

2001

IHC Health Services, Inc., a Utah non-profit corporation v. D&K Management, Inc., a Utah corporation : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

IHC HEALTH SERVICES, INC., a)	
Utah non-profit corporation,)	
)	Priority No. 15
Plaintiff/Appellee,)	
)	Case No. 20010508 SC
v.)	
)	
D&K MANAGEMENT, INC., a Utah)	
corporation.)	
)	
)	
Defendant/Appellant.)	

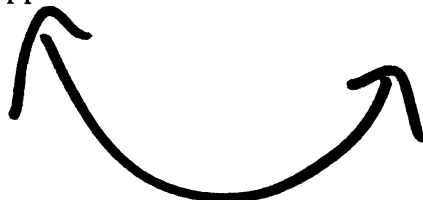
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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(j).

II. DETERMINATIVE STATUTES

None.

III. STATEMENT OF CASE

A. Procedural History

Intermountain Health Care Heath Services, Inc. (“IHCHS”), as landlord, brought a lawsuit to enforce its rights under a certain lease agreement (the “Lease”) between IHCHS and appellant D&K Management, Inc. (“Appellant” or “D&K”), as tenant. The property subject of this lawsuit is currently being developed into a hospital complex and is located at approximately 5100 South State Street, Murray, Utah. D&K operates a private club at the location known as “The Southern Exposure.”

Factually, it is undisputed that D&K failed to pay rent as specified in the Lease in March 1998, such rent not being paid within 10 days of the date due. It is undisputed that the Lease provides the landlord the right, among other options, to terminate the Lease if the tenant fails to pay rent for a period of 10 days after rent falls due. IHCHS elected to exercise its rights under the Lease to terminate D&K’s leasehold for failure to pay rent in a timely fashion. On April 14, 1998, IHCHS sent D&K a Notice of Default and Forfeiture of Lease Agreement pursuant to the terms of the Lease (a copy of which is annexed hereto as Ex. A). When D&K refused to vacate the premises, IHCHS initiated these proceedings, seeking to forfeit D&K’s leasehold interest.

In response to IHCHS' complaint, D&K counterclaimed seeking declaratory relief, arguing that (1) the Lease had been modified to eliminate the due date for each rent payment, and (2) IHCHS had waived its right to terminate, or should be estopped from terminating the Lease. After the pleadings closed, IHCHS filed a motion pursuant to Rule 12(c), Utah R. Civ. P., seeking an award of partial judgment on the pleadings, leaving for trial only the issue of monetary damages owing to IHCHS for D&K's unlawful holdover after IHCHS lawfully terminated the Lease. D&K filed a cross-motion for summary judgment, asking the court to rule as a matter of law that it was entitled to the declaratory relief it sought.

Evidence in the form of affidavits and deposition transcripts was filed both in support of and in opposition to D&K's cross-motion for summary judgment. Moreover, during the briefing process of these motions, D&K filed two separate motions for temporary restraining orders (the "TROs"), which motions were fully briefed, including the filing of supporting and opposing affidavits.¹

The trial court entertained oral argument on the TROs on March 22, 2001. On March 28, 2001, the trial court issued a ruling denying both TROs. D&K then filed a petition with this Court seeking an interlocutory appeal and a stay pending the decision on its petition for interlocutory appeal. On April 4, 2001 this Court denied D&K's motion for a stay pending the decision on its petition for interlocutory appeal. Then, on

¹ The TROs sought to prevent IHCHS from removing a sign in front of the subject property and from dismantling the remainder of the stripmall which had surrounded The Southern Exposure.

April 19, 2001, IHCHS stipulated with D&K for the withdrawal of D&K's petition for interlocutory appeal related to the unsuccessful TROs.

Oral argument on the parties' cross-motions was held on April 13, 2001, and on May 31, 2001 the trial court filed its own Memorandum Decision granting IHCHS' motion for partial judgment on the pleadings and impliedly denying D&K's cross-motion for summary judgment.

B. D&K's Appeal and Summary of IHCHS' Argument

D&K's appeal, as summarized by the Appellant, is rooted in the argument that the trial court improperly relied upon the analysis in Olympus Hills Shopping Ctr., Ltd v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445 (Utah Ct. App. 1994), and Living Scriptures v. Kudlik, 890 P.2d 7 (Utah Ct. App. 1995) to find that IHCHS had not waived its right to forfeit the Lease. Appellant claims that Olympus Hills and Living Scriptures improperly granted the trial court the freedom to consider the "totality of the circumstances" (App. Br. at 14) when determining whether an alleged acceptance of rent after a breach of lease constitutes a waiver, because according to D&K, Woodland Theaters, Inc. v. ABC Intermountain Theaters, Inc., 560 P.2d 700 (Utah 1977), abridged that right and "held" that any acceptance of rent after any breach of lease constitutes a waiver of the remedy for the breach.

As set forth below, D&K misapprehends the actions of the trial court and the relevant holdings at issue. Factually, IHCHS never accepted rent after it declared a default for D&K's failure to pay rent, nor did it ever knowingly accept rent at any time

after D&K's breach. This undisputed fact (See Mem. Decision at 4, 6-7; R. 633, 635-36.) makes D&K's legal argument moot.

Moreover, D&K misreads Woodland, Olympus Hills, and Living Scriptures in an attempt to create an appealable issue. Neither Olympus Hills nor Living Scriptures contradicts Woodland, and the trial court properly applied all three of those cases. These cases all stand for the proposition that if a landlord knowingly treats a lease as subsisting after learning of a tenant's breach, it cannot thereafter terminate the lease for that same breach. They all further recognize that it is not the acceptance of rent that determines if or when a waiver of the breach has occurred, but whether the landlord has intended to treat the lease as a subsisting contract notwithstanding the breach. Both Olympus Hills and Living Scriptures expressly found that waivers had not occurred merely because a rent check was cashed or, in the case of Living Scriptures, four checks were cashed, after the respective landlords claimed forfeiture of the leases.

