

1976

Woodland Theatres, Inc. v. ABC Intermountain Theaters et al : Brief of Respondent

Utah Supreme Court

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WOODLAND THEATRES, INC.,
a corporation,

Plaintiff-Appellant,

vs.

ABC INTERMOUNTAIN THEATRES,
INC., a corporation, and
PLITT INTERMOUNTAIN THEATRES,
INC., a corporation,

Defendant-Respondent.

BRIEF OF RESPONDENT

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The defendant-respondent does not agree with these statements because they improperly attempt to create the atmosphere of a factual issue and purport to state as matters of fact, arguments and contentions of counsel which are not facts supported in the record. For convenience, the plaintiff-appellant will be referred to in this brief as "plaintiff" and the defendant-respondent will be referred to as "defendant".

Nature of the Case

This appeal involves two cases, consolidated in the court below and here, seeking to forfeit a lease of a drive-in theatre, seeking damages, and seeking under the unlawful detainer statute repossession of the premises, all for alleged breaches of the lease. Two clear-cut legal issues are presented to this Court: whether the plaintiff, by acceptance of rent with knowledge of the alleged breaches, waived these breaches, and a subordinate issue of whether the defendant had an obligation to maximize profits.

Disposition of the Case in the Lower Court

Based on alleged breaches of a lease of a drive-in theatre owned by plaintiff, plaintiff sought to forfeit the

lease and recover alleged damages. Plaintiff filed, in the Summer of 1974, two separate actions, one under the Utah Unlawful Detainer Statute, Section 78-36-3 et seq., Utah Code Annotated (1953), Civil No. 221688, and the second under a complaint entitled "Complaint for Breach of Lease and Termination of Lease", Civil No. 222497.

The lease violations alleged in the first case were essentially the same as those in the second, with the difference that in the second there were alleged some additional breaches not raised in the unlawful detainer action. More than one year after filing of the complaint and after extensive discovery, the defendant filed motions for summary judgment in both actions, based upon the ground that even if it is assumed that plaintiff's allegations of lease violations were well taken, by the acceptance of rent with knowledge of such breaches, plaintiff, as a matter of law, had waived the breaches and that, contrary to plaintiff's allegations, defendant had no duty under the lease to maximize revenues from the leased premises.

The motions for summary judgment were heard by the Honorable Marcellus K. Snow on December 12, 1975 and both sides presented their arguments through written memoranda

submitted prior to hearing and by extensive oral argument. After further deliberation, the trial court granted summary judgment for respondent in both cases on December 24, 1975. The plaintiff filed a motion for rehearing which presented no new material not previously considered by the court and the motion, after hearing, was denied.¹

Facts

Where, as in this case, there is no genuine issue as to any material fact, Rule 56 directs that a summary

¹While it is not of major significance, the persistent overreaching of the plaintiff in its brief, is some indication of the weakness of its position. In addition to those factual inaccuracies noted below, the plaintiff, by stating that the motion for summary judgment was made on December 12, 1975 (p. 2) and was heard and ruled on on December 12, 1975 (p. 4) appears to suggest that the motion was not fully considered below. Quite the contrary is true. The plaintiff filed its complaint in the Summer of 1974. The motion for summary judgment was filed well over a year later on November 20, 1975, together with a memorandum in support thereof, after fairly extensive discovery. It was heard by the court on December 12, 1975. Plaintiff did not file its memorandum until December 11, 1975, the day before the hearing. The court took the matter under advisement and entered judgment on December 24, 1975. (See dates on various pleadings in the record and also the Summary Judgment, R. 90, Vol. I, 342 Vol. 2).

Note. The record in this case is in two volumes, apparently because there are two consolidated cases. The record in district court numbered 2211688 will be referred to as Volume 1 and the record in district court numbered 222497 (the second case filed by plaintiff) will be referred to as Volume 2.

judgment shall be granted. The plaintiff here has followed the traditional tactic of a party resisting summary judgment where his legal position is untenable, by attempting to create the atmosphere of a factual dispute in order to avoid the clear mandate of Rule 56. Moreover, plaintiff's statement of facts itself contains gross overstatements in a patent attempt to shock the court and create an atmosphere of bad faith on the part of defendant.² On this appeal, however,

²For example, the plaintiff refers (p. 7 of appellant's brief) to the fence being "weathered and unpainted" but fails to state that there is absolutely no reference to this in the record, fails to state that it is a grape stake fence that is intended to have a natural weathered appearance, is not intended to be painted and has never been painted and was not painted when the plaintiff leased the theatre to defendant. Nor does plaintiff even allude to the fact that the fence in many parts is worn out and can no longer be repaired but should be replaced and under case law it is the landlord's and not the tenant's responsibility to replace worn out parts of the premises. See e.g., Paul v. Paul's Liquor Store Co., 217 A2d 197 (Del. 1966); Presbyterian Distributing Service v. Darling, 166 A2d 308 (Pa. 1960); Maggio v. Cox, 63 So.2d 167 (La. 1953). Another example is that plaintiff constantly states that ABC "assigned the lease" when in fact there is not one item in the record showing any assignment. The only item in the record is that the stock of ABC Intermountain Theatres, Inc. was sold to a new stockholder and the corporate name was changed to Plitt Intermountain Theatres, Inc. (Defendant's Answers to Interrogatories 9 and 10, R. 100-105; 127-129, Vol. 2). Plaintiff attempts to create the atmosphere that there are two separate corporations when in fact there is but one and plaintiff has never effected service of process on any but one corporate entity. Other examples of plaintiff's overstatements to the extent that they may be of assistance in the argument will be referred to in the argument.

the exact nature or extent of the alleged breaches is irrelevant. Needless to say, defendant denies these claims of the plaintiff, along with any other claims of wrong doing on its part, and has affirmatively shown in the record (Defendant's Answers to Interrogatories 9-10, R. 100-105; 127-129, Vol. 2) the expenditures of very substantial sums of money by it in an effort to satisfy a difficult landlord and make certain that it had cured within the grace period given in the lease, even the tenuous claims of the landlord. However, for purposes of the present appeal, all of the allegations of breach which are actually made by appellant in its complaint (but not the exaggerations of those allegations made by counsel in his brief) must be accepted as true and there is, therefore, no genuine issue concerning them.

There are some facts, however, which plaintiff has omitted, which are material to the lower court's disposition of this matter - namely, certain admissions by the plaintiff that it did accept rent after knowledge of the alleged breaches. It will be helpful to include these admissions for reference in this brief and also to set out a more accurate description of the allegations made by the plaintiff.

