KENT V. FAVOR, 1885-NMSC-012, 3 N.M. 347, 5 P. 470 (S. Ct. 1885)

F. H. Kent
vs.
C. D. Favor

No. 205

SUPREME COURT OF NEW MEXICO

1885-NMSC-012, 3 N.M. 347, 5 P. 470

January 22, 1885, Filed

Appeal from Second Judicial District Court, Bernalillo County.

COUNSEL

Childers & Fergusson, for appellee.

A. J. Barr and **Fiske & Warren,** for appellant.

JUDGES

Wilson, J. Axtell, C. J., concurs.

AUTHOR: WILSON

OPINION

*{*349}* **{1}** This action was commenced by the plaintiff below in the Second judicial district against the defendant, in which the plaintiff claimed a balance of rent against the defendant amounting to $ 256.66. The defendant denied that he owed any part of plaintiff's claim. A trial was had, and verdict and judgment were rendered in favor of the plaintiff in the court below for the amount of his claim.

{2} From this judgment, by regular process of law, the defendant appealed, and assigned the following specifications of error: (1) The court erred in admitting improper and irrelevant evidence on the part of the plaintiff; (2) the court erred in refusing the defendant a continuance and compelling him to go to trial, etc.; (3) the court improperly instructed the jury to find for the plaintiff against the defendant for $ 256.66, etc.

{3} The first error assigned was virtually abandoned on the argument and is not sustained. To sustain the second error assigned, the counsel for the appellant cites only the statute of New Mexico; hence the inference arises that no fixed rule has yet been

established how far the supreme court will review the action of a territorial judge in refusing an application to continue a case when it is regularly reached for trial. I am not at liberty to state the opinion of the court on this point, as I am not advised of their collective or individual opinion on the subject; but my own judgment, so far as I am advised, is adverse to regarding it as a subject of review by this court, believing it to be a matter of discretion to be exercised by the judge having charge of the case.

{4} This case does not require a judicial decision of the question, as a careful examination of the affidavit upon which the application for a continuance was founded does not disclose that it contains a statement of facts *{*350}* required by the statute to entitle the appellant to the continuance moved for in the court below.

{5} The act referred to requires the affidavit to set forth "what particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved."

{6} To comply with the requirements of this statute, the affidavit states that he expects to prove by the witnesses that he has fully paid plaintiff for all rent sued for, and that he does not owe the plaintiff anything whatever, but that the plaintiff is "justly indebted to affiant for goods, wares, and merchandise sold and delivered to him at his special instance and request."

{7} Instead of particular facts, as the statute requires, the affidavit sets forth a confused complication of legal conclusions and facts combined, and, instead of saying that affiant "believes the witnesses will prove," he substitutes "expects" for belief; and, instead of setting forth "that he knows of no other witnesses by whom such facts can be fully proved," it is stated that he "cannot prove the same facts by any other persons present." If a party expects to force the continuance of a cause by virtue of an authority contained in a statute against the best convictions of the court, the provisions of the statute must be strictly complied with, which, in this case, was not done, and consequently the second error assigned is not sustained.

{8} The third and fourth errors relate to the charge of the court, and may be considered together.

{9} It is immaterial in this case whether a verbal lease for one year and an occupancy beyond its termination constitute a tenancy from year to year or not, as the plaintiff does not seek to charge the defendant for rent beyond the term that the defendant or his subtenant occupied the premises.

*{*351}* **{10}** The plaintiff testified, in substance, that the defendant, by special arrangement after he had occupied the premises a year or more, agreed to pay him, the plaintiff, per month, $ 83.33 rent for the months of June and July, and $ 60 per month for the months of July and August, 1883, and that the defendant had paid him $ 30, which ought to be applied as payment on the same, and that left a balance of $ 256.66

rent due by the defendant to him, the plaintiff. A man by the name of Easterday was called as a witness by the plaintiff, who had occupied a portion of the premises as subtenant under the defendant. While this witness seemed to forget everything that was material to either plaintiff or defendant, yet, upon the whole, his testimony to some extent corroborated the plaintiff's evidence.

{11} The defendant testified in his own behalf, and denied every material fact testified to by the plaintiff, and expressly denied that he owed the plaintiff for rent, or in any other manner. The testimony of these three witnesses was the whole evidence in the case. Under substantially the foregoing state of facts the court charged the jury:

"Now, gentlemen, comes the question of fact, who tells the truth, and you cannot avoid passing upon that question, and I cannot throw any light upon it. It is for you to say whether the story of the plaintiff, Kent, and Dr. Easterday, under all the circumstances, is true, or whether the story of the defendant, Favor, is true. If you find for the plaintiff, you will find for him in the sum of $ 256.66; Otherwise, you will find for the defendant." These instructions, instead of being error, were eminently proper, under the evidence in the case. It is further complained, as error, that "the court erred in giving his instructions of law orally to the jury, contrary to the statute in such case made and provided." The record on its face does not sustain the error complained of, and there is no evidence *{*352}* **aliunde;** hence the legal presumption is that the charge of the court was delivered to the jury according to law.

{12} In a thorough examination of the whole record in this case we are unable to discover any error of which the defendant has any right to complain. The judgment of the court below is affirmed.