

1988

J. Desmond Bess and Kristine Bess v. Ronald L. Jensen and Patricia Jensen : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

J. DESMOND BESS and)	
KRISTINE BESS,)	
)	RESPONDENT'S BRIEF
Plaintiffs/Appellants)	
)	
vs.)	Case No. 880394-CA
)	
RONALD L. JENSEN and)	(Civil No. CV87-1258)
PATRICIA JENSEN,)	
)	
Defendant/Respondents.)	

APPEAL FROM THE JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH
JUDGE GEORGE E. BALLIF

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ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 14b

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UTAH COURT OF APPEALS

J. DESMOND BESS and)	
KRISTINE BESS,)	
)	RESPONDENT'S BRIEF
Plaintiffs/Appellants)	
)	
vs.)	
)	
RONALD L. JENSEN and)	Case No. 880394-CA
PATRICIA JENSEN,)	
)	(Civil No. CV87-1258)
Defendant/Respondents.)	

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to Section 78-2(a)-3 of the Utah Code Annotated, (1953, as amended) and pursuant to Rule 3 of the Rules of the Utah Court of Appeals.

STATEMENT OF THE NATURE OF PROCEEDINGS

This is an appeal from a judgment entered in the Fourth District Court on April 6, 1988, by Judge Ballif. The appeal addresses only that part of the judgment rendered by Judge Ballif involving the non termination of a Lease Option Agreement.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The appeal before this Court concerns a Option agreement created by the parties along with a lease agreement on the same property. The Lease and the Option Contract are distinct and separate agreements containing separate consideration and restrictions. Judge Ballif found the Jensen's in default of the lease, and thereby terminated the agreement. However, Judge Ballif did not terminate the Option finding it still viable inasmuch as the Jensen's had maintained their part of the Option Contract. The issue raised by Petitioner questions whether Judge Ballif's factual decision regarding the termination of the Lease independent of the Option Contract creates an error of law.

DETERMINATIVE STATUTE

Petitioner references Utah Code Annotated, 1953 as amended, Section 78-36-1. Respondent contends that this statute's applicability is limited, in its determinative nature, to the termination of the Lease and has no determinative effect on the option. Utah case law on contract interpretation and enforceability, as well as doctrines of equity and good conscience, will determine the status of the Option Contract before this Court.

STATEMENT OF THE CASE

The Jensen's entered into a three year lease agreement (dated March 20, 1985) for real property located at R.D. #1, Box

329-A, Provo, Utah¹. (Addendum "A".) The Jensen's entered into an Option Contract (dated April 1, 1985) whereby for a sum of \$2,500 the Jensen's had the exclusive right and privilege of purchasing the real property located at R.D. #1, Box 329-A, Provo, Utah for a period of six months. (Addendum "B", paragraph 3.) This option was renewable for a potential of five additional six month periods provided \$2,500 was paid for each period prior to the expiration of the previous period. (Addendum "B", paragraph 3.)

Both agreements are supported by individual covenants and separate consideration. (See generally Addenda "A" and "B"). The lease agreement provided that in return for \$462.47 per month beginning on the first day of April, 1985, the Jensen's were entitled to possession of the property in question for three years. (Addendum "A".) The responsibility for maintenance, utilities, taxes, insurance, losses, presently existing furnishings and fixtures, rental payments including late payments

¹The legal land description is as follows: PARCEL 1: Commencing 25.39 chains North and 7.63 chains West of the Southeast corner of the Southwest corner of Section 34, township 6 south, Range 2 East, Salt Lake Base and Meridian; thence South 102.8 feet; thence East 168.77 feet; thence 30x 20 ' west 38.74 feet; thence East 429 feet to the West line of the road; thence North 39x 35 ' West 90 feet along said road; thence West 534 feet to the place of beginning.

PARCEL 2: Commencing 25.39 chains North and 7.6 chains West and South 102.8 feet of the Southeast corner of the Southwest Quarter of Section 4, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence East 168.777 feet; thence south 30x 20 ' East 488.02 feet; thence West 430.6 feet; thence North 421.20 feet to the place of beginning.

Together with 1/2 share of the Lake bottom Irrigation Co., Water Stock.

were all openly addressed in the lease agreement.²

On the other hand, the Option Contract provided that in return for \$2,500, the Jensen's were given the exclusive right and privilege of purchasing the property in question for a period of six months. The Jensen's were required to make additional payments of \$2,500 in order to maintain this privilege. The price, evidence of title, closing adjustments, and possession requirements are all discussed per the written agreement. (Addendum "B".)

The Lease Agreement refers to the Option Contract in that it states that the lease period is three years unless it is terminated by the lessee's purchase of the premises under the Option Contract dated April 1, 1985. (Addendum "A".) The Option Contract acknowledges an existing lease agreement between the parties but does not express or imply any agreement that the Option Contract was dependant upon any consideration other than \$2,500 payment as stated in the Contract itself. (Addendum "B", paragraph 6.) The Lease Agreement could be terminated by the exercise of the Option but the Option was not subject to the performance or termination of the Lease. (Addendum "C" and Addendum "D", paragraph 8.)