As stated in plaintiff's statement of facts, the plaintiff, Woodland Theatres, Inc., entered into a lease with the defendant, which was then known as ABC Intermountain Theatres, Inc., providing for the lease of the Woodland Drive-In Theatre premises for a term of fifteen years.³ The lease provided for the payment of a minimum annual guaranteed rental of \$32,500.00 (payable in 12 monthly installments of \$2,708.33 each) against a percentage rental based on a percent of gross receipts.

The plaintiff's unlawful detainer action was filed in August of 1974 and all of the alleged violations of the lease referred to in that action occurred prior to June 26, 1974. (Paragraph 9 of the complaint, R. 3, Vol. 1). The second action was filed in September of 1974, alleging breaches of the lease occurring prior to that date.

The alleged breaches in the unlawful detainer action, basically stated, were that defendant had filed:

³A copy of the lease agreement is attached as Exhibit "A" to the plaintiff's brief. Although defendant denies that that document is a true and correct copy of the lease, it does appear that with respect to the portion of the lease material to the issues here raised, it is the same as the actual lease entered into by the parties and, therefore, as a matter of convenience, reference will be made to that document in this brief.

(a) to properly maintain the theatre (although a large amount of effort and money has been expended on theatre maintenance and improvement, an amount in excess of \$54,000 having been spent in 1974 alone - Defendant's Answers to Interrogatories 9 and 10, R. 100-105; 127-129, Vol 2);

(b) to expand the snack bar within the time provided by the lease (although it is undisputed that this has since been accomplished - Defendant's Answer to Interrogatory 17, R. 111-112, Vol. 2);

(c) to move the theatre marquee, as required by the lease (although the plaintiff, in violation of paragraph 31 of the lease, has not assisted in obtaining the zoning changes necessary to make such a move possible - Defendant's Answer to Interrogatory 17, R. 111, Vol. 2);

(d) to pay the required rent (although it is undisputed that all rental due was regularly and promptly tendered and has now in fact been paid and accepted by plaintiff - Plaintiff's Response to Request for Admissions, R. 130-140, Vol. 2, and Affidavit of Edward Plitt, R. 75-78, Vol. 1).

In addition, plaintiff took the position that defendant's changing its name from ABC Intermountain Theatres, Inc.

to Plitt Intermountain Theatres, Inc., and the alleged sale of the stock of the defendant corporation by the former stockholder to the present stockholder, constituted an assignment of the lease in breach thereof.

The complaint in the second suit reiterated the allegations of the unlawful detainer complaint and alleged one additional breach, i.e. that respondent had breached an implied covenant of the lease to maximize the revenues from the leased premises.

The following facts are admitted by plaintiff by its responses to the defendant's requests for admissions:

1. Prior to June 26, 1974, plaintiff received, accepted and retained the check of Plitt Intermountain Theatres, Inc. (which plaintiff alleges to be an unauthorized assignee of the lease), for rent for the period through July 31, 1974 (plaintiff's response to request for admissions No. 1, R. 130-131, Vol. 2);

2. Prior to accepting this check, plaintiff had heard "rumors" that ABC Intermountain Theatres, Inc. was considering a sale of its theatre operations (plaintiff's response to request for admissions No. 3, R. 131-132, Vol. 2);

3. Said check was retained until July 3, 1974 when it was returned to defendant with a letter of plaintiff's attorney setting forth various alleged breaches. (R. 132-133, Vol. 2);

4. Thereafter, for a period until December, 1974 plaintiff each month regularly returned the checks tendered for rent. (R. 132-133, Vol. 2);

5. In December 1974 subsequent to plaintiff's sending detailed notices of breach of the lease in July and August 1974, and subsequent to the filing of each of these cases (and, therefore, with full knowledge of the alleged breaches of the lease), plaintiff accepted all rental payments which it had previously rejected. (R. 138, Vol. 2);

6. There was no agreement that by accepting rent plaintiff was not waiving the breaches of the lease and there is nothing in the record to support the contention of plaintiff that acceptance of the rent was so conditioned.⁴

⁴The only item in the record involved with these checks is the letter of defendant's counsel sent to plaintiff's counsel when the latter had indicated his desire to again accept the rent, stating "I am pleased that you see the error of your ways, and as requested by you, I am returning herewith the rent checks you previously delivered to me. The following

7. Plaintiff continued to accept regular rental payments thereafter and defendant is current in payment of rent. (R. 138-140, Vol. 2).

The plaintiff having admitted the acceptance of rent, and it being required that the breaches alleged in the complaint must be taken as alleged for purposes of this appeal, there is no genuine issue as to any material fact.

ARGUMENT

Plaintiff at the same time seeks both to forfeit the lease and to collect damages because of the various breaches which it alleges. Plaintiff states three separate issues, but there are really only two questions in issue on this appeal. The main question centers on the effect of plaintiff's having accepted rental payments with knowledge of the alleged breaches

checks of Plitt Intermountain Theatres, Inc. are enclosed:" (R. 90, Vol. 2) If evidence outside the record were admitted, it would show that plaintiff's counsel conceded in the one conversation when he requested repayment of the rent that by accepting the checks the question of waiver was thereby raised and it was at least waiving the asserted breach for the alleged assignment of the lease. Defendant has not previously raised this because it considers it improper to raise matters outside the record, in the nature of simple conversation between counsel, but in light of plaintiff's repeated assertions as to intentions in accepting the rent, this point should be mentioned.

for which it claims the right to forfeit the lease and also to collect damages. The basic issue presented for determination by this court is whether by acceptance of rental payments under the lease, with knowledge of the alleged breaches, the lessor (plaintiff) waived those breaches. Waiver of the breaches would necessarily preclude utilization of the remedy of forfeiture. Plaintiff bases its claim for damages upon what it claims to be an implied obligation of the tenant to maximize revenues from operation of the leased premises and this raises the second issue, whether the tenant (defendant in this appeal) had an obligation under the lease to maximize the revenues from the leased premises.

These issues will be discussed in separate order.

I
BY ACCEPTANCE OF RENTAL PAYMENTS WITH
KNOWLEDGE OF THE BREACHES ALLEGED BY
PLAINTIFF, PLAINTIFF WAIVED THE BREACHES

The principle that by proper expressions or conduct a landlord may waive his rights arising from breaches of a lease by his tenant is universally recognized. Plaintiff does not appear to quarrel with this fundamental rule but attempts to subvert that rule by insisting that whether a waiver exists is

somehow a matter resting upon the subjective intention of the landlord and suggests that the objective evidence of waiver, that is the acceptance of rent, must be ignored. That, however, is not the law.

