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Bowens, Inc v. Valley Lanes Corporation, Glade H. Syme, Ruben Gallegos, Jeffrey G. Syme, and Duane Frederick Catte and Glade H. Syme, Ruben Ross Gallegos, Jeffrey Syme, Duane Frederick Catten and Valley Lanes Corporation v. Charles E. Bowen and Shirley Bowen, His Wife, and Bowens, Inc., A Utah Corporation :Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BOWENS, INC.

Plaintiff-Appellant,

vs.

VALLEY LANES CORPORATION, GLADE H. SYME, RUBEN GALLEGOS, JEFFERY G. SYME, and DUANE FREDRICK CATTEN,

Defendants-Respondents.

Appeal No. 15615

GLADE H. SYME, RUBEN ROSS GALLEGOS, JEFFREY SYME, DUANE FREDRICK CATTEN AND VALLEY LANES CORPORATION,

Plaintiffs-Respondents,

vs.

CHARLES E. BOWEN and SHIRELY BOWEN, his wife, and BOWENS, INC., a Utah Corporation,

Defendants-Appellants.

BRIEF OF RESPONDENTS

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
For Salt Lake County
The Honorable Ernest F. Baldwin, Jr.
District Judge

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NATURE OF THE CASE

This suit involves the interpretation of the provision of a lease dealing with renewal. The essential dispute is whether or not Paragraph VII of the lease grants Appellants an option for a new ten-year term after the expiration of the original term of the lease or merely grants Appellants a right of first refusal. Also at issue is the Trial Court's basis for determining the reasonable rental value of the property, and thus the amount due to the landlord for the period during which the Appellants held over after the expiration of the lease. Finally, Appellants are contesting their personal liability for the amount of the judgment.

DISPOSITION IN LOWER COURT

The case was tried to the Court, the Honorable Ernest F. Baldwin, Jr., presiding. Upon completion of the presentation of evidence and argument by both parties, memoranda were submitted and judgment was rendered for Respondents and against Bowens, Inc., and Charles and Shirley Bowen, as individuals, in the amount of $35,000.00. This amount was based upon the reasonable rental value of the premises for a period of ten months during which Appellants held over after the expiration of the lease on August 31, 1976. After reviewing the disputed testimony of the expert witnesses, the rate of $3,500.00 per month was set by the Court, the figure being somewhere between the disparate figures in evidence.

RELIEF SOUGHT ON APPEAL

The Appellants contend that the lease should be construed to grant Bowens, Inc. the right to a new ten-year term at the expiration of the original lease. Secondly, Appellants seek reversal of the judgment against Charles and Shirley Bowen as individuals. Respondents submit that the Trial Court correctly decided the issues in this case and that, therefore, the judgment of restitution of the premises and rental payment for the period of hold-over should be affirmed.

STATEMENT OF FACTS

The Statement of Facts contained in the Brief of Appellants is only partially correct and includes irrelevant matters as well as allegations and conclusions which are not supported by the record. Appellants have not complied with the Appellate Rules of this Court which require a fair and correct recital of the facts. Therefore, Respondents find it necessary to set forth a summary of the basic facts which are supported by the record.

The Kearns Bowling Lanes are part of a complex including a cafe, a lounge, a game room and a bowling alley which are located in the same building. The facility was constructed approximately twenty years ago on real property located at 3951 West 5400 South in Salt Lake County, Utah. On August 31, 1966, Diamond Developments, Inc., the original purchaser of

the property, leased the facility to Howard C. Nelson and W. Roy Brown. Diamond Developments, Inc. subsequently sold the property to Manivest Corporation who assumed the role of landlord. The August 31, 1966 Lease Agreement (Ex. 32-D which is also part of Ex. 1), which the Court is called upon to construe in this action, covers the bowling alley portion of the building, together with the lanes, pinsetters, tel-e-scores, spectator seats and bowlers seats installed therein. (R.72) Thus, the lease at issue pertains only to the bowling alley portion of the building and the references in Appellants' brief to the cafe and lounge are irrelevant to this suit. They are not covered by the lease in question. (Ex. 32-D and Tr. 121-122)

The Lease Agreement provides for a term of ten years with rent payable at the rate of $1,700.00 per month during the heavy bowling season (September through April) and $725.00 per month for the remainder of the year. Among other provisions, the Lease Agreement contains a paragraph dealing with renewal which grants "to the Lessees the first right of refusal to renew this lease." It is the contention of Appellants that this paragraph grants them an option to renew for a new ten year term.