In brief, D&K's appeal must be denied and the trial court's ruling upheld as a matter of law because:

1. It is undisputed that the pleadings state on their face a breach of lease by D&K which according to the Lease, provides IHCHS with the right to terminate the Lease; and

2. D&K's defenses of waiver and estoppel fail both factually and legally.

Accordingly, this Court should affirm the existing award of partial judgment on the pleadings.

IV. STATEMENT OF FACTS

A. Appellant's Statement of Facts Is Erroneous

Appellant provides a lengthy statement of facts at pp. 4-13 of its brief.

Unfortunately, the Statement of Facts is set forth in general prosaic form, without numbered paragraphs, making direct challenges to the claims difficult. Many of the assertions posited by D&K are, perhaps needless to say, disputed by IHCHS. Indeed, some of the facts set forth by Appellant for this Court contradict the factual findings of the trial court. For example, D&K asserts as a “fact” that IHCHS “accepted” D&K’s April 1998 rent check even though March 1998 rent had not been paid. (Appellant Br. at 7-8.) However, in its Statement of Facts, the trial court expressly found from the affidavits and deposition testimony presented to it that D&K’s April rent was tendered “incorrectly.” (Mem. Decision at 2; R. 631.) Thus, that rent had not been knowingly accepted. Because IHCHS was granted partial judgment on the pleadings, IHCHS contends that the facts which this Court should base its review upon are those set forth in the pleadings. Nevertheless, to clarify the record, IHCHS will respond to certain facts claimed by Appellant that IHCHS contends were not established below.

1. Facts Disputed by IHCHS

Lease Term. D&K claims as a fact that the Lease provided it with three separate five-year renewal options. (App. Br. at 5.) This “fact” is actually part of the case still pending at the trial court and is not resolved by the partial judgment awarded to IHCHS. IHCHS has always contended that the Lease allowed D&K only one five-year extension, not three, and this “fact,” while not particularly germane to the issue now before this

Court, is the subject of pending litigation at the trial court level. D&K's motive for claiming this "fact" is obviously an attempt to gain sympathy by claiming that many years of its Lease term are being forfeited. It is IHCHS' position that the term of the Lease would have expired in any event in 2004.

History of Late Rental Payments. D&K describes a general history of being allowed to make late payments, without penalty, over a period of several years while a tenant at the subject property. D&K's description is not necessarily false, just patently misleading to this Court. It is true that D&K paid rent late without having its Lease forfeited in the past. However, there are two important facts that D&K omits, but that were of great relevance to the trial court:

1. Although D&K's Lease was not terminated for prior late payments, other default options under the Lease were exercised by the landlord. Several Notices To Pay or Quit were served, late charges and penalties were assessed and the like. (E.g., R. at 292, ¶ 2.) It is undisputed that the Lease grants several options to the landlord in case of late payment. (See § 17 of Lease, attached as Ex. A to Brief of Appellant.) In short, although the option of forfeiting the Lease had not been previously exercised, other default options had been exercised, and therefore, D&K's attempt to describe a scenario in which it had free rein to pay rent whenever it desired, if at all, is patently false. (E.g., R. at 292; Aff. of Rideout.)

2. D&K's assertion also ignores that when IHCHS acquired the property from the prior landlord in January 1998, it sent a letter to D&K informing D&K that IHCHS was the new property owner and that it expected rent to be paid on time and to the

property managers. (R. at 292; see also IHCHS letter, attached as Ex. D of Appellant's Brief.) Therefore, even if the prior landlord had allowed late payments, which both the prior landlord and IHCHS dispute (E.g., R. at 292, 293.), D&K was on notice that the new property owner, IHCHS, expected timely rent payments.

April Rent. D&K also mysteriously claims to have paid April 1998 rent in a timely manner. As the trial court found, D&K failed to tender April rent to the property managers as directed and instead gave the check directly to an unknowing Intermountain Health Care ("IHC") employee, who merely cashed the check in due course, without knowledge of these proceedings or IHCHS' desire to terminate the Lease. For this reason, IHCHS' Notice of Default referenced two months of missed rent (i.e., March and April 1998). It is true that IHC cashed a check from D&K that D&K designated as "April rent." However, D&K breached the instructions for paying rent by side-stepping the property managers, and accordingly, IHCHS as landlord did not knowingly "accept" that rental payment. Moreover, because March 1998 rent still had not been paid, IHCHS' Notice of Default still advised D&K of a subsisting breach for which IHCHS had the right to exercise any of its contractually reserved options.

B. Relevant Facts for This Court to Consider

As indicated above, IHCHS contends that because IHCHS was awarded partial judgment on the pleadings, the only facts that should be considered are those set forth as undisputed in the pleadings:

1. In January 1998, IHCHS purchased a strip mall at 52nd South State Street, Murray, Utah from Medical Plaza 9400. (Answer ¶ 7; R. at 39.)

2. Before that purchase, D&K leased space in the mall (specifically, 5142 South State Street) from Medical Plaza 9400, under a written lease agreement dated July 18, 1994 (the previously identified Lease). (Answer ¶ 5; R. at 39.) A true copy of the Lease is annexed hereto as Exhibit A and incorporated herein by this reference.

3. When IHCHS purchased the mall, it accepted an assignment of Medical Plaza 9400's interest in the Lease. (Answer ¶ 7; R. at 39.)