Acceptance of Rental Payments
Waives the Alleged Breaches
as a Matter of Law

The cases are legion, near unanimous, in holding that the acceptance of rent with knowledge of breaches of the lease constitutes as a matter of law a waiver of the alleged breaches. Jensen v. O.K. Investment Corp., 29 Utah 2d 231, 507 P.2d 713 (1973); Bailey v. Zlotnick, 133 F.2d 35 (D.C. App. 1942); Re Hool Realty Company, 2 F.2d 334 (7th Cir. 1924); Wing, Inc. v. Arnold, 107 S.2d 765 (Fla. 1959); Garbaczewski v. Vanucci 96 N.E.2d 653 (Ill. 1950); Bobb v. Frank L. Talbot Theatre Company, 221 S.W. 372 (Mo. 1920); Plassmeyer v. Brenta, 94 A.2d 508 (N.J. 1953); Thaophilakos v. Costello, 54 S.W. 2d 203 (Tex. 1932); Fredeking v. Grimmett, 86 S.E.2d 554 (W. Va. 1955); Major v. Hall, 251 So.2d 444 (La. 1971); Four Seasons, Inc. v. New Orleans Silversmith, Inc., 223 S.2d 686 (La. 1969); Edwards Fine Furniture Inc. v. Ditullio, 252 N.E.2d 348 (Mass. 1948);

Atkinson v. Trehan, 334 N.Y.S.2d 293 (1972); Larson v. Sjogren, 226 P.2d 177 (Wyo. 1951); Brazeal v. Bokelman, 270 F.2d 943 (8th Cir. 1959); Borst v. Ruff, 77 A.2d 343 (Conn. 1950); Sanders v. Satlive Bros. & Co., 174 N.W. 267 (Iowa, 1919); Guptill v. Macon Stone Supply Co., 79 S.E. 854 (Ga. 1913); Bedford Investment Co. v. Folb, 180 P.2d 361 (Cal. 1920); Snyder v. Hill, 45 N.W.2d 757 (Neb. 1951); Perry v. Waddelow, 145 F.Supp. 349 (E.D. Ill., 1956); Weiss v. Johnson, 190 N.E.2d 834 (Ill. 1963); Venters v. Reynolds, 354 S.W.2d 521 (Ky. 1962); Globe Leather & Shoe Findings, Inc. v. Goldburgh, 159 N.E.2d 338 (Mass. 1959); Flying Service, Inc. v. Abitz, 386 S.W.2d 399 (Mo. 1965); Reno Realty & Investment Co. v. Thornstein, 301 P.2d 1051 (Nev. 1956); Fairchild Realty v. Spiegel, Inc., 98 S.E.2d 871 (N.C. 1957); Thomas Peebles & Co. v. Sherman, 181 N.W. 715 (Minn. 1921); Port of Walla Walla v. Sun Glo Producers, Inc., 504 P.2d 324 (Wash. 1912); Katz v. Miller, 133 N.W. 1091 (Wis. 1912); Bolling v. King Coal Theaters, 41 S.E.2d 59 (Va. 1947); Amisano v. Shaw, 227 S.W.2d 951 (Ark. 1950); Butterfield v. Duquesne Mining Co., 182 P.2d 102 (Ariz. 1947).

These cases, representing 28 jurisdictions, are but a few of the vast number of cases supporting this general rule.

Even where a lawsuit has been commenced based on the breaches alleged by the landlord, this rule of waiver is applied where rent is accepted after suit is commenced. Bedford Investment Co. v. Folb, 180 P.2d 361 (Cal. 1947); Jones v. Della Maria, 191 P.943 (Cal. 1920); Guptill v. Macon Stone Supply Co., 79 S.E.854 (Ga. 1913); Borst v. Ruff, 77 A.2d 343 (Conn. 1950); Fairchild Realty v. Spiegel, Inc., 98 S.E.2d 871 (N.C. 1957). Indeed, even where rent was accepted by the landlord in the midst of appeal, the rule has been applied. Snyder v. Hill, 45 N.W.2d 757 (Neb. 1951). It is conceded that on this point, one case cited by plaintiff, which although based on different facts, can be interpreted as holding to the contrary.

Typical of the cases holding that by the acceptance of rent the landlord waives breaches of the lease, is Bedford Investment Company v. Folb, 180 P.2d 361 (Cal. 1947), where the lessee sublet the premises without the consent of the lessor. Based on this breach an unlawful detainer action was commenced. In the midst of the action the landlord accepted the payment of rent. Finding such acceptance to constitute a waiver of the right to maintain the action, the court noted:

"Respondent's acceptance of payment of the rental after the action was filed bars the right to forfeit the lease. The enforcement of covenants for forfeiture are avoided whenever possible. . . . Since it is undisputed that the rent was paid up to the date of trial, the finding that respondent was entitled to damages in the amount of the rental value of \$8.33 per day from May 31, 1946, and the judgment for that amount were contrary to the evidence and therefore erroneous. The payment of rent obviously bars any judgment against appellants for the rent and it likewise bars a judgment either for damages or for possession." Id. at 363. (Emphasis added).

The language in another California decision explains well the basis for these decisions. In Jones v. Della Maria, 191 P.943 (Cal. 1920), the landlord sued to forfeit the lease because of the tenant's failure to post a bond required by the lease. While the suit was pending, the landlord accepted past due rent. In finding the acceptance to constitute a waiver, the California court stated:

"The acceptance of such rent by plaintiff was a waiver of defendant's forfeiture of the leasehold and of plaintiff's right to maintain this action." Id. at 943.

The court then explained:

"The right to recover possession in an action such as this is based on the idea that the tenant has forfeited his leasehold. Notwithstanding the breach by a lessee of any

covenant that he may have made in the lease contract, the lessor may or may not elect to treat the breach as a forfeiture of the lease. Here, by his notice to give the bond or re-deliver possession, served November 11, 1917, and by this action for restitution of possession and the cancellation of the lease, plaintiff elected to treat the lease as forfeited. But notwithstanding this election, he thereafter could waive the forfeiture of the lease and his right to insist thereon as a ground for restitution of possession and cancellation of the lease contract. This plaintiff did by accepting rent for months succeeding that in which he served upon defendant the three days' notice. Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right - an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived the right will thereafter be precluded from asserting it. 'The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture'." (Citation omitted). Id. at pages 943 to 944.

