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E. A. Russell, Martell E. Russell v. Park City Utah Corporation : Brief of Appellant

Utah Supreme Court

Don R. Strong; Attorney for Appellant.
Arthur H. Nielsen; Bruce B Findlay; Nielsen, Conder, Henriod and Gottfredson; Attorneys for Respondents.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

E. A. RUSSELL and MARTELL E. RUSSELL,

Plaintiffs-Respondents,

vs.

PARK CITY UTAH CORPORATION, et. al.

Defendants-Appellant

Supreme Court
No. 14124

BRIEF OF APPELLANT PARK CITY UTAH CORPORATION

Appeal From The Judgment Of The Fourth Judicial District Court For Summit County, The Honorable Allen B. Sorenson, Presiding.

* * * * * * * * * * * * *

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References to the record on appeal herein are abbreviated as follows:

R = Judgment Roll

Tr. = Trial Transcript

Dep. = Deposition

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INSTANT PROCEEDING DECISIONS

STATEMENT OF THE CASE

Respondents instituted this proceeding in the form of a declaratory relief action wherein a determination was sought that a certain Lease and Purchase Agreement dated the 31st day of March, 1967, between Respondents and Appellant's predecessor in interest was terminated for the nonpayment of the 1970-1971 annual rental. The amount of $2,500.00 by way of liquidated damages was also requested by Respondents.

After the filing of supplementary pleadings and several hearings thereon, the lower court entered summary judgment against Appellant which decree was appealed from under Supreme Court No. 12879. Pursuant to this Court's decision filed February 28, 1973, said proceeding was remanded to the lower court for the purpose of a plenary trial "and resolution of all the issues tendered by the parties to this lawsuit".

By the lower court's own motion this matter was set for a trial on the merits, on December 11, 1974, and Appellant's Amended Counterclaim, dated the 8th day of February, 1972, (R 82-86) was allowed to be filed by the trial court (Tr. 29, lines 2-19). Appellant's motion to join necessary additional parties defendant, as encompassed by said Amended Counterclaim, was denied (Tr. 30, lines 13-25; Tr. 34, line 10); and, Appellant's motion for postponement of trial under Rule 40 (b), U.R.C.P. (R 206-207), likewise relating to issues and parties embraced by said Amended Counterclaim, was also denied (Tr. 27, lines 25-30; Tr. 28, lines 1-6). Thereafter, a plenary trial was held on said date presumably

to adjudicate the issues raised by the Complaint (R 1-2), Appellant's Answer (R 52-55) and the Amended Counterclaim (R 82-86, supra.).

DISPOSITION OF LOWER COURT

The lower court rendered judgment against Appellant (R 248-249) thereby determining that the Lease and Purchase Agreement dated March 31, 1967, had been cancelled and was of no further force or effect. No liquidated money damages were awarded Respondents under said adjudication. From said decision Appellant has taken this appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's Judgment, which will result in this Honorable Court's decision to the effect: 1) that Appellant is vested with all of its former right, title and estate in and to the subject March 31, 1967, Lease and Purchase Agreement; 2) that said agreement has not been terminated; 3) that any and all rental accepted by Respondents from Appellant's Subtenants for the leased premises be credited to Appellant upon its monetary obligations under said lease; 4) that all the privileges to purchase real property from Respondents embraced by said agreement are severable provisions, and the same remain in full force and effect according to its terms independent of the leasehold estate; and, 5) that such further relief as to this Court is deemed fair and equitable be granted Appellant.

STATEMENT OF FACTS

On January 24, 1967, Appellant's predecessor in interest, Major-Blakeney Corporation, and Robert W. Ensign entered into a written agreement that contemplated a lease and purchase of Respondents' land (R 144, lines 27-31; R 146, line 15; R 147 line 23), in connection with a proposed ski resort.

On March 31, 1967, Appellant's said predecessor executed with the Respondents a Lease and Purchase Agreement hereinafter referred to as the Master Lease (Exhibit 11), embracing the winter of 1967-1968 as the first ski season of the 10 year term thereunder.

On July 31, 1967, Appellant's said predecessor entered into a sublease with the aforesaid Robert W. Ensign (Exhibit 20), also including said first winter season of 1967-1968, and embracing the same real property and 10 year term as contained in the Master Lease (Tr. 63, lines 6-14). Said interest of Ensign under the sublease was then assigned to Ensign's company, Ski Park City West, Inc., and notice thereof was later recorded in the County Recorder's Office (Exhibit 19).

Uninterrupted possession of Respondents' subject leased property under all the foregoing written agreements was given from the start, through to the present time, to Appellant's Subtenant, Ski Park City West, Inc.; and, Appellant's occupancy has existed only through said Subtenant (Tr. 103, lines 9-30) and through said Subtenant's parent company Life Resources, Inc. (Tr. 56, lines 20-30; Tr. 57, lines 1-12; Tr. 79, lines 5-14).

On or about May 2, 1967, Appellant's predecessor mailed the sum of $2,000.00 to Respondents (Exhibit 18) as required by the "Addendum" (Exhibit 11, last page) to paragraph VI, page 4, of the Master Lease, being a condition for exercising all the land purchase privileges set forth in paragraphs IV and VII of said Master Lease. Having exercised said rights to purchase in May, 1967, five months later in October 1967, the first property acquisition was consumated (Exhibits 13 and 14) as to just a portion of all the land (Exhibit 11, par. IV) encompassed by the over-all purchase privileges referred to in said paragraph VI of the Master Lease.

Respondents were further notified in May 1967, of Ensign's involvement in the ski resort to be operated upon Respondents' leased land and the fact that Respondents would also be dealing directly with the Ensign group in the future (Exhibit 18). In November, 1967, Ensign signed and delivered by registered mail a Ski Park City West Inc., rental check due under Respondents' Master Lease for the first winter season of 1967-1968 (Exhibit 1; Tr. 42, lines 1-12), and Respondents were otherwise aware of the Ensign, Ski Park City West, Inc. and Life Resources, Inc. possession of the leased premises (Tr. 56, lines 20-30; Tr. 57, lines 1-30; Exhibit 19).

