defendant's claims to the songs at issue.

[5] [6] We come, then, to plaintiff's appeal from the denial of its motion for an adjudication of infringement and for an accounting. If plaintiff is not barred by laches this relief is proper. 28 U.S.C. § 2202 specifically provides that: 'Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.' We take this to mean that the further relief sought— here monetary recompense— need not have been demanded, or even proved, in the original action for declaratory relief. The section authorizes further or new relief based on the declaratory judgment, and any additional facts which might be necessary to support such relief can be proved on the hearing provided in the section or in an ancillary proceeding if that is necessary. Cf. *Security Ins. Co. of New Haven v. White*, 10 Cir., 236 F.2d 215. Here the further demand for relief is based on the declaration of plaintiff's ownership of the songs at issue and, unless otherwise barred,

is proper under the statute. The real question, then, is whether the district court was correct in holding that the eleven-year delay between the institution of the suit and the trial constitutes laches which estops plaintiff from now receiving the further relief which it seeks.

[7] Plaintiff instituted this action in 1944, some six years after it had notice of threatened infringement by defendant's predecessor. We see no basis for the application of laches concerning this six-year period, for it appears that in 1941 (some three years after notice) plaintiff commenced a suit against defendant's predecessor concerning the renewed copyright in one of Howard's songs where the question at issue was the effect of the 1916 conveyance. Although that suit was discontinued, *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, D.C.S.D.N.Y., 49 F.Supp. 135, it was dropped only after defendant's predecessor withdrew her claim to the song under the conveyance, which would indicate that defendant's predecessor then believed that the 1916 conveyance did not pass renewal rights. Under the circumstances it seems clear that the plaintiff can be charged with no serious delay in instituting the suit.

[8] [9] [10] Of course, as we know, failure to prosecute a suit diligently, resulting in a substantial delay which causes actual prejudice to the adverse party, can constitute laches. *D. O. Haynes & Co. v. Druggists' Circular*, 2 Cir., 32 F.2d 215; *Pollitzer v. Foster*, 6 Cir., 5 F.2d 901. Here the delay was eleven years, and defendant contends that this should estop plaintiff from now demanding damages in addition to the awarded declaratory and injunctive relief. First, the defendant claims that plaintiff waived such additional relief by failing in its complaint to allege infringement and consequent damages. But obviously this argument is specious. If plaintiff had proved infringement on the trial it would have been entitled to damages under F.R.Civ.Proc., rule 54(c); but under the declaratory judgment statute it was not compelled to take this course. Hence defendant was not entitled to assume from the absence of a plea for damages that plaintiff would not seek them at trial. Likewise defendant was not entitled to assume that plaintiff would not seek damages after trial and entry of the declaratory judgment because plaintiff's complaint ended with the prayer 'that upon application therefor, plaintiff be granted such further relief based on said declaratory judgment as may be necessary or *523 proper'— the very procedure provided by 28 U.S.C. § 2202. The course plaintiff adopted was thus not unusual.

[11] Second, defendant contends, and the district court agreed, that the eleven-year delay prejudiced its defenses against the infringement claims. But the record shows that the defendant consented to or joined in applications for these delays. So clearly it was then unworried as to prejudice resulting from them. Moreover, its affidavits show no specific prejudice; and the court's findings of 'manifest prejudice' are not supported by anything in the record. The record does show, however, commendable efforts on the part of both parties to litigate all their claims concerning ownership of Howard's songs in this proceeding. Amendments of the pleadings indicate that the claims were complex, which probably accounts to some degree for the delay. Doubtless the parties, too, were both stimulated to renewed interest by the

renaissance of old songs under the benign auspices of radio and television. Each case where laches is urged as a defense must be decided on its own facts. Under the circumstances here present it seems unfair to tax plaintiff, the rightful owner, rather than defendant, the infringing wrongdoer, with severe penalties for the delay in which they both participated.

On the defendant's appeal affirmed; on the plaintiff's appeal reversed and remanded for further proceedings in accordance with this opinion.

All Citations

255 F.2d 518, 1 Fed.R.Serv.2d 785, 117 U.S.P.Q. 308

Footnotes

- 1 The plaintiff also moved to alter and amend the judgment pursuant to F.R.Civ.Proc., rule 59(e), to provide that it was the sole owner of the copyrights in another group of songs in which the court found defendant had no interest and for injunctive relief with respect to these songs. This motion was granted, and defendant takes no appeal from this aspect of the case.

KeyCite Yellow Flag - Negative Treatment

Abrogation Recognized by Exclaim Marketing, LLC v. DirecTV, LLC,
E.D.N.C., September 30, 2015

80 F.3d 895

United States Court of Appeals,
Fourth Circuit.

GILBANE BUILDING COMPANY, a
Corporation; Applied Retrieval Technology
Corporation, Plaintiffs—Appellees,
and

Holland Glass Company, Incorporated;
Metromont Materials; Landmasters, Inc.;
B & B Contracting Company, Incorporated;
CACI, Incorporated—Federal; Pettit
Construction Company, Incorporated, Plaintiffs,
v.

FEDERAL RESERVE BANK OF RICHMOND,
CHARLOTTE BRANCH, Defendant—Appellant,
International Fidelity Insurance Company,
Defendant & Third Party Plaintiff-Appellee,
and

Electricron, Incorporated,
Defendant & Third Party Plaintiff.
APPLIED RETRIEVAL TECHNOLOGY
CORPORATION, Plaintiff—Defendant
& Third Party Defendant—Appellant,
and
Holland Glass Company, Incorporated;
Metromont Materials; Landmasters, Inc.;
B & B Contracting Company, Incorporated;
CACI, Incorporated—Federal; Pettit
Construction Company, Incorporated; Plaintiffs,
Gilbane Building Company, a Corporation;
Plaintiff—Third Party Defendant-Appellee,
v.

FEDERAL RESERVE BANK OF RICHMOND,
CHARLOTTE BRANCH, Defendant
& Third Party Defendant—Appellee,
International Fidelity Insurance Company,
Defendant & Third Party Plaintiff-Appellant,
and

Electricron, Incorporated,
Defendant & Third Party Plaintiff.

Nos. 93–2448, 93–2449.

Argued Jan. 29, 1996.

Decided April 1, 1996.

Subcontractors in project to construct branch of federal reserve bank sued contractor and bank for breach of contract. Contractor cross-claimed against bank. The United States District Court for the Western District of North Carolina, Robert D. Potter, Senior District Judge, awarded damages to Bank against contractor, damages to contractor against bank, which were trebled under North Carolina Unfair Trade Practices Act (UTPA), and damages to bank against subcontractor and its surety. Parties appealed. The Court of Appeals, Ervin, Circuit Judge, held that: (1) special master's findings did not support award under UTPA; (2) special master's factual findings were not reviewable; and (3) subcontractor was not denied its right to cross-examine expert consulted by special master.

Affirmed in part and reversed in part.

West Headnotes (21)

[1] **Federal Civil Procedure**

— Relief justified by facts

Defendant's contention that district court abused its discretion by allowing posttrial amendment of plaintiff's pleadings was governed by rule authorizing recovery under any theory supported by facts proven at trial, rather than by rule allowing amendments to conform to evidence; issue was not whether evidence differed from plaintiff's initial allegations, but whether allegations properly pled and proven supported theory and type of relief not specified in plaintiff's demand for judgment. Fed.Rules Civ.Proc.Rules 15(b), 54(c), 28 U.S.C.A.

7 Cases that cite this headnote

[2] **Federal Civil Procedure**

— Claim for relief in general

Claim is deemed sufficient if it contains a short and plain statement of claim that will give defendant fair notice of what plaintiff's claim is and grounds upon which it rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**

— Claim for relief in general

Statement of claim is sufficient so long as plaintiff colorably states facts which, if proven, would entitle him to relief; claimant need not set forth any theory or demand any particular relief, because court will award appropriate relief if plaintiff is entitled to it on any theory. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

12 Cases that cite this headnote

[4] **Federal Civil Procedure**

— Relief justified by facts

District court acted within its discretion in determining that plaintiff's motion to add claim at beginning of hearing before special master provided adequate warning to defendant that successful prosecution of additional claim would increase its damages, and plaintiff was thus entitled to any relief supported by special master's findings of fact. Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

3 Cases that cite this headnote

[5] **Federal Courts**

— Pleading

District court's determination regarding whether allegations properly pled and proven support theory and type of relief not specified in plaintiff's demand for judgment is reviewable only for abuse of discretion. Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

1 Cases that cite this headnote

[6] **Federal Courts**

— Questions of Law in General

Whether facts support a cause of action involves application of law to facts, and thus review is de novo.

2 Cases that cite this headnote

[7] **Antitrust and Trade Regulation**

— Nature and Elements

Antitrust and Trade Regulation

— Representations, assertions, and descriptions in general

To recover under North Carolina Unfair Trade Practices Act (UTPA), plaintiff must prove that defendant engaged in conduct that was in or affecting commerce, that the conduct was unfair or had capacity or tendency to deceive, and that plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation. N.C.G.S. § 75-1.1 et seq.

18 Cases that cite this headnote

[8] **Antitrust and Trade Regulation**

— Questions of law or fact

In actions involving North Carolina Unfair Trade Practices Act (UTPA), occurrence of alleged conduct, damages, and proximate cause are fact questions for jury, but whether conduct was unfair or deceptive is a legal issue for court. N.C.G.S. § 75-1.1 et seq.

9 Cases that cite this headnote

[9] **Antitrust and Trade Regulation**

— In general; unfairness

To be actionable under North Carolina Unfair Trade Practices Act (UTPA), conduct must be immoral, unethical, oppressive, unscrupulous, or substantially injurious. N.C.G.S. § 75-1.1 et seq.

27 Cases that cite this headnote

[10] **Antitrust and Trade Regulation**

— Fraud; deceit; knowledge and intent

For purposes of North Carolina Unfair Trade Practices Act (UTPA), act are "deceptive" when they possess tendency or capacity to mislead, or

create likelihood of deception. N.C.G.S. § 75-1.1 et seq.

13 Cases that cite this headnote

[11] Antitrust and Trade Regulation

— In general; unfairness

Antitrust and Trade Regulation

— Fraud; deceit; knowledge and intent

Either unfairness or deception can bring conduct within purview of North Carolina Unfair Trade Practices Act (UTPA); act need not be both unfair and deceptive. N.C.G.S. § 75-1.1 et seq.

13 Cases that cite this headnote

[12] Antitrust and Trade Regulation

— Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation

— Representations, assertions, and descriptions in general

Antitrust and Trade Regulation

— Omissions and other failures to act in general; disclosure

Coverage of North Carolina Unfair Trade Practices Act (UTPA) includes fraud, negligent misrepresentation, and failure to disclose information when tantamount to misrepresentation. N.C.G.S. § 75-1.1 et seq.

Cases that cite this headnote

[13] Antitrust and Trade Regulation

— Contractual relationships and breach of contract in general

Coverage of North Carolina Unfair Trade Practices Act (UTPA) does not include simple breach of contract, absent substantial aggravating circumstances, or broken promise, unless promisor had no intent to perform when he made promise. N.C.G.S. § 75-1.1 et seq.

13 Cases that cite this headnote

[14] Antitrust and Trade Regulation

— Reliance; causation; injury, loss, or damage

Under North Carolina Unfair Trade Practices Act (UTPA), when plaintiff's reliance is the causal link between violative conduct and damages, reliance need not be reasonable. N.C.G.S. § 75-1.1 et seq.

2 Cases that cite this headnote

[15] Antitrust and Trade Regulation

— Other particular relationships

Bank did not violate North Carolina Unfair Trade Practices Act (UTPA) by allegedly ordering extra work from contractor that was building branch of bank when bank lacked authority and ability to pay, intentionally delaying payment, arbitrarily reducing contractor's compensation without regard to what was actually owed, and violating contract by assuming role of project architect; those acts were breaches of contract, but there was no indication either that bank did not intend to perform when it made agreements or that there were other substantial aggravating circumstances. N.C.G.S. § 75-1.1 et seq.

2 Cases that cite this headnote

[16] Federal Civil Procedure

— Relief justified by facts

Under rule authorizing recovery under any theory supported by facts at trial, contractor, which was building branch of bank, was not entitled to alternative relief on claim alleging violation of North Carolina Unfair Trade Practices Act (UTPA), which contractor had added through amendment, even though bank's misrepresentation did constitute an unfair or deceptive trade practice; special master's factual findings did not differentiate between work that was done as a proximate result of bank's misrepresentation and work that would have been done anyway, and thus contractor failed to allege all factual conclusions necessary for relief sought. Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

3 Cases that cite this headnote

[17] Federal Courts

Particular errors

Court of Appeals could not review special master's factual finding that bank had not accepted substantial performance of system installed in bank building by subcontractor, where parties had agreed to be bound by special master's factual findings.

Cases that cite this headnote

[18] **Federal Civil Procedure**

Evidence, report of

Federal Civil Procedure

Recommittal

Special master's failure to file with district court the exhibits that master used in hearings did not warrant remand to master, where parties had agreed that special master's findings of fact would be final rather than subject to review for clear error; exhibits were relevant only to factual portions of inquiry. Fed.Rules Civ.Proc.Rule 53(e)(1), 28 U.S.C.A.

2 Cases that cite this headnote

[19] **Federal Courts**

Mixed questions of law and fact in general

Court of Appeals reviews mixed questions of law and fact under a hybrid standard, applying to factual portion of each inquiry same standard applied to questions of pure fact and examining *de novo* legal conclusions derived from those facts.

42 Cases that cite this headnote

[20] **Federal Courts**

Particular errors

Sufficiency of evidence to support special master's factual findings was unreviewable on appeal, where parties had agreed that special master's factual findings would be final.

1 Cases that cite this headnote

[21] **Federal Civil Procedure**

Evidence

Party was not denied its opportunity to cross-examine expert consulted by special master; party had agreed to informal procedures used in special master proceedings, party knew that expert's opinions would influence master's findings and that those findings would be conclusive, and party would have been entitled to review expert's findings and cross-examine him had party so requested. Fed.Rules Evid.Rule 706(a), 28 U.S.C.A.

Cases that cite this headnote

***898** Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Senior District Judge. (CA-90-374-C-C-P, CA-90-274-C-C-P, CA-91-99-C-C-P, CA-91-237-C-C-P, CA-91-281-C-C-P, CA-91-293-C-C-P, CA-91-384-C-C-P, CA-90-318-C-C-P).

Attorneys and Law Firms

ARGUED: George Verner Hanna, III, Moore & Van Allen, Charlotte, North Carolina, for Appellant. Robert Lewis Burchette, Johnston, Taylor, Allison & Hord, Charlotte, North Carolina, for Appellee Gilbane; Mitchell Allen Stein, Stein & Associates, P.C., New York City, for Appellee Applied Retrieval. **ON BRIEF:** Randel E. Phillips, Mary Elizabeth Erwin, Moore & Van Allen, Charlotte, North Carolina, for Appellant. Patrick E. Kelly, Greg C. Ahlum, Gary J. Welch, Johnston, Taylor, Allison & Hord, Charlotte, North Carolina, for Appellee Gilbane.