In August of 1973, Bowens, Inc. entered into an Agreement (Ex. 1-P) with Howard C. Nelson and W. Roy Brown which provided for the purchase of the bowling alley business and for the performance by the buyers of the obligations of the

former tenants under the August 31, 1966 Lease Agreement. Charles E. Bowen and Shirley M. Bowen, personally and individually, guaranteed all of the terms and conditions of the Purchase Agreement including the obligations of the tenants under the original lease by signing the document "as guarantors." (R.73 and Tr. 111) Shirley Bowen testified that under this document "we bought the bowling alley business and the remainder of their lease. . . ." (Tr. 111) On August 28, 1975, a further Agreement (Ex. 2-P) was entered into between Nelson and Brown and Bowens, Inc. which provided for the assignment of all of the rights and obligations of Nelson and Brown under the Lease Agreement to Bowens, Inc. (R.73) Thus, the Bowens' Purchase Agreement (Ex. 1-P) embraced "the sale of the business including an assignment of the lease." (Tr. 113-114)

The members of the Valley Lanes group first entered the picture in the Spring of 1976, when Glade Syme, his wife and his two sons began discussing the possible purchase of the bowling business from the Bowens. The contemplated purchase was contingent upon two conditions precedent. First, that the Symes could obtain a loan to make the down payment and, second, that Manivest would agree to renew and extend the lease for an additional ten year term at an acceptable rate. The negotiations broke down when Manivest made it clear that it was not interested in releasing the bowling alley for another term, but rather wanted to sell

the property. (Tr. 181-182) When the Symes were unable to work out the terms of an extended lease they declined to execute the written agreement which had been prepared, stopped the loan application from being processed any further and left the premises which they had been operating for about six weeks on a trial basis while the details relating to their proposed purchase from the Bowens were being worked out.

At this point, Glade and Jeff Syme talked with two other persons about joining together to purchase the landlord's interest in the premises, since, in declining to work out a renewed lease with the Symes, Manivest had indicated it wanted to sell its interest. Charles Bowen admitted in testimony that he was present and participated in negotiations with Manivest and that he even went so far as to offer additional collateral of his own to induce Manivest to extend the lease and that in declining to do so they made it clear that "they would prefer to sell it." (Tr. 209) As a consequence, in April of 1976, Glade Syme, Ruben Gallegos, Jeffrey Syme and Duane Catten entered into an agreement for the purchase of the real property in which the bowling alley is located and, in connection with that purchase, the interest of the landlord under the August 31, 1966 Lease Agreement was assigned to them from Manivest. Shortly thereafter, the four individuals assigned their interest in the premises to Valley Lanes Corporation, which they had formed. (R.73)

On April 22, 1976, Irene Warr, as counsel for the Bowens, wrote a letter to Manivest Corporation advising the landlord

of their "desire to exercise their first right of refusal to renew the lease on the bowling alley." (Ex. 3-P) The letter was forwarded to Valley Lanes and its counsel, Tom Metos, responded with a letter (Ex. 4-P) dated May 12, 1976, advising Ms. Warr of the purchase of the landlord's interest by Valley Lanes and that in view of "the change of economic conditions since the date of the original lease" the rent payable during any renewal period would have to be increased to $6,500.00 per month. Contrary to Appellants' representation that these "terms were non-negotiable" (Brief of Appellants at 2) Paragraph VII of the Lease Agreement provides for the resolution of any dispute over the fair market lease value through the hiring of appraisers by the two parties. Additionally, Respondents established at trial that these terms were negotiated with, and acceptable to, a third party (Tr. 166-167) who was interested in leasing the premises. (Ex. 7-P) The Bowens frankly admitted at the time of the trial that at no time prior to the expiration of the lease did they hire an appraiser as was required by Paragraph VII. (R.74 and Tr. 142) They also failed to prove that they at any time even made a counteroffer to the proposal by the landlord as was required by the Lease Agreement. (R.74) The statement that they "communicated an offer to pay $2,500.00 as a monthly rental" (Brief of Appellants at 3) is based upon Exhibit 6-P which the Court found to be lacking in foundation. (Tr. 122-124) Tom Metos, the attorney to whom the letter is addressed, testified that he had neither seen the letter nor discussed