The annual rental period under the Master Lease commences on March 31st and ends the following March 30th of each year, but the rental due date therefor occurs on November 1st during said period. Subsequent to the aforementioned payment of rent in 1967, by the Subtenants to Respondents, Appellant paid the next two annual

payments, the last of these which was due on November 1, 1969, being delivered after December 15, 1969 (Tr. 43, lines 16-23; Exhibit 3) covering the period March 31, 1969 through March 30, 1970. Thus, both Appellant and its Subtenants were making the lease payments to Respondents under the Master Lease (Tr. 107, lines 18-19; Dep. 23, lines 14-25; Dep. 24, lines 1-25) although later than the prescribed November 1st due date each year.

During the latter part of 1970, Appellant's Subtenants became delinquent as to various monetary obligations owing Appellant in amounts substantially exceeding rent then coming due to Respondents, (Dep. 38, lines 17-25; Dep. 39, lines 1-25; Dep. 40, lines 1-23; Dep. 42, lines 16-25; Dep. 44, lines 20-25; Dep. 45, lines 1-14; Dep. 51, lines 14-18; Exhibit 6). The last partial payment made by Appellant's Subtenants, on the latters' over-all debt to Appellant, was by Subtenants' check signed by a member of the parent company, Life Resources, Inc., for the Ski Park City West, Inc. group (Exhibit 4; Dep. 54, lines 11-18).

Subsequently, Appellant and its Subtenants became involved in litigation as adverse parties whereby Mr. Arthur H. Neilsen, Esq. was engaged as counsel for said Subtenants concerning the subject land under the Master Lease, and other issues (Tr. 91, lines 14-22; Tr. 92, lines 7-17; Tr. 5, lines 24-30; Tr. 6, lines 1-11; Tr. 24, lines 24-30; Tr. 38, lines 9-16; Tr. 104, lines 20-30; Dep. 49, lines 19-25; Dep. 50, lines 1-10).

After commencement of the aforesaid litigation in 1970, Appellant instructed the Subtenants in February, 1971, to again make the

annual rental payment under the Master Lease directly to Respondents, as had been done previously, and that the Subtenants' account payable to Appellant would be credited to the extent of this payment (Dep. 45, lines 15-25; Dep. 46, lines 1-25), since said Subtenants owed amounts under the written agreements (R 144-154; Exhibit 20), which exceeded the annual rental payment under the Master Lease (Dep. 38-40, 42, 44, 45, 51; Exhibit 6, supra).

By letter dated March 3, 1971, Respondents were advised of this payment procedure (Exhibit 6), whereupon counsel for Appellant's Subtenants, Mr. Arthur H. Neilsen, (Dep. 54, lines 11-18) also became counsel for Respondents. (Tr. 45, lines 26-30; Tr. 46, lines 1-7).

On March 9, 1971, Appellant was advised by the Subtenants'-Respondents' attorney, Mr. Neilsen, that the Subtenants would not partially satisfy the outstanding debts to Appellant by making the annual rental payment due for the 1970-1971 period under the Master Lease directly to Respondent, (Exhibit 7); and, thereafter on March 11, 1971, Mr. Neilsen mailed a notice wherein a 45-day deadline was established by which Appellant was to make the said rental payment (Exhibit 8).

Said Subtenants' - Respondents' attorney, Mr. Neilsen, confirmed the substance of his aforesaid 45 day absolute deadline, in a letter dated March 29, 1971, wherein a day certain was set forth as April 26, 1971, by which the delinquent rent owing to Respondent was to be paid, (Exhibit 9).

At no time did Respondents tender a written notice pursuant to Article VIII, page 5, of the Master Lease, allowing "such further time as is reasonably necessary" to cure the default after the expiration of the initial 45 day period.

Appellant's representative in charge of all its business affairs in Utah (Tr. 129 lines 9-25) received the Respondents' said March 11, 1971, notice after April 1, 1971, (Tr. 110, lines 10-30) and thereupon began contacting various investors to obtain funds for the current rent due Respondents (Tr. 111, lines 1-20; Tr. 112, lines 8-10). It took Appellant until June 7, 1971, to raise the said rent and tender the same to Respondents (Exhibit 10; Tr. 69, lines 6-13) through their attorney, Mr. Neilsen. This tender was refused by said Subtenants'-Respondents' attorney on June 15, 1971 (Exhibit 25).

Mr. Neilsen filed the within suit just over one week later, on June 24, 1971, on behalf of Respondents, and, prepared a new lease agreement under date of July 1, 1971, that was entered into between Respondents and Mr. Neilsen's other client: the parent company of Appellant's Subtenant, Life Resources, Inc. (Exhibit 26; Tr. 91, lines 14-22; Tr. 92, lines 7-17). Said new lease encompassed the identical 1,982.07 acres and copied substantially the same language and provisions as Appellant's Master Lease (Exhibit 11), except, Respondents' annual rental return was raised by 20% while Appellant's Subtenants obtained a reduction of 50% per annum, all accomplished by said benefiting parties' common counsel, Mr. Arthur Neilsen.

At no time has Appellant's Subtenants' actual possession of the subject leased premises been disturbed, from their occupancy in 1967 through to the execution in July, 1971, of the purported new lease or thereafter (Tr. 103, lines 9-30; Tr. 56, lines 20-30; Tr. 57, lines 1-12; Tr. 78, lines 28-30; Tr. 79, lines 1-14).

From and after early March 1971, when Mr. Neilsen became counsel for Respondents (Tr. 45, lines 26-30; Tr. 46, lines 1-7) and was likewise attorney for Life Resources, Inc. and its subsidiaries Ski Park City West, Inc. (Tr. 91, lines 14-22; Tr. 92, lines 7-16) and Ensign Company, Respondents did not negotiate with or otherwise deal with Appellant's Subtenants except through Mr. Neilsen representing both sides, (Tr. 84, lines 17-30; Tr. 85, lines 15-30; Tr. 86, lines 1-25) regarding matters leading up to the execution of the aforesaid "new" lease (Exhibit 26).