The trial court found that the Jensen's had failed to make payments as provided in the Lease Agreement and therefore Petitioners were entitled to termination of the lease and the

²The Lease agreement and the Option Contract can be seen in their entirety in the Addenda "A" and "B".

receipt of all delinquent payments plus interest from May 12, 1987, to the present time. (Addendum "E", paragraphs 1, 2, and 3.) The Trial court also found that the Option Contract was still viable and that upon the Jensen's making all future required payments pursuant to the Option Contract (and their assumption of the loan from the Real Estate Contract dated June 30, 1978, between Neal as "Sellers" and Bess as "Buyers,") the Jensen's were entitled to possession of the property and Quit-Claim Deed from the Petitioner conveying all of their right, title, and interest in the subject property and the Jensen's. (Addendum "E", paragraph 8.)

SUMMARY OF THE ARGUMENT

The question before this court is one of fact not law. The Lease and the Option Contract are distinct and separate agreements containing separate consideration and restrictions. The test to determine the independence of these contracts is whether the express terms of the option are independent of the covenants of the lease and whether the two contracts are supported by valid consideration. If so, then the option continues in existence notwithstanding the lease's termination. In compliance with this test a lease and an option can act independently of each other despite references to one another. Allowing the extinguishment of the Option Contract would create a great windfall to the Petitioner, and a greater injustice to the Jensen's pursuant to doctrines of reliance embodied in Restatement (Second) Of Contracts Sections 87(2) and 90. The

Jensen's were found to have failed to meet the contingencies of the lease and they have lost their rights accordingly; but in equity and good conscience they have upheld the bargain under the option and have reasonably relied on such. Consequently, the intent of the parties will not be frustrated if the Petitioner regains fair rental value of his property subject to the Jensen's legal option to purchase.

ARGUMENT

THE TRIAL COURT CORRECTLY DECIDED THE HOLDER OF A LEASE AND OPTION TO REAL PROPERTY DOES NOT AS A MATTER OF LAW LOSE BOTH LEASE AND OPTION UPON THE DEFAULT OF THE LEASE.

The Lease and the Option Contract are distinct and separate agreements containing separate considerations and restrictions.

The Appellant has advocated the notion that these two separate agreements should be construed as a single contract. For justification, the Appellant has relied upon three Court cases which are all distinguishable from the present case. In Sacramento Baseball Club, Inc., v. Great Northern Baseball, Co., 73 Utah Advanced Reports 10 (1987), the Utah Supreme Court had to determine the enforceability of two simultaneously executed contracts. One was for the sale of a baseball franchise for \$100,000. The second was for consultation services to be provided by the seller for \$88,000. The Court determined that there was never any intention to provide consultation services and that the second contract was a sham. The actual selling price of the franchise was \$188,000 and the parties created the phony contract in order to enable the buyer and seller to manipulate

the tax treatment of the exchange. So when the court said "[a]n agreement may be a single contract even though it consists of several writings that the parties have never physically attached to each other," Id at 11, they were referring to a situation in which there are collateral documents that are unsupported by distinct consideration. That is not the case in the present case. As stated above, both contracts were independent and both were supported by their own consideration.

Similarly, Land Reclamation, Inc. v. Riverside Corp., 261 Or. 180, 184, 492 P.2d 263, 265 (1972) is cited as holding that the parties can use two written instruments, instead of one, to effectually carry on their agreement. In Land Reclamation a buyer and seller entered into a contract to convey land. The contract required that the buyer use the land for a sanitary landfill. The warranty deed which was subsequently executed contained no restrictions or conditions. The Oregon Court determined that the deed was only a vehicle for passing title to the buyer according to the terms of the Contract, and not a memorialization of the agreement. Here again, the second document which is being merged into the first is without separate consideration. The consideration tendered for the deed is one and the same as that declared in the contract. Therefore, the Court should treat the two documents as representing one agreement. This is not so in the present case because there were two separate agreements: one for a lease, the other for an option to buy and they each have separate and distinct consideration.

Completing his argument, the appellant cites Bledsoe v. Hill, 747 P.2d 10 (Colo. App. 1987) as holding that if one agreement is contained in more than one instrument, the documents must be construed together to determine the intent of the parties. This is a true statement of law but it is not decisive in this case for three reasons. First, there is not one agreement in the case at hand; there are two. Second, even if you construe the documents together, there is nothing in either of them which indicates that the intent of the parties was to make the contracts dependant upon each other. The stated exception is that the lease agreement would terminate if the option was exercised, but that would occur as a matter of law as the Jensen's possessory interest in the property would merge into their ownership interest. Finally, as stated in Bledsoe, "questions of intent of the parties to a written instrument implicate factual issues," Id at 12. Factual issues are best determined by the trier fact and in this case the trier of fact has already concluded that the intent of the parties was to make independent agreements.