its contents with Appellants (Tr. 160-161) and Mr. Gallegos testified that he had never seen the letter until it was shown to him in court. (Tr. 257) Consequently, the Trial Court found that Appellants "failed to make any kind of a tender of performance which would satisfy this condition of the Lease Agreement." (R.74)

After Appellants failed to accept the proposed new lease or to hire appraisers, the proffered new lease was withdrawn. Having concluded that Paragraph VII constituted a "first right of refusal", as it is characterized in the Lease Agreement, and that the landlord was in a position to withdraw the property from being re-leased, Mr. Metos wrote a letter on July 1, 1976, doing just that. (Ex. 8-P and 9-P) In that same letter, the new owners offered $35,000.00 to purchase the personal property and fixtures which were not included under the terms of the original lease. After the expiration of the lease on August 31, 1976, the landlord served a "Notice to Quit" (R. 13) on the tenants and the pending cases were filed shortly thereafter. After consolidation the Court ordered that the Bowens could continue to occupy the disputed property during the pendancy of the proceedings.

ARGUMENT

POINT I

PARAGRAPH VII OF THE AUGUST 31, 1966 LEASE AGREEMENT GRANTS THE LESSEE A FIRST RIGHT OF REFUSAL RATHER THAN AN OPTION TO RENEW AND THE BOWENS ARE NOT ENTITLED TO A LEASE FOR AN ADDITIONAL TEN YEAR TERM.

The fundamental issue determined by the Trial Court was whether the Bowens were entitled to renew the lease on the bowling alley for an additional ten year period. The interpretation of the language of Paragraph VII of the Lease Agreement was critical in resolving this issue. That paragraph provides:

> Lessors hereby give and grant to the Lessees the first right of refusal to renew this lease. Lessees shall notify the Lessors in writing by registered mail at least ninety (90) days prior to expiration of this lease of lessees intention to release said premises herein contained, otherwise Lessors shall assume that the Lessees does (sic) not desire to release and this lease shall terminate on August 31, 1976. Should Lessees desire to release, Lessors shall submit to Lessees a proposed new lease for a ten (10) year term or a bonifide (sic) offer to lease by a third party within thirty (30) days of date that request for release has been received by Lessor. Should the Lessee feel the lease terms unreasonable then Lessee will hire a competent appraiser to place a fair market lease value on said property. Should Lessor then feel this market value not reasonable, they will obtain a competent appraiser to place a fair market value on said property and equipment. Should the two appraisers and Lessee and Lessor fail to arrive at a meeting of the minds, then the two appraisers will appoint a third appraiser by mutual agreement, to act as a referee and all parties concerned will be bound by the finding of appraisers as to fair market value. (Ex. 32-D)

While there is a traditional rule that in construing ambiguous provisions relating to renewal the tenant is usually favored, (50 Am. Jur. 2d, "Landlord and Tenant", §1162), there is no basis for doing so where, as here, neither party to the dispute prepared the lease and there was no evidence presented with respect to what was intended by the language

which was employed. Russell v. Valentine, 14 Utah 2d 26, 376 P.2d 548 (1962).

Thus, the place to begin is with the language contained in Paragraph VII of the Lease Agreement. The Agreement characterizes the Lessee's right as a "first right of refusal" and, in interpreting the provision, this characterization cannot be ignored. In Basler v. Warren, 159 F.2d 41 (1947), the Tenth Circuit, applying Utah law to the construction of a contract, asserted as a universal canon of construction that every word and phrase in a contract should be given a meaning according to its importance in the context of the contract, and stated:

> Courts are not warranted in reading out of a contract words or phrases placed there by the contracting party unless they cannot be rationally fitted into the scheme of agreement between the parties.