On or about July 1, 1971, Respondents received and accepted the sum of $5,826.21, under said new lease (Exhibit 26, paragraph 12).

In addition to tendering the full rental payment of $4,855.18 on June 7, 1971, (Exhibit 10), Appellant made an additional tender of the full amount of the rental together with interest thereon and Respondents' costs, for a total of $5,319.00, to the Summit County Clerk's Office within 5 days after the entry of the prior Summary Judgment herein (R 128-129). This payment was not accepted by Respondents, and the latter has steadfastly refused at all times to entertain any form of tender from Appellant through to the date of the current appeal in this matter.

ARGUMENT

POINT I: RESPONDENTS' MARCH 11, 1971, LETTER DID NOT OPERATE AS LEGAL NOTICE OF DEFAULT, AND FAILED TO START THE TIME RUNNING TO CURE THE RENTAL DELINQUENCY.

This Court's decision relative to the instant proceeding has laid the legal foundation which renders Respondents' purported notice (Exhibit 8) a nullity:

> "The notice treated the 45-day requirement as absolute. And it made no allowance for any 'further reasonable time' which the covenant allowed (Par. VIII of Lease) in which to remedy the default .....What has been said above concerning this notice and the service thereof should be considered in light of the general rule that one who seeks to invoke a forfeiture must strictly comply with the prerequisites thereof because forfeitures are not favored in the law (citing: Green v. Palfreyman, 109 U 291, 166 P.2d 215; Williston, Sec. 602A, P. 333-334, 500 P.2d 1008, N 6)..." (Emphasis added)
>
> Utah Supreme Court, No. 12879, Feb. 28, 1973, Decision (Concerning the issues of the within action, No. 14124)

Supporting the above principles this text states the rule as:

> "...(the notice) must comply with the requirements of the lease and the law respecting the time allowed for payment."
>
> 49 Am. Jur. 2d 1047

To compound the ineffectiveness of their said March 11, 1971, notice, Respondents' elaborated thereon in a second communication dated March 29, 1971, (Exhibit 9), by setting forth an exact day, "April 26, 1971", as the limit intended by said prior notice of March 11, 1971, which indeed does allow only 45 days and no more, assuming service was made on March 12, 1971. However, if any

"reasonable time" after 45 days had been established by Respondents in their notice that day could not coincide with their deadline of "April 26, 1971". Thus, whatever one interprets a reasonable time to be, said April 26, 1971 date could not have complied therewith in any case. These circumstances fall within the scope of the following rule, rendering the said March 11, 1971, notice invalid on that basis alone:

> "A notice to quit is ineffective where ... it gives as the date of quitting a date other than that on which the tenancy properly terminates." (Emphasis added)
>
> 41 ALR 2d 1400, Note 25, (Citing much authority)

Indicating that the notice must be precise, 31 ALR 2d 387 refers to more than 100 cases in all jurisdictions supporting said rule. Under these views of the law, Respondents have never started the time running, "reasonable" or otherwise, within which a default would have to be cured!

Beyond the foregoing concept, the termination date of April 26, 1971, (Exhibits 8 and 9) was effective only to render further action by Appellant useless and futile after that date, as proposed in principle by this Utah case:

> "But, entirely apart from all authority, how often must it be decided that where it appears, as in this case, that a tender would have been wholly useless, no tender is necessary? ... the great weight of authority is to the effect that where the evidence without conflict shows, or where it is found, that a tender would have been useless, none is required to be either alleged or proved." (Emphasis added)
>
> Utah Hotel Company v. Madsen, 43 Utah 285, 134 P.577

Again, we are entitled to the legal presumption that at any time after April 26, 1971, Respondents would have refused Appellant's tender, just as the latter's June 7, 1971, tender (Exhibit 10) was immediately rejected by Respondents. Particularly, since the Statement of Facts herein, supported by uncontroverted evidence and admissions of counsel, discloses Respondents' motivation to obtain a 20% higher rental each year while Appellant's Subtenants enjoy a 50% reduction in their rent, to the exclusion of Appellant altogether, all accomplished by their common counsel who authored the aforesaid notices (Exhibits 8 and 9).

Therefore, predicated on the foregoing analysis, the question of what "further time ... is reasonably necessary to cure" the default is redundant since to consider that issue it is necessary to first impart validity to the March 11, 1971, notice in order to start the time running at all (whether 45 days or a reasonable time thereafter). Once it is admitted that said notice, of itself, does not comply with the lease, thereupon, Appellant did not have to act in any manner thereon and the latter could legally invoke the presumption established by the Utah Hotel Company case (43 Utah 285, 134 P. 577, supra) to the effect that a tender after April 26, 1971, would have been useless.

A fortiori, if there existed only an invalid notice at the time of Appellant's June 7, 1971, tender (Exhibit 10), and at the time of the July 1, 1971, acceptance of $5,826.21 by Respondents from Appellant's Subtenants (Exhibit 26, par. 12), and as of the last tender of $5,319.00 (R 128-129), such facts compel the conclusion that the subject default was legally cured under the said

lease there having been no sufficient notice of default ever rendered by Respondents.

POINT II: SHOULD THIS COURT DETERMINE THE MARCH 11, 1971, NOTICE DID START THE TIME RUNNING WITHIN WHICH TO CURE, APPELLANT IS ENTITLED TO EQUITABLE RELIEF FROM FORFEITURE.

Concerning the very issues raised by the instant proceeding, this Honorable Court said:

> "... forfeitures are not favored in the law (citing: Green v. Palfreyman, 109 Utah 291, 166 P.2d 215; Williston, Sec. 602A, p. 333-334. 500 P.2d 1008, N.6)."
>
> Utah Supreme Court, No. 12879, Feb. 28, 1973, Decision

The subject Master Lease was for a term of ten years, commencing March 31, 1967, through March 31, 1977. After three annual payments had been made, the circumstances giving rise to the instant proceeding occurred.