By advocating the theory that these two separate agreements should be construed as one contract, the Appellant hopes to place the Jensen's in a situation similar to that of Russell v. Park City, Utah, Corp., 548 P.2d 880 (Utah 1976). In Russell, the Supreme Court decided a case in which a right of first refusal was contained in the same document as a lease contract. The Plaintiffs in Russell, terminated the lease agreement of the

Defendants due to Defendants failure to make timely rental payments. Defendants had made annual rental payments for the first three years. Late in the fourth year defendant and its sublessee, Park West, were in dispute as to how much money Park West actually owed Defendant. The defendant then advised Park West to make rental Payments directly to the plaintiff to offset their debts to defendant. Park West failed to make rental payments to Plaintiff as directed by defendant. Early in the fifth year plaintiffs sent a letter to defendant's stating that if rent was not paid within 45 days, they would terminate the lease. The defendants did not meet the deadline, but offered payment approximately two weeks late. Plaintiffs refused payment and the lease was terminated. Plaintiffs contended that the right of purchase was intended as an integral part of the total lease; and when the lease was breached the right to purchase also was lost. The defendant argued that the first right of refusal was an independent contract supported by separate consideration (\$2,000) and independent of the lease for the entire ten year term of the lease. The Utah Supreme Court affirmed the trial court's decision to terminate the first right of refusal in Russell. The rule of law as stated by the Russell Court is: "if by the express terms of the option; it can be seen as independent of the other covenants of the lease, and is supported by a valid consideration; it can continue in existence notwithstanding the lease's termination." Russell at 891-92. Citing Prout v. Roby, 82 U. S. (15 Wall.) 471 (1872). The Russell Court did not apply

the general rule in favor of the lessee/optionee for three reasons: First, both agreements were contained in the same document and there was an ambiguity within that document which made the intent of the parties uncertain regarding the relationship between the agreements. Second, the trial court had admitted extraneous evidence to clarify the ambiguity and had determined that the intent was for the right of refusal to be an integral part of the lease. Third, the intent of the parties was a question of fact and the Supreme Court of Utah affirmed the trial court's decision as the trier of fact.

In the present case, there is no ambiguity in the contracts. The ambiguity in Russell involved a statement in the option portion of the contract which stated that "said right to purchase to remain in existence during the entire term of the lease." (emphasis added) Therefore, there was a legitimate question as to whether the option was intended to be dependant upon the existence of the lease. Here, there are two separate documents with independent consideration. The option terms are six month increments and are not based upon the term, or the existence, of the lease. The trier of fact has determined that the intent of the parties was to enter into two separate and independent agreements. According to the rule stated in Prout v. Roby as cited in Russell, the option may be permitted to continue in existence despite the termination of the lease.

According to the restatement (second) of contracts Section 87 (1981):

(1) An offer is binding as an option contract if it:

(a) is in writing and signed by the offeror, recites purported consideration for the making of the offer, and proposes an exchange of fair terms within a reasonable time . . .

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

Id.

The Option contract before the court is in harmony with all the requirements of Section 87(1) and Section 87(1)(a). In conjunction with Section 87(2), Comment e. states that the reliance must be "substantial as well as foreseeable". The Jensen's have done considerable work on the subject property in contemplation of exercising their option including: putting in a textured ceiling in the living and dining rooms, wallpapering the living dining and bedrooms, painting the living, dining and bedrooms, installing a rooftop swamp cooler and a refrigerator upstairs, carpeting the upstairs and downstairs bedrooms and living room, placing curtains in the living, dining and master bedrooms, placing blinds in the bedroom, replacing the main water line to the house, planting numerous large trees on the property, replacing a wall in the shower, replacing the septic tank, repairing the general plumbing and restringing the fence. Through the aforementioned improvements, and others, the Jensen's have developed equity in the property of approximately \$30,000 in the subject property which includes the six payments of \$2,500

each according to the Option Contract which were accepted and cashed by the Petitioners. Not only are these improvements and equity substantial, they were foreseeable by Petitioner. Allowing the extinguishment of the Option Contract would create a windfall to the Petitioner, and an extreme injustice to the Jensen's pursuant to doctrines of reliance embodied in Restatement (Second) Of Contracts Sections 87 (2) and 90 (1981).³

The trial court's decision to maintain the Option Contract conforms with the objective theory of contracts. This common law theory bases the assent to a contract not on the subjective intention of the party, but on what a reasonable person would have thought from the party's conduct. From this approach the Jensen's are well within the scope of a reasonable man standard to believe that the two agreements, each capable of standing alone, could be treated as such. The allowance of the option is not unconscionable because possession reverts back to the lessor subject to the Jensen's option to buy. This scenario is identical to that in Russell, when the court stated, "after the lease was terminated as delineated above, the plaintiffs were free to rent the property to Park West or anyone else, as the trial court correctly ruled." Id. The Jensen's have failed to meet the contingencies of the lease and they have lost their

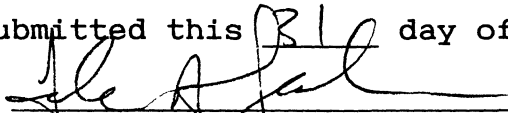
³A promise which the promisor should reasonable expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

rights accordingly, but in equity and good conscience they have upheld the bargain under the option and have reasonably relied on such; consequently, the intent of the parties will not be frustrated if the Petitioner regains fair rental value of his property subject to the Jensen's legal option to purchase.