Before MURNAGHAN, ERVIN, and WILKINS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge ERVIN wrote the opinion, in which Judge MURNAGHAN and Judge WILKINS joined.

OPINION

ERVIN, Circuit Judge:

This case arose from construction in Charlotte, North Carolina, of a branch of the Federal Reserve Bank of Richmond ("FRB"). By agreement of the parties, the

claims at issue in this appeal were tried initially before a court-appointed special master. The district court awarded damages to FRB against general contractor Gilbane Building Company. Gilbane does not appeal. The district court also awarded damages against FRB in favor of Gilbane, and trebled the entire amount for unfair or deceptive trade practices under North Carolina's Unfair Trade Practices Act ("UTPA"), N.C. Gen.Stat. § 75-1.1 *et seq.* Some of the trebled damages were to pass through Gilbane to various subcontractors, including Applied Retrieval Technology Corp. ("ART"), but the district court ruled that the trebling would benefit Gilbane only. FRB appeals only the trebling of the award. Finally, the district court awarded damages to FRB against ART and its surety—International Fidelity Insurance Company ("IFIC").¹ ART appeals that award, and contests the district court's refusal to treble the damages it received from FRB through Gilbane.

We disagree with the district court's decision to treble FRB's liability. But we find no error in its awards to FRB against ART. Thus we reverse the finding of unfair and deceptive trade practices, and affirm on all remaining issues.

I.

Litigation of these disputes began in North Carolina state court, and North Carolina substantive law controls. But the case properly was removed to federal district court under 12 U.S.C. § 632, which establishes federal subject matter jurisdiction over any civil suit *899 in which a Federal Reserve Bank is a party. Appellate jurisdiction is appropriate under 28 U.S.C. § 1291, because the parties' appeals are from final judgments.

II.

On October 3, 1986, FRB and Gilbane entered into a contract under which FRB would pay Gilbane an amount greater than \$32 million to serve as general contractor and project manager for construction of FRB's Charlotte branch. In 1990, several subcontractors initiated lawsuits against Gilbane and FRB for failing to pay for the subcontractors' work. Gilbane cross-claimed against FRB for withholding payment.

On April 16, 1991, FRB and Gilbane entered into the "Dooley Agreement," which suspended the litigation and appointed contractor R.T. Dooley to judge performance under

the contract. To settle disputes not resolved by the Dooley Agreement, Gilbane and FRB moved the district court for appointment of a special master. The court appointed Walter L. Hannah, a North Carolina construction attorney, to hear both the construction disputes between Gilbane and FRB ("the construction cases") and a dispute between FRB, ART, CACI, Inc., and IFIC regarding the project's Automated Storage and Retrieval System ("the retrieval cases"). The parties agreed to be bound by the special master's findings of fact, and that the district court would make all conclusions of law.

During the construction hearings, Gilbane moved the special master to add an unfair or deceptive trade practices claim. After the hearings ended, the district court ruled that the UTPA claim was supported by the special master's findings of fact, and it trebled the damages awarded to Gilbane. FRB moved the court to amend the judgment as unfairly prejudicial and abusive of the court's discretion, arguing that the court should either vacate the treble damages award or submit the issue to the special master to determine whether it was properly tried during the hearings. The court did the latter, and the special master responded that Gilbane had raised the issue properly and that FRB had consented impliedly to trial of the issue by failing to show how it would be prejudiced by amendment of Gilbane's cross-claim. The court denied FRB's motion to amend the judgment, and FRB appeals.

The retrieval cases arose from ART's installation of an automated vault storage and retrieval system. Relying on the special master's report, the district court awarded ART \$102,000 from Gilbane, "representing the balance due to ART under its contract." But it held ART liable to FRB, through Gilbane, for a total of \$359,842.21: \$325,000 for the difference between the actual value of the completed retrieval system and its reasonably expected value under the contract, \$6,000 for wiring that failed to meet specifications, and \$28,842.21 for "maintenance labor costs" above those normally expected for such a system.

ART appeals the award to FRB, protesting (1) that FRB waived any damages by accepting ART's substantial performance, (2) that the special master violated Fed.R.Civ.P. 53(e)(1) by failing to file with the district court the exhibits introduced at the hearing, (3) that the special master's findings regarding the system's useful life were not supported by the evidence, and (4) that it was not given an opportunity to cross-examine the expert consulted by the special master. Additionally, ART contests the district court's refusal to treble

the damages awarded to ART through Gilbane. Like Gilbane, and based on the same acts by FRB, ART moved the district court for leave to amend its pleadings to include a claim for treble damages. Unlike Gilbane, however, ART had not raised its UTPA claim before the special master, and the district court denied its motion. ART contends on appeal that the justification for its claim is not materially different from that for Gilbane's.

III.

A.

1.

[1] FRB contends that the district court abused its discretion by allowing a post-trial amendment of Gilbane's pleadings to include an unfair or deceptive trade practices claim. *900 FRB acknowledges that Fed.R.Civ.P. 15(b) allows such an amendment when the issue actually has been tried by the consent of the parties. It argues, however, that the special master's findings do not support the conclusion that FRB impliedly consented to trial of the UTPA issue. Gilbane responds that FRB had sufficient notice of the UTPA claim and the opportunity to present evidence to rebut the claim, and that FRB neither claimed nor proved that it would be prejudiced by the amendment until after the district court entered its judgment.

FRB and Gilbane agree that whether the district court could consider the UTPA issue is controlled by Rule 15(b), which provides:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings 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. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission

of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Despite the parties' agreement, this is not a Rule 15(b) situation. It is governed instead by Rule 54(c), which authorizes recovery under any theory supported by the facts proven at trial: "[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 the party's pleadings."

[2] [3] The distinction between Rule 15(b) and Rule 54(c) is grounded in the fundamental structure of the Federal Rules' pleading system. The introduction of the Rules in 1938 eliminated the murky code-pleading requirement that a claimant plead ultimate facts and avoid pleading evidence and conclusions of law. *See* 5 Charles A. Wright et al., *Federal Practice and Procedure* § 1218, at 178–80 (2d ed.1990). Code pleading needlessly emphasized the form of a complaint over its substance, as an excerpt from a 1929 treatise illustrates:

Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth [sic] an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading.

John N. Pomeroy, *Code Remedies* § 423, at 640 (5th ed.1929), *quoted in* 5 Wright, et al. § 1218 at 179 n. 1. The "notice-pleading" scheme of the Rules has eliminated code pleading's formalistic, purely factual approach. Courts now deem a claim sufficient if it contains a " 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957) (quoting Rule 8(a)(2)). Nevertheless, despite the more forgiving pleading standards, the essence of a claim remains its factual elements. *See* 5 Wright, et al. § 1215 at 145 ("The rules do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented."). Thus, under Rule 8(a)(2), a "statement of the claim" is sufficient "so long as a plaintiff colorably states facts which, if proven, would entitle him to

relief.” *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir.1982), and the claimant “need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it on any theory.” *New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24–25 (4th Cir.1963), *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964).

*901 Rule 15(b) is an exception to the general rules of pleading. As its heading suggests, it is designed to allow amendment of a pleading when the facts proven at trial differ from those alleged in the complaint, and thus support a cause of action that the claimant did not plead. Because notice to the defendant of the allegations to be proven is essential to sustaining a cause of action, Rule 15(b) applies only when the defendant has consented to trial of the non-pled factual issues and will not be prejudiced by amendment of the pleadings to include them.

Rule 54(c), in contrast, is not an exception to the general rules. It is, instead, a clarification of the fundamental point that we noted in *New Amsterdam Casualty*—that the relief to which a claimant is entitled is not limited to the relief it requested in its original demand for judgment. 323 F.2d at 24–25. Thus Rule 54(c) contains no express requirements of consent or lack of prejudice,² but commands that the trial court “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 the party’s pleadings.” Fed.R.Civ.P. 54(c) (emphasis added).

Gilbane does not contend, as Rule 15(b) requires, that its evidence at the hearing proved facts not encompassed by its initial pleadings. Nor does FRB question whether the facts Gilbane proved were within the scope of its original allegations. Instead, to show that it did not consent, FRB argues the opposite: “The Federal Reserve did not object to any of the evidence presented by Gilbane during the Hearings because this evidence related to issues within Gilbane’s pleadings.” It follows that the issue framed by the parties on appeal is not whether the evidence differed from Gilbane’s initial allegations, but whether the allegations properly pled and proven support a theory and type of relief not specified in Gilbane’s demand for judgment. That issue is controlled by Rule 54(c).

2.

We previously addressed a plaintiff’s post-verdict request for UTPA damages in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712 (4th Cir.), *cert. denied*, 464 U.S. 848, 104 S.Ct. 155, 78 L.Ed.2d 143 (1983). We affirmed the district court’s denial of the motion, holding that alternative relief under Rule 54(c) is unavailable when granting it would be unjust. *Id.* at 716 (citing *United States v. Marin*, 651 F.2d 24, 31 (1st Cir.1981)); *accord Albemarle Paper Co.*, 422 U.S. at 424, 95 S.Ct. at 2375 (“[A] party may not be ‘entitled’ to [Rule 54(c)] relief if its conduct of the cause has improperly and substantially prejudiced the other party.”). Trebling a defendant’s exposure after trial, we determined, would be unfairly prejudicial:

[A] substantial increase in the defendant’s potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). We believe that this exception to the Rule is applicable in the present case.

[The plaintiff]’s complaint gave no warning to [the defendant] that successful prosecution of the action could result in an award to [the plaintiff] of three times [its] actual damages. This default denied [the defendant] and its counsel the opportunity to make a realistic appraisal of the case, so that their settlement and litigation strategy could be based on knowledge and not speculation.

Id. at 716–17 (quotation marks and citations omitted).

[4] [5] The instant case, like *Atlantic Purchasers*, involves a post-trial motion for treble damages under the UTPA. But it is factually distinguishable. The *Atlantic Purchasers* plaintiff moved for UTPA damages only after the jury already had rendered its verdict. 705 F.2d at 714–15. Gilbane, in contrast, moved to add its UTPA claim at the beginning of the construction hearings, so the district court ruled that FRB was not unfairly prejudiced. The district court’s ruling is reviewable only for abuse of discretion, *902 *Albemarle Paper Co.*, 422 U.S. at 424, 95 S.Ct. at 2374–75; *Atlantic Purchasers*, 705 F.2d at 717, and the district court did not abuse its discretion by determining that Gilbane’s motion at the beginning of the hearing provided adequate warning to FRB. Accordingly, Gilbane is entitled to any UTPA relief supported by the special master’s findings of fact.

B.

[6] Whether facts support a cause of action involves application of law to the facts. *South Carolina State Ports*

Auth. v. M/V Tyson Lykes, 67 F.3d 59, 61 (4th Cir.1995). Thus we review *de novo* whether the special master's factual conclusions satisfy the elements of the UTPA.

1.

[7] [8] To recover under the UTPA, a plaintiff must prove (1) that the defendant engaged in conduct that was in or affecting commerce, (2) that the conduct was unfair or “had the capacity or tendency to deceive,” and (3) “that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.” *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174, 179–80 (1986). Occurrence of the alleged conduct, damages, and proximate cause are fact questions for the jury, but whether the conduct was unfair or deceptive is a legal issue for the court. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342, 346–47 (1975); *accord United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375, 389 (1988) (“[I]t is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice.”); *see also* James McGee Phillips, Jr., Note, *Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?*, 54 N.C. L.Rev. 963, *passim* (1976) (discussing *Hardy*'s resolution of the issue). In this case the factfinder was a special master instead of a jury, but the same division of responsibility applies.

The standard of review of a special master's findings, however, is different from the formidable standard applied to jury verdicts. A special master's factual conclusions normally are reviewable for clear error. Fed.R.Civ.P. 53(e)(2); *Henry A. Knott Co. v. Chesapeake & Potomac Telephone Co.*, 772 F.2d 78, 85 n. 11 (4th Cir.1985). But they are unreviewable if the parties so stipulate, Rule 53(e)(4), as they did in this case. Because the special master's factual findings are conclusive, and because Rule 54(c) applies only where the existing findings of fact are entirely sufficient for the court to award alternative relief, we can affirm the district court's trebling of damages only to the degree that the special master's report includes all of the findings necessary for a UTPA award: (1) conduct or statements that this court determines to have been unfair or deceptive within the meaning of the UTPA, (2) damages to Gilbane as a proximate result of the conduct or statements, and (3) the dollar amounts of the damages.

[9] [10] [11] What constitutes an unfair or deceptive trade practice is a somewhat nebulous concept. North Carolina courts base their determinations on the circumstances of each case, *Goodrich v. Rice*, 75 N.C.App. 530, 331 S.E.2d 195, 198 (1985), acknowledging that no precise definition is possible, *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C.App. 393, 248 S.E.2d 739, 746 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). The courts' opinions do offer guidance, however. In *Harrington*, the North Carolina Court of Appeals described unfairness under the UTPA as

conduct “which a court of equity would consider unfair.” *Extract Co. v. Ray*, [221 N.C. 269] 20 S.E.2d 59, 61 (1942). Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others.

Id. 248 S.E.2d at 744. To be actionable under the statute, conduct must be “immoral, unethical, oppressive, unscrupulous, or substantially injurious....” *Branch Banking & Trust Co. v. Thompson*, 107 N.C.App. 53, 418 S.E.2d 694, 700, *disc. rev. denied*, *903 332 N.C. 482, 421 S.E.2d 350 (1992) (internal quotation and citation omitted). Acts are deceptive when they “possess[] the tendency or capacity to mislead, or create[] the likelihood of deception.” *Chastain v. Wall*, 78 N.C.App. 350, 337 S.E.2d 150, 154 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986), *quoted in Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 534–35 (4th Cir.1989). Either unfairness or deception can bring conduct within the purview of the statute; an act need not be both unfair and deceptive. *Rucker v. Huffman*, 99 N.C.App. 137, 392 S.E.2d 419, 421 (1990).

[12] [13] In practice, courts have applied the statute liberally. *See* Robert G. Byrd, *Misrepresentation in North Carolina*, 70 N.C. L.Rev. 323, 372 (1992). Fraud is covered, of course, *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342, 346 (1975), and negligent misrepresentation also has been deemed sufficient. *Forbes v. Par Ten Group, Inc.*, 99 N.C.App. 587, 394 S.E.2d 643, 651 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). Even failure to disclose information has been considered deceptive when tantamount to misrepresentation. *Kron Medical Corp. v. Collier Cobb & Assocs.*, 107 N.C.App. 331, 420 S.E.2d 192, 196, *disc. rev. denied*, 333 N.C. 168, 424 S.E.2d 910 (1992); *accord Leake v. Sunbelt Ltd.*, 93 N.C.App. 199, 377 S.E.2d 285, 288, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). A simple

breach of contract is not unfair or deceptive, however, absent "substantial aggravating circumstances." *Branch Banking & Trust Co.*, 418 S.E.2d at 700 (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir.1989)). And a broken promise is unfair or deceptive only if the promisor had no intent to perform when he made the promise. See *Kent v. Humphries*, 50 N.C.App. 580, 275 S.E.2d 176, 182–83, modified, 303 N.C. 675, 281 S.E.2d 43 (1981); *Overstreet v. Brookland, Inc.*, 52 N.C.App. 444, 279 S.E.2d 1, 6 (1981).