The only basis on which Respondents sought a termination of said Master Lease was the alleged default in the annual rental payment for the period March 31, 1970, to March 30, 1971. Reduced to the bare essentials, the uncontroverted ultimate facts in this case show: a) Appellant tendered the full rental amount of $4,855.18 on June 7, 1971 (Exhibit 10); b) Respondents accepted the sum of $5,826.21, as rental for the identical property embraced by the Master Lease, from Appellant's Subtenants on or about July 1, 1971 (Exhibit 26, par. 12); c) Appellants again tendered the full amount of rental with interest and costs, for a total of $5,319.00, prior to the final judgment in this current proceeding, (R 128-129). The latter circumstances are embraced

by the rule which holds that a tender of delinquent rent, plus interest, after suit and before a final adjudication, avoids forfeiture of a lease (31 ALR 2d 362).

Thus, the controlling doctrine as adopted by this Court (No. 12879, Decision, supra.) states that forfeiture is not favored. Said principle requires the provision for forfeiture in the Master Lease (Paragraph VIII, Exhibit 11) to be strictly construed against Respondents in seeking to invoke the forfeiture. That is, a lease forfeiture provision is considered security for the payment of rent and equity will offer relief against forfeiture upon the payment thereof since the purpose of forfeiture is served. Such a fundamental principle has been uniformly adopted in the United States, (U.S. Sup. Ct., 19 L. Ed. 166, infra.), as follows:

> "... forfeiture (of lease) is only an incident intended to secure its (rent) payment; ... that when the principal (rent) is paid with interest the compensation is complete."
>
> Sheets v. Selden, U.S. Sup. Ct., 19 L. Ed. 166 (Supported by Karn v. King, U.S. Sup. Ct., 51 L. Ed. 360, 363)
>
> "(forfeiture of lease will be set aside) upon the notion that such condition and forfeiture are intended merely as a security for the payment of money (rent)."
>
> Pomeroy, 1 Eq. Jur. 4th Ed. Sect. 453
>
> "...stipulation or covenant permitting forfeiture... will be strictly construed against the lessor ... and liberally in favor of the lessee".
>
> 51C C.J.S. 330

"(Where) no new rights have intervened nor has the position of the parties been changed by the delay (forfeiture will be denied a lessor)"

Giles v. Austin, (New York) 62 NY 486

"Compensation, and not a forfeiture, is a favorite maxim with courts of equity."

Clanton v. Oregon Kelp-Ore Prod. Co., (Oregon) 296 P.30

The foregoing principles are particularly applicable to the matter at hand when considered against certain facts, namely: a) prior to Respondents' notice (Exhibit 8), Appellant assigned a portion of its accounts receivable from its Subtenants, to Respondents (Exhibit 6); b) whereupon, for the first time an objection to said assignment was made by said Subtenants, through their attorney (Exhibit 7), and concurrently therewith Respondents became clients of that same attorney (Tr. 45 lines 26-30; Tr. 46, 1-7) whereby two days later said insufficient notice of default was mailed (Exhibit 8); c) therefore, said assignment as a method of payment was defeated by the collusion of Respondents and Appellant's debtor Subtenants, through their common counsel (Tr. 91, lines 14-22; Tr. 92, lines 7-17) on March 9, 1971, even before any time period, faulty or not, had been commenced on March 11, 1971; d) said common counsel enhanced the position of both Respondents and Appellant's debtor Subtenants, through a purported new lease (Exhibit 26; Tr. 91, lines 14-22; Tr. 92, lines 7-17), giving Respondents 20% more annual rental while reducing said Subtenants' rent by 50%, in contrast to the Master Lease (Exhibit 11) and the sublease (Exhibit 20).

Continuing with argument as to balancing the equities between Appellant and Respondents, no prejudice whatever can be adduced from the circumstances herein and applied to Respondents were the Master Lease to be reinstated. In support thereof, the court below found:

> "No evidence was presented on (Respondents') actual damages. The court finds no cause of action on plaintiffs' (Respondents') claim for liquidated damages."
>
> Fourth District Court, Jan. 6, 1975, Decision (R 191)

Further, Respondents have protected themselves against future damages, should said Master Lease be reinstated as prayed for by Appellant herein, by virtue of this statement from their "new" lease with Appellant's Subtenants, to wit:

> "In the event it shall be finally determined .... that said lease (Exhibit II) ... is still in force and effect ... Lessors (Respondents) shall return to Lessee (Appellant's Subtenants) the amount of any rent paid by Lessee under the provisions of this lease, provided all rent under such prior lease is paid." (Emphasis added)
>
> July 1, 1971, Lease Agreement, page 4, par. 12 (Exhibit 26).

Therefore, no prejudice to Respondents was found as to the period before the instant lawsuit (R 191, supra.), and the above recited provision clearly contemplates that the Respondents remain current as to rent after the within proceeding since they would only return rent already received by them in the future if "all rent under such prior lease (Exhibit 11) is paid", (Exhibit 26, supra.). The effect of said latter provision, in any case, is to assure Respondents they will be current in rental

receipts, one way or another, whenever the Master Lease of March 31, 1967, is reinstated.

POINT III: SECTION 78-36-10, UTAH CODE ANNO., 1953 (AS AMENDED), ENTITLED APPELLANT TO SUMMARY RELIEF TO AVOID TERMINATION OF THE LEASE.

In addition to the tender made by Appellant to Respondents on June 7, 1971, (Exhibit 10), Appellant delivered the full amount of delinquent rent, interest and costs in the sum of $5,319.00 to the Summit County clerk's Office within 5 days after entry of the prior Summary Judgment herein (R 128-129), according to said Section 78-36-10. (supra.). Respondents also rejected this tender.