See also Vulcan Steel Corporation v. Markosian, 23 Utah 2d 287, 462 P.2d 166 (1969); Seal v. Tayco, 16 Utah 2d 323, 400 P.2d 503 (1965); Cornwall v. Willow Creek Country Club, 13 Utah 2d 160, 369 P.2d 928 (1962). In this connection, it is significant that the characterization appears at the beginning of the paragraph and that there is no reference to an option anywhere in the document.

In the case of Russell v. Park City Corporation, 548 P.2d 889 (Utah, 1976), the Court distinguised between an option and a "right of refusal" as follows:

> We note awareness that what is often called "the right of refusal" is not the same as an option, wherein the optionee has a definite right to purchase, whereas, the right of refusal has no effect until and unless the party granting it . . . decides to sell.

See also Chournos v. Evana Investment Co., 97 Utah 335, 93 P.2d 450 (1939); 51C C.J.S., "Landlord and Tenant", §88(3).

When the Valley Lanes group failed to receive either a counteroffer to their proposal to re- lease the premises for $6,500.00 per month (R.74) or an indication that an appraiser had been or would be appointed, (R.74 and Tr. 142) the decision was made by them to withdraw the property from being released. The letter written by Mr. Metos on July 1, 1976 formally communicated the intention of the landlord to withdraw the premises. (Ex. 9-P)

The "first right of refusal" gave the Bowens a preferential right in the event that the landlord elected to re- lease the property. However, the "first right of refusal" did not give them the power to compel the landlord to re- lease when it decided to occupy the premises itself. The July 1, 1976 letter withdrew the property, and the preemptive right of the Bowens to an extended term thereby terminated.

Even if the Court construes Paragraph VII to grant lessees an "option" to renew, the conclusion is inescapable that the Bowens did not comply therewith and that they are not in a position to ask that it be specifically performed. It is fundamental that, in order for an optionee to be entitled to specific performance, he must establish that he ". . . exercised the option in accordance with its terms." Lincoln Land & Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971). See also I.X.L. Furniture v. Berets, 32 Utah 454,

91 P. 279 (1907); Tilton v. Sterling Coal & Coke Co., 28 Utah 173, 77 P. 758 (1904). The person seeking to enforce an option has the burden of proving that he fully performed or tendered full performance within the applicable time period. In other words:

> The mode of exercising the option, if specified in the contract of the parties, must be in accordance with that prescribed by the agreement, and the tenant cannot without the consent of the landlord abrogate or change the agreement.

51C C.J.S., "Landlord and Tenant", §57.

Paragraph VII of the Lease Agreement in question contains a series of steps to be taken by the parties:

1. Lessees give notice at least 90 days prior to the expiration of the lease of their intention to release the property.
2. If the lessees give such notice, the lessors shall submit, within thirty days:
   (a) terms of a proposed new lease for a ten-year term, or
   (b) a bona fide offer to lease by a third party.
3. If the lessees feel that the new lease terms are unreasonable, they must hire an appraiser to place a "fair market lease value" on the property.
4. If the lessors disagree with the reasonableness of the amount that the lessees' appraiser arrives at, they can obtain their own appraisal.
5. If the parties and their appraisers can't agree, then a third appraiser will be appointed to act as

a referee.

6. The parties agree to be bound by the findings of the appraisers as to the fair market lease value.

There is no question from the evidence that steps one and two were properly taken and it was up to the Bowens to take the next step. They had an obligation, within the period of the original lease, to come back with a formal offer to enter into a new lease based upon an appraisal.[1] This they indisputably failed to do. (R.74 and Tr. 142) Nor did they tender performance of this condition pursuant to Utah Code Annotated, §78-27-1 (1953).

Under these circumstances the following rule is clearly applicable:

> The failure or inability or refusal to carry out the terms of the contract at the time when performance is due will ordinarily be grounds for refusing specific performance, since specific performance will not generally be decreed in favor of a party who has himself been in default. . . .