CONCLUSION

In conjunction with the test set forth in Russell and the doctrines of reliance and equity, the Respondents respectfully request the Court to hold that the lease contract and the Option Contract are separate and independent, thus upholding the factually based decision of the trial court.

Respectfully submitted this 31 day of August, 1988.



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ADDENDUM

Addendum "A": Lease Agreement
Addendum "B": Option Contract
Addendum "C": Decision of Judge Ballif dated
January 28, 1988
Addendum "D": Judgment and Order dated April 6, 1988
Addendum "E": Findings of Fact and Conclusions of Law
dated April 6, 1988

Addendum "A": Lease Agreement

"THIS IS A LEGALLY BINDING CONTRACT IF NOT UNDERSTOOD. SEEK COMPETENT ADVICE."

Lease

J. DESMOND BESS and KRISTINE BESS, his wife
of P.O. Box 134 _____, County of _____, Laie, Hawaii 96762-0134 ~~XXXXXX~~
hereinafter referred to as landlord, hereby remise, release and let to RONALD L. JENSEN and PATRICIA JENSEN
of RFD#1 Box 329, _____, Provo _____, County of _____, Utah _____, State of Utah,
hereinafter referred to as tenant, all those premises situate, lying and being in the _____
_____ of _____ County of _____ Utah
and State of Utah, commonly known as _____
and more particularly described as follows, to wit: (See Exhibit "A" ATTACHED HERETO AND
INCORPORATED HEREIN)

(Legal Description)

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the tenant, from the 1st
day of April _____ A.D. 1985, for and during and until the 15th day of April _____ A.D.
1988, a term of three years unless terminated by Lessee's purchase of said premises
under an Option dated April 1, 1985.

And tenant covenants and agrees to pay to landlord as rental for said premises, the sum of \$
~~XXXXXX~~ \$462.47 per month, beginning the first day of April 1985 and
continuing on the first day of each month thereafter during the term hereof.

And tenant further agrees to deliver up said premises to landlord at the expiration of said term in as good order
and condition as when the same were entered upon by tenant, reasonable use and wear thereof and damage by the
elements excepted, and the tenant will not let or underlet said premises, or any part thereof without the written
consent of landlord first had and obtained, which consent will not be unreasonably withheld.

And tenant further covenants and agrees that if said rent above reserved or any part thereof shall be unpaid
for ten days after the same shall become due; or if default in any of the covenants herein contained to be
kept by tenant is not cured within five days from written notice, or if tenant shall vacate such premises,
landlord may elect, without notice or legal process, to re-enter and take possession of said premises and every
and any part thereof and re-let the same and apply the net proceeds so received upon the amount due or to become
due under this lease, and tenant agrees to pay any deficiency.

Responsibility for the maintenance shall be as indicated: Tenant responsible (T), Landlord responsible for (L).
Roof T, Exterior Walls T, Interior Walls T, Structural Repair T, Interior Decorating T,
Exterior Painting T, Yard Surfacing T, Plumbing Equipment T, Heating and Air Conditioning Equip-
ment T, Electrical Equipment T, Light Globes and Tubes T, Glass Breakage T, Trash Removal T,
Snow Removal T, Janitor T, Others T, Landlord to pay assessments on 1/2 share of
LakeBottom Irrigation Co.

Responsibility for utilities, taxes and insurance shall be as indicated: Tenant responsible for (T), Landlord res-
ponsible for (L).
Power T, Heat T, Water T, Sewer T, Telephone T, Real Property tax L, Increase
above 1985 in Real Property Tax L, Personal Property Tax T, Fire Insurance on Building L, Fire
Insurance on Personal Property T, Glass Insurance T, Other _____

Each party shall be responsible for losses resulting from negligence or misconduct of himself, his employees
or invitees.

Furniture, fixtures and personal property of tenant may not be removed from the premises until rent and other
charges are fully paid.

In case of failure to faithfully perform the terms and covenants herein set forth, the defaulting party shall pay
all costs, expenses, and reasonable attorneys fees resulting from the enforcement of this agreement or any right
arising out of such breach.

