

1976

# Woodland Theatres, Inc. v. ABC Intermountain Theaters et al : Reply Brief of Appellant

Utah Supreme Court

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## TABLE OF CONTENTS

### INTRODUCTION

- I. Acceptance of Rental Payments does not Waive  
Forfeiture of the Leasehold as a Matter of Law . . 2
- II. The Rule of Waiver does not apply to Claims  
for Damages . . . . . 4
- III. There is an Implied Covenant under the Lease  
Agreement for Plitt to operate the Drive-In  
Theatre in a Prudent and Businesslike  
Fashion . . . . . 7

### CONCLUSION . . . . . 10

# TABLE OF AUTHORITIES

## CASES:

	<u>Page</u>
Atkinson v. Trehan, 334 N.Y.S.2d 293 (1972)	5, 7
Bailey v. Zlotnick, 133 F.2d 35 (D.C. Cir. 1942)	3
Bedford Investment Co. v. Folb, 180 P.2d 361 (Cal. 1947)	5, 6
Borst v. Ruff, 77 A.2d 343 (Conn. 1950)	3
Brazeal v. Bokelman, 270 F.2d 943 (8th Cir. 1959)	3, 5
Cousins Investment Co. v. Hastings Clothing Co., 113 P.2d 878 (Cal. 1941)	9
Edwards Fine Furniture, Inc. v. Ditullio, 252 N.E.2d 348 (Mass. 1969)	3
Fredeking v. Grimmett, 86 S.E.2d 554 (W. Va. 1955)	3
Guptill v. Macon Stone Supply Co., 79 S.E. 854 (Ga. 1913)	5
Jensen v. O.K. Investment Corp., 29 Utah 2d 231, 507 P.2d 713 (1973)	3, 5
Jones v. Della Maria, 191 P.943 (Cal. 1920)	3, 4, 5
Katz v. Miller, 133 N.W. 1091 (Wis. 1912)	3
Klein v. Longo, 34 A.2d 359 (Mun. Ct., D.C. 1943)	7
Larsen v. Sjogren, 226 P.2d 177 (Wyo. 1951)	3, 5
Major v. Hall, 251 So. 2d 444 (La. 1971)	5
Masciotra v. Harlow, 233 P.2d 586 (Cal. 1951)	9
Miller v. Reidy, 260 P. 358 (Cal. 1927)	3
Monte Corp. v. Stephens, 324 P.2d 538 (Okla. 1958)	9
Palm v. Mortgage Investment Co., 229 S.W.2d 869 (Tex. 1950)	9

TABLE OF AUTHORITIES --(Continued)

Percoff v. Solomon, 67 So. 2d 31 (Ala. 1953)	9
Roseman v. Day, 184 N.E.2d 650 (Mass. 1962)	5
Sanders v. Sutlive Bros. & Co., 174 N.W. 267 (Iowa 1919)	3
Snyder v. Hall, 45 N.W.2d 757 (Neb. 1951)	5
Stern v. The Dunlap Co., 228 F.2d 939 (10th Cir. 1955)	9
Venters v. Reynolds, 354 S.W.2d 521 (Ky. 1962)	3
Wecht v. Anderson, 444 P.2d 501 (Nev. 1968)	7
Weil v. Ann Lewis Shops, 281 S.W.2d 651 (Tex. 1955)	9
Weiss v. Johnson, 190 N.E.2d 834 (Ill. 1963)	3
Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 1959)	3, 5

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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WOODLAND THEATRES, INC.,	)	
a corporation,	)	
	)	
Plaintiff-Appellant,	)	Case No. 14440
	)	
vs.	)	Case No. 14441
	)	
ABC INTERMOUNTAIN THEATRES,	)	
INC., a corporation, and	)	
PLITT INTERMOUNTAIN THEATRES,	)	
INC., a corporation,	)	
	)	
Defendants-Respondents.	)	
	)	

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REPLY BRIEF OF APPELLANT

INTRODUCTION

This reply brief is filed in order to dispel any false impressions that may have been left by the Brief of Defendant-Respondent in this appeal. The defendant-respondent Plitt Intermountain Theatres, Incorporated (hereinafter "Plitt") has argued in its brief from a succession of extremely broad generalizations that have no meaning in the context of this appeal unless they are carefully and precisely qualified. The plaintiff-appellant Woodland Theatres, Incorporated (hereinafter "Woodland") hereby replies to Plitt's brief in order to insure that this Court has a clear and unambiguous statement of the issues in this appeal before

Woodland agrees with Plitt that, "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 [Woodland] waived those breaches." (Brief of Defendant-Respondent at 12.) However, Plitt's conclusions on the issue of waiver, as outlined in its brief, are contrary to the authorities it cites and are clearly erroneous in the context of this appeal.