4. With the assignment of the Lease, D&K became IHCHS' tenant. Pursuant to section 3 of the Lease, D&K was obligated to pay IHCHS \$3,280 per month in rent. (Answer ¶¶ 7, 8; R. at 39, 40.)

5. According to Section 3 of the Lease, this rent was due "in advance of the first day of each calendar month" (Answer ¶ 8; R. at 40.)

6. Section 17.1 of the Lease provides, in pertinent part:

Default by Tenant. Upon the occurrence of any of the following events, Landlord shall have the remedies set forth in Section 17.2:

[a] Tenant fails to pay any other sum due hereunder within (10) days after the same / shall be due.

7. Section 17.2, in turn, provides, in pertinent part:

Remedies. Upon the occurrence of the events set forth in Section 17.1, Landlord shall have the option to take any or all of the following actions, without further notice or demand of any kind to Tenant or any other person:

[c] Termination of this lease by written notice to Tenant

(Answer ¶ 14; R. at 18-19.)

8. After IHCHS took ownership of the property leased to D&K, D&K timely paid rent for February 1998. (Answer ¶ 9; R. at 40.)

9. D&K did not make any rent payment for March 1998, during March 1998. (Answer ¶ 10; R. at 40.)

10. On April 14, 1998, IHCHS gave D&K written notice that it was terminating the Lease.² (Answer ¶ 16; R. at 42.) (A copy of the “Notice of Default and Forfeiture of Lease Agreement,” is attached as Ex. A hereto.)

11. On or about March 1, 1999, D&K and IHCHS entered into a Consent, Reservation of Rights and Escrow Deposit Agreement whereby D&K could tender what it claimed to be additional accruing rents and IHCHS could reject such payments without waiving any of its rights. (R. at 157-162.)³

² At the time the letter was sent, IHCHS did not know that D&K had allegedly attempted to pay rent for April 1998. The Notice of Default and Forfeiture of Lease Agreement made reference to such failure. IHCHS subsequently discovered that D&K had delivered a check to IHC’s corporate offices (rather than to the property managers) and had designated the check as “April rent.” However, it is still an undisputed fact that as of April 15, 1998, D&K had failed to pay March, 1998 rent. Additionally, when D&K ultimately tendered March, 1998 rent on April 16, 1998, that check, like all subsequent rental payments, was rejected. Since that time, IHCHS has placed all of D&K’s tendered rents in escrow, according to an agreement that IHCHS “does not waive its claim of default and/or forfeiture of the Lease Agreement by allowing D&K Management to continue to occupy the Leased Premises . . .” (Answer, ¶ 20.) In short, it is an undisputed fact that no rent payments were accepted by IHCHS after it delivered the Notice of Default and Forfeiture of Lease Agreement to D&K.

³ Specifically, paragraph 4 of that document provides that

[T]he parties agree that, by the execution and delivery of this Escrow Agreement, IHCHS does not waive its claims of default and/or forfeiture of the Lease Agreement against D&K Management by allowing D&K Management to continue to occupy the Leased Premises or to make any one

C. The Court Can Grant IHCHS' Motion Despite Disputed Facts

While there are numerous disputed facts that would normally require a trial, this Court is able to uphold the trial court's award of partial judgment on the pleadings. D&K admitted on the pleadings and confirmed by affidavit all of the facts necessary to establish IHCHS' breach of lease claim. D&K's affirmative defenses of waiver and estoppel fail as a matter of law. Accordingly, the trial court granted IHCHS' motion for partial judgment on the pleadings notwithstanding the disputed facts. In contrast, D&K attempted to convince this Court that it was entitled to summary judgment on various theories that the Lease had been modified. Numerous facts were disputed in that context. But, because D&K's claims were improper as a matter of law, those disputed facts did not prevent the trial court from granting IHCHS' motion for partial judgment on the pleadings and should not prohibit this Court from upholding that award.⁴

or all of the Escrow Deposits, and all of IHCHS' claims and assertions against D&K Management, including without limitation those set forth in the Default Letter, and against any defenses of D&K Management, whether articulated before or after the date of this Escrow Agreement, are expressly reserved and not waived by reason of this Escrow Agreement and shall not in any way be lessened or diminished by reason of or in connection with the execution and delivery of this Escrow Agreement.

⁴ Significantly, D&K has asked this Court to enter summary judgment in D&K's favor rather than remand for trial (App. Br. at 40.) Therefore, it must necessarily be D&K's position that the issues presented can be adjudicated as a matter of law despite any disputed facts.

V. RESPONSE TO STATEMENT OF ISSUES
AND STANDARD OF REVIEW

As set forth in the Statement of the Case, IHCHS never brought a motion for summary judgment in this matter. Nevertheless, D&K's description of the issues to be determined by this appeal include assertions that the trial court erred by granting IHCHS summary judgment despite material disputed facts. Moreover, many of the issues presented by D&K for resolution assume legal and factual conclusions that the trial court did not share with D&K. For instance, D&K's first stated issue on appeal is whether IHCHS waived its right to forfeit the Lease based upon D&K's failure to pay March 1998 rent after IHCHS accepted D&K's April 1998 rent. (Appellant Br. at 1.) However, as set forth above, the trial court found that IHCHS never intentionally or knowingly accepted April 1998 rent because it was not tendered in accordance with the parties' contract. (Mem. Decision at 2; R. at 631.) Simply stated, many of the issues D&K have put before this Court assume facts not in the record.