Tenant shall deposit monthly rent payments to Landlord's account #198715
at Universal Campus Credit Union in Provo, Utah

Witness the hands and seals of said landlord, S and said tenant, S at Provo, Utah
this 20th day of March A.D. 1985

Signed in presence of

[Signature]
[Signature]

J. Desmond Bess (Seal)
J. Desmond Bess
Kristine Bess (Seal)
Kristine Bess
Ronald L. Jensen (Seal)
Ronald L. Jensen
Patricia Jensen (Seal)
Patricia Jensen

EXHIBIT "A"

DESCRIPTION:

PARCEL 1: Commencing 25.39 chains North and 7.63 chains West of the Southeast corner of the Southwest quarter of Section 34, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence South 102.8 feet; thence East 168.77 feet; thence North 30° 20' West 38.74 feet; thence East 429 feet to the West line of the Road; thence North 39° 35' West 90 feet along said road; thence West 534 feet to the place of beginning.

PARCEL 2: Commencing 25.39 chains North and 7.63 chains West and South 102.8 feet of the Southeast corner of the Southwest Quarter of Section 34, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence East 168.77 feet; thence South 30° 20' East 488.02 feet; thence West 430.6 feet; thence North 421.20 feet to the place of beginning.

Together with 1/2 share of Lake Bottom Irrigation Water.

Addendum "B": Option Contract

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

OPTION

NOW ALL MEN BY THESE PRESENTS:

That J. DESMOND BESS and KRISTINE BESS, husband and wife
P.O. Box 134, Laie, Hawaii 96702-0134, hereinafter referred to as "Seller, hereby agrees for and in con-
sideration of TWO-THOUSAND FIVE HUNDRED AND NO/100 - - - - - (\$ 2,500.00) Dollars,
aid by RONALD L. JENSEN and PATRICIA JENSEN, husband and wife
RFD #1, Box 329 A, Provo, Utah 84601, hereinafter referred to as "Buyer", as follows:

1. PROPERTY: Seller hereby gives and grants to Buyer and to his heirs and assigns for a period of 6 months from
the date hereof, hereinafter referred to as "First Option Period", the exclusive right and privilege of purchasing the follow-
ing described real property located at R.D. # 1, Box 329-A, Provo, County of
Utah, State of Utah, and more particularly described
as follows:

(SEE EXHIBIT "A" APPEARING ON THE REVERSE SIDE HEREOF, INCORPORATED HEREIN
FOR DESCRIPTION)

Together with 1/2 share of Lake Bottom Irrigation Co., Water Stock.

together with all water rights appurtenant thereto or used in connection therewith.
Said real property and improvements, if any, shall hereinafter be referred to as "The Property").

2. PRICE. The total purchase price for said property is EIGHTY THOUSAND AND NO/100 - - - - -
\$80,000.00 Dollars, payable in lawful money of the United States, strictly within the following times, to-wit. All
sums paid for this option and any extension thereof as herein provided, shall be first applied on the purchase price, and the
balance shall be paid as follows:

Total down payment including funds paid hereunder to be \$15,000.00.
Buyer to assume existing loan from Real estate Contract dated June 30, 1978, by and between
Stephen William Neal and Barbara Ann Neal, as Seller and J. Desmond Bess and Kristine Bess,
Buyers in accordance with the terms thereof. Balance of Seller's equity to be paid together
with interest thereon at the rate of 11.5 % per annum in equal annual installments including
principal and interest in the amount of \$3,000.00, with first installment due one year after
exercise of option and annually thereafter until sellers equity is paid in full.

3. EXTENSION OF OPTION. Upon payment by Buyer to Seller of an additional sum of TWO-THOUSAND FIVE
HUNDRED AND NO/100 - - - - - (\$ 2,500.00) Dollars, cash or by cashier's
check, prior to the expiration of the first option period, this option shall be extended for six months, hereinafter
referred to as "Second Option Period". Upon Buyer's payment to Seller of a further sum of TWO-THOUSAND FIVE
HUNDRED AND NO/100 - - - - - \$ 2,500.00 Dollars, prior to the expiration
of the second option period, this option shall be extended for a third period of SIX additional months,
hereinafter referred to as "Third Option Period". Upon Buyer's payment to Seller of a further sum of
TWO-THOUSAND FIVE HUNDRED AND NO/100 (\$2,500.00) Dollars, prior to the expiration of the third
option period, this option shall be extended for a fourth period of six additional months,
hereinafter referred to as "Fourth Option Period". Upon Buyer's payment to Seller of a further
sum of TWO-THOUSAND FIVE HUNDRED AND NO/100 (\$2,500.00) Dollars, prior to the expiration of
the Fourth Option period, this option shall be extended for a fifth period of (SEE BELOW *)

4. EXERCISE OF OPTION. This option shall be exercised by written notice to Seller on or before the expiration of
the first option period, or if extended, the expiration of the second or third option periods as the case may be. Notice to
exercise this option or to extend the option for the additional option period, whether personally delivered or mailed to
Seller at this address as indicated after Seller's signature hereto, by registered or certified mail, postage prepaid, and post-
marked on or before such date of expiration, shall be timely and shall be deemed actual notice to Seller.
or within 10 days thereafter

5. EVIDENCE OF TITLE.

(a) Promptly after the execution of this option, Seller shall deliver to Buyer for examination such abstracts of title,
le policies, and other evidences of title as the Seller may have. In the event this option is not exercised by Buyer, all
ch evidences of title shall be immediately returned without expense to Seller.