The significant portion of the aforesaid statute is stated as:

> "When the proceeding is for an unlawful detainer after default in the payment of the rent, and a lease agreement under which the rent is payable has not by its terms expired, (Master Lease expires March 31, 1977), execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant shall be restored to his estate; ... "(Emphasis and brackets added).
>
> Section 78-36-10, Utah Code Anno. 1953 (As Amended)

A proper course avilable to Appellant's Subtenants'-Respondents' counsel, Mr. Nielsen, was one whereby he should have effectuated a simple payment of assigned funds from the Subtenants to Respondents, consistent with the underlined portion of the

foregoing statute (Sect. 78-36-10, supra), and compatible to the Subtenants' agreement with Appellant (Exhibit 20, page 27, paragraph 3.). However, said counsel independently arranged a different solution without even having negotiations between his clients, Respondents and Appellant's Subtenants, (Tr. 84, lines 17-30; Tr. 85, 15-30; Tr. 86, lines 1-25), in that Appellant's said assignment of funds (Exhibit 6) its tender of June 7, 1971, (Exhibit 10) and the subject tender under Section 78-36-10 (Supra) were all rejected in favor of a "new" lease that excluded Appellant's interest (Exhibit 26).

Whatever the true legal result has been by virtue of the instant suit in the lower court, all concerned have to admit that Appellant's possession of the premises has been at issue, making such action, pro tanto, at least in the "nature" (269 P.109, infra) of an unlawful detainer action despite the declaratory relief label attached; and, it follows that Appellant or its Subtenants would be entitled to invoke the redemption and restoration privileges of the statute first above mentioned (Sect. 78-36-10, supra) within 5 days of any dispossessory judgment.

Artificial distinctions, through the labeling tactic, have been overcome in numerous instances to accomplish substantial justice. In Gray v. Defa, 103 Utah 339, 135 P. 2d 251, (1943) this Court reversed the court below, thereby permitting the defendants greater pleading rights and defenses, for the reason that although the complaint sought a declaratory judgment to quiet title to real property the action was "in effect" an

ordinary quiet title action and should proceed on that basis despite the label used by the plaintiffs. In considering the California statute comparable to Utah's Section 78-36-10 hereinbefore quoted (supra), the court characterized the payment after judgment and restoration privileges therein as applicable to real property dispossession proceedings generally, despite the label involved, by stating:

> "A privilege granted to every defendant brought in under proceedings of this nature, and it is a substantial right of which he cannot be deprived by any action of the trial court." (Emphasis added)
>
> Telegraph Ave. Corp. v. Raentsch, 269 P.109 (Calif. 1928)

The importance of restoring a defaulting tenant to his leasehold has been recognized by this Court under said statute (Sect. 78-36-10, supra), in Commercial Block Realty Co. v. Merchants' Protective Ass'n, 71 Utah 505, 267 P. 1009, where a tenant was allowed to pay the rent and costs after judgment and be restored to his leasehold estate, to "safeguard" such a valuable property interest. This same "safeguard" should apply where, as in the instant case, the proper rental was tendered to Respondents both before (Exhibit 10) and after (R 128-129) judgment. Moreover, since said statute provides that a post judgment payment may be made by any "party interested" in the continuance of the subject lease, the pre-judgment payment accepted by Respondents in the sum of $5,826.21 on July 1, 1971, delivered by Appellant's Subtenants' parent company, should be construed as a satisfaction of the delinquent rental entitling Appellant to restoration of

the Master Lease interest within the spirit and purpose of said Section 78-36-10.

Appellant was even prepared for another tender pursuant to said statute, under the latest judgment of the lower court (R 248-249), but, instead relied on the rule recited in Utah Hotel (43 Utah 285, supra; POINT I hereof), in view of Respondents' counsel's representations to the undersigned that they would continue to reject any and all tenders.

POINT IV: RESPONDENTS HAVE WAIVED FORFEITURE BY THEIR CONDUCT INVOLVING THE APPELLANT'S SUBTENANTS.

Although Appellant has experienced difficulty in raising all facts which properly relate to the instant proceedings (See POINT VI hereof), enough compelling, undisputed evidence has been introduced to indicate that Respondents have waived any forfeiture of the March 31, 1967, lease (Exhibit 11) by virtue of conduct with Appellant's Subtenants which was both, (1) proper, and (2) improper, according to law, regarding Appellant's interest in the premises. A discussion of said subject matter, under numbers corresponding to the foregoing two catagories, is now presented:

(1) Appellant's Subtenants went into possession of the premises from the very beginning encompassing the same term and land covered by the Master Lease, through a second document dated July 31, 1967, (Exhibit 20; Tr. 103, lines 9-30). Regardless of what said latter document (Exhibit 20) is labeled, the law construes the fact that the same term and land were transferred to

said Subtenants to be an assignment of interest, as indicated by: 49 Am. Jur 2d, 410, 411 (Sect. 391), 51C C.J.S. 122, 123 (Sect. 43) and 16 R.C.L. 1021.

Robert W. Ensign, a party to said July 31, 1967, document (Exhibit 20), in disclosing that his company, Ski Park City West, Inc., was the ultimate subtenant as to all Appellant's predecessor's interest in the March 31, 1967, lease, clearly considered said July 31, 1967, document an assignment to him and his company, (Exhibit 19, lines 11-13). Likewise, on the other side, the Utah representative for Appellant (Tr. 129, lines 19-25) also considered said transfer to the Subtenant group an assignment (Tr. 94, lines 29-30; Tr. 95, lines 1-6; Tr. 103, lines 9-21; Tr. 125, lines 27-30; Tr. 126, lines 1-2). Moreover, Appellant's predecessor and the Ensign-Subtenant group were jointly involved in the preparation of said Master Lease, and other project matters, (Dep. 10, lines 20-25; Dep. 11, lines 1-7; Dep. 32, lines 15-25).

The legal consequences of said relationship between Appellant and its Subtenants, insofar as Respondents' position is concerned, is explained analogously by:

> "the assignee (Appellant's Subtenants) of a leasehold by virtue of the assignment, becomes personally liable for rents .... the assignee of a lease becomes ... the debtor of the (Respondent) lessor for installments of rent falling due after the assignment ... the (Appellant) lessee after the assignment is treated somewhat in the nature of a surety or guarantor of the assignee." (Brackets added for clarification)
>
> 49 Am. Jur. 2d 455 (Sect. 459)

A 1972 case holds that a lessor, such as Respondents, ratified the lessee's (Appellant) assignment where said lessor observed the assignee (Appellant's Subtenants):

> "in complete control of the leased premises, and who had received a monthly rental payment directly from assignee." (See: Exhibits 1, 18 and 19; Tr. 56, lines 20-30; Tr. 57, lines 1-12; Tr. 103, lines 23-30)
>
> North Little Rock et al. v. Van Bibber, 483 SW 2d 223 (1972)

The undisputed evidence shows: a) that said Subtenants have been in possession of the leased premises from the start through to the present, the Appellant never taking possession except through said Subtenants, (Tr. 103, lines 9-30; Tr. 56, lines 20-30; Tr. 57, lines 1-12); b) that Respondents have received from said Subtenants, through a payment by the group's parent company, Life Resources, Inc., the sum of $5,826.21 on or about July 1, 1971, (Exhibit 26, paragraph 12); and, c) that Respondents have never interrupted in any way the said original possession of the leased land.