Furthermore, IHCHS contends that the legal standard for review that D&K has posited is only partially correct. D&K refers to several cases for the proposition that this Court will review an award of summary judgment for correctness. Again, IHCHS has not sought summary judgment, but IHCHS agrees that the trial court's legal conclusions as to whether judgment on the pleadings was appropriate is reviewed for correctness. See e.g., Mountain America Credit Union v. McLellan, 854 P.2d 590, 591 (Utah Ct. App. 1993) (cert. denied, 1993).

However, one of the issues raised in D&K's cross-motion for summary judgment was waiver. Waiver by its nature is a mixed question of fact and law. This Court has expressly held that appellate courts should grant broad discretion to trial courts in determining whether a waiver has occurred in any particular case. State v. Pena, 869 P.2d 932, 933 (Utah 1994); see also Living Scriptures, 890 P.2d at 7,10 (Utah Ct. App. 1995) (same). Accordingly, this Court should review for correctness the trial court's determination that the pleadings establish a breach of lease giving rise to the termination of the Lease. However, it should defer to the trial court's determination that IHCHS had not waived that right unless this Court finds that the trial court abused its powers of review.⁵

VI. ARGUMENT

A. The Trial Court Properly Concluded that IHCHS' Right To Terminate the Lease Should Be Enforced as a Matter of Law Based upon the Pleadings

The law will enforce a lease agreement providing for termination of the lease when a tenant fails to pay rent on time. See, e.g., Woodland, 560 F.2d 700; Davidsohn v. Doyle, 825 P.2d 1227 (Nev. 1992); Welch v. Kiser, 668 So. 2d 9 (Ala. 1994); Holt v.

⁵ IHCHS' motion was granted as a matter of law. However, because D&K filed a cross-motion for summary judgment that went beyond the pleadings and then filed two separate motions for temporary restraining orders, at the time the trial court issued its ruling it had received and reviewed over a half-dozen affidavits and numerous deposition transcripts. Therefore, the trial court was well positioned to determine any factual issues as they related to D&K's claims of waiver or estoppel. The trial court's Memorandum Decision indicts that it was granting IHCHS' motion for partial judgment on the pleadings and summary judgment. IHCHS contends that to the extent the trial court's extensive review of affidavits and deposition transcript converted IHCHS motion to one for summary judgment, the trial court intentionally found that either award was proper in these circumstances.

Warren, 176 F.2d 479 (10th Cir. 1949). In this case, the Lease required the tenant to pay rent in advance on the first day of each month. The Lease also imposed a penalty if rent was not paid within 10 days of the due date. It is an undisputed fact that the first time D&K tendered March 1998 rent was on April 16, 1998. Under no circumstances could this tender be characterized as timely. It is further undisputed and was specifically found by the trial court that IHCHS rejected that belated tender of March 1998 rent. (Mem. Decision at 2.) Accordingly, IHCHS had the legal right to exercise any of the options the Lease provided to the landlord for the tenant's failure to pay rent. One option given to the landlord upon the tenant's failure to pay rent on time or within the grace period is the right to terminate the Lease. Because IHCHS acted in accordance with the Lease, the trial court properly awarded IHCHS partial judgment on the pleadings, finding that IHCHS could forfeit the Lease.

1. Plaintiff Never Waived the Right To Terminate the Lease

D&K's main argument before the trial court and again on appeal is that IHCHS waived its right to terminate the Lease. This argument is founded upon the claim that IHCHS cashed the check D&K had marked "April rent" even though it was forfeiting the Lease for D&K's failure to pay March 1998 rent. As discussed in the Statement of Facts, it is true that IHCHS cashed a check described by D&K as "April rent" on April 8, 1998 because D&K took that check directly to a corporate employee of IHC rather than to IHCHS' property managers as instructed. Accordingly, IHC unknowingly cashed that check in due course without knowledge of IHCHS' intention to terminate the Lease.

Still, the critical undisputed fact is that D&K had never paid its March 1998 rent, and therefore was not current on its rent on April 14, 1998 when IHCHS sent D&K the Notice of Default and Forfeiture of Lease Agreement.⁶ It is further undisputed that the first time D&K tendered March 1998 rent was on April 16, 1998, which was after IHCHS had elected to terminate the Lease.

IHCHS' conduct, as a matter of law, does not amount to a waiver. The Utah Supreme Court has explained that a waiver of the right to terminate a lease for a breach occurs when a landlord knowingly treats the lease as a subsisting contract after he or she learns of the breach justifying termination through acceptance of rent. See, e.g., Woodland, 560 P2d. at 700. In contrast, D&K reads Woodland to stand for the proposition that any rent check cashed after a breach of lease occurs forever waives the landlord's right to elect remedies for the breach, irrespective of the landlord's knowledge or intent. A brief analysis of Woodland clarifies the basis for its holding.

Woodland Theatres, Inc. leased a drive-in movie theater to ABC Intermountain Theatres, Inc. Woodland sued ABC to terminate its lease, alleging that before July 1974, ABC had failed in its obligation "to improve and maintain the premises and equipment in a good state of repair; [and] to operate the theater in a prudent, diligent, and businesslike

⁶ Significantly, IHCHS sent the Notice of Default and Forfeiture of Lease Agreement after the "April rent" check was cashed. At the time the Notice of Default and Forfeiture of Lease Agreement was sent, it is undisputed that D&K had failed to pay rent on its due date or within the 10-day grace period. Even if the "April rent" check was applied to March rent, April rent was then beyond the grace period. Conversely, if the "April rent" check was applied to April rent, the March rent was beyond the grace period. Under any interpretation of the events, at the time IHCHS elected its contractual remedy to default and forfeit D&K, D&K was in breach of the Lease.

manner” Id. at 701. For a time, Woodland refused to accept rent from ABC. In December 1974, however, Woodland accepted all rents it had previously rejected.⁷ Subsequently, while the lawsuit was pending, Woodland accepted regular rental payments. The court noted that, at the time of judgment, ABC was completely current on its rent. In this factual scenario, Justice Maughn recognized that a “landlord seeking enforcement of a forfeiture must take care not to do anything which may be deemed an acknowledgment of a continuation of the tenancy. Any act done by a landlord knowing of a cause for forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.” Id. at 702. (quoting 3A Thompson on Real Property (1959 replacement), at 576).