The Rule of Waiver is Applied to all Breaches by the Tenant

In the court below, the plaintiff attempted to draw a distinction between the results of a breach for improper assignment (apparently conceding that acceptance of rent waived

an improper assignment), and for other breaches by a lessee. The cases apply no such distinction in holding that acceptance of rent is a waiver of the breach. The cases are clear that the waiver extends to "breach of covenant or other wrongful acts" [Brazeal v. Bokelman, 270 F.2d 943 at 946 (8th Cir. 1959)]. The cases cited involve waiver of breaches for failure to pay rent; Guptill v. Macon Stone Supply Co., 140 Ga. 696, 79 S.E.854 (1913); improper assignment, Jensen v. O. K. Investment Company, 29 Utah 2d 231, 507 P.2d 713 (1973); Bedford Investment Co. v. Folb, 180 P.2d 361 (Cal. 1920); Major v. Hall, 251 So.2d 444 (La. 1971); failure to post bond, Jones v. Della Maria, 191 P.943 (Cal. 1920); failure to pay taxes, Atkinson v. Trehan, 334 N.Y.S. 2d 293 (1973); Snyder v. Hill, 45 N.W.2d 757 (Neb. 1951); failure to build buildings, Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 1959); improper use of the premises, Roseman v. Day, 345 Mass. 93 185 N.E.2d 650 (1962); and failure to repair, Larson v. Sjogern, 226 P.2d 177 (Wyo. 1951). In Larson v. Sjogern, the plaintiff attempted to forfeit a lease, alleging that "the fences on the land were not kept in repair in violation of the agreement in the lease and that the land was over-

grazed, and that a reservoir was built on the land without the consent of the lessor, and that this constituted waste". 226 P.2d at 182. Drawing no distinction between the facts presented by that case and any other waiver case, the Wyoming court held that by acceptance of rent, the alleged breaches had been waived.

Thus, the principle of waiver is universally applied to any breach by the tenant.

The Subjective Intent of
the Plaintiff is Irrelevant

In the face of the overwhelming authority that the acceptance of rent constitutes a waiver as a matter of law, the plaintiff says that in spite of its actions in accepting the rent, its subjective intention is controlling. It being clear that the defendant is entitled to judgment as a matter of law because of the admitted fact of plaintiff's inordinate retention of a rent check in June and July 1974 prior to giving notice of breach or filing suit and its later acceptance of rent in December 1974 and thereafter, plaintiff attempts to create out of whole cloth an issue of fact in an effort to avoid summary judgment.

The plaintiff now asserts that it accepted the rent payments, "as a gesture of good faith" pursuant to terms of a "tentative" settlement agreement and acceptance of rent was "a gesture of good faith". Plaintiff contends that it did not intend to waive the breaches when it accepted the rent (pages 9 and 10 of plaintiff's brief). The labored explanation of this contention is itself revealing, but it is also of paramount importance that there is nothing whatever in the record to support any such contention. The only item in the record is the letter of defendant's lawyer to plaintiff's lawyer dated December 23, 1974, by which the checks were transmitted and which states "I am pleased that you see the error of your ways, and as you requested I am returning herewith the rent checks you previously delivered to me. The following checks of Plitt Intermountain Theatres, Inc., are enclosed." (R. 90, Vol. 2). This item alone shows that no such agreement or understanding existed, but be that as it may, for purposes of this appeal, the whole preposterous proposition is not relevant.

There was never even a "tentative" settlement agreement, but merely a proposal explored by counsel that counsel agreed to present to their respective clients as a possibility

for settling the case. Also, as indicated in footnote 4 above, if the informal discussions between counsel are somehow to be interjected (and it is submitted that to do so would be grossly improper) the plaintiff must accept the fact that its own counsel was aware that accepting the rent raised the spectre of waiver, but nevertheless said his client wanted the rent.

It is apparently plaintiff's contention that "the question of appellant's intent" when it accepted the rent is a factual question that prevents summary judgment. However, the law is that the acceptance of rent by the plaintiff conclusively establishes a waiver. This is the teaching of all of the cases on this point. It is very seldom that a landlord announces: "By accepting the rent, I am hereby waiving all breaches". But the law says that certain conduct, the acceptance of rent, is as conclusive as such an announcement and precludes reliance on breaches occurring before the rent is accepted. Appellant simply cannot in one breath forfeit the lease and in another take the rent. It is significant that to this very day the plaintiff continues to accept the rent.

This legal principle is well expressed in the case of Miller v. Reidy, 260 P.358 (Cal. 1927), a case that plaintiff inappropriately cites in its own brief. In that case, the defendant lessee sublet the leased premises without the consent of the lessor in violation of the lease agreement. Immediately thereafter, the lessors took steps to bring about a forfeiture of the lease. Subsequent to that time, however, the rental payments required by the lease were paid and accepted. Upon each such acceptance the lessor executed a receipt stating that acceptance of rent was "without prejudice of any of my rights under the lease of said premises". In upholding the trial court's determination that in spite of such a reservation by the lessor, he had waived the breach of the lease by acceptance of rent, the California Appellate Court states:

"This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention. (Citation omitted). For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistency."
Id. at 360.

It is clear, therefore, that regardless of what a lessor's subjective intent may be, by his action of accepting rent with knowledge of a breach, he is deemed to have waived the breach.

Even if it is conceded, for purposes of the argument here, that plaintiff did have the "good faith" intention on which its argument here rests at the time it accepted the several past rental checks in December 1974, how can that immunize the plaintiff from waiver each month thereafter when it accepts the rent? Plaintiff certainly knew there was no settlement when it served a massive set of written interrogatories on April 8, 1975 (R. 43-52, Vol. 2) and a request for trial setting on April 28 (R. 58, Vol. 2) and discovery thereafter continued. The fact that appellant continued to accept the rent month after month firmly establishes its waiver of the alleged breaches of the lease.

Not one persuasive authority is cited by plaintiff in support of this main portion of its argument about its subtle subjective intention to take the rent and forfeit the lease. In the face of a very substantial body of law, plaintiff presents a handful of readily distinguishable and inapposite

cases and lamely cites two cases (perhaps for inapplicable dicta) the holdings of which are directly to the contrary of the proposition for which they are cited.

The case chiefly relied upon by the plaintiff acknowledges that the waiver need not be expressed in words and further states that a clear act of the party is sufficient to constitute a waiver and that it is not necessary that there be an express waiver. Lucas Hunt Village Co. v. Klein, 218 S.E.2d 595 (Mo. 1949). This case is factually inapposite and does not run counter to the plethora of authority cited above. In that case the lessor's bookkeeper, who handled 606 rent accounts, inadvertently accepted one month's rent after the lessee had breached the lease. As soon as the mistake was discovered, no further payments were accepted. There was in that case no evidence of "knowing" acceptance of rent. In the case here before the court, however, there is not, nor can there be, any claim of inadvertence or mistake by the plaintiff.

Brazeal v. Bokelman, 270 F.2d 943, although cited by plaintiff, does not support its position, as the holding in that case is squarely against that position. The same is

true of Miller v. Reidy, 260 P.2d 358 (Cal. 1927).