71 Am. Jur. 2d, "Specific Performance", §60. In view of the foregoing, the Trial Court's restitution of the premises to the landlord should be upheld.

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1. Respondents do not contest the major thrust of Point III in Appellants' Brief. That is, the appointment of appraisers as provided by Paragraph VII of the lease was intended to resolve a grievance presently in existence and therefore does not run afoul of Barnhart v. Civil Service Employees Co., 16 Utah 2d 223, 398 P.2d 873 (1965). Respondents do maintain that the failure to hire an appraiser, as required by the Lease Agreement, is grounds for denial of specific performance. See 50 Am. Jur. 2d, "Landlord and Tenant", §1167.

POINT II

THE TRIAL COURT PROPERLY ALLOWED MONTHLY RENTAL FOR THE PERIOD DURING WHICH THE TENANT HELD OVER AND THE INDEPENDENT FEE APPRAISER WHO TESTIFIED ON BEHALF OF VALLEY LANES HAD SUPERIOR QUALIFICATIONS AND HIS APPROACH IN DETERMINING THE FAIR MARKET LEASE VALUE OF THE PROPERTY WAS MORE REALISTIC AND COMPREHENSIVE.

Appellants do not dispute the right on the part of the landlord to recover a reasonable rental based on the Bowens' use and occupancy of the premises for a ten month period beginning on September 1, 1976 and continuing through the course of the trial. As Appellants held over pursuant to a court order, treble damages under Utah Code Annotated, §78-36-10 (1953) were held by the Trial Court to be inappropriate. The remaining options are either to base such an award upon the rental provided for under the Lease Agreement or the rental figures supplied by one or the other of the appraisers who testified at the trial.

While there is some latitude in determining what is a reasonable award for hold-overs, (see, e.g., 49 Am. Jur. 2d "Landlord and Tenant", §1124-1129) this Court has held that when the tenant refused to vacate:

> The court properly awarded plaintiffs possession of the property, and damages for the time defendant remained in possession. Damages recoverable under such circumstances are generally the reasonable rental value of the premises.

Pingree v. Continental Group Of Utah, Inc., 558 P.2d 1317 (Utah, 1976); Woodland Theatres, Inc. v. ABC Intermountain Theatres, 560 P.2d 700 (Utah, 1977). In considering the question of damages more particularly this Court has held:

> The plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer. Clearly the loss of the value of the use and occupation of the premises, or the rental value thereof, during the period when the premises were unlawfully withheld from plaintiff, is . . . damage suffered. . . . While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of possession is the minimum of damages.

Forrester v. Cook, 77 Utah 137, 292 P. 206 (1930) (emphasis added). It is clear from this case that at a bare minimum Respondents are entitled to the amount of rent provided under the Lease Agreement. To be specific, Respondents are entitled to at least $1,700.00 per month for eight months (September through April) and $725.00 for two months (May and June) or a total of $15,050.00. It is obvious that this sum represents a minimum and is well below what would be a "reasonable rental value." If for no other reason than it represents the rental reserved over a decade ago, the Court should base the award upon the expert testimony of the appraisers.

After reviewing the disputed testimony of the experts, the Trial Court awarded Respondents $3,500.00 per month for the period during which the Bowens held over. The basis for determining this figure was the expert testimony of appraisers for each party. Mr. John C. Brown, the independent fee appra

who testified on behalf of Valley Lanes, found the fair market value of the premises to be $3,800.00 per month in its condition at the time of trial. (Tr. 272) He placed an alternative value of $5,700.00 per month on the property if new pin-setters were installed and a few other basic repairs were made. (Tr. 272) As the Bowens were perfectly aware of the critical need for new pin-setters and had, in fact, negotiated with Manivest and put down earnest money in contemplation of replacing the dilapidated equipment in order to retain the league bowlers, any realistic evaluation of the reasonable rental value could easily have been based upon the higher figure. The costs of a lessee's mismanagement should not be borne by the landlord. In fairness, the rental value ought to be based upon the highest and best use of the property.