Although Woodland stated in discovery responses that it did not “in any respect admit that said acceptance constitutes a waiver of any claims for breach of the subject lease,” the court determined that such “unilateral reservation avails lessor nothing” and that “the acceptance of [the] rental payments after the action was filed precludes its right to enforce forfeiture.” Id. (emphasis added).

In contrast, IHCHS never accepted rent after it sent out its Notice of Default and Forfeiture of Lease Agreement. On April 16, 1998, having been in default for more than a month, and having received the Notice of Default and Forfeiture of Lease Agreement, D&K first tendered a check for March rent. The very next day, April 17, 1998, IHCHS

⁷ Apparently it was Woodland’s position that, by accepting rent, it was somehow recovering its damages.

returned the check, rejecting the tender. IHCHS has not cashed a rent check since delivering its Notice of Default and Forfeiture of Lease Agreement.

Because IHCHS never attempted to collect rent or otherwise treat the Lease as a subsisting contract after it delivered the Notice of Default and Forfeiture of Lease Agreement, under Woodland, IHCHS did not waive its ability to terminate the Lease. See also Welch, 668 So. 2d at 9 (right to forfeit lease not waived though rent prepaid for two months after event of default giving rise to right to forfeit; rent accepted before sending notice of forfeiture cannot constitute waiver); Davidsohn, 825 P.2d 1227 (in commercial lease only affirmative action by landlord to acknowledge ongoing lease after notice of termination waives right to terminate; technical waiver cannot occur in face of affirmative steps to enforce termination).

2. D&K's Arguments on The Waiver of Law Are Too Simplistic

D&K argues in essence that IHCHS waived its right to enforce the Lease by negligently and unknowingly reaffirming the existence of the Lease after D&K's breach. (D&K Mem. at 11-14.) The law with respect to waiver as a general principle is well-established. "A waiver is the intentional relinquishment of a known right." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993). The Utah Supreme Court has made clear that in order to constitute a waiver, "there must be [1] an existing right, benefit or advantage, [2] a knowledge of its existence, and [3] an intention to relinquish it." Id.; see also Geisdorf v. Doughty, 972 P.2d at 72; Pasker, Gould, Ames & Weaver, Inc. v. Morse, 887 P.2d 872, 876 (Utah Ct. App. 1994). In this case the

undisputed facts prove that IHCHS did not intend to relinquish its right to terminate the Lease after it learned of D&K's breach., and the trial court properly found as a matter of fact that once IHCHS elected its remedy of forfeiture, it never varied from its stated intention. (Mem. Decision at 4; R. at 633.)

3. D&K's Arguments on Facts Constituting Waiver Are Equally Flawed

To support its claim of waiver, D&K asserts that IHCHS reaffirmed the Lease by (1) accepting April's rent after the March breach; (2) accepting March's rent on April 16, 1998; (3) demanding an increase in the rent in June 1998; (4) demanding proof of insurance on January 21, 1999; (5) sending invoices to D&K for the increased rent amount; and (6) receiving checks mailed by D&K for rent though not cashing them. D&K's argument ignores the critical undisputed facts of this dispute contort the law of waiver, and seek to place an impossible burden upon landlords dealing with holdover tenants who unlawfully refuse to vacate rented premises despite breaching a lease agreement.

IHCHS will deal with each alleged act constituting a waiver below to demonstrate that D&K's arguments are without merit.

Accepting April's Rent After the March Breach. D&K argues that IHCHS waived the right to terminate the Lease by accepting April's rent on April 3, 1998, after the March breach. D&K's argument ignores that IHCHS did not terminate the lease until after it had unknowingly accepted April's rent and terminated the Lease based upon D&K's failure to pay March's rent. (R. at 611; Mem. Decision at 2; R. at 292-93 (Aff. of

D. Rideout.)) Cashing the April rent check did not constitute a knowing waiver. Rather than being delivered to the Daniel Rideout (“Rideout”) pursuant to IHCHS’ instructions, the April rent was sent directly to IHC’s corporate office. (R. at 292-93.) Because D&K failed to deliver the payment as instructed, IHC, which manages numerous properties, inadvertently cashed the check. (R. at 279; *Uriona Aff.*) Such inadvertent action cannot constitute a waiver. See Werner v. Baker, 693 P.2d 385, 387 (Colo. Ct. App. 1984) (recognizing that acceptance of rent must be “knowing”); Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York, 462 N.E.2d 1176, 1179 (N.Y. 1984) (same); Rhodes v. United States, 310 A.2d 250, 251 (D.C. Ct. App. 1973) (rejecting defendant’s claim of waiver when landlord did not intend to waive claim even when landlord accepted rent paid after notice of termination); see also Schottenstein Trustees v. Carano, 2000 WL 1455425 (Ohio Ct. App. 2000) (holding that acceptance of check must be knowing to constitute waiver). Because the trial court found as a matter of fact that the April check was improperly tendered to IHC in light of IHCHS’ instructions to its tenant, the inadvertent cashing of that check was not a waiver as a matter of law. (R. at 611; Mem. Decision at 2.)