In Re Wil-low Cafeterias, Inc., 95 F.2d 306 (2d Cir. 1938), cited by plaintiff, is also inapplicable. The decision of the court in that case was governed by a specific provision in the lease whereby the parties had agreed that:

" . . . the receipt of rent with knowledge of any breach shall not be deemed to be a waiver as to any breach of any covenant or condition herein contained." Id. at 308.

There is no such provision in this lease nor any other agreement to that effect.

B.J.M. Realty Corporation v. Ruggieri, 326 F.2d 281 (2d Cir. 1964) relied upon by plaintiff, is also readily distinguishable. At the time that case was heard, the lessee had filed for bankruptcy and because of a bankruptcy rule that payments made by a bankrupt to a lessor could not be considered to be "rent" until the court had given its permission to affirm the lease, an issue entirely different from the present one controlled the case. The issue in the B.J.M. Realty Corporation case was whether an acceptance of "rent" had taken place. That issue is expressed in the following language from that opinion:

"In order to prevail, the trustee must prove that the landlord accepted 'as rent' the payments made to him by the debtor after the landlord

had learned that the forfeiture provision of the lease had been breached." Id. at 283.

In the case at bar, it is undisputed that the payments made to the plaintiff were rent under the terms of the lease and the B.J.M. Realty Corporation case, therefore, has no application.

Plaintiff's attempted reliance on Merkowitz v. Mahoney, 215 P.2d 317 (Colo. 1949) is likewise misplaced. In that case, unlike the present case, many of the breaches relied upon by the landlord in his action for forfeiture occurred after his acceptance of rent had ceased. As stated on pages 319-320 of that decision:

"It next is contended under the heading of 'waiver and estoppel' that the acceptance of rent accruing after the cause of forfeiture, with knowledge of such cause, is a waiver of the right of forfeiture. Again assuming that this is a correct statement of applicable law and assuming that it would in fact bar the termination of the lease upon the other grounds alleged, which we do not deem it necessary to discuss, still the record discloses that the last rental received by the plaintiff was in August 1947, and there is substantial evidence of repeated and regular violation of the lease . . . and subsequent breaches were not waived by receipt of rent."

Furthermore, those amounts of rent which were paid during the pendency of the Merkowitz case were paid to the clerk of the court, rather than to the plaintiff (p. 320). With respect to the effect of that arrangement upon the waiver issue, the court stated:

"The very fact that the payments were made from month to month to, and accepted by, the court in which the action was pending without dismissal of the action would establish conclusively that they were made either by stipulation or by order of court as in lieu of bond for the protection of the landlord pending the litigation, and not as an intended waiver of default and recognition of the continuance of the lease." Id. at 321.

Although because of the special circumstances present in the Merkowitz case, the general rule regarding waiver through the acceptance of rent was not applicable, the court nevertheless reaffirmed that rule. On page 320 it stated:

"It is the general rule that any act done by a landlord, with knowledge of an existing right of forfeiture, which recognizes the existence of the lease is a waiver of the right to enforce the forfeiture . . . where a landlord after violation of the lease has his election to declare the lease at an end or to permit it to continue, the acceptance of rent due thereafter is usually held to constitute an election to waive the forfeiture, and, having made his election,

the landlord cannot thereafter rely on the past default as ground of terminating the lease."

Wecht v. Anderson, 444 P.2d 501 (Nev. 1968) and Myers v. Herskowitz, 165 P.1031 (Cal. 1917), cited by plaintiff are similarly distinguishable. In those cases, as in Merkowitz the breaches alleged by the plaintiff as the grounds for those suits took place after the acceptance of rent had ceased. Moreover, in Myers, to avoid waiving the lessee's forfeiture, the lessor refused to accept the rent. In an attempt to circumvent this action, the lessee deposited the amount of the rent in the lessor's bank account. For obvious reasons, the court found such action not to constitute a waiver.

The Law Abhors a Forfeiture

It is universally recognized that forfeitures are not favored by the law and waivers of the right to declare a forfeiture will be readily found. In Larson v. Sjogern, 226 P.2d 177 (Wyo. 1951), the Wyoming Supreme Court stated:

"Forfeitures are not favored, since that is a harsh method by which to deprive a party of his rights . . . Such forfeiture may be waived and since it is not favored, slight circumstances will at times suffice to constitute a waiver. Thus it is stated in 32 Am. Juris. 747:

'Generally speaking, any recognition by the lessor of a tenancy as subsisting after a right of entry has accrued, where the lessor has notice of the forfeiture, will have the effect of a waiver of the landlord's right to a forfeiture of the leasehold. Slight acts on the part of the lessor may be sufficient. Indeed, it has been ruled that any act on the part of the lessor, by word or deed, with knowledge of what has been done, which signifies his intention to affirm the lease, is conclusive evidence of a waiver of the forfeiture.' . . . Thus, too, the payment and acceptance of rent, after breach, with knowledge thereof as is true in this case, will ordinarily waive the causes for forfeiture." Id. at 182 to 183.

The United States Court of Appeals for the Eighth Circuit, in Brazeal v. Bokelman, 270 F.2d 943 (8th Cir. 1959), stated:

"We approach the problem mindful of the universally recognized principle of law that forfeiture, which is the right of a landlord to terminate a lease because of the lessee's breach of covenant or other wrongful act, is not favored by the courts." Id. at 946.

Other courts have used stronger language in expressing this rule. In Duncan v. Malcomb, 351 S.W.2d 419, 420 (Ark. 1961), the Arkansas Supreme Court stated: "Of course, it is elementary that equity abhors forfeitures". The California court stated in Churchill v. Kellstrom,

136 P.2d 602, 605 (Cal. 1943), "Both in law and in equity forfeitures are abhorred but by the same token waivers are favored."

Because of the disfavored status of forfeitures, waivers are readily found and even slight acts on the part of the lessor will constitute a waiver of lease violation. For example, in Borst v. Ruff, 77 Atlantic 2d 343 (Conn. 1950), two checks tendered by the lessee were dishonored for insufficient funds. A notice to quit was served and an action commenced. While the action was pending, several checks were tendered by the tenants. These checks were accepted but never cashed. At trial the court held that merely retaining these checks without cashing them constituted a waiver of the right to declare a forfeiture, and that finding was upheld by the Connecticut court, which stated:

"Such acceptance by the landlord renewed the tenancy and waived the default."
Id. at 344.

Thus, in this case, the mere retention (prior to the filing of these suits by plaintiff) from prior to June 26 until July 3 (R. 130-133, Vol. 2) by Woodland of the defendant's check

tendered in June 1974 for rent for July 1974 was sufficient to constitute a waiver.

This general rule disfavoring forfeitures has been adopted by this court. In Peterson v. Hodges, 121 Utah 72, 239 P.2d 180 (1951), a case involving the attempted forfeiture of a lease of real property, this court stated:

"Forfeitures are not favored. Even contracts which expressly provide for a forfeiture will not be extended beyond the strict and literal meaning of the language used." Id. at 184.