(b) In the event this option is exercised as herein provided, Seller agrees to pay all abstracting expense or at Seller's
tion to furnish a policy of title insurance in the name of the Buyer.

(c) If an examination of the title should reveal defects in the title, Buyer shall notify Seller in writing thereof,
d Seller agrees to forthwith take all reasonable action to clear the title. If the Seller does not clear title within a reason-
le time, Buyer may do so at Seller's expense. Seller agrees to make final conveyance by Warranty Deed or _____

_____ In the event of sale of other than real property. If either party fails to perform
provisions of this agreement, the party at fault agrees to pay all costs of enforcing this agreement, or any right arising
of the breach thereof, including a reasonable Attorney's fee.

six additional months, hereinafter referred to as "Fifth Option period", Upon Buyer's
payment to Seller of a further sum of TWO-THOUSAND FIVE HUNDRED AND NO/100 (\$2,500.00)
Dollars, prior to the expiration of the Fifth option period, this option shall be extended
for a sixth period of six additional months hereinafter referred to as "Sixth Option Period".

Buyer shall have a 10 day grace period after expiration date of each option to make
payments to extend the option for each option period.

6. CLOSING ADJUSTMENTS. All risk of loss and destruction of property and expenses of insurance shall be borne by Seller until date of possession. At time of closing of sale, property taxes, rents, insurance, interest and other expenses of property shall be prorated as of date of possession. All other taxes, including documentary taxes, and all assessments, bridge liens and other liens, encumbrances or charges against the property of any nature, shall be paid by Seller except as required by Buyer under existing lease as a tenant. **

7. POSSESSION. Seller agrees to surrender possession of the property ~~XXX, XXXXXX~~ following written notice of the exercising of this option by Buyer, and closing of sale through Escrow, at Security Title and Abstract Company.

8. The Seller recognizes None N/A Real Estate Company (broker and Agent) through its salesman None the Real Estate Broker with whom Seller listed this property for sale, and Seller agrees to pay a commission to said broker equal to None % of the gross sale price, and Seller hereby authorizes the agent to withhold such commission from the proceeds of sale at time of closing.

or within ten days thereafter

9. If this option be not exercised on or before the dates specified herein/for exercise of same, the option shall expire of its own force and effect and the Seller may retain such option monies as have been paid to the Seller as full consideration for the granting of this option.

IN WITNESS WHEREOF, the Seller hereunto has set his name this 1st day of April 1985. ** Any insurance funds paid to Seller for damage, loss, or destruction of dwelling shall be used to replace or repair said dwelling to original condition.

SIGNED IN PRESENCE OF:

[Signature]

J. Desmond Bess
J. Desmond Bess
Kristine Bess
Kristine Bess Seller

Address of Seller: P.O. Box 134
Laie, Hawaii 96762-0134

APPROVED FORM — UTAH STATE

BLANK NO. 119—A U GEN P/O CO. — 3215 SO. 2000 EAST — SALT LAKE CITY

EXHIBIT "A"

DESCRIPTION:

PARCEL 1: Commencing 25.39 chains North and 7.63 chains West of the Southeast corner of the Southwest quarter of Section 34, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence South 102.8 feet; thence East 168.77 feet; thence North 30° 20' West 38.74 feet; thence East 429 feet to the West line of the Road; thence North 39° 35' West 90 feet along said road; thence West 534 feet to the place of beginning.

PARCEL 2: Commencing 25.39 chains North and 7.63 chains West and South 102.8 feet of the Southeast corner of the Southwest Quarter of Section 34, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence East 168.77 feet; thence South 30° 20' East 488.02 feet; thence West 430.6 feet; thence North 421.20 feet to the place of beginning.

Together with 1/2 share of Lake Bottom Irrigation Water.

APPROVED: March 20, 1985

Ronald L. Jensen
Ronald L. Jensen Buyer
Patricia Jensen
Patricia Jensen Buyer

Addendum "C": Decision of Judge Ballif dated
January 28, 1988

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1988 JAN 28 PM 4: 26

WILLIAM F. HUGHES, CLERK

DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

J. DESMOND BESS and)	Case Number	CV 87 1258
KRISTINE BESS,)		
Plaintiffs,)		
vs.)	DECISION	
RONALD L. JENSEN and)		
PATRICIA JENSEN,)		
Defendants.)		

This matter came before the court for trial on the 1st day of December, 1987, Orson B. West, Jr. appearing for the plaintiffs and Frederick A. Jackman appearing for the defendants.

The parties filed with the court a written stipulation of fact augmented by oral proffers, argued the case and submitted it to the court for decision.

The court having fully considered the matter now enters its:

DECISION

In this matter the court finds the issues as they pertain to termination of the lease (attached to complaint as Exhibit A) in favor of the plaintiff and against the defendant and finds that the lease payments as provided in said lease are delinquent from and after the month of May, 1987, until the

present-time. The same having been due and payable on the first day of each month, and delinquent from and after the 10th day of each month.