Additionally, it is important to note that acceptance of the April rent was before IHCHS’ notice of intent to terminate. In Woodland, the Utah Supreme Court made clear that it was the acceptance of rent “after the action was filed” that precluded the landlord’s right to terminate. 560 P.2d at 702 (emphasis added). Because the inadvertent cashing of the April check happened before IHCHS’ notice of termination, it could not constitute an affirmation of the contract subsequent to the termination. Finally, even if inadvertently

accepting this one check constituted acceptance of rent, accepting a single rent payment after termination does not by itself, constitute a waiver. See Living Scriptures, 890 P.2d at 7, 9-10 (holding that landlord's acceptance of late payments four times did not constitute waiver because it was not routine).⁸

Accepting March's Rent on April 16, 1998. D&K argues that the trial court "erroneously refused to conclude that IHCHS accepted D&K's tender of March rent." (App. Br. at 30.) Indeed, as the trial court found, IHCHS never accepted March's rent. Although D&K delivered a check for March rent, after being advised of the termination, to IHCHS' property manager's elderly mother, IHCHS immediately returned the check without cashing it. (Complaint ¶ 10; Answer ¶ 10; Appeal Br. ¶ 30.) Returning tendered payments without cashing them cannot reasonably be considered accepting payment. See Black's Law Dictionary (5 ed 1979) (defining accepting as "[t]o receive with approval or satisfaction; to receive with intent to retain"); see also Corcoran Management Co., Inc. v. Withers, 513 N.E. 2d 218, 223 (Mass. Ct. App. 1987) (holding but not cashing rent check does not amount to acceptance of rent); Cipolla v. McCloskey, 1998 WL 852810 (Ohio Ct. App. 1998) (same); Burns v. Wallace, 78 N.Y.S. 2d 99,101 (Ny. 1948 (same); Pillot v. Moss, 53 N.E. 2d 73, 74 (Ohio Ct. App. 1943) (same); Rhodes, 310 A.2d at 251

⁸ This holding is not in disaccord with Woodland. In Woodland, the Landlord accepted five months of rental payments after previously rejecting those same payments and thus confirmed ABC Theaters' tenancy. 560 P.2d at 702. Such conduct did not occur in Living Scriptures, nor has it occurred in this case. Even if D&K's allegations are correct, IHCHS inadvertently accepted only one rental payment before its notice of termination. IHCHS has done nothing to confirm D&K's tenancy since it learned of D&K's breach.

(defining acceptance as receipt with intent to retain). Additionally, even if receiving the check for one day constituted acceptance, it was not knowing. Ms. Rideout, an elderly woman in her late 80s at the time, did not know that IHCHS had terminated the Lease and did not knowingly accept the payment with the intent to waive IHCHS' right to terminate the lease, nor was she authorized by the property managers to accept the check. (R. at 292-93.)

Demanding an Increase in Rent in June 1998; Demanding Proof of Insurance on January 21, 1999; Sending Invoices to D&K For Increased Rent Amount; Receiving Checks Mailed By D&K for Rent. The remaining actions that D&K asserts constitute a waiver of the right to terminate were taken after notice of termination and more importantly after D&K refused to vacate the premises. However, none of the actions constitute a waiver of D&K's breach because in none of these instances did IHCHS recognize D&K as a tenant under a subsisting lease. Indeed, the most important fact of this case in that regard is that IHCHS has not accepted a single payment from D&K since IHCHS gave notice of termination. (R. at 279; *Uriona Aff.*)

D&K's suggestion that IHCHS has repeatedly recognized D&K as a tenant in the face of IHCHS' uniform refusal to accept rent is nearly absurd. No landlord refuses rent from an entity it recognizes as its tenant. Since April 14, 1998, IHCHS has consistently maintained that the Lease was terminated and D&K was unlawfully in possession of the premises. *Id.* at 9-11. However, D&K refused to vacate the premises. In light of D&K's refusal to vacate, IHCHS was forced to take actions to protect its rights and its property. *Id.* If IHCHS prevails, it is entitled to damages for D&K's unlawful detainer. Those

damages include the reasonable rental value of the premises. See Pingree v. The Continental Group of Utah, 558 P.2d 1317 (Utah 1976). Conversely, if D&K prevails, IHCHS is entitled to accrued rental payments under the Lease. Accordingly, regardless of the outcome, IHCHS is entitled to recovery from D&K. Consequently, IHCHS proposed and began negotiations to prepare an escrow agreement whereby D&K would put the rental amounts into escrow pending resolution of this dispute. (R. at 157-62.) Such action cannot constitute a waiver. Certainly, IHCHS did not intend for these actions to relinquish its right to terminate. Indeed, the escrow agreement provides that “IHCHS does not waive its claims of default and/or forfeiture of the Lease Agreement against D&K Management by allowing D&K Management to continue to occupy the Lease Premises or to make any one or all of the Escrow Deposits” (emphasis added).

Likewise, D&K’s continued possession of the premises risks substantial damage to the property. It is not unreasonable for a property owner to require a holdover tenant who remains in possession after default to demonstrate adequate insurance. D&K’s argument would require landlords to risk destruction of the premises in order to terminate a lease whenever the tenant has refused to vacate. That argument was properly rejected by the trial court. Ultimately, D&K’s argument fails because since April 14, 1998, IHCHS has repeatedly told D&K that the Lease was terminated and it was only taking the actions set forth above to protect itself in light of D&K’s unlawful detainer.

Woodland, does not require a different result. In Woodland, the landlord accepted five months of rent after initially rejecting those rental payments. 569 P.2d at 702. The court noticed that, at the time of judgment, ABC was completely current on its rent. Id.