[14] What constitutes proximate cause between a deceptive act and a plaintiff's damages remains ambiguous. Dicta indicates that reliance is unnecessary, *Rucker v. Huffman*, 99 N.C.App. 137, 392 S.E.2d 419, 421–22 (1990), but no cases have permitted recovery without reliance. Byrd, *supra*, at 367. Nevertheless, it is well-established that when the plaintiff's reliance is the causal link between the violative conduct and the damages, the reliance need not be reasonable:

If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter.

Winston Realty Co. v. G.H.G., Inc., 70 N.C.App. 374, 320 S.E.2d 286, 290 (1984), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985). *But cf. Opsahl v. Pinehurst, Inc.*, 81 N.C.App. 56, 344 S.E.2d 68, 77 (1986) (holding that in the construction context, where completion dates are subject to factors beyond the control of the parties, a misrepresentation that projected completion dates are firm is not actionable under the UTPA), *disc. rev. dismissed as improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987); *accord Bolton Corp. v. T.A. Loving Co.*, 94 N.C.App. 392, 380 S.E.2d 796, 809, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 496 (1989).

2.

The special master did not believe that his findings supported a UTPA claim. That is an issue of law, however, so we review it *de novo*. To do so, we look directly to the special master's binding factual findings to determine whether they establish the elements required for UTPA relief.

[15] Gilbane points to findings of several acts that it believes constituted unfair or deceptive trade practices by FRB. They include: (1) ordering extra work when it lacked

authority and ability to pay, (2) representing to Gilbane that it had "unlimited" authority to pay for the work, (3) intentionally delaying payment, (4) arbitrarily reducing Gilbane's compensation without regard to what actually was owed, and (5) violating the contract by assuming the role of Project Architect. Motion to Amend or Modify the Special Master's Findings of Fact and Conclusions of Law at 11–12. Except for the representation of unlimited authority, the acts were mere breaches of contract. In each case FRB failed to satisfy obligations to which it had agreed, but the special master's findings do *904 not indicate either that FRB did not intend to perform when it made the agreements or that there were other substantial aggravating circumstances. The special master's opinion, while entitled to no deference, is instructive on the issue of substantial aggravating circumstances:

The Special Master, in considering the Findings of Fact to be submitted to the Court, did not make findings which he considers as rising to the level of those which would be unfair or deceptive trade practices.... [O]nly one individual with FRB guided or committed the acts which Gilbane now contends entitle it to damages for unfair and deceptive trade practices. It was and is the opinion of this court that this individual was "over his head" in the administration of the building contract and in attempting to make decisions which should have been made only after receiving instructions in consultation with more experienced management.

Special Master Report—Clarifications at 13–14.

[16] The misrepresentation of authority to pay did constitute an unfair or deceptive trade practice. FRB delayed processing change orders until the work on them had been completed, and then refused to pay the costs submitted by Gilbane. In response to this ongoing problem,

Gilbane asked the FRB to identify the FRB representative with authority to approve change orders and to state the dollar limitation of that approval authority. On or about May 4, 1987, the FRB representative, Powell,

[inaccurately] confirmed that he had “unlimited” authority to approve change orders. Gilbane relied upon FRB's representation and continued to work. Special Master's Findings of Fact and Conclusions of Law—Construction at 23. But the report does not differentiate between work that was done as a proximate result of Powell's misrepresentation and work that already had been done or would have been done anyway.

Rule 54(c) allows alternative relief only where *all* factual conclusions necessary for the relief sought have been found by the trier of fact. *See Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir.1982) (“Rule 54(c) creates no entitlement to relief based on issues not squarely presented and litigated at trial.”). It may be, and in fact is likely, that Gilbane worked on some change orders as a proximate result of Powell's misrepresentation. But whether that is true, and if so what damages were incurred, was not included in the special master's findings. Thus Gilbane is not entitled to alternative relief under Rule 54(c).

IV.

A.

[17] ART contends that the special master erred by awarding damages against it for obvious defects in the retrieval system. It argues that FRB waived any such damages by accepting substantial performance in the system's installation. As FRB points out, however, that it occupied the building and used the system does not constitute acceptance of the system as conforming to the contract. *See Kandalis v. Paul Pet Constr. Co.*, 210 Md. 319, 123 A.2d 345, 347 (1956) (“[t]he mere fact that the purchasers take possession when the building is completed does not necessarily constitute a waiver of defects or an acceptance of the contractor's workmanship.”); *Hall v. MacLeod*, 191 Va. 665, 62 S.E.2d 42, 46 (1950); Robert F. Cushman & David A. Carpenter, *Proving and Pricing Construction Claims* 388–89 (1990). The special master found as a matter of fact that “FRB has refused to acknowledge the functionality and reliability of the automated storage and retrieval system.”

ART challenges the assumption that acceptance is an issue of fact, and tries to convert it into a legal question:

[T]he Court and the Special Master erred in not determining the scope of the performance of the parties, the consequence of the subsequent Agreement in May of 1990, the consequence of the start of the Warranty Periods, and the consequence of the completion of the Warranty Periods. Such determinations involve issues of law, and were simply not considered by the District Court, thus rendering the findings and conclusion erroneous as a matter of law.

*905 ART is correct that those determinations involve issues of law, but the determinations are important only for their probity on the factual question of whether FRB accepted ART's performance. Because the parties agreed that the special master's factual findings are final, we cannot review his conclusion that FRB did not accept the retrieval system as conforming to the contract.

B.

[18] ART also complains that the Special Master did not file with the District Court the exhibits he used in the hearings:

The judgment must be reversed, and the case remanded, because the Special Master failed to file the original exhibits, as required by Fed.R.Civ.P. 53(e)(1), thereby preventing the district court from reviewing the Special Master's determinations on mixed questions of fact and law for abuses of discretion.

ART is correct that Rule 53(e)(1) requires filing with the district court of evidence and exhibits. But that requirement was designed to complement Rule 53(e)(2)'s default standard of review for special masters' findings of fact—clear error. In this case, the parties agreed that the special master's findings of fact would not be subject to review for clear error, but would be final.

[19] ART suggests that the parties' agreement encompassed mixed questions of law and fact, and that we should review the district court's findings on such questions for abuse of discretion. But we do not review mixed questions for abuse of discretion. We review them under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts. See *United States v. Han*, 74 F.3d 537, 540 & n. 1 (4th Cir.1996). In this case, therefore, we accept the special master's findings of fact as final and review the conclusions based on those facts *de novo*.

The exhibits are relevant only to factual portions of the inquiry—portions that were conclusively decided by the special master. Filing the exhibits would serve no purpose. Moreover, the exhibits constitute only a fraction of the evidence that was before the special master. The bulk of the evidence was testimony, but the parties agreed that the hearings would not be recorded or transcribed. A review of the exhibits without the testimony would be incomplete and inconsistent with the parties' agreement. Thus the special master's failure to file the exhibits with the district court did not violate Rule 53(c)(1).

C.

[20] ART argues next that the evidence did not support the special master's findings regarding the useful life of the retrieval system:

[T]he exhibits presented to the Special Master show that his finding that the Vault Retrieval System should have had a useful life of 15 years, but only had a useful life of 10 years, was not supported by a sufficient quantum of evidence, and his calculation of damages is erroneous as a matter of law.

The sufficiency of the evidence is entirely unreviewable, because the parties agreed that the special master's factual findings are final. The calculation of damages argument is based on objections to the factual findings from which the calculations were made, so it also is an improper subject for review.

D.

[21] ART also contends that it was denied the opportunity to cross-examine the expert consulted by the special master, in violation of Fed.R.Evid. 706(a). It objects to the special master's adoption of the expert's opinion in the special master's findings regarding the useful life of the retrieval system. Rule 706(a) provides:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations.... A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be *906 subject to cross-examination by each party, including a party calling the witness.

That ART never asked to cross-examine the expert during the special master's hearings is irrelevant, it argues, because it entered its request "at the earliest possible time, i.e., immediately upon first receipt of the Expert's Findings."

ART agreed to the informal procedures used in the special master proceedings. It knew that the expert's opinions would influence the special master's findings, and that those findings would be conclusive. Had it so requested, it would have been entitled to review the expert's findings and cross-examine him before the special master's report was filed. But it did not. We will not construe Rule 706(a) to allow a party to undo the informal procedures to which it agreed simply because it is dissatisfied with the result.

E.

ART's final argument is that it should have been permitted to amend its pleadings to include a UTPA claim. Any UTPA damages awarded to Gilbane that involve the retrieval system, ART contends, should pass through Gilbane to ART, which "stands in the shoes of its general contractor." Because we have determined that Gilbane is entitled to no award of treble

damages, *supra* part III.B.2, there is nothing to pass through to ART. Thus we consider neither the timeliness of ART's motion nor the merits of whether pass-through treble damages would be appropriate.

V.

The special master's findings of fact are insufficient to support Gilbane's claim of unfair or deceptive trade practices. Thus Gilbane is not entitled to treble damages under the UTPA. ART's agreement to the finality of the special master's factual findings bars its contentions that FRB waived its claims for defects in the retrieval system, that the special master should have filed his exhibits with the district court, and that there was insufficient evidence to support the special

master's findings regarding the useful life of the system. ART's objection that it had no opportunity to cross-examine the expert is precluded by its agreement to the informal procedures used by the special master. Finally, we do not reach the merits of ART's treble damages claim because it depends on a UTPA award to Gilbane. Accordingly, we reverse the district court's award of treble damages to Gilbane, and affirm its resolution of all remaining issues.

AFFIRMED IN PART AND REVERSED IN PART.

All Citations

80 F.3d 895, 34 Fed.R.Serv.3d 799, 44 Fed. R. Evid. Serv. 130

Footnotes

- 1 The interests of ART and IFIC are equivalent in this appeal, so we hereinafter refer to them collectively as "ART."
- 2 Case law has carved out an exception where alternative relief would be unfairly prejudicial. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424, 95 S.Ct. 2362, 2374–75, 45 L.Ed.2d 280 (1975); *see also infra* part III.A.2. On its face, however, Rule 54(c) is compulsory.

843 F.2d 546

United States Court of Appeals,
District of Columbia Circuit.

HORN & HARDART COMPANY, Appellant,
v.

NATIONAL RAIL PASSENGER CORPORATION.

No. 87-7087.

|
Argued Feb. 9, 1988.

|
Decided April 8, 1988.

Landlord of commercial premises filed motion for further relief in declaratory judgment action in which tenant's request for declaratory judgment had been denied. The United States District Court for the District of Columbia, 659 F.Supp. 1258, Oliver Gasch, Senior District Judge, granted landlord relief, and tenant appealed. The Court of Appeals, Wald, Chief Judge, held that: (1) district court had jurisdiction to grant further relief, notwithstanding tenant's prior appeal of denial of declaratory relief; (2) grant of further relief to landlord was "proper" relief following declaratory judgment declaring landlord's right to terminate leases; (3) landlord's claims for further relief were not barred by res judicata; and (4) landlord was entitled to attorneys' fees and three times average monthly rent for tenant's holdover on premises.

Affirmed.

West Headnotes (4)

[1] **Declaratory Judgment**

— Declaratory relief

Under "further relief" provision of federal declaratory judgment statute, district court had jurisdiction to construe liquidated-damages and cost-on-default clauses of commercial leases, notwithstanding that tenant had previously taken appeal from district court's interpretation of termination provisions of leases. 28 U.S.C.A. § 2202.

20 Cases that cite this headnote

[2] **Declaratory Judgment**

— Money judgment

Federal Civil Procedure

— Particular types of cases

In declaratory judgment action concerning interpretation of commercial leases, landlord was entitled to request further relief in form of triple rent and attorney fees pursuant to leases' liquidated-damages and cost-on-default provisions after district court had initially construed termination provisions of leases and found that landlord had right to terminate leases; even though landlord's substantive request may not have been "necessary" to effectuate lease termination ruling, such request was clearly "proper" relief permitted in declaratory judgment action. 28 U.S.C.A. § 2202.

22 Cases that cite this headnote

[3] **Judgment**

— Nature of Action or Other Proceeding

Ordinary principles of claim preclusion do not apply to actions brought under declaratory judgment act provision permitting party to seek further relief that is "necessary or proper" in relation to initial judgment. 28 U.S.C.A. § 2202.

17 Cases that cite this headnote

[4] **Landlord and Tenant**

— Damages

Landlord and Tenant

— Costs and attorney fees

Pursuant to liquidated-damages and cost-on-default provisions of commercial leases, landlord was entitled to recover triple rent and attorneys' fees after tenant held over on property, notwithstanding tenant's claim that it remained on premises on basis of reasonable good-faith understanding of legal rights; liquidated damages provision of leases did not include bad-faith requirement.

2 Cases that cite this headnote

*546 **53 Appeal from the United States District Court for the District of Columbia (Civil Action No. 85-00820).

Attorneys and Law Firms

John G. Roberts, Jr., with whom Peter F. Rousselot and Allen R. Snyder, Washington, D.C., were on the brief, for appellant.

*547 **54 Charles F. Lettow, with whom Matthew D. Slater, Washington, D.C., was on the brief, for appellee.

Before WALD, Chief Judge, STARR and WILLIAMS, Circuit Judges.

Opinion

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Appellant Horn & Hardart Company (Horn & Hardart) seeks review of a district court decision granting a motion by appellee National Railroad Passenger Corporation (Amtrak) for “further relief” under the Declaratory Judgment Act.¹ Specifically, the district court enforced liquidated-damages and cost-on-default contract provisions against Horn & Hardart, the lessee of restaurant space in Amtrak's Pennsylvania Station in New York City.²

Horn & Hardart, a Nevada corporation involved in the food services industry, entered into three leases with Amtrak on June 1, 1980, for restaurant space in Pennsylvania Station, New York City. On November 29, 1984, Amtrak informed Horn & Hardart that it intended to terminate all three leases pursuant to provisions that authorized such termination when corporate or construction purposes so required, and demanded that Horn & Hardart vacate the premises by February 28, 1985. Instead, Horn & Hardart instituted an action based on the Declaratory Judgment Act seeking a ruling that the terminations violated the lease provisions. Horn & Hardart also sought an injunction against Amtrak's seeking an eviction as well as \$2.5 million in damages for losses suffered by Horn & Hardart as a result of Amtrak's actions. This action, based on an alleged failure of Amtrak to abide by the notice of termination clauses, was unsuccessful. First, the district court, *see Horn & Hardart Co. v. National Railroad Passenger Corp.*, No. 85-0820, mem.op. (D.D.C. May 30, 1985) (*Horn & Hardart I*) [available on WESTLAW, 1985 WL 9426], then this court, *see Horn & Hardart Co. v. National Railroad Passenger Corp.*, 793 F.2d 356 (D.C.Cir.1986) (*affirming*

Horn & Hardart I), upheld Amtrak's legal right to terminate the leases. Simultaneously, Amtrak took actions in New York courts to regain possession. Horn & Hardart vacated the properties on August 5, 1985. That same month, Amtrak paid Horn & Hardart \$180,000 in compensation for the early termination pursuant to a cancellation-premium clause, and, on August 19, 1986, Amtrak brought the present action for “further relief” under § 2202 of the Declaratory Judgment Act.