Said facts are covered by the rules of law which conclude that behavior such as Respondents' constituted waiver of the Master Lease forfeiture, as adduced from these authorities:

> "subtenants possession is the possession of the lessee (citing many cases)"
>
> 51C C.J.S. 140
>
> " Possession ... a holding of land legally by one's self or through another such as a lessee, under title, estate, or interest of any kind." "Emphasis added)
>
> Whithed v. St. Anthony & Dakota Elevator Co., 9 ND 224, 83 NW 238

"Possession in law ... a constructive possession as distinguished from possession in deed, or in fact, ... that possession which the law annexes to title."

42 Am. Jur. Property, Sect. 42

This Utah statute embraces the aforesaid concepts:

"(a tenant) continues in possession thereof (land) in person or by subtenant ..." (Emphasis added)

Section 78-36-3, Utah Code Anno., 1953 (As Amended)

As to Respondents' acceptance of said $5,826.21:

"If the lessor accepts from the sublessee or assignee (rent owed by lessee) nonpayment of which is the asserted cause of forfeiture, the lessor will be treated as having waived the forfeiture for nonpayment of the rent (citing cases)" (Emphasis and brackets added)

118 ALR 128 (11 a.2.)

As to the combined effect of all the foregoing law:

"A landlord's waiver of his right to terminate or forfeit a lease may be ... implied and evidenced by conduct."

52A C.J.S. 39, Footnote 52 (citing 51C C.J.S. 573)

Of further significance concerning the element of Appellant's constructive possession, aside from the issue of the notice's sufficiency (Exhibit 8), it is apparent that another manifestation of Respondents' waiver of forfeiture is indicated by their failure to act upon this portion of the Master Lease:

"... and in the event Lessee fails to correct said default within such further time as is reasonably necessary to cure the same, Lessee shall quit and surrender the premises to Lessors ..." (Emphasis added)

March 31, 1967, Lease and Purchase Agreement, Paragraph VIII, page 5 (Exhibit 11)

Appellant's refusal to "quit and surrender the premises to lessors" was clearly set forth in their responsive pleadings filed with the lower court on July 15, 1971 (R 49-55), which were mailed to Respondents' counsel on the same day (R 55). Said July 15, 1971 resistence to Respondents' complaint, constituting an implicit refusal to "quit and surrender the premises", was certainly known to their counsel long before the latter actually consumated the purported "new" lease transaction under counsel's August 23, 1971, letter to Respondents (Exhibit 26). The fact of Appellant's uninterrupted possession, through its Subtenants (Life Resources, Inc., Ski Park City West, Inc., et al), needs no further elaboration in view of the principles of law hereinbefore recited on the subject. Thus, the sum effect of such facts forces the conclusion that besides resisting the Master Lease provision quoted (supra), Appellant meets, pro tanto, the description of the tenant in this statute:

> "A tenant of real property, for a term less than life, is guilty of an unlawful detainer: .... (3) When he continues in possession, in person or by subtenant, after default in the payment of any rent ..... "(Emphasis added)
>
> Section 78-36-3, Utah Code Anno., 1953 (As Amended)

To implement said statute, this applies:

> "Necessary parties defendant. - No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made a party defendant in the proceeding ..." (Emphasis added)
>
> Section 78-36-7, Utah Code Anno. 1953 (As Amended)

As to the scope and purpose of these statutes:

> "A landlord who is entitled to possession must, on the refusal of the tenant to surrender the premises, resort to the remedy given by law to secure it." (Emphasis added)
>
> King v. Finn, 3 Utah (2d) 419, 285 P.2d 1114

Therefore, waiver of forfeiture is further shown by Respondents' failure to seek redress through judicial process against both Appellant and its occupying Subtenants, in order to terminate Appellant's possession as contemplated by paragraph VIII, page 5 of the Master Lease (Exhibit 11).

(2) Conduct of Respondents' which can be considered improper and prejudicial to Appellant's property rights must be observed in the context of their relationship with Appellant's Subtenants. Central to this relationship is the fact that Respondents engaged the same attorney who represented said Subtenants, at a time when Appellant had assigned a portion of Subtenants' debt to Respondents to cover the delinquent rent; whereupon, the Subtenants refused to honor the assignment, the Respondents sought to cancel the Master Lease while refusing Appellants' tender, and thereafter Respondents and the Subtenants entered into a "new" lease which increased Respondents' annual rental return by 20% yet reduced the Subtenants' rent by 50% each year.

From the facts, one can conclude that through their common counsel the Respondents and Subtenants participated in a collusion which was at least business interference, or at the other extreme perhaps fraud, concerning Appellant's affairs involving the Master

Lease. These circumstances compare closely to those of another case, outlined as follows:

Senter (lessor) leased to Probst (lessee). Probst subleased to American Oil Co. (subtenant). American Oil "desired to be rid of the contract with Probst"; and, Senter wanted increased rent, being unhappy with the amount being received under the Probst lease. Probst defaulted in the payment of rent, whereupon American Oil and Senter negotiated behind Probst's back and arranged a "new" lease, excluding Probst. Senter claimed a forfeiture under the original Probst lease. In denying the claimed forfeiture of said original Probst lease, the court said:

> "This is a legal fraud that cannot be tolerated. It amounted to no eviction so far as Probst (lessee) was concerned, and was an arrangement between Senter (lessor) and the American Oil Co. (subtenant) by which each of them profited ..."
>
> Senter v. Probst, 197 So. 100

POINT V: THE LAND PURCHASE PRIVILEGES IN THE LEASE DOCUMENT ARE SEVERABLE AND MAY BE EXERCISED INDEPENDENT OF ANY ALLEGED LEASE FORFEITURE.