In this factual scenario, the court recognized that “[a] landlord seeking enforcement of a forfeiture must take care not to do anything which may be deemed an acknowledgment of a continuation of the tenancy.” Id. at 702. Conversely, in this case, IHCHS has continuously maintained and repeatedly told D&K that the Lease was terminated and D&K was obligated to vacate the premises. Since April 1998, IHCHS has never taken a different position and D&K’s claim of waiver is simply unsupported by the facts. Accordingly, IHCHS has not knowingly relinquished its right to terminate the lease based upon D&K’s breach. See Living Scriptures, 890 P.2d at 9-10; Welch, 668 So. 2d 9; Davidsohn, 825 P.2d 1227.⁹

4. The Trial Court Properly Found No Waiver to Have Occurred.

All reported decisions in this jurisdiction discussing an allegation that a landlord waived its right to enforce a lease by post breach actions support the trial court’s ruling.

⁹ The trial court cited with approval the Nevada case of Davidson v. Doyle, 825 P.2d 1227 (Nev. 1992) for the proposition that IHCHS should be allowed to take steps to protect its property (such as demanding insurance) during the course of litigation after D&K indicated it would not vacate the premises. The trial court found the analysis in Davidson, together with that in Living Scripture and Olympus Hills demonstrated that IHCHS should not be found to have waived its right to terminate the Lease simply because it took reasonable steps to protect itself after D&K refused to honor the Notice of Default. D&K argues that Davidson is inconsistent with Woodland, and hence the trial court’s reliance thereon is error. However, the point the trial court found persuasive in Davidson is in no way inconsistent with Woodland. Moreover, the trial court relied on Living Scripture and Olympus Hills for the same propositions.

Finally, a close reading of Davidson reveals that the court therein was noting that Woodland found a waiver for post-breach acceptance of checks while other jurisdictions have not found such conduct a waiver. Yet the proposition Davidson was cited for (i.e. reasonable steps taken to protect property after tenant refuses to vacate do not constitute waiver) has nothing to do with the rent payment analysis. D&K’s protestations about the trial court’s reference to Davidson are meritless.

For instance, in Olympus Hills, 889 P.2d 445,461, the Utah Court of Appeals did hold that in some circumstances acceptance of rent after a breach of lease may constitute a waiver of the breach. However, the case clarified that where there is clear and undisputed evidence that the landlord had taken a definite course of action to terminate the lease, the mere acceptance of rent does not constitute a waiver, because as a matter of law, a waiver must be an intentional act.

The facts do not show that Olympus Hills intended to waive its right to claim default under the lease. Rather, they show a definite course by Olympus Hills to terminate the lease. We acknowledge that acceptance of rental payments may constitute a waiver of a claim of breach. Givard v. Appleby, 660 P.2d 245, 248 (Utah 1983); Woodland Theaters, Inc. v. ABC Intermountain Theaters, Inc., 560 P.2d 700, 701 (Utah 1977). However, this is just one fact to consider in determining whether there was a waiver.

Id.

Similarly in Living Scriptures, 890 P.2d 7, the Utah Court of Appeals affirmed the trial court's ruling that Living Scripture's acceptance of late rent for four months did not waive its right to thereafter demand timely rent and evict Kudlik for failing to pay timely rent. Id. at 11. The Living Scriptures opinion also emphasizes the discretion given to trial courts to determine whether a waiver has occurred. Id. at 10.

In this instance the trial court concluded that based upon the undisputed facts as contained in the pleadings, IHCHS had taken sufficient express and determined steps to terminate the Lease such that the details complained of by D&K could not amount to an intentional waiver of its expressed intention to terminate the Lease. That ruling by the trial court was consistent with Utah law and should be upheld.

5. D&K's Attempt To Distinguish Olympus Hills and Living Scriptures Is Flawed and Disingenuous

Appellant's brief dwells repeatedly on the argument that "Living Scriptures and Olympus Hills . . . are both easily distinguishable on their facts from the present situation," (App. Br. at 21.) and that the trial court erred when it relied on those cases to award IHCHS partial judgment. Curiously, it was D&K that directed the trial court to those cases.

In Appellant's opposition to plaintiff's motion for partial judgment on the pleadings and memorandum in support of defendant's motion for summary judgment, D&K instructed the trial court that the elements of waiver as recognized by Utah law were expressed in Living Scriptures. (Id. at 19 n.8; R. 112.) ("The elements of waiver consist of . . ." (citing Living Scriptures). Having instructed the trial court that it should apply the rules of waiver as articulated in Living Scriptures it is inappropriate for D&K to now argue on appeal that the trial court erred by applying Living Scriptures' analysis under these facts. Importantly, D&K does not argue that the trial court misread Living Scriptures; rather, it argues that Living Scriptures is an aberration from the "purer" doctrine of waiver found in Woodland. D&K's arguments are not only disingenuous, but misapprehend Living Scriptures, Olympus Hills and Woodland as well. All of these cases recognize that a landlord can waive a contractual remedy, and all cases looked at the intent of the landlord to determine whether it had meant to treat the lease as ongoing when the complained of events occurred. Appropriately, the trial court relied upon

Woodland, Olympus Hills and Living Scriptures when it ruled that no waiver had been intended by IHCHS.

B. The Trial Court Did Not Erroneously Ignore D&K's Estoppel Arguments

Beyond claiming that IHCHS' conduct waived its right to terminate the Lease, D&K argued that the same conduct should estop IHCHS from terminating the Lease. D&K made this argument at the trial court level and now claims as reversible error that the trial court ignored these arguments. It is true that the trial court's Memorandum Decision did not use the term "estoppel" in granting IHCHS' motion and denying D&K's. However, the facts D&K claimed constituted an estoppel were the same facts D&K claimed constituted a waiver. D&K's entire estoppel argument is merely a second shot at the same target. D&K instructed the trial court in its memoranda that its argument of waiver and estoppel were essentially identical. (See, e.g., D&K Mem. in Supp. of Summ. J. at 19 n.8; R. 112.) ("same result [of estoppel] if this Court applied the closely-related doctrine of waiver").