The district court, relying on § 2202, enforced the leases' end-of-term holdover and cost-on-default clauses, and awarded Amtrak \$335,017.30 in damages and \$52,562.02 in attorney's fees. *Horn & Hardart Co. v. National Railroad Passenger Corp.*, 659 F.Supp. 1258 (D.D.C.1987) (*Horn & Hardart II*). Horn & Hardart raises four objections to this result. Because all four objections are unavailing, we affirm the district court's order.

*548 **55 A. Jurisdiction

[1] First, appellant-Horn & Hardart's argument that the district court lost jurisdiction once its initial judgment was appealed to this court is mistaken. The “further relief” provisions of both state and federal declaratory judgment statutes clearly anticipate ancillary or subsequent coercion to make an original declaratory judgment effective.³ Neither a completed appeal, *see McNally v. American States Insurance Co.*, 339 F.2d 186, 187, 188 (6th Cir.1964) (per curiam), nor a considerable period of delay after the trial court ruling, *see Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69 (1958), terminates this authority. Section 2202's retained authority, commentators have noted, “merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.” Borchard, *Declaratory Judgments* 441 (2d ed.1941); *see also Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir.1980).⁴ To rule otherwise would allow the party against whom a declaratory judgment is rendered to nullify her adversary's right to § 2202 relief merely by lodging an appeal. Indeed, such a forfeiture rule would conflict not only with common sense, but also with the principle that when a party files a notice of appeal the district court only surrenders “its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). This court expressly confined

its earlier inquiry to “whether the trial court erred in its interpretation of termination provisions contained in three 1980 leases between Amtrak ... and [Horn & Hardart].” 793 F.2d at 356. The district court, therefore, never surrendered jurisdiction over the leases’ liquidated-damages and cost-on-default provisions now on appeal.

B. The Declaratory Judgment Act

[2] Section 2202 of the Declaratory Judgment Act provides for “necessary or proper relief”—specifically, “proper relief based on the declaratory judgment.” 28 U.S.C. § 2202 (emphases added). Amtrak’s request for further relief in the form of triple rent and attorneys’ fees follows absolutely from, and is based on, the district court’s decision in *Horn & Hardart I* confirming Amtrak’s right to terminate the leasehold.⁵ And even though Amtrak’s present request may not be “necessary” to effectuate the lease termination ruling, the plain language of the Declaratory Judgment Act does not require this degree of stringency. The relief need only be proper. *See, e.g., Besler v. United States Dept. of Agriculture*, 639 F.2d 453, 454–55 (8th Cir.1981); *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, 522 (2d Cir.), *cert. denied*, 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69 (1958) (damages for infringement of copyright awarded to supplement declaratory judgment as to ownership, even though damages were not asserted in complaint). Further relief is certainly proper in this case because the leasehold arrangement between Amtrak and Horn & Hardart specified that a valid notice of termination was the only factual and legal predicate necessary for recovery of liquidated damages and costs.

C. Res Judicata

[3] The district court properly rejected Horn & Hardart’s third objection that Amtrak’s claims for further relief are barred by *res judicata* doctrine. It ruled that ordinary principles of claim preclusion do not apply to § 2202 actions given their clear purpose of supplementing declaratory relief. *See, e.g., Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc.*, 575 F.2d 530, 534–40 (5th Cir.1978); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir.1986) (dictum). In turn, this logic rests on the declaratory judgment exception to claim preclusion doctrine. *See* Restatement (Second) of Judgments § 33 (1982); *see also Mandarino v. Pollard*, 718 F.2d 845, 847, 848 (7th Cir.1983) (dictum), *cert. denied*, 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984). Where a party asks only for declaratory relief, courts have limited the preclusive effect to

the matters declared, hence permitting a later action seeking coercive relief based on the same cause of action. Indeed, the very language of § 2202 indicates that the prevailing party in a declaratory judgment may seek further relief in the form of damages or an injunction. *Powell v. McCormack*, 395 U.S. 486, 499, 89 S.Ct. 1944, 1952, 23 L.Ed.2d 491 (1969); *see also Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, 522 (2d Cir.1958), *cert. denied*, 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69; Annot., 10 A.L.R.2d 782, 787 (1950) (citing cases). Federal and state cases, moreover, have utilized § 2202, or its state counterparts, to award damages at a later date to parties who have earlier succeeded at the declaratory judgment stage. *See, e.g., Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1066 (10th Cir.1980); *Farley v. Missouri Dept. of Natural Resources*, 592 S.W.2d 539, 541 (Mo.App.1979).

Horn & Hardart attempts to rebut reliance on the declaratory judgment exception to claim preclusion with the observation that where a plaintiff’s original action seeks coercive or injunctive, as well as declaratory, relief, traditional rules of claim preclusion may apply to bar later actions. This bar could only affect Amtrak, however, had it filed an answer, thereby making its own counterclaims ripe. In this case, Rule 13(a)’s compulsory counterclaim requirement never became relevant.⁶ For a counterclaim to be compulsory, Amtrak would have to have been obliged to submit responsive pleadings, *see* Restatement (Second) of Judgments § 21 (defendant who prevails on counterclaim is treated as plaintiff and rules of merger apply). Instead, Amtrak merely filed a motion to dismiss, which under Fed.R.Civ.P. 12(b)(6) is not such a responsive pleading. Summary disposition was entered before Amtrak was required to submit an answer. *See United States v. Snider*, 779 F.2d 1151, 1157 (6th Cir.1985) (no bar to second suit where motion to dismiss settled earlier case without pleadings). Where a defendant neither asserts, nor is required to assert, a counterclaim, Restatement (Second) of Judgments § 22 explains that the previously unlitigated issues will not later be estopped by the earlier action. *See, e.g., County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290, 292 (4th Cir.1987). The issues now before this court, we have noted, were not decided in the prior action over the termination provisions. **57⁷]

*550 D. Merits

[4] Reaching the merits, we find that the plain and straightforward language of the leases controls. The leases stated

that because Amtrak would incur considerable costs if Horn & Hardart failed to vacate upon notice of termination, *see Horn & Hardart II*, 659 F.Supp. at 1266 (liquidated damages provisions), Horn & Hardart, in the event of a holdover, would be liable for both attorneys' fees and three times its average monthly rent.⁸ District of Columbia law, which governs Amtrak contracts, holds that such liquidated-damages clauses are valid and enforceable. *See, e.g., Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 368 (D.C.1984). Horn & Hardart's disagreement with this result rests on an alleged "well-established principle that holdover sanctions should not apply to those remaining on the premises on the basis of a reasonable, good faith understanding of their legal rights." *See* Brief for Appellant at 12. To be sure, parties may negotiate to include a bad faith requirement before a liquidated damages forfeiture will ensue. However, these leases do not contain any such requirement; nor does District of Columbia law require that default be in bad faith before liquidated damages or attorneys' fees may be compelled. *See Burns v. Hanover Insurance Co.*, 454 A.2d 325, 327 (D.C.1982) (parties may agree in advance the sum to be forfeited as liquidated damages unless amount is shown to be penalty); *Hagans Management Co. v. Nichols*, 409 A.2d 179,

182 (D.C.1979) (lease provision for payment of attorneys' fees on default upheld).

We conclude that Horn & Hardart cannot escape its contractual obligations, which Amtrak now seeks to pursue under § 2202. Appeal from an adverse declaratory judgment does not erect a jurisdictional bar to further relief in the district court based on the original judgment, nor does the doctrine of claim preclusion bar a valid § 2202 "further relief" action in the circumstances of this case where the defendant was never required to assert counterclaims in the original suit. Although our explication of the issues differs in some respects from the trial court's rationale, we agree with the district court that none of Horn & Hardart's procedural or substantive arguments will permit that corporation to escape its contractual liability to Amtrak.

Affirmed.

All Citations

843 F.2d 546, 269 U.S.App.D.C. 53

Footnotes

- 1 Section 2202 reads:
Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.
28 U.S.C. § 2202.
- 2 The end-of-term holdover clauses concerning liquidated damages uniformly provide:
Lessee ... agrees that if possession of the demised premises is not surrendered to the Lessor within seven days of the date of expiration or sooner termination of the term of this lease, then Lessee agrees to pay Lessor as liquidated damages for each month and for each portion of any month during which Lessee holds over in the premises after expiration or termination of the term of this lease, a sum equal to three times the average rent and additional rent which was payable per month under this lease during the last six months of the term thereof.
See Horn & Hardart Co. v. National Railroad Passenger Corp., 659 F.Supp. 1258, 1266–67 (D.D.C.1987) (emphasis omitted).
The leases also included provisions that required Horn & Hardart to pay costs and expenses, including attorneys' fees, suffered by Amtrak because of a "default in the observance or performance of any term or covenant on Lessee's part..." *Id.* at 1268 (emphasis omitted).
- 3 Horn & Hardart's reliance on *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir.1983), albeit misplaced, is instructive. Though *Overnite* states the general rule that an appeal divests a district court of jurisdiction, the court qualifies this rule by recognizing that jurisdiction can be "reserved" by statute. *Id.* at 792. The Declaratory Judgment Act's provision for further relief works such a reservation. *See* Borchard, *Declaratory Judgments* 439 (2d ed. 1941).
- 4 *See also* Anderson, *Actions for Declaratory Judgments* § 451 (2d ed. 1951 & Supp.1959). Anderson writes:
While it is true that the declaratory judgment statute does not authorize the retention by the court of any jurisdiction after entertaining a declaratory judgment, yet it does not follow that a court may not retain jurisdiction to enter such subsequent orders that will make effective the declaratory judgment that has been granted. The power of the court of equity to retain jurisdiction to give complete and effectual relief is well established, and it follows without any

serious controversy that the court may make such further orders to give effect to a declaratory judgment as shall seem meet and proper.

Id. at 1058.

- 5 We note that were the subsequent action for § 2202 further relief to occur unfairly late, suit might be barred by the doctrine of laches. No such concern exists in the present case.
- 6 Because Rule 13 did not become timely, we do not consider the possibility that § 2202's provision for supplementary relief might actually enlarge the declaratory judgment exception to claim preclusion to permit a supplemental action even where the original action involved more than declaratory relief. *Cf. Edward B. Marks Music Corp. v. Charles K. Harris Music Corp.*, 255 F.2d 518 (2d Cir.) (court awards § 2202 further relief even though original claim includes injunctive relief request—no discussion of claim preclusion), *cert. denied*, 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69 (1958).
- 7 Indeed, § 2202's post-judgment relief need not be demanded, or even proved, in the original action. *See Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69 (1958).
- 8 Amtrak's twin claims for triple rent damages and attorneys' fees are based on the leases' clauses cited in note 2, *supra*. Because both claims involve sums that have a reasonable relation to the probable damages Amtrak incurred from Horn & Hardart's holdover, these automatic forfeitures do not constitute a penalty which would be invalid under *Burns v. Hanover Insurance Co.*, 454 A.2d 325, 327 (D.C.1982). The district court's conclusion that the sums did not act as a penalty, see *Horn & Hardart II*, 659 F.Supp. at 1266, is not contested by either party.

424 F.2d 854
United States Court of Appeals,
District of Columbia Circuit.

Wayne HUDSON, Appellant,
v.
Kenneth L. HARDY et al., Appellees,
United States, Intervenor.

No. 20908.

|
Argued on Rehearing Jan. 7, 1970.

|
Decided Feb. 12, 1970.

The United States District Court for the District of Columbia, Matthew F. McGuire, J., dismissed inmate's petition styled petition for writ of declaratory judgment seeking essentially habeas corpus relief, and he appealed. The Court of Appeals, 134 U.S.App.D.C. 44, 412 F.2d 1091, vacated and remanded. On petition for rehearing, the Court of Appeals held that question of whether case styled by inmate as petition for writ of declaratory judgment and praying that he be taken from control cell and given privileges of other inmates was rendered moot by transfer of petitioner to prison outside jurisdiction would be remanded for determination.

Remanded.

West Headnotes (6)

[1] **Civil Rights**

— Criminal Law Enforcement; Police and Prosecutors

Allegations that certain officials of District of Columbia, purporting to act pursuant to local law, had subjected petitioner to cruel and unusual punishment, to punishment without cause and to unconstitutional discrimination, if true, made out claim for money damages under statute governing civil actions for deprivation of rights. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[2] **Declaratory Judgment**

— Money judgment

Money damages may be awarded in action for declaratory judgment.

5 Cases that cite this headnote

[3] **Federal Courts**

— Voluntary cessation of challenged conduct

Claim for damages is not rendered moot by cessation of wrong once done.

2 Cases that cite this headnote

[4] **Habeas Corpus**

— Improper restraint or detention in general

Habeas corpus tests not only fact but also form of detention.

3 Cases that cite this headnote

[5] **Habeas Corpus**

— Remand

Case involving question whether case styled by inmate as petition for writ of declaratory judgment and praying that he be taken from control cell and given privileges of other inmates was rendered moot by transfer of petitioner to prison outside jurisdiction would be remanded for determination.

12 Cases that cite this headnote

[6] **Habeas Corpus**

— Transfer of prisoner pending proceedings

If case in which inmate filed petition styled petition for writ of declaratory judgment and in which he sought essentially habeas corpus relief was treated as application for habeas corpus, transfer of inmate to prison outside jurisdiction of federal court was in violation of federal rule governing custody of prisoners in habeas corpus proceedings and would not deprive court of jurisdiction. Fed.Rules App.Proc. rule 23, 28 U.S.C.A.

9 Cases that cite this headnote

Attorneys and Law Firms

***854 **366** Mr. Daniel Marcus, Washington, D.C. (appointed by this Court), for appellant.

Mr. David P. Sutton, Asst. Corporation Counsel for the District of Columbia, with whom Messrs. Hubert B. Pair, Principal Asst. Corporation Counsel, and Richard W. Barton, Asst. Corporation Counsel, were on the brief, for appellee Hardy. Mr. Charles T. Duncan, Corporation Counsel, also entered an appearance for appellee Hardy.

Mr. Nathan Dodell, Asst. U.S. Atty., with whom Messrs. David G. Bress, U.S. Atty., at the time the brief was filed, and Joseph M. Hannon, Asst U.S. Atty. were on the brief, for intervenor.

Messrs. Melvin C. Garbow and Ralph J. Temple, Washington, D.C., filed a memorandum on behalf of National Capital Area Civil Liberties Defense and Education Fund, as amicus curiae.