Under established case law, it is evident that even by slight acts indicating an affirmance of the lease, a landlord waives any breach by the tenant.

In an admittedly different but analogous factual situation dealing with a vendor's attempt to forfeit an installment land contract, the rule was also recognized by this court. In Swain v. Salt Lake Real Estate and Investment Company, 3 U.2d 121, 299 P.2d 709 (1955), this Court stated:

"It is fundamental that a vendor cannot claim a forfeiture and at the same time receive the purchase money. [Citation omitted]. A vendor by receiving money when past due is precluded from availing himself of any right of forfeiture which

has arisen because of the failure to pay one installment on time. The cross-appellant objects that the formal elements of waiver are not present in this instance and that the defendant did not detrimentally change its position in reliance upon the action of the sellers in accepting its payments late. The proposition that defendant would order its bank to pay \$254.85 a gratuity to its vendors, who are attempting to declare forfeiture, is indeed open to doubt; but whether we regard the sellers' action as a waiver or as an election to disregard the breach and continue the contract, the act of accepting payments under the contract is unequivocal in its legal effect. As we said in Kohler v. Lundberg, 54 U.339, 180 P.590, 592: 'Courts of equity are loth to enforce a forfeiture, especially when a refusal to do so, as in this case, gives to all parties to the agreement every right to which they are entitled, and thus in no way works a hardship upon anyone'. Id. at 710-711.

The Swain case presents another reason for affirming the judgment here. As in that case, the refusal to enforce a forfeiture of the lease, will give the parties here every right to which they are entitled, and thus no hardship will be imposed on anyone. The plaintiff has received and continues to receive all of the rent (both the fixed minimum and percentage rent) to which it is entitled under the lease. The defendant, on the other hand, has expended much effort and money (in excess of \$54,000 in 1974 alone, the year in question

in this case) in repairing, maintaining and improving the theatre premises (R. 100-105; 127-129, Vol. 2) and it would work a substantial hardship on defendant to lose the benefit of such efforts and expenditures. Furthermore, any breaches which plaintiff contends to have occurred have all been corrected (R. 100-116, Vol. 2).

II
THE DEFENDANT HAD NO DUTY TO
MAXIMIZE REVENUES AND PLAINTIFF
HAS NO PROPER CLAIM FOR RELIEF

The case first filed by plaintiff sought to forfeit the lease under the unlawful detainer statute (R. 1-5, Vol. 1). Several weeks later, apparently as an afterthought, another complaint was filed (R. 2-23, Vol. 2). The second complaint was virtually the same as the first, except that it sought large damages. The basis for this damage claim was a new allegation to the effect that the defendant, as a tenant under a so-called "percentage lease" has an implied obligation to maximize revenues earned from the leased premises and that the defendant, because of the breaches of the lease previously alleged, had not maximized revenues and had, therefore, breached this obligation. Also, in its brief here, in an effort to avoid the mandate of the authorities suggested above, plaintiff

obliquely suggests that acceptance of rent does not waive "material breaches of a lease agreement". (Page 16-18 plaintiff's brief). This latter point will be discussed first.

Acceptance of Rent Waives
All Existing Breaches

Plaintiff, by ignoring the very substantial authority to the effect that acceptance of rent waives a forfeiture (this point having been fully argued in the court below), appears to concede that it has no right to forfeit the lease and that at least to that extent the summary judgment is correct. In a rather weak effort to avoid the full impact of its waiver, however, the plaintiff suggests that somehow the breaches may be subsisting for purposes other than forfeiture.

The authorities dealing with the question of waiver through the knowing acceptance of rent, including those cited under Point I above, do not draw a distinction between the waiver of forfeiture and the waiver of other remedies, it being generally stated that the knowing acceptance of rent waives a breach of the lease. (See cases cited under Point I

above). In the trial court the thrust of this part of plaintiff's argument was to the effect that the rule of waiver applied only to certain types of breaches and that it did not extend to breaches of covenants to repair and maintain the premises. The argument appears to be abandoned, but, as discussed above at page 13, it must be emphasized here that the rule of waiver is applied, regardless of the type of breach or whether the remedy sought for such breach is forfeiture or damages or both.

As stated in Bedford Investment Company v. Folb, 180 P.2d 361 (Cal. 1947), discussed in detail under Point I:

"The payment of rent obviously bars any judgment against appellants for the rent and it likewise bars a judgment either for damages or for possession." Id. at 363. (Emphasis added).

Plaintiff cites several cases on pages 16 to 18 of its brief in a feeble attempt to support its position on this issue. However, careful review of those cases reveals that they do not support plaintiff's contention. For example, Atkinson v. Trehan, 334 N.Y.S.2d 293 (1972), does not acknowledge a landlord's right to sue for damages despite a waiver of the right to terminate the lease. Although in its decision,

the word damages was used, in essence the court simply stated that the lessor had the right to enforce a provision in the lease requiring the lessee to pay taxes for the period it was actually in possession. This is consistent with respondent's position, as it is not contended that by accepting rent appellant has waived its right to require such payments. On the contrary, the acceptance of rent is considered to be a reaffirmation of the lease.

Klein v. Long, 34 A.2d 359 (Mun. Ct. of Appeals, D.C., 1943) deals with the commission of waste on the leased premises, an issue not raised in the present case. In that case, due to the very substantial detrimental and permanent modification of the premises by the tenant, the court found the tenant guilty of "waste". No claim of waste is made in this case, nor could it be. Waste is a term of art in real property law and has no application in this case.

As is evident from the previous discussion under Point I of the Wecht decision, the remaining case cited by appellant, it also does not support appellant's position.

Through the knowing acceptance of rent, appellant waived the alleged breaches, including any claims it may have had for damages.

There is No Implied
Covenant to Maximize Revenues

Plaintiff's claim for damages is bottomed on its allegation that there is an implied covenant under a percentage lease that the tenant will operate the business on the premises in a manner to maximize revenues and thereby maximize the amount of percentage rent earned by the lessor. This contention that there is such an implied covenant in the lease is added to the allegations in the second complaint, which are otherwise the same as those in the first complaint by paragraphs 13, 14 and 15, which read in relevant part as follows:

"13. Pursuant to the provision of the lease and in accordance with the intent of the parties that Woodland receive part of its compensation from a percentage of the gross receipts above the minimum guaranteed annual lease payments provided for in the lease, defendants were obliged to . . . operate the theatre in a prudent, diligent and businesslike manner and to acquire the finest available motion picture products suitable for display at the theatre so as to maximize the revenue therefrom such that Woodland would receive the benefit of the gross proceeds which would result from such prudent, diligent, and businesslike operation of the theatre.