I. Acceptance of Rental Payments does not Waive Forfeiture of the Leasehold as a Matter of Law. Plitt is clearly wrong in arguing that the acceptance of rental payments with knowledge of breaches of a lease agreement constitutes waiver of the breaches as a matter of law. Waiver, as it applies to forfeiture of a leasehold, is a matter of the lessor's intent, as manifested verbally, in writing, or by conduct. Certainly, the acceptance of rent by a landlord may be an indicator that the landlord regards the lease as subsisting and thus waives the available forfeiture remedy. Yet, interpreting a landlord's acceptance of rent as a demonstration in some instances of his intent to waive forfeiture under the lease agreement is far from recognizing as a graven principle that the acceptance of rent waives a forfeiture of the leasehold as a matter of law. This Court has observed the distinction if Plitt's counsel has not.



In Jensen v. O.K. Investment Corp., 29 Utah 2d 231, 507 P.2d 713 (1973), the Utah Supreme Court carefully analyzed the implications of plaintiffs' actions in determining the waiver issue. An intent to waive was deduced from the plaintiffs' conduct, but in no way did the plaintiffs' acceptance of rent resolve the issue as a matter of law.

The conduct of plaintiffs over the period of years in which Dan's remained in possession, particularly after they received written notification that the option to renew was being exercised and they accepted the increased rental payment, constituted a waiver of their right to demand a forfeiture for breach of the condition against assignment without written consent. Jensen v. O.K. Investment Corp., 29 Utah 2d 231, 507 P.2d 713, 717 (1973) (emphasis added).

Utah is not alone in determining the issue of waiver from the parties' intent as indicated by the parties' words or conduct, as an examination of authorities from other jurisdictions clearly demonstrates. See Brazeal v. Bokelman, 270 F.2d 943, 947 (8th Cir. 1959); Bailey v. Zlotnick, 133 F.2d 35, 36 (D.C. Cir. 1942); Edwards Fine Furniture, Inc. v. Ditullio, 252 N.E. 2d 348, 349 (Mass. 1969); Weiss v. Johnson, 190 N.E. 2d 834, 836 (Ill. 1963); Venters v. Reynolds, 354 S.W.2d 521, 524 (Ky. 1962); Wing, Inc. v. Arnold, 107 So.2d 765, 768 (Fla. 1959); Fredeking v. Grimmer, 96 S.E.2d 554, 563 (W. Va. 1955); Larsen v. Sjogren, 226 P.2d 177, 182 (Wyo. 1951); Borst v. Ruff, 77 A.2d 343, 344 (Conn. 1950); Miller v. Reidy, 260 P. 358, 360 (Cal. 1927); Jones v. Della Maria, 191 P. 943 (Cal. 1920); Sanders v. Sutlive Bros. & Co., 174 N.W. 267, 268 (Iowa 1919); Katz v. Miller, 133 N.W. 1091, 1093 (Wis. 1912).

Woodland has already outlined in its initial brief

the factual circumstances tending to establish that any rental

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payments accepted from Plitt were accepted pursuant to a tentative settlement agreement without prejudice to Woodland's rights to renew its lawsuits in case the settlement broke down, as in fact it did. (Brief of Appellant at 9-10, 15.) As the court stated in Jones v. Della Maria, 191 P. 943 (Cal. 1920),

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.

However, a person's words or conduct when laid before the court at trial may also demonstrate an intent contrary to the waiver of forfeiture. In relation to this appeal, Woodland has had no opportunity to establish the inconsistency of its actions with the waiver of Plitt's forfeiture of the leasehold. Woodland deserves a chance to prove that its objective actions belied any intent to waive Plitt's forfeiture of the Woodland Drive-In Theatre leasehold, and accordingly, the district court's summary judgment order should be overturned.