The Trial Court also considered the testimony of the Bowens' appraiser, Mr. Zakis, who concluded that based solely upon a cost approach the premises would only support a monthly rental of $1,800.00. (Tr. 297) The essential problem with this cost approach is that it only reflects what the Bowens were able to produce and not what the property is objectively worth. We respectfully submit that the testimony of John C. Brown with respect to the fair market value is entitled to greater weight for a variety of reasons. His qualifications and experience as an independent fee appraiser are substantially better than those of Appellants' witness. (Tr. 259-261 and Tr. 296-297) Mr. Brown has also had recent experience in

evaluating bowling alleys. (Tr. 264) His analysis included several different approaches, including the "income" approach and the "economic return" approach. (Tr. 266-267) By contrast, Mr. Zakis' analysis was limited to the "cost" approach. (Tr. 298) This approach considers only the value of the underlying property, the cost of reproducing the facilities and the element of depreciation. It does not consider in any way the amount of income that the property is likely to generate or a comparison with the income generated by other, similar properties.

In a chapter dealing with the "Appraisal of Bowling Centers" by Thomas R. Coates in the Encyclopedia of Real Estate Appraising, (ed. by Edith J. Friedman, Prentice-Hall, 1968) there appears the following comment about the "income" approach used by Valley Lanes' expert:

> The appraiser must depend almost entirely on the Income Approach in estimating the value of a modern bowling center to the operator because of two special characteristics:
>
> 1. The value of used bowling equipment is completely dependent on the income it will produce in the building in which it is located, since there is very little market at present for such equipment.
>
> 2. The modern bowling building is of special design and does not lend itself readily to conversion for other uses.

The refurbished rental value of $5,700.00 which Mr. Brown testified the property could produce is also based upon an

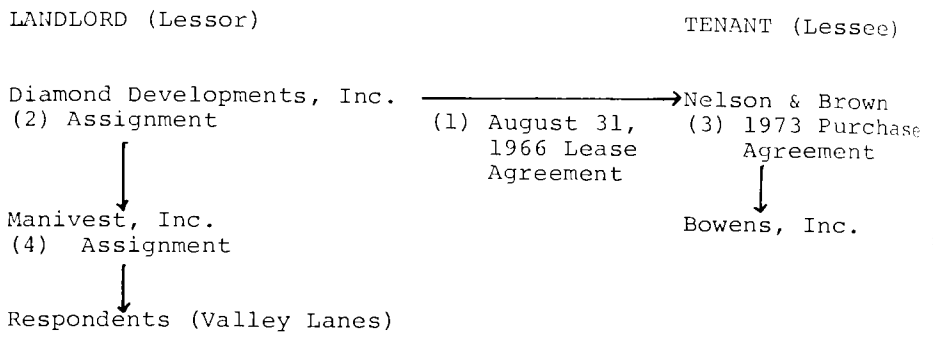
income per number of games bowled approach. And, this rental figure is predicated upon a very conservative estimate of the business potential when compared to other bowling businesses similarly situated. (Tr. 267-268)

There was ample evidentiary support for the Trial Court's decision that $3,500.00 per month represented a realistic rental for the period of the hold-over. The judgment for Respondents which was based thereon should not be diminished on appeal.

POINT III

VALLEY LANES AS THE ASSIGNEE OF THE LANDLORD IS A CREDITOR BENEFICIARY OF THE PURCHASE AGREEMENT BETWEEN BROWN AND NELSON AND BOWENS, INC., AND CHARLES AND SHIRLEY BOWEN PERSONALLY GUARANTEED TO PERFORM ALL OBLIGATIONS OF THE LEASE AGREEMENT AND THEREBY EXPRESSLY INTENDED TO BENEFIT THE LESSOR.

The Appellants contend that the Trial Court's judgment against Charles and Shirley Bowen, as individuals, is without basis and should not be upheld. However, the relationship between the parties and the documents in evidence clearly support the Court's finding that the Bowens "personally guaranteed all of the terms and conditions of the purchase agreement, including the obligations of the tenants under the August 31, 1966 Lease Agreement." (R.73) The following diagram will aid the Court in visualizing the relationship between the parties:



Respondents are the successors in interest to Manivest and Manivest was the owner and lessor of the property when Nelson and Brown entered into the 1973 Purchase Agreement (Ex. 1-P) with the Bowens. Respondents submit that they are creditor beneficiaries of that agreement by reason of the assignment from Manivest since the agreement was specifically intended to benefit Manivest as a lessor.