Pursuant to the stipulated facts and proffers made, the court further finds that the plaintiffs served a notice to quit upon the defendants by personal service on Patricia Jensen, one of the co-tenants, on May 21, 1987, which notice sought the payment of one month's rent which plaintiffs had declined on the 12th day of May, 1987, or that suit for treble damages would be commenced. This notice was ineffective as to the treble damage for unlawful detainer in that plaintiff had already refused the cash tender of the delinquent payment for the month of May.

Based on the letters of plaintiff's counsel to defendants dated March 9 and April 10 (Exhibits no. 3 and 5) concerning past delinquencies and future strict compliance with the lease provisions as to payment, it is clear that the intent of Exhibit #6 was to get the defendants out of possession of the property, and that the letter of Universal Campus Credit dated May 14, 1987, (Exhibit No. 7) and the notice in Exhibit No. 6 to deliver up possession was sufficient notice to defendants' that the lease was considered terminated by the plaintiffs due to the May delinquency. Any confusion created by the service of Exhibit No. 6 and defendants failure to respond thereto, was put to rest when plaintiff filed this action to terminate the lease on May

29, 1987, and served summons and complaint on June 4, 1987. Pingres v. Continental Group of Utah, Inc., 558 P.2d 1317 (1976). See also Johnson v. Austin, 73 Utah Adv. Rep. 40.

The plaintiff is entitled to a termination of the lease and the receipt of all payments tendered, plus interest, in the amount of the monthly rental from May 12, 1987, to the present time. The court finds that the lease payments are the reasonable rental value of the premises for the period of defendant's occupancy from and after May of 1987.

Plaintiff is also entitled to attorney's fees for prosecuting the termination of the lease agreement.

As to the claims of the plaintiff to forfeit the payments made under the option agreement, the court finds the issues against the plaintiff and in favor of the defendant, that said option agreement is still viable and that all payments made thereunder have been consistent and in accordance with the obligations imposed upon the defendant to pay pursuant to the option agreement, and upon the defendant counterclaimants making all of the additional required payments thereunder, and their assumption of the loan from the real estate contract dated June 30, 1978, between Neal as sellers and Boss as buyers, the defendants will be entitled to possession of the property and a quit claim deed from the plaintiff conveying all of their right, title and interest in the subject property to Jensens.

The defendants are entitled to their attorney's fees against the plaintiff for defending their rights pursuant to the option contract. The court considers that the attorney fees and costs cancel, so that each party will bear their own.

Counsel are directed to prepare appropriate findings consistent with rulings in their favor herein, and submit same to the court for signing and entry as one judgment and decree in this matter.

DATED at Provo, Utah, this 28 day of January, 1988.



GEORGE E. BALLIF, JUDGE

Addendum "D": Judgment and Order dated April 6, 1988

FILED
1988 APR -6 AM 10:05
[Signature]

FREDERICK A. JACKMAN, #1632
Attorney for Defendant
1327 South 800 East, Suite 300
Orem, Utah 84058
(801) 225-1632

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

J. DESMOND BESS and
KRISTINE BESS,

Plaintiffs,

JUDGMENT AND ORDER ✓

v.

RONALD L. JENSEN and
PATRICIA JENSEN,

Defendants

JUDGE BALLIF
Civil No. CV87-1258

This matter came before the Court for trial on the 1st day of December, 1987, Orson B. West, Jr., appearing for the plaintiffs and Frederick A. Jackman appearing for the defendants. The parties filed with the Court a written Stipulation of fact augmented by oral proffers, argued the case and submitted it to the Court for its decision. The Court having heretofore entered its Findings of Fact and Conclusions of Law, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The defendants failed to make lease payments as provided in the Lease Agreement.

2. The defendants are delinquent in their lease payments from May, 1987, until the present time.

3. Lease payments have been due and payable on the 1st day of each month and are delinquent from and after the 10th day of each month.

4. The plaintiffs are not entitled to treble damages.

5. Plaintiffs are entitled to termination of the Lease and the receipt of all payments tendered plus interest in the amount of the monthly rental from May 12, 1987, to the present time.

6. The lease payments are the reasonable rental value of the premises for the period of defendants' occupancy from and after May of 1987.

7. Plaintiffs are entitled to attorney's fees for prosecuting the termination of the lease.

8. The Option Agreement is still viable and that all payments thereunder have been consistent and in accordance with the obligations imposed upon the defendant to pay pursuant to the Option Agreement.

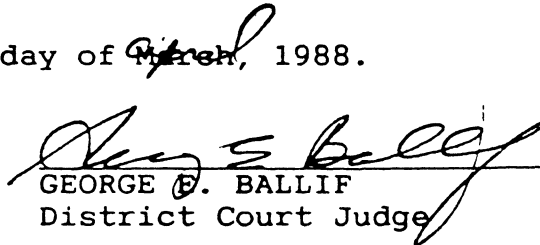
9. That upon the defendants' making all of the additional required payments pursuant to the Option Agreement and their assumption of the loan from the Real Estate Contract dated June 30, 1978, between Neal as "Sellers" and Bess as "Buyers", the defendants will be entitled to possession of the property and a

Quit-Claim Deed to the defendant from the plaintiff conveying all of their right, title and interest in the subject property to the defendants.