## II. The Rule of Waiver does not apply to Claims for Damages.

Acceptance of rental payments has no bearing whatsoever on a lessor's right to maintain a suit for damages on the basis of

the lessee's breaches of the lease agreement. The authorities cited by Plitt in support of its concept of waiver do not apply waiver in relation to a lessor's suit for damages claiming breach by the lessee. See, e.g., Jensen v. O.K. Investment Corp., 29 Utah 2d 233, 507 P.2d 713 (1973); Brazeal v. Bokelman, 270 F.2d 943 (8th Cir. 1959); Atkinson v. Trehan, 334 N.Y.S.2d 293 (1972); Major v. Hall, 251 So. 2d 444 (La. 1971); Roseman v. Day, 184 N.E.2d 650 (Mass. 1962); Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 1959); Snyder v. Hall, 45 N.W.2d 757 (Neb. 1951); Larsen v. Sjogren, 226 P.2d 177 (Wyo. 1951); Bedford Investment Co. v. Folb, 180 P.2d 361, 363 (Cal. 1947); Jones v. Della Maria, 191 P. 943 (Cal. 1920); Guptill v. Macon Stone Supply Co., 79 S.E. 854 (Ga. 1913). In fact, in one of the cases cited by Plitt in its brief to this Court, Atkinson v. Trehan, 334 N.Y.S.2d 293 (1972), the court specifically points out the right of the lessor to bring a suit at law for damages resulting from the lessee's alleged breaches of the lease agreement.

Judgment may be entered for the respondent without prejudice to a suit at law for damages for the alleged failure to pay the tax increase and without prejudice to a new proceeding for the alleged violation of the use provision of the lease. *Id.* at 296.

This last aspect of the court's ruling follows its determination that the lessor had waived the lessee's forfeiture of the leasehold for precisely the same alleged breaches by accepting rental payments.

Plitt relies heavily on the case of Bedford Investment Co. v. Folb, 180 P.2d 361 (Cal. 1947), to establish that a landlord waives all breaches of the lease agreement by the lessee and all damages occasioned thereby by accepting payments of rent. In Bedford, the court ruled that respondent lessor was not entitled to damages in the amount of the rental value (\$8.33 per day) from May 31, 1946 to date and could not bring suit to collect such damages. However, the court's ruling was based on uncontroverted evidence in the record before it establishing that the appellants lessees had paid their rent to the lessor pursuant to the terms of the lease agreement "right up to date." Bedford Investment Co. v. Folb, 180 P.2d 361, 362-63 (Cal. 1947). The Bedford decision was thus based on the fact that the lessor had no damages in terms of lost rental and in no way supports or even states the idea that a lessor waives the opportunity to sue for damages resulting from the lessee's breaches by accepting payments of rent.

The ultimate result of Plitt's argument that by accepting rental payments, a landlord waives all breaches of the lease agreement is to require a lessor to immediately declare a forfeiture of the lease agreement and refuse to accept further rental payments in order to file suit for damages caused by any breach of the lease agreement, no matter what magnitude or variety of breach is involved. Otherwise, the opportunity to litigate a claim for damages against the lessee would be lost

through the all-encompassing application of the waiver principle. Obviously, no such result is required by the authorities that have considered the waiver question. In fact, quite the opposite is true, as the Atkinson court and other courts have confirmed. Cf. Wecht v. Anderson, 444 P.2d 501 (Nev. 1968); Klein v. Longo, 34 A.2d 359 (Mun. Ct., D.C. 1943).

Whatever result is reached in this action on the issue of waiver of Plitt's forfeiture of the leasehold, it should have no impact on Woodland's right to maintain its action for damages resulting from Plitt's breaches of the lease agreement. Plitt's payments of rent cannot compensate Woodland for the damages occasioned by Plitt's breaches of the lease agreement. The district court's summary judgment order would deny Woodland the right to establish its damages. Such preclusion is unwarranted by the facts of this action and by the authorities that have expressed themselves on the waiver issue. Accordingly, the district court's summary judgment ruling as it applies to Woodland's claims for damages resulting from Plitt's breaches of the lease agreement should be reversed.