Before BAZELON, Chief Judge, and WRIGHT and ROBINSON, Circuit judges.

***855 **367** On Petition for Rehearing

Opinion

PER CURIAM:

Our original opinion in this case was filed on February 14, 1968. Subsequent to that date, appellees petitioned for rehearing both on the merits and on the ground that, while his appeal was pending in this court, appellant had been transferred to a federal prison outside our jurisdiction; this, they suggest, renders the case moot. The United States, granted leave to intervene, petitioned for rehearing on substantially the same grounds. We appointed counsel for appellant and set the case for oral argument. On the merits, for the reasons stated in our original opinion, we reaffirm that opinion.¹ The question of mootness, raised for the first time on the petition for rehearing, requires some further discussion.

I.

[1] [2] [3] Appellant, unrepresented by counsel, styled his pleadings in the District Court a 'petition for writ of declaratory judgment.' If so treated, there is no question but that the case is not moot. Appellant's claim was that certain officials of the District of Columbia, purporting

to act pursuant to local law, had subjected him to cruel and unusual punishment, to punishment without cause, and to unconstitutional discrimination. If true, these allegations make out a claim for money damages under 42 U.S.C. § 1983 (1964). *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Hurd v. Hodge*, 334 U.S. 24, 31, 68 S.Ct. 847, 92 L.Ed. 1187 (1948). And money damages may, of course, be awarded in an action for declaratory judgment. 28 U.S.C. § 2202 (1964); *Security Insurance Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956); see *Richey v. Wilkins*, 335 F.2d 1, 6 (2d Cir. 1964).² Needless to say, a claim for damages is not rendered moot by cessation of the wrong once done.

II.

[4] [5] Even if appellant does not desire to have his pleadings treated as an action for damages, it is by no means certain that the case has become moot. The core of his complaint when filed was an unlawful deprivation of liberty. He prayed 'that I, Wayne Hudson Plaintiff Be taken from M.S.U. Control cell and Given the Privileges of all other inmate(s). * * *' His petition, in effect, was a petition for a writ of habeas corpus;³ and it has been so treated by his attorney since counsel was appointed.⁴ If the pleading is considered a petition for habeas corpus, the question of mootness is a complex one. Since ultimate decision may turn on facts not of record here, and since the suggestion of mootness ***856 **368** was not made until our original opinion had already been issued, we believe that it is best presented to the District Court on remand. Compare *Powell v. McCormack*, 395 U.S. 486, 496 n. 8, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Robinson v. California*, 371 U.S. 905, 83 S.Ct. 202, 9 L.Ed.2d 166 (1962) (on petition for rehearing). In aid of the remand, we sketch the relevant principles.

III.

[6] Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). In the present case, it may be that cessation of the disciplinary restrictions complained of has rendered the case moot.⁵ But the imposition of discipline will normally have two consequences: first, the punishment actually imposed; and second, the records maintained relating to that punishment.⁶ Appellant's disciplinary record may follow him throughout the prison system; if his punishment was without cause, he

is punished anew each time his record is used against him. *Burgett v. Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).⁷ Similarly, his disciplinary record may affect his eligibility for parole. *Matthews v. Hardy*, 137 U.S.App.D.C. 39, 42, 43, 420 F.2d 607, 610-611 (Aug. 29, 1969); cf. *Peyton v. Rowe*, 391 U.S. 54, 56 n. 3, 64, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Finally, we note that the sentencing judge recommended commitment to the federal penitentiary at Lewisburg, Pennsylvania, but that appellant has nevertheless been transferred to the penitentiary at Leavenworth, Kansas. Appellant's brief suggests that confinement at Leavenworth may itself be a punishment inflicted upon appellant because of his disciplinary record.⁸

On remand, therefore, the District Court should ascertain precisely what relief appellant seeks. If he desires that the case be treated as a petition for habeas corpus, the court should inform itself of the extent to which appellant is, or is likely to be, still subject to disabilities because of the unlawful acts alleged. Only then can an informed decision be made whether appellant has an interest in the outcome of sufficient magnitude to warrant judicial review.

All Citations

424 F.2d 854, 137 U.S.App.D.C. 366

Footnotes

- 1 Appellees strenuously object to our action in remanding the case on appellant's motion for the appointment of counsel. However, various panels of this court have often taken such action in the past when it is clear from the records of a case that further action is required below. See, e.g., *Mathews v. Hardy*, No. 21,315 (Order filed Feb. 14, 1968); *Barnett v. Preston*, No. 20,577 (Order filed Nov. 22, 1966).
- 2 See also Fed.R.Civ.P. 54(c):
Every 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.
- 3 Habeas corpus tests not only the fact but also the form of detention. *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969) (by implication); *In re Bonner*, 151 U.S. 242, 14 S.Ct. 323, 38 L.Ed. 149 (1894); *Covington v. Harris*, 136 U.S.App.D.C. 35, 38, 39, 419 F.2d 617, 620-621 (Mar. 14, 1969); see *Jones v. Cunningham*, 371 U.S. 236, 238-243, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Alternatively, the papers could be treated as a request for injunctive relief under 42 U.S.C. § 1983 (1964). See *Barnett v. Rodgers*, 133 U.S.App.D.C. 296, 299 n. 4, 410 F.2d 995, 998 n. 4 (1969).
- 4 Likewise, the affidavit of Charles M. Rogers, superintendent of the D.C. Jail, refers to the case as 'HABEAS CORPUS NUMBER 83-67' (CAPITALIZATION IN original).
- 5 Of course, if the case is treated as an application for habeas corpus, appellant's transfer outside the jurisdiction was in clear violation of our then Rule 29(a), now substantially Fed.R.App.P. 23. As such, the transfer would not normally deprive us of jurisdiction, see *Ahrens v. Clark*, 335 U.S. 188, 193, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948). If, however, the case is otherwise moot, it does not seem likely that even a deliberate violation of our rules would revive the dead issues.
- 6 Compare *Taylor v. McElroy*, 360 U.S. 709, 79 S.Ct. 1428, 3 L.Ed.2d 1528 (1959) (per curiam).
- 7 We note that although appellees filed in this court an affidavit indicating that appellant has been transferred to the United States Penitentiary at Leavenworth, Kansas, they have not indicated that he is not there subjected to the same additional restraints as at the D.C. Jail.
- 8 See Brief for Appellant at 14-15:
It is clear that confinement at Leavenworth, a maximum security institution, is much less desirable than confinement at Lewisburg, which is described by the Bureau of Prisons as a 'medium security penitentiary' which provides 'wider training opportunities' than are available at Leavenworth. Compare United States Bureau of Prisons, Policy Statement No. 7300.13A, Appendix A, p. 15 (1967) (describing Leavenworth), with p. 17 (describing Lewisburg). Thus, for example, Lewisburg offers a variety of technical training programs as well as a complete academic program through high school and arrangements with Pennsylvania State University for inmates to take specialized courses in the behavioral sciences. And it has a substantial work release and community placement program. *Id.* at 17. Leavenworth, on the other hand, has no 'significant' special training programs and 'because of the nature of the institution's mission, work release is not stressed.' *Id.* at 15.

KeyCite Yellow Flag - Negative Treatment

Distinguished by U S Fidelity & Guaranty Co v. Harriss & Covington
Hosiery Mills. M.D.N.C., March 12, 1954

123 F.2d 558

Circuit Court of Appeals, Fourth Circuit.

MARYLAND CASUALTY CO.

v.

BOYLE CONST. CO., Inc., et al.

No. 4831.

|

Nov. 10, 1941.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia; Alva M. Lumpkin, Judge.

Declaratory judgment action by the Maryland Casualty Company against the Boyle Construction Company, Inc., and others, for declaration of rights of the plaintiff under policy of public liability insurance covering use of an automobile which was involved in an accident. From an order dismissing the action, plaintiff appeals.

Affirmed.

West Headnotes (10)

[1] **Declaratory Judgment**

— Automobile Liability Insurance

Where nonresident insurer seeking declaratory judgment concerning its liability under an automobile liability policy was admittedly obligated to defend actions instituted against insured, coverage of the policy was not in dispute, and both insurer and insured contended that decedent whose death resulted from automobile accident was an employee of insured and that exclusive remedy for his injuries and death was under the South Carolina Workmen's Compensation Act, there was no "controversy" between insured and insurer and the federal court had no jurisdiction of the action.

Acts S.C. July 17, 1935, 39 St. at Large, p. 1231;
Jud. Code, § 274d, 28 U.S.C.A. §§ 2201, 2202.

11 Cases that cite this headnote

[2] **Federal Courts**

— Case or Controversy Requirement

Federal Courts

— Controversies Between Citizens of Different States; Diversity Jurisdiction

A bona fide controversy between citizens of different states is necessary to support federal court jurisdiction which depends on diversity of citizenship.

2 Cases that cite this headnote

[3] **Federal Courts**

— Required, necessary, or indispensable parties

Although nonresident insurer which sought declaratory judgment in federal court concerning its liability under an automobile liability policy had a justiciable "controversy" with administrator who had commenced state court actions against insured for damages resulting from automobile accident, the insured was an "indispensable party" to any action to settle that controversy, and joinder of the insured, who was a resident of the same state as administrator and whose interest in the controversy was identical with that of the insurer, defeated federal court jurisdiction of the declaratory judgment action. 28 U.S.C.A. §§ 2201, 2202.

19 Cases that cite this headnote

[4] **Courts**

— Assumption and exercise of conflicting jurisdiction in general

Where nonresident liability insurer sought declaratory judgment in federal court concerning its liability under automobile liability policy, and only question involved was whether a decedent, whose death had resulted from an automobile accident, was an employee of insured so that exclusive remedy for his injuries and death was under the South Carolina Workmen's

Compensation Act, and the same question was involved in actions previously instituted in state court by decedent's administrator, a South Carolina resident, against insured who was also a South Carolina resident, the District Court's refusal to entertain the declaratory judgment action was a sound exercise of discretion. Acts S.C. July 17, 1935, 39 St. at Large, p. 1231; 28 U.S.C.A. §§ 2201, 2202.

5 Cases that cite this headnote

[5] **Declaratory Judgment**

— Discretion of Court

The District Court is vested with a sound discretion in respect to granting of declaratory relief and the discretion not to grant it is soundly exercised where it appears that such relief will serve no useful purpose and that the only effect of granting it will be to drag into the federal courts the trial of causes properly pending in state courts and not subject to removal. 28 U.S.C.A. §§ 2201, 2202.

17 Cases that cite this headnote

[6] **Federal Courts**

— Necessity of Objection; Power and Duty of Court

Ordinarily, a federal court having jurisdiction of subject matter and over the parties to a justiciable controversy must exercise that jurisdiction but this is not an absolute mandate and the court has some discretionary power in each instance whether to exercise its jurisdiction.

1 Cases that cite this headnote

[7] **Courts**

— Assumption and exercise of conflicting jurisdiction in general

Where a prior action between the same parties and involving the same issues has been filed in a court of concurrent jurisdiction, and decision by that court would adjudicate all rights of the parties, the federal court having jurisdiction of action brought by defendant in the prior

action may refuse, in its discretion, to entertain jurisdiction.

2 Cases that cite this headnote

[8] **Declaratory Judgment**

— Termination or settlement of controversy

A declaratory judgment should be granted where it will serve a useful purpose in clarifying and settling legal relations and will terminate and afford relief from uncertainty, insecurity and controversy, and should be denied where another court has jurisdiction of issue, where proceeding involving identical issues is already pending in another tribunal, where special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. 28 U.S.C.A. §§ 2201, 2202.

29 Cases that cite this headnote

[9] **Declaratory Judgment**

— Liberal or strict construction

The federal Declaratory Judgment Act is an important development in "procedural law" and should be liberally construed. 28 U.S.C.A. §§ 2201, 2202.

4 Cases that cite this headnote

[10] **Declaratory Judgment**

— Concurrent and conflicting jurisdiction

The federal court in giving liberal construction to Declaratory Judgment Act should be careful not to encroach upon state jurisdiction. 28 U.S.C.A. §§ 2201, 2202.

4 Cases that cite this headnote

Attorneys and Law Firms

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Elliott, McLain, Wardlaw & Elliott, all of Columbia, S.C., on the brief), for appellees.

Before PARKER, SOPER, and DOBIE, Circuit Judges.

Opinion

PARKER, Circuit Judge.

This is an appeal from an order dismissing an action instituted by a casualty insurance company to obtain a declaratory judgment under a policy of public liability insurance and to enjoin the prosecution of actions commenced in a state court against the insured. The plaintiff in the actions in the state court was Victor G. Miller, the administrator of the estate of one Horace R. Miller, who had been killed in an automobile collision by a truck operated by one Snelgrove, an employee of the insured, the Boyle Construction Company. In one of the actions instituted in the state court against the insured, the administrator demanded damages in the sum of \$50,000 for the wrongful death of Horace R. Miller, and in the other, damages in the sum of \$25,000 for pain and suffering resulting from the injury which caused death. The Maryland Casualty Company, plaintiff in the suit at bar, had issued a policy of public liability insurance to the Boyle Construction Company in which it undertook, to the extent of \$10,000 in the case of any one person injured, to pay on behalf of the insured liability imposed for damages caused by accident and arising out of the ownership, maintenance or use of automobiles covered by the policy, and to defend in the name of the insured any suit alleging such injury and seeking damages on account thereof, even though such suit were 'groundless, false or fraudulent'.

This action for declaratory judgment was instituted in the court below after the actions against the insured had been instituted in the state court by the administrator. At first, only the administrator and the insured were joined as defendants. Afterwards, the pleadings and process were amended to bring in Snelgrove, the operator of the truck, and the American Mutual Liability Insurance Company, the insurance carrier of the Boyle Construction Company under the South Carolina Workmen's Compensation Act, Act S.C. July 17, 1935, 29 St.at Large, p. 1231. The complaint alleged that there was no liability on the part of the Boyle Construction Company to the administrator of Miller for the reason that Miller, at the time of his death, was engaged in the performance of duties as an employee of the construction company and any claim arising out of his death was subject to the provisions of the Workmen's Compensation Act, which provided an exclusive remedy in the premises, and was not covered by its policy. It

asked that the court declare whether or not the plaintiff was obligated to defend the actions which had been brought in the state court or to pay any judgment therein obtained within the limits of its policy, and also whether the administrator could maintain the actions in the state court or was confined to the remedy provided by the Workmen's Compensation Act. It also prayed an injunction to restrain the prosecution of the actions in the state court. It appears from the fact of the complaint that the plaintiff Maryland Casualty Company is a Maryland corporation, that the defendant administrator and the defendant Snelgrove are citizens and residents of the state of South Carolina, that the defendant Boyle Construction Company, the insured, is a South Carolina corporation, and that the American Mutual Liability Insurance Company is a corporation of Massachusetts.