"14. That defendants breached their obligation under the lease . . . and failed to operate the theatre in a prudent, diligent and businesslike manner and failed to acquire the finest available motion picture products suitable for display at the theatre, and therefore, failed to maximize the revenue therefrom.

"15. That as a result of defendant's breaches . . . Woodland has been damaged by reason of . . . loss of revenue from the percentage of gross revenue to which it is entitled and which it would have received . . ."

An examination of the relevant provisions of the lease and the authorities in this area reveals that no such implied covenant exists.

Paragraph 2 of the lease agreement provides for the payment of a substantial guaranteed annual rental of \$32,500. In addition, it provides for the payment to the lessor of:

"A. Fifteen per cent (15%) of the gross admission receipts, if any, of the theatre in excess of One Hundred Eighty-Three Thousand Three Hundred and Thirty Three Dollars (\$183,333.00), and

"B. Fifteen percent (15%) of the gross concession receipts, if any, of the theatre in excess of Sixty Five Thousand Dollars (\$65,000).

"The gross admission receipts and gross concession receipts of the theatre upon

determination of the percentage rental, if any, due under this lease are to be computed, shall be calculated at the end of each year of the term of this lease and the amount of percentage rental, if any, due the Lessor as percentage rental shall be paid by the Lessee without demand no later than thirty (30) days after the end of each such lease year." (Emphasis added).

Paragraph 2 also states:

"The Lessee in no way guarantees that there shall be any percentage rental earned and due and payable under the terms and conditions of this lease.
(Emphasis added).

It is abundantly clear from the provisions of the lease that the respondent lessee was under no duty to see that sufficient revenues were realized from the leased premises to insure the payment of any percentage rental, let alone a maximum percentage rental as appellant suggests. The language of the lease, therefore, contradicts the allegations in the complaint.

Even without this language, the cases establish that there is no duty to maximize revenues. In fact, it is generally held that where a percentage lease provides for the payment of a minimum guaranteed rental which is not merely nominal, the payment of the minimum rental completely fulfills

the lessee's rental obligations under the lease. Any additional rental is considered as merely a bonus to the lessor. Furthermore, the cases generally hold that not only is the lessee under no obligation to maximize the lessor's percentage rental, but as long as he pays the minimum rental, he has no obligation even to continue to do business on the premises. Masciotra v. Harlow, 105 Cal. App. 2d 376, 233 P.2d 586 (1951); Percoff v. Solomon, 259 Ala. 482, 67 So.2d 31 (1953); Cousins Investment Co. v. Hastings Clothing Co., 45 Cal. App. 2d 141, 113 P.2d 878 (1941); Berland Realty Co. v. Hahne & Co., 26 N.J. Super. 477, 98 A.2d 121 (1953); Monte Corp. v. Stephens, 324 P.2d 538 (Okla. 1958); Wheil v. N. Lewis Shops, Inc., 281 S.W. 2d 651 (Tex. 1955); Palm V. Mortgage Investment Co. of El Paso, 229 S.W. 2d 869 (Tex. 1950); Stern v. Dunlap, 228 F.2d 939 (10th Cir. 1955).

Stern v. Dunlap Co., supra, is representative of the cases in this area. Although that case arose out of New Mexico, the opinion is not based upon the law of any particular jurisdiction. In that case the plaintiffs owned a store building in Las Cruces, New Mexico, in which they had

for many years conducted a drygoods mercentile business. In 1946, plaintiffs conveyed the stock of merchandise and leased the premises to the tenant under a percentage lease with a guaranteed minimum rental of \$350 per month. The lease also provided that the lessee would keep the premises in good repair and that it would remodel the store front at its own expense. Defendant operated the business in substantially the same manner as it had been operated by the plaintiff until 1958. In that year, defendant opened another store in the same city. By changing the leased store to a "bargain center", while shifting the high quality line of merchandise to the new store, and by juggling the names, promotional budgets, charge accounts, and other items between the two stores, the defendant was able to shift much of the business and good will of the leased premises to its new store. As a result, the gross sales of the leased store and the percentage rental paid to the plaintiff dropped substantially. The plaintiff claimed that defendant had thereby breached an implied covenant. The trial court withdrew from the jury the issues relating to rental and to injury or damage to the reputation of the premises, finding that no implied covenant existed. In sustaining this action, the Tenth Circuit said:

" . . . In its major aspect the cause of action by the appellants was in substance an asserted past and continuing breach of covenant to conduct on the leased premises during the entire term of the lease a mercantile store dealing in the sale of high class merchandise similar in quality to that previously carried in stock by the appellants. It was implicit in the lease agreement that the parties contemplated that the appellee would use the premises for the conduct of a mercantile business. But the lease did not contain any provision that the appellee would conduct on the premises a business dealing in the sale of high class merchandise similar in quality to that previously handled and sold thereon by the appellants. The lease was completely silent in that respect. But the appellants relied on an implied covenant obligating the appellant to conduct on the premises the business of that kind . . . The provision in respect to rental was clear. The monthly payment of \$350.00 rental represented a substantial rental, not a mere nominal sum. A further sum was to be paid annually, based upon a percentage gross sales. And rental was paid in strict accord with such terms of the agreement. We are clear in the view that the changing of the nature of the business conducted on the leased premises did not constitute a breach of an implied covenant [of] the lease with resulting wrongful invasion of the rights of the appellants in respect to rental." (Citations omitted).
Id. at 942 and 943.

Thus, even where the lessee has taken affirmative action to reduce the lessor's percentage rental, there is no implied covenant on the part of the lessee to maximize rents nor is there a breach of any rental covenant. In the present

case, plaintiff did not allege any intentional reduction of revenues, but its only contention was that respondent could conceivably have generated more revenue than it did.

In Dickey v. Philadelphia Minit-Man Corporation, 377 Pa. 549, 105 A.2d 580 (1954), the Pennsylvania court sustained the granting of a demurrer to the complaint, holding that there is no implied covenant to continue the business or maximize revenue. Explaining the tremendous practical problems which a court would face if it were to find such an implied covenant, the court stated:

"If an implied covenant, as claimed by plaintiff, should be held to arise in such cases what would be the extent of the restriction thereby imposed on the lessee? Would it extend to each and every act on his part that might serve to reduce the extent of his business and thereby the percentage rental based thereon? Would it forbid him, for example, if operating a retail store, from keeping it open for a fewer number of hours each day than formerly? Would it forbid him from dismissing salesmen whereby his business might be reduced in volume? Would it forbid him from discontinuing any department of his business even though he found it to be operating at a loss? It would obviously be quite unreasonable and wholly undesirable to imply an obligation that would necessarily be vague, uncertain and generally impracticable." Id. at 582.