III. There is an Implied Covenant under the Lease Agreement for Plitt to operate the Drive-In Theatre in a Prudent and a Businesslike Fashion. Plitt asserts in its brief to this Court 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 do business on the premises." Brief of Defendant-Respondent at 40. Plitt com-

pletely misses Woodland's point with regard to performance under the lease agreement. Plitt did not choose to allow the Woodland Drive-In Theatre to sit idle while Plitt paid the minimum rent provided for in the lease agreement to Woodland. Plitt ran the drive-in theatre business, and it is Woodland's complaint that through improper maintenance and neglect of the physical plant of the theatre, Plitt allowed the business of the theatre to deteriorate so that Woodland's receipts under the percentage rental provisions of the lease were artificially limited.

What Woodland is attempting to establish through its claims that Plitt (and formerly, ABC Intermountain Theatres, Incorporated) failed to operate the theatre in a prudent, diligent and businesslike manner is the damages to Woodland resulting from Plitt's neglectful operation and faulty maintenance of the Woodland Drive-In Theatre. Woodland does not presume to set a particular level of performance for Plitt's conduct of the drive-in theatre business. However, it is Woodland's contention that Plitt allowed the physical plant of the theatre to deteriorate so greatly that many potential theatre patrons were repelled by the theatre's state of disrepair and others had to be turned away because Plitt and/or ABC had failed to maintain facilities adequate to serve them. Woodland's claim plainly presents a question of fact that cannot be disposed of by summary judgment, and Woodland should have the opportunity to present its supporting evidence before the trier of fact.

One thing is clear from the cases cited by Plitt in its brief to this Court, and that is that percentage rental provisions are in the nature of agreements "sui generis" and must be interpreted according to their own peculiar terms. See Percoff v. Solomon, 67 So. 2d 31, 39 (Ala. 1953). See also Stern v. The Dunlap Co., 228 F.2d 939 (10th Cir. 1955); Monte Corp. v. Stephens, 324 P.2d 538 (Okla. 1958); Weil v. Ann Lewis Shops, 281 S.W.2d 651 (Tex. 1955); Masciotra v. Harlow, 233 P.2d 586 (Cal. 1951); Palm v. Mortgage Investment Co., 229 S.W.2d 869 (Tex. 1950); Cousins Investment Co. v. Hastings Clothing Co., 113 P.2d 878 (Cal. 1941). In Stern v. The Dunlap Co., 228 F.2d 939 (10th Cir. 1955), the Tenth Circuit Court of Appeals stated the standard for finding an implied covenant or obligation in relation to a contractual agreement otherwise written.

[I]f it is clear from all of the pertinent parts or provisions of the contract, taken together and considered in the light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties or was necessary to carry their intention into effect, it will be implied and enforced. Id. at 943.

The percentage rental provisions relevant in this action provide for payments of fifteen percent (15%) of the gross admission receipts above \$183,333.00 and fifteen percent (15%) of the gross concession receipts in excess of \$65,000. The derelictions of the defendants-respondents Plitt and ABC responsible for limiting Woodland's receipts under the percentage

rental provisions of the lease agreement have been previously outlined in appellant Woodland's initial brief to this Court. What Woodland is asking for is damages resulting from Plitt's and ABC's failure to operate the Drive-In Theatre in a prudent and businesslike fashion. Such prudent and businesslike operation, if the theatre business was run at all, was certainly envisaged in the lease agreement, and Woodland is entitled to an opportunity to present its case to prove its harm. Woodland has presented a clear issue of fact. The district court's summary judgment ruling should thus be overturned and Woodland's action reinstated.

#### CONCLUSION

In its brief to this Court, Plitt has relied on a series of overly broad propositions to obfuscate the legal principles that clearly apply in relation to this appeal. Those principles are: (1) Waiver of a lessee's forfeiture of the leasehold is a matter of the lessor's intent, to be gathered by the trier of fact from the lessor's words, writings and conduct. The acceptance of rent by the lessor does not waive the lessee's forfeiture as a matter of law. (2) Acceptance of rent does not waive the lessor's right to bring a suit for damages resulting from the lessee's breach of the lease agreement. (3) An implied covenant may be found from the lease agreement itself or from the facts and circumstances surrounding its execution.



Woodland has had no opportunity to present its claims, and such an opportunity is clearly mandated by the record in this action to date. Plitt is not entitled to judgment as a matter of law; and accordingly the district court's summary judgment rulings should be reversed.

DATED this 4th day of November, 1976.

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