The administrator of Miller and the American Mutual Liability Insurance Company filed answers challenging the jurisdiction of the court and objecting to interference, under the declaratory judgment act, with actions pending in the state courts or with matters properly cognizable before the state Industrial Commission under the Workmen's Compensation Act. The Boyle Construction Company and its employee *561 Snelgrove did not answer. The court below dismissed the action on the authority of *State Farm Mutual Automobile Ins. Co. v. Huges*, 4 Cir., 115 F.2d 298, 300, 132 A.L.R. 188. The court held, also, that it would not be justified in exercising its power to render a declaratory judgment for the purpose of determining questions properly cognizable before the Industrial Commission. The plaintiff has appealed from the order of dismissal, but in this court abandons its prayer for injunctive relief.

[1] [2] It is perfectly clear, we think, that this case is controlled by our decision in the *Huges* case, *supra*. There is no controversy of any sort whatever between plaintiff and the insured. The coverage of the policy is not in dispute and plaintiff is admittedly obligated to defend the actions instituted against the insured, even though they be 'groundless, false or fraudulent'. The declaratory judgment sought would not relieve plaintiff of the duty of defending them, except as a result of adjudicating the question of liability therein pending, as to which there is no controversy whatever between plaintiff and insured. The interests of plaintiff and insured are identical not only in the litigation instituted in the state court but also in this suit. If the contention that Miller was an employee of insured be sustained, this will relieve the insured of liability for the claims for damage asserted by the administrator and will also relieve plaintiff from any liability on account thereof under its policy. If the contention is not sustained, insured may be

held in damages in an amount in excess of the policy and plaintiff may be held liable under the policy for the face amount thereof. As we said in the *Hugee* case: 'The position of plaintiff then comes to this: that because the operator of a motor vehicle is insured by an out of state insurance company that agrees under its policy to defend suits against the insured, claims against the insured may be dragged into the federal courts for litigation, notwithstanding that the insured and claimant are citizens of the same state and notwithstanding that there is no controversy of any sort between the insured and the company. Merely to state such a proposition is to answer it, when it is remembered that a bona fide controversy between citizens of different states is necessary to support jurisdiction which depends on diversity of citizenship.'

In the *Hugee* case we called attention to some of the authorities requiring realignment of the parties in a case such as this and dismissal of the case where such realignment results in destroying the diversity of citizenship upon which jurisdiction is grounded. A report of that case in A.L.R. is followed by an exhaustive note showing the application of the principle in a wide variety of cases. See note 132 A.L.R. 193-212. Another recent decision applying the same principle is *Farr v. Detroit Trust Co.*, 6 Cir., 116 F.2d 807, 811, wherein the Circuit Court of Appeals on the Sixth Circuit, speaking through Judge Hamilton, said:

'Where diversity of citizenship is the sole ground of jurisdiction as here, the parties will be aligned in accordance with their real interest and if, upon such alignment, there is not diversity of citizenship between the parties on opposite sides of the controversy, the suit will be dismissed. *Niles-Bement-Pond Company v. Iron Moulders' Union*, 254 U.S. 77, 82, 41 S.Ct. 39, 65 L.Ed. 145; *Berg v. Merchant*, 6 Cir., 15 F.2d 990. The plaintiffs in the original action on the facts alleged might have stated a cause of action within the jurisdiction of the court but we do not decide that question. Making the appellant with whom they had no controversy a defendant in that action, requires that he be aligned on the side on which he belongs. *Lec v. Lehigh Valley Coal Company*, 267 U.S. 542, 543, 45 S.Ct. 385, 69 L.Ed. 782. The pleader's arrangement of the parties is not conclusive on the court. The court must look into the real facts and in considering the jurisdictional questions, will rearrange the parties according to the nature of the controversy. *Harter Tp. v. Kernochan*, 103 U.S. 562, 565, 26 L.Ed. 411; (*City of*) *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 180, 25 S.Ct. 420, 49 L.Ed. 713. This rule is especially applicable when, as here, by co-operation

or prearrangement the real parties in interest are manifest. *Removal Cases*, 100 U.S. 457, 469, 25 L.Ed. 593.

'It is clear, from the record, that appellant is beneficially interested in the granting of the relief sought by the plaintiffs in the original action and that he is on their side of the controversy. It follows from so aligning the parties that his sole controversy is with citizens of his own state. *DeGraffenreid v. Yount-Lee Oil Company*, 5 Cir., 30 F.2d 574; *Magnolia Petroleum Company v. Suits*, 10 Cir., 40 F.2d 161. The court below properly dismissed appellant's cross-claim for want of jurisdiction.'

*562 [3] As we pointed out in the *Hugee* case, if there were a bona fide controversy between plaintiff and the insured, a different situation would be presented; for in such case the basis for a realignment of parties would be absent. If, for example, there were a bona fide controversy over the meaning or coverage of the policy or over the question of its validity or expiration, it would no doubt be proper to invoke the power of the court to render a declaratory judgment against the insured and to join the claimant against the insured as a party defendant, so that there might be a complete settlement of the controversy. Of course the plaintiff has a justiciable controversy with the claimant, and there is diversity of citizenship between plaintiff and the claimant; but insured is an indispensable party to any suit to settle that controversy (*Steele v. Culver*, 211 U.S. 26, 29 S.Ct. 9, 53 L.Ed. 74) and the joinder of insured defeats the jurisdiction, since its interest in the controversy is identical with that of plaintiff and it is a citizen of the same state as the claimant.

Plaintiff relies upon *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826. It does not appear from the report of that case, however, that there was any occasion to realign the parties or that such realignment would have destroyed the jurisdiction resting on diversity of citizenship. Furthermore, it is distinctly stated in the opinion of the Supreme Court that there was an actual controversy between the Casualty Company and the insured; and the nature of that controversy appears from an examination of the opinion of the Circuit Court of Appeals rendered in the case. 6 Cir., 111 F.2d 214. The company was denying that its policy covered the truck which caused claimant's injury; and this controversy was entirely separate and distinct from that as to the insured's liability to claimant. Under such circumstances, it could not be said that the interests of the insured and the company were identical, for the insured might be held liable for the act of his employee and yet the company be absolved of liability on the ground that the truck

was not covered by the policy. There was thus no basis for realignment, and we sustained the jurisdiction in such a case in *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 99 F.2d 665, which we distinguished in our opinion in the *Hugee* case. See 115 F.2d at page 302. It should be noted, also, that the point actually decided by the Supreme Court in the *Pacific Oil Company* case was the narrow one that there was a justiciable controversy between the insurance company and the claimant, although the latter had not secured judgment against the insured, a point which is not here in controversy.

[4] And we think that the order dismissing the action should be sustained for another reason, viz., that it was a sound exercise of discretion on the part of the District Judge. The only question which the suit was brought to determine was whether or not Miller was an employee of insured at the time of his injury and death; and this was a question which was necessarily involved in the actions already pending in the state court and which could be tried in those actions just as well as in the declaratory judgment suit. In this connection it should be remembered that both plaintiff and defendant in the actions in the state court were citizens of South Carolina and that the amount demanded in those suits was many times the amount of the policy issued by the Casualty Company to the insured. Furthermore, upon the answer to the question as to whether Miller was an employee of insured depended the rights of the parties under the South Carolina Workmen's Compensation Law, administered under the South Carolina statutes by the State Industrial Commission; and it was upon this ground that plaintiff joined as a defendant the company carrying insured's workmen's compensation insurance, so that it would be bound by the court's adjudication of questions, which under the South Carolina statutes were determinable, as to it, by the industrial commission. Under such circumstances we think that the court properly refused to entertain the suit for a declaratory judgment and dismissed the proceedings.

[5] This is not to say that the declaratory jurisdiction is defeated because there is another remedy available. We held directly to the contrary of that proposition in *Stephenson v. Equitable Life Assur. Soc.*, 4 Cir., 92 F.2d 406. It is merely to hold that the court is vested with a sound discretion with respect to the granting of declaratory relief, and that the discretion not to grant it is soundly exercised where it appears that such relief will serve no useful purpose and that the only effect of granting it will be to drag into the federal courts the trial of causes properly pending in state courts and not subject to removal.

*563 In *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 92 F.2d 321, 323, we pointed out that discretion is vested in the court with respect to the granting or refusing of declaratory relief, even in cases of which it unquestionably has jurisdiction. We said:

'The federal Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. § 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000. This being true, there is no ground for applying the settled rule, well stated in *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257, that the courts may not decline the exercise of jurisdiction conferred upon them. The question is not as to whether jurisdiction shall be assumed but as to whether, in exercising that jurisdiction, a discretion exists with respect to granting the remedy prayed for. No one would question the power of the federal courts to grant injunctions in proper cases; but nothing is better settled than that whether or not injunctive relief shall be granted is a matter resting in the sound discretion of the trial judge. The same is true of specific performance and of the legal remedy of mandamus. The declaring of 'rights and other legal relations' without executory or coercive relief is an extraordinary remedy, the granting of which, like the remedies mentioned, should certainly rest in the sound discretion of the court because of the liability of abuse to which it might otherwise be subjected.

'The Uniform Declaratory Judgment Act expressly provides for the exercise of discretion (section 6) as does the New York Civil Practice Act and the Rules adopted thereunder (section 473; rule 212). And the rule is well settled under the English statute and court rules that the granting of declaratory relief is a matter resting in the court's discretion. *Russian Commercial Industrial Bank v. British Bank*, 90 L.J.K.B.N.S. 1089, 19 A.L.R. 1101. Prof. Bouchard points out that these statutory provisions 'merely embody the established Anglo-American practice in all jurisdictions.' *Declaratory Judgments*, p. 100. While the federal act does not expressly provide that the granting of declaratory relief shall rest in the court's discretion, this is clearly implied from the fact that it merely gives the court power to grant the remedy without prescribing any of the conditions under which it is to be granted, and it is hardly to be supposed that it was intended that it should be granted as of course in every case where a controversy exists. The Report of the Judiciary Committee of

the Senate states that there is a discretion under the statute 'not to issue the judgment if it will not finally settle the rights of the parties,' and, further, that 'while the procedure is neither distinctly at law or in equity, but sui generis, the Supreme Court could probably at any time made rules under its equity power, if it saw fit.' Senate Report No. 1005, 73d Cong., 2d Sess. And in every case in which the question has been raised the holding has been that the granting of relief under the federal act is a matter resting in the sound discretion of the court. *New York Life Ins. Co. v. London* (D.C.) 15 F.Supp. 586, 590; *New Discoveries v. Wisconsin Alumni Research Foundation* (D.C.) 13 F.Supp. 596, 599; *Automotive Equipment v. Trico Products Corporation* (D.C.) 11 F.Supp. 292, 294, 295; *Zenie Bros. v. Miskend* (D.C.) 10 F.Supp. 779, 782; note, 32 *Ill. Law Review* 248.

'As said by Judge Knight in the case of *Automotive Equipment v. Trico Products Corporation*, however, the discretion to grant or refuse the declaratory relief 'is a judicial discretion, and must find its basis in good reason,' and is subject to appellate review in proper cases. We think that this discretion should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations (see *Bouchard, Declaratory Judgments*, 101); but it should not be exercised for the purpose of trying issues involved in cases already pending, especially where they can be tried with equal facility in such cases or for the purpose of anticipating the trial of an issue in a court of coordinate jurisdiction. The object of the statute is to afford a new form of relief where needed, not to furnish a new choice of tribunals or to draw into the federal courts the adjudication of causes properly cognizable by courts of the states. See *Associated Indemnity Corp. v. Manning* (D.C.) 16 F.Supp. 430.'

In *American Automobile Ins. Co. v. Freundt*, 7 Cir., 103 F.2d 613, 619, the same *564 doctrine was enunciated by the Circuit Court of Appeals of the Seventh Circuit, the court saying with respect to the *Quarles* case: 'We are convinced of the soundness of the reasoning and conclusion of the Fourth Circuit Court of Appeals in the foregoing case. The opinion emphasizes that the discretion allowed by the Act 'should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations'; but the opinion also emphasizes that declaratory relief should not be granted when the result is a 'piece-meal trying of the controversies without benefit to anyone'; or when the remedy

is invoked 'merely to try issues or determine the validity of defenses in pending cases.'

With respect to the use of the declaratory judgment procedure to try in the federal courts controversies properly pending in state tribunals, the Seventh Circuit Court of Appeals used the following language in the case last cited: 'In the instant case the legal justification for refusal to exercise jurisdiction may be found in the legislative purpose of the grant of power as well as the more general considerations of comity as between federal and state courts. The Supreme Court has held that the Declaratory Judgment Act is not jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction. The roots of declaratory procedure are found in equity procedure, chiefly in the *quia timet* relief. The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case.'

[6] [7] The rule of discretion and the propriety of the refusal of relief where a prior action has been filed in a court of concurrent jurisdiction is thus well and succinctly stated by Judge Huxman, speaking for the Circuit Court of Appeals of the 10th Circuit in *Excess Ins. Co. of America v. Brillhart*, 10 Cir., 121 F.2d 776, 778:

'Ordinarily a court having jurisdiction of the subject matter and over the parties to a justiciable controversy must exercise that jurisdiction. This is, however, not an absolute mandate and the court has some discretionary power as to whether it will in each instance assume and exercise the jurisdiction which the statute confers. *Kansas City So. Ry. Co. v. United States*, 282 U.S. 760, 763, 51 S.Ct. 304, 306, 75 L.Ed. 684; *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 52 S.Ct. 413, 76 L.Ed. 837; *American Automobile Ins. Co. v. Freundt et al.*, 7 Cir., 103 F.2d 613; *United States Fidelity & Guaranty Co. v. Koch*, 3 Cir., 102 F.2d 288.

'Where a prior action has been filed in a court of concurrent jurisdiction between the same parties and involving the same issues, and a decision by that court would adjudicate all the rights of the parties, a federal court, although having jurisdiction to entertain an action brought by a defendant in the pending cause, may within its discretionary powers refuse to entertain jurisdiction. *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 92 F.2d 321; *Maryland Casualty Co. v.*

Consumers Finance Service, Inc., 3 Cir., 101 F.2d 514; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 99 F.2d 665.'

In Aetna Casualty & Surety Co. v. Quarles, supra, we held that the court had properly refused to entertain a suit for declaratory relief by an insurance company where suit had been instituted against the company in the state court for recovery on a judgment for which it was claimed to be liable under its policy. The company denied liability under its policy on the ground that there had been collusion between claimant and the insured. We held that declaratory relief should not be afforded merely for the purpose of adjudicating a defense that could just as well be tried in the action pending in the state court. We said:

'The declaratory judgment was sought under the bill as amended, therefore, merely for the purpose of determining the validity of a defense which the company was asserting in the action against it and which could be equally well determined in that action. The granting of the declaratory relief would have meant a piecemeal trying of the controversy without benefit to any one. Under such circumstances the court properly exercised its discretion in refusing to entertain the bill. It is well settled that the declaratory remedy should not be invoked merely to try issues or determine the validity of defenses in pending cases. 1 C.J.S., Actions (Sec. 18, pp.) 1024, 1031; Borchart, Declaratory Judgments, 110; Northeastern *565 Marine Engineering Company v. Leeds Forge Company (1906) 1 Ch. 324, affirmed (1906) 2 Ch. 498; Slowmach Realty Corp. v. Leopold, 236 App.Div. 330, 258 N.Y.S. 500.