The reluctance of the courts to allow the lessor to meddle in the lessee's affairs and to second guess his

business decisions has been a substantial factor influencing their refusal to find an implied covenant in percentage leases requiring the lessee to maximize revenue.

In refusing to find an implied covenant, the decisions also rely on the general rule that implied covenants are not favored by the law and will not be implied where the language of the lease is clear. This rule has been followed in Utah. Ephraim Theatre Co. v. Hawk, 7 U.2d 163, 321 P.2d 221 (1958); and Flowers v. Wrights, Inc., 227 P.2d 768, 119 Utah 378 (1951), (two cases dealing with percentage leases). In the Ephraim Theatre Co. case, the literal terms of a theatre lease did not provide any minimum monthly rental, but provided for the lessor to be compensated by receiving a portion of the profits. When the business proved to be unprofitable, the lessor brought an action for rent, claiming that in the interest of fairness, the contract should be so construed as to impose upon the defendant an obligation to pay a fixed monthly rental. In refusing to read such an implied obligation into the lease agreement, this court stated:

"It would defeat the very purpose of formal contracts to permit a party to invoke the

use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said, or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist. Generally speaking, neither of the parties, nor the court has any right to ignore or modify the conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced 'in accordance with the intention as . . . manifested by the language used by the parties to the contract'." Id. at 223.

In the Flowers case, this court again emphasized that:

"While we must enforce the lease in accordance with the intent of the parties, we must find that intent from the language of the lease itself, especially when it is clearly expressed." Id. at 771.

Although plaintiff on page 20 of its brief attempts to create a factual issue by claiming that parole evidence should be considered in interpreting the lease, and that an implied covenant should be read into it, extraneous evidence must not be considered, unless the lease is ambiguous. In the present case, the language of the lease is clear, as it provides "The lessee in no way guarantees that there shall be any percentage rental earned and due and payable under the terms and conditions of this lease". There is, therefore,

no basis for plaintiff's assertion that parole evidence should be considered and an implied covenant to maximize revenues from the leased premises should be read into the lease.

Plaintiff's attempted reliance on Flowers on pages 21 to 23 of its brief reveals the weakness of its position on this question. The issue of whether there exists an implied covenant to maximize revenues under a percentage lease was never considered in that case. The sole question was whether a lessee under a percentage lease must account to his lessor for revenues received from a sublessee. The issues presented by this case and the Flowers case are, therefore, entirely different and that decision has no application to the present question.

Plaintiff's citation of the dicta from the Flowers decision dealing with a lessor's remedies where he had been intentionally deprived of rent is likewise without application to the present issue. There is no allegation whatsoever that respondent has intentionally reduced the theatre revenues and, in fact, it would be preposterous to suggest that respondent would intentionally deprive itself of 85 per cent of the revenues in order to avoid the payment to appellant of 15 per cent.

Cessna Loan Company v. Baron, 149 Wash. 386, 270 P.1022 (1928), cited by plaintiff, is also inapplicable. In that case the landlord was not seeking damages or forfeiture due to the tenant's alleged breach as in this case, but was merely seeking to recover a percentage of the revenues realized by the tenant from departments of the business which had been moved from the leased premises to an adjoining building. The Washington Supreme Court made it clear that that particular issue was the only one under consideration as it stated "We do not decide any issue other than that squarely presented in this case". Id at 1024. That issue is not present in this case and consequently, the Cessna Loan case is not applicable.

Plaintiff's citation of Williston on Contracts, Revised Edition, Vol. 1, Section 104A, at page 357, on page 16 of its memorandum, is another indication of the weakness of plaintiff's position. That citation is taken from a section entitled "Consideration in Bilateral 'Requirement' and 'Output' Contracts". The cited statement makes no reference whatsoever to the maximization of profits under percentage leases, or even to leases.

The case of State Auto & Casualty Underwriters v. Salisbury, 27 U.2d 204 (1972), 494 P.2d 529, likewise has no

application to the case at bar. That case dealt solely with an agent's duties to his principal.

Unlike the present case, the lease in Mayfair Operating Corporation v. Vessemer Properties, Inc., 7 S.2d 342 (Fla. 1942), contained an express provision requiring the lessee to "use its best efforts to obtain and maintain the highest volume of business on the premises". Id. at 342.

The parties in Selber Brothers, Inc. v. Newstadt's Shoe Stores, 194 S.579 (La. 1940), had through three successive lease agreements, established a well-settled course of dealing with one another. There is no such course of dealing here involved, and in this case the defendant took over a failing operation from a court-appointed receiver (R. 338-339, Vol. 2), expressly provided in the lease there was no assurance that rental would be paid in excess of the minimum amount (R. 11, Vol. 1), and it is stretching to the utmost to say that plaintiff here has a right to damages. Moreover, in the Selber case,

" . . . the defendant made a drastic change in the use of the premises, more than four months before the expiration of the lease, and thereby willfully lessened the rental value of the place as a first-class shoe store, in order to divert the business to the new location which the defendant had rented more than four months before the expiration of this lease."

Id. at 581.

Even if the Selber case were interpreted as plaintiff contends it should be, it is squarely against the overwhelmingly large number of cases holding to the contrary.

In this case, it is not contended that defendant has drastically changed the use of the premises, that it has willfully reduced the revenues therefrom, or that it has attempted to divert business from the leased premises to another theatre. In fact, the defendant does not operate any other drive-in theatre in the area and has no drive-in theatre to which it could divert revenues. It is undisputed that the respondent has continued to operate the theatre on a continual year-round basis, with plaintiff's contention being that respondent could conceivably have realized more revenues from the operation of the theatre.

Both the authorities and the provisions of the lease itself make it clear that there is no basis for plaintiff's assertion that an implied covenant to maximize revenues from the leased premises should be read into the lease.

SUMMARY AND CONCLUSION

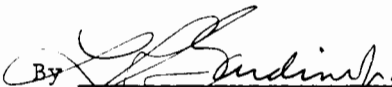
By accepting rental payments under the lease, plaintiff waived the asserted breaches. Since both actions

filed by plaintiff were based on the alleged breaches, there is no longer any basis for the claims. In addition, defendant lessee had no obligation under the lease to maximize revenues.

It is respectfully submitted that the summary judgment should be affirmed.

DATED this 24th day of August, 1976.

CHRISTENSEN, GARDINER, JENSEN & EVANS

By 
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Attorneys for Defendant

CERTIFICATE OF SERVICE

The foregoing Brief of defendant-respondent was served upon the plaintiff-appellant by delivering true copies thereof to its attorney, Richard Burbidge, 500 Kearns Building, Salt Lake City, Utah, 84101.