The March 31, 1967, Master Lease (Exhibit 11) contains three land purchase privileges:

A.) Page 3, paragraph IV, option for 35 acres;

B.) Page 4, paragraph VII, first refusal on land balance;

C.) Page 5, paragraph VII, option on land balance to be exercised on March 31, 1977.

The separate, distinct and "further consideration" for all three purchase privileges is established in yet another part of the instrument, under paragraph VI, page 4, thereof. Said consideration consisted of $2,000.00 cash payment to Respondents deposited with them before May 5, 1967 (Exhibit 18, dated May 2, 1967, second paragraph: "$2000.00 ... mailed today").

Thus, as of May 5, 1967, Respondents had received $2,000.00 and nothing further would be due them, whether for a land purchase or rent, until six months later. In November, 1967, both the first rental payment (Exhibit 11, first page) and the consideration for the first land acquisition (Exhibit 11, page 3) would become due. However, had neither of said latter November, 1967 payments been made there was no legal obligation for Respondents to return the $2000.00 and they could have re-leased the premises to others for any rent they wished, still subject to the remaining two purchase privileges (Exhibit 11, pages 4 and 5) which privileges are tied to equitable, mutually agreed upon methods for fixing a price that adjusted to the passage of time (appraised value at time of purchase). Further, the leasehold provisions are not integrated and merged into the purchase terms, since said agreements are easily exercised separately without prejudice to Respondents.

Entirely apart from the foregoing, it is a fact that the November 1967, rent and first purchase consideration were delivered, with the said earlier $2000.00 given credit in the later escrow (Exhibit 13). Respondents still derived a separate and additional

benefit from said earlier $2000.00 deposit by virtue of the interest bearing value such sum possessed for six months, not to mention the very real advantage to Respondents who could enjoy the use of said sum for any need or pleasure six months before the other lease and purchase provisions would operate. In any case, the language of the document itself is clear as to the severability of the $2000.00 consideration:

> "As a further consideration for the above option (35 acres), and other privileges to purchase hereinafter recited (first refusal, page 4; March 31, 1977, option, page 5), and in addition to the other covenants and conditions contained in this Agreement, Lessee agrees (to deposit $2000.00 etc.)" (Emphasis added)
>
> Master Lease, Paragraph VI, page 4 (Exhibit 11)

The Respondents' handwritten recital in the middle of page 5, of the Master Lease should be construed as setting a fixed date of "March 31, 1977", for exercising the second option, (Exhibit 11, page 5). The other privilege expressed on page 4, paragraph VII, gives an absolute right to purchase on a first refusal basis "after the 1st day of November, 1968," without any specific termination date set forth for such provision. As written, said first refusal preference extends beyond March 31, 1977, and would cease to be operative only when the Respondents obtained an acceptable third-party offer to buy, whereupon, said provision would terminate either by Appellant's purchase on the terms specified or by declining such right. Until these circumstances ripen, whether before or after March 31, 1977, Appellant's first refusal prerogative continues and the court below is without power to revoke the same.

It is implicit by the aforesaid structuring, that the document intended these remaining two purchase privileges would not depend on the survival of the leasehold term for validity, since the first refusal provision operates any time after November 1, 1968, unlimited by the lease term, and the March 31, 1977, second option date specifically occurs when the lease has run its course. Thus, since this separation was acceptable in the beginning to Respondents there can be no prejudice whatever to them now if these purchase privileges are exercised in precisely the same manner and time-frame, independent of the leasehold, as originally contemplated by the subject "Lease and Purchase Agreement" (Exhibit 11). The foregoing is governed by these principles of law:

> "The determination of whether a breach of the lease by the lessee renders an option to purchase nugatory depends on whether the option and lease are one agreement or are independent. This resolves itself into a problem of construction of the instrument ...."
>
> 49 Am. Jur. 2d, Landlord & Tenant, Section 385, P. 403 (See Utah cases supporting severability: 77 P.758; 93 P.2d 450)

If there is in fact an option and it is clear enough to express complete terms of a purchase, these facts alone weigh strongly in favor of an "absolute right", regardless of where or in what form such option is found (i.e. - in a lease or otherwise), as reflected by this authority:

> "Language which gives the privilege or exclusive option to buy creates an absolute right ..." (Emphasis added)
>
> Falkenstein v. Popper, 183 P.2d 707

In support thereof, and citing much authority:

10 ALR 2d Anno. Section 9, P.894

POINT VI: THE LOWER COURT COMMITTED PROCEDURAL ERROR PREJUDICIAL TO APPELLANT.

Appellant respectfully requests this Honorable Court to carefully consider POINTS I to V hereof, based on unchallenged evidence actually before the court below as shown by the Statement of Facts herein, and reverse the district court's rulings if warranted. Such a course is far preferable, by avoiding further expense and delay to these burdened litigants, as opposed to remanding this cause a second time on the procedural grounds hereinafter recited. However, if such remand is the only relief available Appellant accepts that decision gratefully, based presumably on the procedural argument that follows:

A.) In allowing Appellant's Amended Counterclaim, (R 82-86; Tr. 29, 2-13), the issues encompassing Appellant's Subtenants were squarely before the lower court; and, as indicated by 59 Am. Jur 2d 624-630, such counterclaim is a proper means to bring a necessary party into the suit.

Appellant made its motion to join its two Subtenants, Ski Park City West, Inc. and the parent company, Life Resources, Inc., as necessary party defendants, on the date set for trial, which motion was denied (Tr. 30 lines 23-30; Tr. 34, line 10). The lower court gave as its reason for denying the motion the fact it "was not timely filed", (Tr. 117, lines 26-30; Tr. 118, lines 1-12).