'The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, i.e., to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. Whether the remedy shall be accorded one who petitions for it is a matter resting in the sound discretion of the trial court, to be reasonably exercised in furtherance of the purposes of the statute. It should not be accorded, however, to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted.'

[8] Professor Borchart in a passage quoted with approval by this court in the Quarles case has well said (Declaratory Judgments 107-109): 'The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1)

when the judgment will serve a useful purpose of clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed. In addition, and perhaps, as indicating when a useful purpose will not be served, statute and practice have established the rule that the judgment may be refused when it is 'not necessary or proper at the time under all the circumstances.' * * * The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. In these cases it is neither necessary nor proper to issue the declaration.'

The rendering of the declaratory judgment here sought would have resulted in trying in the federal court the decisive issue in two damage suits pending between citizens of South Carolina in a state court. It would have settled also an issue with respect to workmen's compensation liability, which under the statutes of South Carolina was triable before the state Industrial Commission. The only excuse for doing this would have been that a foreign insurance company had issued a policy to the defendant in the state court actions agreeing to discharge the liability of the defendant therein to the extent of less than one-seventh of the amount sued for in those actions. The insurance company had no defense to its liability except the defense which the defendant was asserting in those actions, viz., that Miller was an employee of the defendant; and since it had the right to defend the actions for the insured it could assert that defense there. It is suggested that, since the company was a citizen of another state, it had a right to resort to the federal courts rather than the state courts for the trial of the issue. Aside from the question of realignment which we have discussed above, however, we do not think that the mere fact that the company had a contract with one of the parties to an action in a state court, with respect to defending that action and paying any judgment recovered against such party, would justify the federal court in exercising the declaratory jurisdiction to try issues in an action which was essentially one between citizens of the same state; and the refusal of the federal court to exercise its power to render a declaratory judgment under such circumstances must be deemed a sound exercise of the discretion vested in it under the Declaratory Judgment Act.

[9] [10] The federal declaratory judgment act is an important development in procedural law and should be liberally construed. In giving it this liberal construction, however, we must be careful not to encroach upon the state jurisdiction; otherwise we may awake to find that such encroachment has resulted in the act's being repealed or being modified in such way as to render it practically valueless. It furnishes a convenient and appropriate remedy to liability insurance companies where there is a bona fide controversy with the insured over the coverage of the policy or over other matters which can be settled more satisfactorily in such suit than in the ordinary form of litigation; but insurance companies should not be permitted, under *566 the guise of seeking declaratory judgments, to drag into the federal courts the litigation of claims between citizens of the same state over which it was never intended that the federal courts should exercise jurisdiction. If these efforts are persisted in and are sanctioned by the courts, such abuse of the remedy may well lead to the repeal by Congress of one of the most beneficent pieces of procedural legislation enacted in recent years.

The order appealed from will be affirmed.

Affirmed.

All Citations

123 F.2d 558

651 F.2d 24
United States Court of Appeals,
First Circuit.

UNITED STATES, et al., Plaintiffs, Appellees,

v.

Carlos MARIN, Defendant, Appellant,
and

Caribbean Restaurants, Inc., Defendant, Appellee.

UNITED STATES of America,
et al., Plaintiffs, Appellees,

v.

Carlos MARIN, Defendant, Appellee,
and

Caribbean Restaurants, Inc., Defendant, Appellant.

Nos. 80-1216, 80-1217.

|

Argued Nov. 7, 1980.

|

Decided May 22, 1981.

Government, which was assignee of claim against lessor corporation, and lessor's receiver brought suit seeking to invalidate the leasehold interests of lessee and sublessee. The United States District Court for the District of Puerto Rico, Robert A. Grant, J., sitting by designation, entered judgment from which lessee and sublessee appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that: (1) corporation's treasurer lacked authority under corporation's bylaws to bind corporation to lease and such lease was void where corporation never ratified the action and where treasurer did not have apparent authority on which lessee, who had actual knowledge that litigation was pending and that receivership had been determined to be necessary for corporation, could have reasonably relied, and (2) having no rights in the property created by invalid lease, lessee could not convey any rights to sublessee under Puerto Rico law and sublessee, which acted with full knowledge of the circumstances under which lessee obtained his lease and actively participated in an effort to conceal the defects from the registry in order to have lease and sublease recorded, was not entitled to any protection as an innocent third party.

Affirmed.

West Headnotes (9)

[1] **Federal Courts**

— Contract claims

Suit by government and receiver to void leases and sublease of portion of corporation's hotel was ancillary to government's suit against estate of corporation's sole shareholder for back taxes and therefore district court had ancillary jurisdiction over the suit.

Cases that cite this headnote

[2] **Corporations and Business Organizations**

— To make other particular transactions

Corporation's treasurer lacked authority under corporation's bylaws to bind corporation to lease and such lease was void where corporation never ratified the action and where treasurer did not have apparent authority on which lessee, who had actual knowledge that litigation was pending and that receivership had been determined to be necessary for corporation, could have reasonably relied.

1 Cases that cite this headnote

[3] **Estoppel**

— Default or wrongful act of person setting up estoppel

Estoppel is an equitable doctrine which is not available for benefit of one whose conduct has been inequitable.

Cases that cite this headnote

[4] **Landlord and Tenant**

— Estoppel to deny relation

In light of fact that lessor's receiver's acquiescence in lessee's occupancy of premises was procured through fraudulent misrepresentations by lessee's attorney, lessor's receiver was not estopped from challenging validity of the lease.

2 Cases that cite this headnote

[5] **Corporations and Business Organizations**

-- Leases

Landlord and Tenant

-- Recording lease or contract

Registration of lease as a public deed under Puerto Rico law did not validate the lease, which was executed by corporate officer who lacked authority to bind the corporation. 30 L.P.R.A. § 58.

Cases that cite this headnote

[6] **Landlord and Tenant**

-- Rights and liabilities of sublessees

Having no rights in the property created by invalid lease, lessee could not convey any rights to sublessee under Puerto Rico law and sublessee, which acted with full knowledge of the circumstances under which lessee obtained his lease and actively participated in an effort to conceal the defects from the registry in order to have lease and sublease recorded, was not entitled to any protection as an innocent third party. 30 L.P.R.A. § 59.

Cases that cite this headnote

[7] **Declaratory Judgment**

-- Money judgment

Although complaint did not contain explicit prayer for damages, district court properly determined that damages were an appropriate element of case in which government and receiver, which obtained declaration that leasehold interests of lessee and sublessee were subordinate to interests of government, established that lessee dealt with receiver in bad faith in obtaining lease and that sublessee knew that there were irregularities in lessee's lease. Fed.Rules Civ.Proc. Rule 54(c), 28 U.S.C.A.

6 Cases that cite this headnote

[8] **Federal Civil Procedure**

-- Relief justified by facts

It is court's duty to grant whatever relief is appropriate in the case on facts proved. Fed.Rules Civ.Proc. Rule 54(c), 28 U.S.C.A.

11 Cases that cite this headnote

[9] **Implied and Constructive Contracts**

-- Use and occupation of realty

Evidence supported finding that lessee and sublessee, which were both aware of defects of lease between lessor and lessee, were possessors in bad faith under Puerto Rico law and therefore lessee and sublessee were properly held jointly liable for sum equal to the rental value of the sublease minus lessee's expenses for cleaning the premises and any monies lessee had already paid on the lease. 31 L.P.R.A. § 1424.

Cases that cite this headnote

Attorneys and Law Firms

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Before CAMPBELL and BOWNES, Circuit Judges, and HOFFMAN, * Senior District Judge.

Opinion

LEVIN H. CAMPBELL, Circuit Judge.

This is the latest in a series of cases arising from the United States' efforts to collect some \$2,600,000 in taxes owed by the late Felix Benitez Rexach, a Puerto Rican engineer who earned large sums from construction projects in the

Dominican Republic between 1944 and 1958. See *United States v. Lucienne D'Hotelle*, 558 F.2d 37 (1st Cir. 1977) and related cases cited therein at 38 n.1. The action from which these appeals are taken grew out of the government's attempt to reach Benitez's major remaining asset: The Normandie Hotel in San Juan.

To explain these proceedings, it is necessary to outline the history of a previous *26 related action brought by the United States against Benitez on February 10, 1964 (*United States v. Benitez*, Civil Action No. 67-64, D.P.R.). At that time, Benitez was sole owner, as well as President and a director, of Escambron Development Company. Escambron, in turn, owned and operated the Normandie Hotel as its principal business. The other directors of Escambron were Modesto Bird, Sr., who also served as Treasurer, and Modesto Bird, Jr., who served as Secretary. In its suit, the United States sought to foreclose against Benitez's 100 percent stock interest in Escambron, and to have a receiver appointed who would liquidate Escambron to satisfy Benitez's tax liabilities. The government also sought to have assigned to it a debt of Escambron to Benitez in excess of \$1 million.

On February 20, 1964, the parties to that suit, including Escambron and the two Birds, stipulated to the entry of an injunction pendente lite which prohibited them from "selling, assigning, pledging, encumbering, or otherwise disposing of any assets" of Escambron except "in exchange for fair and sufficient consideration in the regular course of business and provided that the consideration given in exchange for any assets is delivered in Puerto Rico to the Escambron Development Company at the time of any such transfer." This injunction continues in force to the present.¹ Felix Benitez Rexach died on November 2, 1975, while the government's suit against him was pending. On January 19, 1976, the court appointed Jorge Guillermetty as receiver for the assets of Escambron,

for the purpose of conserving and managing said assets pending adjudication of the plaintiff's lien claims asserted in this action and for the purpose of selling said assets at the best possible price for the purpose of satisfying the liens of the United States as set forth in the judgment of this court entered on October 20, 1975 in the related Civil Action No. 531-64.²

On March 30, 1977, the government received a judgment in No. 67-64 against Benitez's estate for \$2,622,127.13, plus

interest, along with assignment to it of Escambron's debt to Benitez.

The events leading to the present action, No. 77-121, occurred between the time of Benitez's death and the conclusion of the government's suit against his estate (No. 67-64). At the time of Benitez's death, a portion of the ground floor of the Normandie Hotel was occupied by a franchise of McDonald's Restaurant. On January 2, 1976, Modesto Bird, Sr., purporting to act on behalf of Escambron,³ signed a contract leasing to Carlos Marin the portion of the Hotel then occupied by McDonald's. The lease was for an initial term of three years with renewal at Marin's option for up to a total of 17 years. The district court found that Marin was fully aware of the ongoing litigation and pending receivership.⁴ The court also found that the directors of Escambron never adopted a resolution authorizing execution of the lease.

Between February and May 1976, Marin sought to have the newly appointed receiver *27 recognize the lease. Guillermetty reported this development to attorneys for the government, informing them that the lease was for a total of three years.⁵ The government made no objection to a three-year lease, and Guillermetty informed Marin by a letter dated May 20, 1976, that Marin could take possession of the premises.

During this time, Marin was negotiating with Caribbean Restaurants, Inc., to sublease the property for use as a franchise of Burger King. The court found that Caribbean participated in these negotiations with full awareness of the litigation and of the receivership. Caribbean insisted that Marin's lease be registered as a public deed. The January 2 lease could not be registered because it was not notarized, because it was not authorized by the corporation, and because of its reference to a receivership. Marin and Modesto Bird, Sr., therefore executed a new lease on June 16, 1976, omitting the reference to a receiver. The new lease was notarized, and Modesto Bird, Jr., executed a "Certificate" stating that the corporation had authorized the registration of a deed.⁶ The lease was registered, and Marin and Caribbean entered into a sublease, which was also registered, on September 20, 1976.

Sometime after May 20, 1976, Guillermetty became aware that Marin's lease was for a total of not three, but 17 years. He brought this fact to the attention of government attorneys, who expressed their objections to Marin's attorney. Marin's attorney responded by reiterating that the lease was for

three years, and assuring the government that the prospective sublessee was aware of its objections. On October 13, 1976, the receiver petitioned the district court for instructions regarding Marin's claims under the leases. The court declined to give instructions and advised Guillermety to act on advice of his attorney. In January 1977, the government and the receiver brought this suit seeking to void the leases and sublease.

The court found numerous defects in both leases and declared them void.⁷ Finding that Marin had obtained no right to occupy the property and therefore had no interest to convey to Caribbean, the court held that Caribbean had occupied the property as a trespasser, and that the receiver was entitled to damages measured by the fair market value of Caribbean's occupancy. The court set this amount at the rent provided in the sublease between Marin and Caribbean,⁸ holding the two defendants jointly liable and allowing them to offset the rent paid by Marin to the receiver and Marin's expenditures for cleaning the premises. Both Marin and Caribbean have appealed, each asserting numerous claims of error.

I. Jurisdiction

[1] Caribbean alone challenges the district court's jurisdiction. Caribbean claims *28 that the district court erred in finding jurisdiction under various sections of the Judicial Code (28 U.S.C.) and the Internal Revenue Code (26 U.S.C.). However, the district court also explicitly found that the action "is ancillary to the parent case, Cause No. 67-64 in this court wherein the co-plaintiff, Jorge Guillermety, was appointed as Receiver." We agree with the district court that it had ancillary jurisdiction. Since this ancillary jurisdiction is sufficient, we need not reach Caribbean's arguments that there was no independent jurisdictional base. *Teherpnin v. Franz*, 485 F.2d 1251 (7th Cir. 1973), cert. denied, sub nom. *McGurren v. Ettelson*, 415 U.S. 918, 94 S.Ct. 1416, 39 L.Ed.2d 472 (1974).⁹

II. The Leases

Marin and Caribbean both claim that at least one of the two leases was valid and binding on the receiver. Caribbean further claims that even if the leases between Marin and Bird were defective, its own rights under the sublease are protected by Article 34 of the Mortgage Law of Puerto Rico, 30 P.R. Laws Ann. s 59. We have reviewed the record in detail, and we find no error in the court's conclusions on each of these claims.¹⁰

The district court found the January 2 lease void on two independent grounds: first, Bird, as Treasurer of Escambron, lacked authority to contract for the corporation; and second, the directors of Escambron never adopted a resolution authorizing the lease. In addition, the court held that the lease violated the injunction pendente lite, and that even if the lease were valid, Marin's rights would be subordinate to those of the United States under the doctrine of *lis pendens*. We affirm the court's conclusion that the lease was never validly executed, and we therefore do not consider the effect of the injunction and the doctrine of *lis pendens*.

[2] The by-laws of Escambron Development Company provide for contracts by the corporation as follows:

The President ... shall ... sign and execute all contracts when authorized to do so by the Board of Directors.

No contract binding the Company to the payment of money or other obligation, except for the purchase of ordinary supplies, shall be made, except by like approval and authorization of the Board.

With respect to the role of Treasurer, the by-laws provide that he

shall have the care and custody of the funds and securities of the Company in such bank or banks as the directors may elect. He shall countersign all certificates of stock signed by the President.