Paragraph 9 of the Purchase Agreement (Ex. 1-P) is entitled "Existing Lease" and it provides:

> Buyer acknowledges and understands that the land, building and fixed equipment presently used by Kearns Bowling Lanes is owned by MANIVEST, INC. and the right to use the same is subject to that certain Lease Agreement dated the 31st day of August, 1966, by and between DIAMONDS DEVELOPMENT, INC., a Utah corporation, and ERNEST C. PASARRIS and W. HOWARD MAYES, as Lessors, and HOWARD C. NELSON and W. ROY BROWN of Salt Lake County, State of Utah, as Lessees, which Lease Agreement is attached hereto and marked Exhibit "E". Buyer agrees to faithfully perform all terms, covenants and conditions of said Lease and any amendments, modifications and addendums to said Lease. In this connection Buyer agrees to provide Sellers at a place designated in writing by Sellers with a cashier's

> check for the payments required to be made under the said Lease Agreement to the above said Lessors, or their assigns, not later than the first day of each and every month during the term of the said Lease commencing with the first day of September, 1973. It being the understanding that Sellers will then transmit the said lease payments to the Lessors. (emphasis added)

Under Utah law, this Purchase Agreement is an effective assignment and not a mere sublease because a "sublease for the whole term is in law an assignment . . ." even though "rent and a right of re-entry for nonpayment are reserved, or even though it is called a sublease." Jensen v. O.K. Investment Corporation, 507 P.2d 713, (Utah, 1973). As a consequence, the subsequent assignment (Ex. 2-P) was merely redundant and as of the date of the Purchase Agreement, Manivest and Bowens, Inc. were in the relationship of landlord and tenant. As the Court put it in Jensen:

> Where the instrument creates an assignment and not a sublease the relationship of landlord and tenant exists between the lessor and the assignee and their rights, inter se are determined accordingly.

Id. at 716. There can be no question that one of a landlord's rights is to enforce covenants contained in the lease because he is both in privity of contract and privity of estate with the tenant. Therefore, the lessor is clearly in a position to enforce the Purchase Agreement between Nelson and Brown and the Bowens because the Bowens agreed to "faithfully perform all terms, covenants and conditions of said Lease and any

amendments, modifications and addendums to said Lease." (Ex. 1-P Paragraph 9)

Additionally, there can be no question that Manivest and Valley Lanes as their succesor are creditor beneficiaries of the Purchase Agreement. Section 133 of the Restatement of Contracts provides:

> Where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary.

It is clear that under the Purchase Agreement the Bowens promise to perform their obligations as Lessees and successors in interest to the original Lease Agreement. And rent is a clear obligation under the lease. (Ex. 32-D page 1) The performance of their promise to pay rent is clearly a satisfaction of an "actual . . . duty" which will benefit the lessor.

In adopting this section of the Restatement of Contracts this Court has stated that if:

> The promissee's expressed intent is that some third party shall receive the performance in satisfaction and discharge of some actual or supposed duty or liability of the promisee the third party is a creditor beneficiary. (emphasis added)

Schwinghammer v. Alexander, 21 Utah 2d 418, 446 P.2d 414 (1968). See also, Kelly v. Richards, 95 Utah 560, 83 P.2d 731 (1938). Appellants have cited various cases from other jurisdictions to the effect that the contract must evidence an intent to

benefit a third party before the third party will be in a position to enforce it. This is a correct statement of the law. In this case, however, there is abundant evidence of such an intent.

The Purchase Agreement specifically names Manivest and further provides that the buyer agrees to faithfully perform all terms of the Lease Agreement. A more specifically expressed intent is hard to imagine. And there can be no question that this intent extends to Valley Lanes because the Lease Agreement provides in Paragraph XIV (Ex. 32-D page 7) that:

> The terms and conditions hereof shall inure to and be binding upon the heirs, assigns and personal representatives of the parties hereto.