10. The defendants are entitled to their attorney's fees against the plaintiffs for defending their rights pursuant to the Option Agreement.

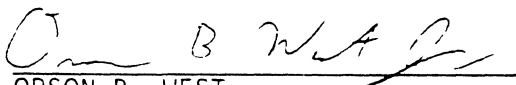
11. The Court considers the attorney's fees and costs cancelled so that each party will bear their own costs and attorney's fees.

DATED this 6th day of ~~March~~ ^{April}, 1988.



GEORGE D. BALLIF
District Court Judge

APPROVED AS TO FORM:



ORSON B. WEST
Attorney for Plaintiffs

Addendum "E": Findings of Fact and Conclusions of Law
dated April 6, 1988

FILED
1987 APR 6 AM
A. L. JENSEN

FREDERICK A. JACKMAN, #1632
Attorney for Defendant
1327 South 800 East, Suite 300
Orem, Utah 84058
(801) 225-1632

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

J. DESMOND BESS and
KRISTINE BESS,

Plaintiffs,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

v.

RONALD L. JENSEN and
PATRICIA JENSEN,

Defendants

JUDGE BALLIF
Civil No. CV87-1258

This matter came before the Court for trial on the 1st day of December, 1987, Orson B. West, Jr., appearing for the plaintiffs and Frederick A. Jackman appearing for the defendants. The parties filed with the Court a written Stipulation of fact augmented by oral proffers, argued the case and submitted it to the Court for its decision. The Court having fully considered the matter, now enters its:

FINDINGS OF FACT

1. The defendants failed to make lease payments as provided in the Lease Agreement.
2. The defendants are delinquent in their lease payments

from May, 1987, until the present time.

3. Lease payments have been due and payable on the 1st day of each month and are delinquent from and after the 10th day of each month.

4. The plaintiffs are not entitled to treble damages.

5. Plaintiffs are entitled to termination of the Lease and the receipt of all payments tendered plus interest in the amount of the monthly rental from May 12, 1987, to the present time.

6. The Court finds that the lease payments are the reasonable rental value of the premises for the period of defendants' occupancy from and after May of 1987.

7. Plaintiffs are entitled to attorney's fees for prosecuting the termination of the lease.

8. The Court finds that the Option Agreement is still viable and that all payments thereunder have been consistent and in accordance with the obligations imposed upon the defendant to pay pursuant to the Option Agreement.

9. That upon the defendants' making all of the additional required payments pursuant to the Option Agreement and their assumption of the loan from the Real Estate Contract dated June 30, 1978, between Neal as "Sellers" and Bess as "Buyers", the defendants will be entitled to possession of the property and a Quit-Claim Deed to the defendant from the plaintiff conveying

all of their right, title and interest in the subject property to the defendants.

10. The defendants are entitled to their attorney's fees against the plaintiffs for defending their rights pursuant to the Option Agreement.

11. The Court considers the attorney's fees and costs cancelled so that each party will bear their own costs and attorney's fees.

CONCLUSIONS OF LAW

1. Defendants breached the Lease Agreement and the Lease is hereby terminated.

2. The plaintiffs are entitled to judgment in the amount of \$462.47 per month commencing from May, 1987, to the present, with interest at the rate of 10% per annum thereon.

3. Plaintiffs are entitled to attorney's fees and Court costs.

4. The Option Agreement is still viable as between the parties and all payments made thereunder have been consistent and in accordance with the obligation imposed upon the defendants to pay pursuant to the Option Agreement.

5. That upon the defendants' making all of the additional required payments thereunder, and their assumption of the loan from the Real Estate Contract dated June 30, 1978, between Neal

as "Sellers" and Bess as "Buyers", the plaintiff shall convey the property by Quit-Claim Deed to the defendants and at that time the defendants will be entitled to possession of the properties.

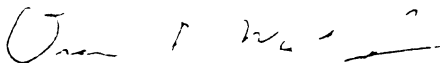
6. The defendants are entitled to their attorney's fees against the plaintiff and such attorney's fees shall act as a set-off as against the attorney's fees awarded to the plaintiff and therefore, the attorney's fees cancel so that each party will bear their own costs and attorney's fees.

DATED this 6th day of ~~March~~ April, 1988.



GEORGE E. GALLIF
DISTRICT COURT JUDGE

APPROVED AS TO FORM:



ORSON B. WEST
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that 4 true and correct copies of the foregoing RESPONDENT'S BRIEF were mailed, postage prepaid, on the _____ day of August, 1988, to the following:

Bradley R. Jones, #A4747
Attorney at Law
302 West 5400 South, Suite 103
Murray, Utah 84107