The district court understood these provisions to mean that only the President could contract for Escambron, and he only with *29 authorization by the Board of Directors. We think this is the clear import of the by-laws.¹¹ Marin argues that the by-laws "do not prohibit the signing of contracts by an officer who is not the president." But Marin fails to cite any provision authorizing the Treasurer to contract for the corporation, nor does he cite any Puerto Rico case law holding that such authority is implied in by-laws such as these or in the inherent powers of a treasurer of a Puerto Rico corporation.

Marin also criticizes the court's factual determination that the directors of Escambron never adopted a resolution authorizing the lease. He concedes that no such resolution appears on the corporation's books, but cites his own testimony and that of another witness that they saw a

resolution. The court discredited this testimony and credited that of both Birds that no resolution was ever adopted. Credibility judgments are for the trier of fact and are not to be disturbed on appeal unless they are unreasonable, which plainly this was not. Marin relies further on a certificate executed by Modesto Bird, Jr., on June 17, 1976, reciting that the corporation had, on January 2, authorized Modesto Bird, Sr., to execute a deed based on the January 2 lease "executed by the corporation." See note 6, supra. The district court discredited this certificate, stating that it did not believe the resolution quoted had ever existed.¹² We find ample support for this judgment both in the certificate itself and in the circumstances of its execution.

Marin contends that even if Bird lacked authority to act for the corporation, and even if the corporation did not ratify the lease, Bird had apparent authority on which Marin reasonably relied. The district court properly rejected this theory, noting that the lease itself acknowledged that a receiver was about to be appointed. Even if the corporate by-laws had not put Marin on notice of Bird's limited authority, actual knowledge that litigation was pending and that receivership had been determined to be necessary would surely cause a reasonable lessee to inquire further into the authority of one who purported to act for the corporation.

[3] [4] Since Bird lacked authority to contract for the corporation, and since the corporation never ratified his action, the January 2 lease was void. Appellants argue, however, that the lease was validated after the fact by the receiver's letter of May 20, 1976, in which he acquiesced in their occupancy; alternatively, they argue that both plaintiffs are estopped from challenging the lease since both led the defendants to rely on its validity. The court found various defects in this reasoning; most importantly, the court found that the receiver's letter was procured through fraudulent misrepresentations by Marin's attorney to the effect that 1) the lease was for a total of three years, and 2) the lease had been authorized by a corporate resolution. The court concluded that Marin was not entitled to benefit from these misrepresentations. The court's finding was not clearly erroneous, and its conclusion follows naturally from its finding; estoppel is an equitable doctrine which is not available for the benefit of one whose conduct has been inequitable.

*30 [5] The June 16 lease and deed suffer from all the defects applicable to the January 2 lease. Registration does not cure these defects. 30 P.R. Laws Ann. s 58. These

documents were therefore void and created no rights in Marin.¹³

[6] Having no rights in the property, Marin could convey none to Caribbean, and the sublease between Marin and Caribbean was void as well. Caribbean argues, however, that its sublease cannot be invalidated because it is an "innocent third party" protected by Article 34 of the Mortgage Law of Puerto Rico, 30 P.R. Laws Ann. s 59. That statute provides as follows:

Instruments or contracts executed or entered into by a person who, according to the registry, has a right to do so, shall not be invalidated with regard to third persons after they have been recorded even though the interest of such party should subsequently be annulled or terminated by virtue of a prior deed which was not recorded or for reasons which do not clearly appear from said registry.

The courts of Puerto Rico have applied this statute to protect only third parties who act without actual knowledge of any defect. See *Alvarez v. Aponte*, 83 P.R.R. 595 (1961); *People v. Riera*, 27 P.R.R. 1 (1919); *Amy v. Amy*, 15 P.R.R. 387 (1909). But see *Annoni v. Nadal's Heirs*, 135 F.2d 499 (1st Cir. 1943) (Puerto Rico court had suggested actual knowledge would not bar application of section 59 where defect did not appear in registry, but earlier Puerto Rico cases had held otherwise). Here, the district court found, on the basis of strong evidence, that Caribbean acted with full knowledge of the circumstances under which Marin obtained his lease, and that it actively participated in an effort to conceal the defects from the registry in order to have the lease and sublease recorded. Under these circumstances, Article 34 provides no protection.¹⁴ The district court correctly concluded that neither Marin nor Caribbean had any rightful interest in the Normandie Hotel, and that they therefore occupied the property as trespassers.

III. Damages

Having found that Marin and Caribbean were joint trespassers in the Normandie Hotel, the district court awarded the receiver damages. The damages, for which Marin and Caribbean were held jointly liable, were set at the reasonable rental value of the premises, as measured by the rent in the sublease between Marin and Caribbean. This amount was

offset by monies expended by Marin in cleaning the premises and the rent already paid to the receiver by Marin.

[7] Both Marin and Caribbean argue that the district court erred in awarding damages because the government and the receiver had made no claim for damages. Marin and Caribbean contend they were prejudiced by not knowing that damages were claimed. Had they known, they say, they would have pressed certain counterclaims. We consider these contentions in turn.

[8] First, it is true that the complaint did not contain an explicit prayer for damages. What was requested was a declaration that the leases were void or that the leasehold interests of Marin and Caribbean were subordinate to the interests of the United States. There was, however, a prayer for "such other and further relief as *31 is equitable in the premises"; furthermore, Fed.R.Civ.P. 54(c) provides that "every 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." Fed.R.Civ.P. 54(c). "This rule has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802-03 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). See *Columbia Nastri & Carta Carbone v. Columbia Ribbon & Carbon Manufacturing Co.*, 367 F.2d 308, 312 (2d Cir. 1966).

The district court awarded damages for which Marin and Caribbean were jointly liable because the evidence presented at trial proved not only that the leases were void but that Marin dealt with the receiver in bad faith, and that Caribbean knew that there were irregularities in Marin's January lease with the corporation. We think the district court properly determined that damages were an appropriate element of relief in this case.

To be sure, there may be cases where the failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief. See *Rental Development Corporation of America v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962). This is not such a case. The damages award stemmed directly from the facts proved at trial concerning the validity of the leases. See *Robinson v. Lorillard*, 444 F.2d 791. Questions of defendants' good faith and credibility were inherent in the issues presented to the court. Moreover, Marin and Caribbean had ample notice in the course of the

proceedings that the receiver claimed a right to recover the differential in the lease between them, and had an opportunity to contest that claim.¹⁵

[9] We turn next to the computation of damages. The damages award, for which Marin and Caribbean were held jointly liable, the rental value of the lease between Marin and Caribbean minus Marin's expenses for cleaning the premises and any monies Marin had already paid to the receiver on its lease with the corporation, is consistent with Puerto Rico law.

A possessor in bad faith shall pay for the fruits collected and for those which the lawful possessor might have collected, and shall only have the right to be reimbursed for the necessary expenses incurred in the preservation of the thing. Expenses incurred in improvements for luxury and pleasure shall not be refunded to the possessor in bad faith, but he may remove the objects for which such expenses have been incurred, provided the thing suffers no injury thereby, and the lawful possessor does not prefer to retain them and pay the value they may have at the time he enters into possession.

31 P.R. Laws Ann. s 1470. We find no error in the district court's conclusion that both Marin and Caribbean were possessors in bad faith, the court having found that each was aware of the defects in the January lease. See 31 P.R. Laws Ann. s 1424.

There is no merit in Marin's objection that it would have "counter-claimed and brought evidence to establish expenses incurred, *32 loans to the lessor, and indemnity for new obligations, etc." had it known about the damages claim. Prior to the second trial and after receipt of letters from the government claiming the right to the lease differential, see note 15, *supra*, Marin did in fact file a counterclaim for expenses incurred in protecting the Hotel Normandie against vandalism and robbery. However, Marin abandoned this claim and presented no evidence in support thereof. Marin's failure to press its own counterclaim can hardly be laid at the doorstep of the government.

Caribbean objects to the damages award on the ground that it has already paid to Marin the amount required by

the judgment. The evidence at the second trial warranted a finding of liability in favor of the government against Caribbean, and the amount awarded was well within the boundaries of that authorized by section 1470, *supra*. Caribbean's recourse, if any, would be for contribution from Marin. *Garcia v. Government of the Capitol*, 72 P.R.R. 133, 140-41 (1951); 31 P.R. Laws Ann. s 3109.

Affirmed.

All Citations

651 F.2d 24, 48 A.F.T.R.2d 81-5560, 81-2 USTC P 9506

Footnotes

* Of the Eastern District of Virginia, sitting by designation.

- 1 Shortly after bringing suit, the government filed a notice of lis pendens with the United States District Court and with the Registry of Property of Puerto Rico, indicating that the action might affect the property of Escambron. Six years later, on January 21, 1970, the Puerto Rico Registry rejected the notice on the ground that the suit did not affect the property of Escambron directly. The government denies having received notice of this action. The district court found that a check of the Registry's records of Escambron would have revealed the filing and later rejection of the notice.
- 2 Civil Action No. 531-64 was a suit by the government against Benitez in which Benitez was held liable for taxes owed by his wife. The government received judgment in that action on October 20, 1975. See *United States v. Lucienne D'Hotelle*, 558 F.2d 37. After appellate review and later proceedings on remand, the government's judgment in that action was \$732,933.07.
- 3 The district court found that no formal appointment of corporate officers had occurred since 1966, but that Benitez and the two Birds continued to serve in their respective roles as President, Treasurer, and Secretary until Benitez's death and that the other two continued in their roles thereafter.
- 4 The lease itself stated that "a receiver is consigned for the property."
- 5 The court found that Guillermet's misconception on this point had two sources: first, a "blurred" copy of the lease provided to him, and second, a misrepresentation to this effect by Marin's attorney.
- 6 The Certificate read as follows:
I, Modesto Bird Jr., of legal age, married, secretary of the Escambron Development Corporation and resident of San Juan, Puerto Rico, certify that on January 2, 1976, the Board of Directors of the Escambron Development Corporation unanimously approved the following Resolution:
IT IS HEREBY RESOLVED that Mr. Modesto Bird, Sr. Treasurer of this corporation is authorized in representation of same to execute a deed in such terms and conditions that he believes convenient in order to raise into a public deed the lease agreement executed by this corporation and Mr. Carlos Marin on January 2, 1976, covering a building next to the Hotel Normandie in San Juan, Puerto Rico and with an approximate area of three thousand square feet.
And so that it is registered I swear and subscribe the present certification in San Juan, Puerto Rico on June 17, 1976.
- 7 The court below held two complete trials on this action. The first was held before Judge Torruella from March 7 to 24, 1979. On June 8, 1979, Judge Torruella ordered the case reassigned to another judge for further action. A second trial was held before Judge Grant from July 23 to August 13, 1979. Judge Grant entered judgment on February 21, 1980.
- 8 This amount was more than twice the rent provided in the lease between Marin and Bird.
- 9 Among Caribbean's jurisdictional claims is the argument that the instant action was not adequately authorized by the Secretary of the Treasury and the Attorney General. The original letters from these officers combined with the continued active participation of employees of both these departments are sufficient authorization. *United States v. Morrison*, 531 F.2d 1089 (1st Cir. 1976); *United States v. Tillinghast*, 55 F.2d 279 (1st Cir. 1932). Caribbean's further argument that the judgments in No. 67-64 and No. 531-64 are "invalid, at least with respect to their effect on the Normandie Hotel, because they were entered into in absence of indispensable parties" is without merit. The prior actions concerned the tax liability of Benitez Caribbean had nothing to do with such liability. The instant action gives Caribbean the appropriate opportunity to litigate its interest in the Normandie Hotel.
- 10 Both defendants begin by attacking the court's findings of fact, particularly its findings with respect to their knowledge of the ongoing litigation and with respect to the lack of corporate authorization for the leases. Citing *In re Las Colinas*, 426 F.2d 1005 (1st Cir. 1970), they urge us to apply a particularly high standard of review to the court's findings because the court adopted the plaintiffs' proposed findings of fact and conclusions of law almost verbatim. As stated in that case, the practice of adopting a party's proposed findings is not to be encouraged. It may cast some doubt on the independence of

the court's thought process; we review findings of this sort with particular care. Nevertheless, the district court's findings must stand unless clearly erroneous. Fed.R.Civ.P. 52. We have examined the record thoroughly and do not find clear error.

- 11 Both appellants argue that these restrictions cannot be raised here because of 14 P.R. Laws Ann. s 1206, which provides: Want of corporate power shall not be pleaded or asserted in any action or proceeding except (a) by the Commonwealth of Puerto Rico or an agency or instrumentality thereof ... or (b) by a stockholder or stockholders of the corporation or its directors or officers or any of them in an action or proceeding between them or any of them arising out of the conduct of the business or affairs of the corporation, provided that the rights of third parties shall not be affected thereby.

This statute is similar to those in a number of states cutting off the corporation's defense of ultra vires in order to protect persons who contract with corporations. 1 Model Business Corporations Act Annotated s 6, at 201. The statute has no application here; the district court's holding is not that Escambron lacked power to enter into the lease, but that Bird lacked authority to act for Escambron, and that the corporation did not ratify his action by adopting a resolution authorizing the lease.

- 12 We note that this particular statement was not included in the government's proposed findings.

- 13 The district court relied primarily on the receivership to find this lease void, holding that only the receiver could act for the corporation from the date of his appointment. Marin points out that Guillermetey never voted the stock of the corporation so as to place control in his own hands, as the court's order authorized him to do. Marin argues that Escambron's management retains control of the corporation until the receiver acts to assume control. We need not address this argument. The June 16 lease was plainly void in any event for the same reasons as the January 2 lease.

- 14 The district court held Article 34 inapplicable on two additional grounds which we need not address: 1) that article 34 applies only where the third party's grantor had actual title subject to some hidden defect, not where, as here, the grantor had no interest in the property at all; 2) that the defect in Marin's lease appeared from the registry itself, since the notice of lis pendens was visible there, despite its rejection, and would have alerted Caribbean to the ongoing litigation in which an injunction had issued and a receiver had been appointed.

- 15 At the close of the first trial (see note 7, supra), the government's proposed findings of fact and conclusions of law provided that the receiver was entitled to claim the fruits and benefits of Marin's possession, defined as the rent differential. At this point, the government, viewing Caribbean as merely negligent, sought to collect from Marin. Shortly thereafter, the government advised counsel for Caribbean by letter, a copy of which went to counsel for Marin, that it claimed the rent payments from Caribbean to Marin. In November 1979, after the close of the second trial at which the evidence showed that Caribbean knowingly participated in registering an invalid lease, the government submitted proposed findings of fact and conclusions of law which included joint liability for damages. The district court's order, memorandum, and findings were not filed until February 1980. Both Marin and Caribbean therefore had opportunity to contest the request for damages. Indeed, Caribbean filed a supplement to its trial memorandum in December 1979. Both parties also filed post-judgment motions under Rules 52 and 59 of Fed.R.Civ.P. After hearing argument from counsel on all of these motions, the district court denied the motions. Neither appellant appeals these rulings.