And the Purchase Agreement (Ex. 1-P) provides in Paragraph 21, which is entitled "Executors and Assigns", that:

> [i]t is understood that the stipulations aforesaid are to apply and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

Respondents submit that if both agreements by their terms run to assigns then there can be no question that there is an express intent on the face of the contracts to benefit future assignees of the lessor. The fact that Valley Lanes is not specifically named in the agreements or that the contract is not exclusively for its benefit as a third party should not prevent it from

enforcing a duty owing to it as Lessor.[2]

Turning finally to the Bowens' personal guarantee, it should be noted that Paragraph 7 of the Purchase Agreement requires them to pay "all bills and expenses of operation." And in a similar context involving a guarantee the Colorado Supreme Court has held that "monthly payment of . . . rent . . . was a liability present in its course of business . . ." and that "covenants to pay rent . . . run with the land, and that an assignee of a lease who accepts it is liable on the covenants." Shaffer v. George, 64 Colo. 47, 171 P. 881 (1918). This Court has held in the context of a guarantee on a note that the guarantee follows the note and may be enforced by any one entitled to collect it. See First Nat'l Bank v. Taylor, 38 Utah 516, 114 P. 529 (1911). In that same case the Court stated that:

> [i]t is not necessary, in order that the guarantee should be binding upon the guarantor, that the debtor should have knowledge of the transaction, or be in any way a party thereto. The reason for the rule is that privity of contract between debtor and the guarantor is not required.

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2. See Hartman Ranch Co. v. Associated Oil Co. 10 Cal. 2d 232, 73 P.2d 1163 (1937), in which the California Supreme Court held that the lessor has a right of action as a creditor beneficiary against an assignee of a lease who agreed with the original lessee to assume the original lease even though the lessor was not a party to the contract of assumption, and the contract was not exclusively for his benefit. The Court reasoned that such a result is justified when "it is recognized that in contracts of the creditor beneficiary type the main purpose of the promisor is not to confer a benefit on the third party beneficiary but to secure the discharge of his debt or performance of his duty to the third party."

Id. at 531. Similarly, in the context of a guarantee on a mortgage this Court has held that where the guarantee "was given to secure the performance of the terms and conditions of the contract assigned to the [plaintiff] . . . [t]his was an absolute guarantee and upon the default of the third parties the [defendants] became liable to perform in their steads. . . ." Hallstrom v. Buhler, 14 Utah 2d 111, 378 P.2d 355 (1963). This case is analogous in principle to the position of the Bowens. While the Purchase Agreement was signed by Bowens, Inc., Charles and Shirley Bowen, who are the principals of that family held corporation, also signed as personal guarantors to insure the performance of their corporation. The lessor would never have consented to the assignment to a corporation with insufficient assets to insure payment of the rent and thus the personal guarantee was required. There is no reason not to enforce that guarantee in favor of the lessor as the parties clearly intended. To do otherwise would be to allow the Bowens to hide behind a family corporation and thereby avoid the personal obligations which they specifically assumed.

CONCLUSION

The appeal of the Bowens must fail. The District Court, upon receipt of all the evidence, found no basis to support Appellants' bald assertions of bad faith or inequitable dealings. Rather, the evidence demonstrates that the Bowens are not entitled to an additional ten-year term both because the lease does not grant them such an option and because they totally failed to comply with the requirements of the lease

regarding renewal. Having held over after the expiration of the lease, the Bowens are required to pay a reasonable rental for the use and occupation of the premises. Based upon expert testimony, the Trial Court set a rental figure for the hold-over period which is fair and equitable and strikes a balance between the disputed testimony placed in evidence. Finally, the performance of this obligation was personally guaranteed by the Bowens, as individuals. That guarantee was clearly intended to benefit the lessor and to insure the performance of the Bowens' obligations under the Lease Agreement. Consequently, Respondents stand in the position of a bona fide third party beneficiary to whom a duty is owing which this Court should uphold upon appeal.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondents were served upon John C. Green, 430 Judge Building, Salt Lake City, Utah 84111, by hand delivery this 28thday of July, 1978.

D. Randall Trueblood

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