Reference to Appellant's aforesaid Ammended Counterclaim (R 82-86, supra), discloses in what way the Subtenants were appropriately involved in the instant litigation and Respondents' Complaint reveals that declaratory relief is sought to determine the status of the subject Master Lease by which the Subtenants possession of the leased premises evolved. Other relevant issues are likewise expressly or implicitly raised by said pleadings, involving said Subtenants.

The rules of law which urge a trial court to have before it all necessary parties need no elaboration insofar as the within cause is concerned, to wit:

> "Parties - When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration." (Emphasis added)
>
> Section 78-33-11, Utah Code Anno. 1953 (As Amended)
>
> Said statute is cited in:
>
> Thiokol Chemical Corp. v. Peterson, 15 Utah (2d) 355, 393 P.2d 391.
>
> Where possession of leased property is at issued:
>
> "Necessary parties defendant - No other person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made a party defendant ..." (Emphasis added).
>
> Section 78-36-7, Utah Code Anno. 1953 (As Amended)

Rule 19 of the Utah Rules of Civil Procedure, requires the joinder of necessary parties. Contrary to the lower court's view that Appellant's joinder motion "was not timely filed" (supra.) the 1973 Supplement to said Rule 19, cites this authority:

"...New parties may be brought in at any time before or after trial and before judgment." (Emphasis added)

39 Am. Jur 955, Sect. 84 (Updated by 59 Am. Jur 2d 630, using same language)

Further to the question of a "timely" filing:

"...Parties may be dropped or added by order of the court on motion of any party or of its own motion at any stage of the action ..." (Emphasis added)

Rule 21, Utah Rules of Civil Procedure

Appellant made a motion under Rule 40 (b), U.R.C.P. (R 206-207) seeking a postponement, for reasons that are likewise embraced by the issues relating to the Subtenants sought to be joined, as hereinbefore discussed under this POINT VI. This motion was also denied, presumably on the same basis that it was not timely filed (Tr. 27, lines 25-30; Tr. 28, lines 1-6). This Court has deemed a lower court's similar denial as an "abuse of discretion", where a party sought relief under said Rule for good cause: Bairas v. Johnson, 13 Utah (2d) 269, 373 P.2d 375.

Appellant's frustration by not having the Subtenants before the lower court as parties was prejudicial in that relevant evidence was excluded from trial, as disclosed by these references to the December 11, 1974, Transcript:

Tr. 94, lines 2-28
Tr. 106, lines 11-30
Tr. 107, lines 1-22
Tr. 112, lines 2-29
Tr. 115, lines 15-30
Tr. 119, lines 19-30
Tr. 122, lines 4-30 (Proffer of proof)
Tr. 123, lines 1-30 (Proffer of proof)
Tr. 124, lines 1-30 (Proffer of proof)
Tr. 125, lines 1-10 (Proffer of proof)

B.) Reference to Exhibit 14, page 3 thereof, describes certain real property which constitutes the land sold by Respondents in accordance with paragraph IV, page 3, of the Master Lease through the escrow identified by Exhibit 13. The lower court's judgment, (R 248), near the bottom of the page, includes said property as being vested in Respondents. Admittedly, this is probably an oversight, but such error must be corrected particularly since said judgment has been recorded in the Summit County Recorder's Office and thereby improperly clouds the title to said acreage.

Respondents' counsel admitted at trial that the realty covered by the above Exhibits 13 and 14, had been paid for and the transaction closed (Tr. 52, lines 25-30; Tr 53, lines 1-30; Tr. 54, lines 1-7)

SUMMARY

Appellant submits that the March 11, 1971 purported "notice", whatever else it was, was not notice under the Master Lease as it did not by its very language comply with paragraph VIII of said lease. For that reason alone no time period whatever commenced running to cure a default, "reasonable" or otherwise (POINT I). Even if some validity were imparted to said "notice" relief against forfeiture of the lease is called for on equitable principles. Particularly, since Appellant demonstrated good faith by first assigning its Subtenants' debt to Respondents and thereafter making a tender of rent on two occasions. Prejudice to Respondents is

completely lacking by reinstating the lease since they have been fully compensated, either by Appellant or its Subtenants, and are now current, as contemplated when said lease was originally executed, (POINT II). The second of the aforesaid tenders of rent was not only an act warranting equitable relief against forfeiture, it was sufficient to compel such relief as a matter of law (POINT III).

When Respondents permitted Appellant's Subtenants to continue in possession, accepted more than enough rent from them to cure the delinquency and in effect ratified the substance of the Master Lease by signing a "new" lease containing essentially the same language as the former document, such conduct constituted a waiver of forfeiture (POINT IV).

The $2000.00 cash consideration delivered to Respondents 6 months before further money became due under the lease or any purchase plan, and which would have been retained if said further funds did not come, was certainly a valid legal consideration that effectuated all the purchase privileges as severable provisions. These privileges, by any interpretation of the subject document, are not limited by or merged into the leasehold terms and survive said lease irrespective of what happens to the latter (POINT V).

Although frustrated in presenting evidence which was clearly relevant and admissable pursuant to Appellant's Amended Counterclaim, the aforementioned points of this brief do refer to enough uncontroverted proof introduced into the record which warrants the relief requested by Appellant in this appeal. However, in an

abundance of caution Appellant has described procedural error, and error that may be just an oversight (judgment includes land never at issue), going to the heart of this action. That is, by allowing Appellant's Amended Counterclaim the issues surrounding the Subtenants became viable matters integrated into this litigation and it was inconsistent therewith, not to mention the legal inpropriety, to decline joining them as parties defendant so as to broaden Appellant's area of inquiry. Moreover, had said Subtenants been properly joined as defendants, counsel for Plaintiffs-Respondents would have been in conflict of interest between such adverse parties although said conflict still existed concerning the matters herein despite the joinder issue. (POINT VI).

DATED this 21st day of October 1975.

Respectfully submitted,

DON R. STRONG,
Appellant's Attorney

CERTIFICATE OF SERVICE

Served two copies of the foregoing Brief of Appellant Park City Utah Corporation upon counsel for Respondents, by mailing the same to them at their address set forth on the cover hereof, postage prepaid, this 21st day of October 1975.