Additionally, the trial court did address in its Memorandum Decision issues that would preclude D&K's estoppel claim. For instance, the trial court recognized that IHCHS' January 1998 letter to D&K advising it that it had a new landlord put D&K on notice of how and where it needed to pay rent from that time forward. (Letter is Ex. D of Appeal Br.) This fact would alone defeat D&K's claim that its prior history with the Rideout landlords should estop IHCHS from strictly enforcing the Lease.

Most importantly, however, the estoppel arguments D&K made to the trial court were legally flawed, even assuming all factual allegations made by D&K were true. As set forth below, IHCHS, as a matter of law, would not be estopped from enforcing the Lease.

1. IHCHS Should Not Be Estopped From Enforcing Payment Deadlines

D&K argues that IHCHS is estopped from enforcing the payment deadlines set forth in the Lease. (D&K Mem. at 15-19.) D&K's argument fails as a matter of law. A party alleging equitable estoppel bears the burden of proving three elements: (1) representation; (2) reliance; and (3) detriment. Weise v. Weise, 699 P.2d 700, 702 (Utah 1985). In this case, IHCHS made no representation and D&K did not reasonably rely.

To support its claim of estoppel, D&K asserts that IHCHS misled D&K into believing that it could make its payments whenever it was convenient and that it relied upon that belief in failing to make the March payment on time. Both arguments are factually and legally incorrect.

2. IHC Did Not Represent That D&K Could Make Payments Untimely

To support its claim of estoppel, D&K must prove that IHCHS made a false representation. See Weise, 699 P.2d at 702. In the absence of promissory estoppel, estoppel must be based upon a representation concerning a past or present fact and not a mere promise or statement of the future. Nunley v. Westates Casing Services, Inc., 989 P.2d 1077, 1088 (Utah 1999). Additionally, the alleged promise must be reasonably certain and not based upon the claimant's subjective understanding. Id. at 1089. In an

attempt to fulfill that burden, D&K argues that IHCHS misled D&K by (1) the Rideout's long-standing pattern of accepting late rent and (2) IHCHS' acceptance of February's rent late. D&K's argument fails as a matter of law.

D&K argues that the Rideout accepted late payments from D&K for years and therefore misled D&K into believing that it could make payments late. Initially, it is undisputed that D&K was never explicitly told that it could make payments untimely without risk of forfeiture. (R. at 272; Rideout Affidavit ¶ 6; see also Bangerter Affidavit at 28-29.) Instead, D&K relies upon its subjective belief from its alleged history of poor performance. Such subjective belief cannot be the basis for estoppel. Nunley, 989 P.2d at 1088. Moreover, there was no such agreement between the parties. Mr. Rideout explained in his affidavit that there was never an explicit or implicit agreement that D&K could pay rent untimely. (R. at 292-93; Rideout Aff. ¶ 2, 6.) In fact, when D&K failed to make timely payment, the Rideouts immediately demanded payment. Id. ¶ 2. On several occasions, the Rideouts sent formal notices to pay or quit to D&K requiring them to pay the rent within three day or to vacate the premises. Id. Indeed, on at least one occasion, the Rideouts threatened to terminate the Lease. Id. at Ex. A thereto. Additionally, Rideout often imposed late fees for failure to make timely payment. Id., see also (Bangerter Dep. at 29-30.) The notice to pay or quit and the late fees clearly refute D&K's alleged modification allowing it to pay the rent when it was convenient.¹⁰

¹⁰ Even if D&K's argument was factually correct, these representations were made at a time when the Rideouts were not agents for IHCHS and therefore cannot form the basis of an estoppel claim against IHCHS.

In essence, D&K's argument is that the landlord had never terminated the Lease previously and therefore IHCHS should not be allowed to do so in this case. That argument ignores the plain language of the Lease. The Lease provides for a variety of remedies upon default by D&K, including forcible reentry, suit for ejectment, termination of lease, and/or imposition of late fees. (Lease § 17.2.) The Lease specifically also allows the landlord to simply accept the payments late. Id. In addition to accepting late rent, however, the Lease provides that the Landlord may terminate the Lease. Additionally, the Lease provides that "Landlord shall have the option to take any or all of the following actions." Id. Accordingly, even if in the past the landlord had chosen to exercise its option to collect late rent, that decision does not preclude the landlord from choosing to exercise a different remedy for a subsequent breach. Even if the Rideouts did not choose to terminate the Lease, that does not preclude IHCHS from exercising that option upon D&K's default, as it did in this case.

Next, D&K argued that IHCHS represented that D&K could make untimely payments by accepting the February payment late. That argument ignores the facts and the law. Initially, whether the February payment was late is a disputed fact.¹¹ Additionally, even if IHCHS accepted payment late once, that hardly establishes the

¹¹ D&K bases its claim on the fact that the bank stamp on the back of the check shows it was processed on February 24, 1999. However, the check is dated February 1, 1999. Although it had been the Rideouts' practice to take checks to the bank when received, no one claims personal knowledge of when the February check was paid. It had always been IHCHS' understanding that the February 1, 1999 date on D&K's check was correct, notwithstanding D&K's current position that it apparently backdated the check to make it appear timely. For purposes of IHCHS' motion, D&K's answer admitted that it paid February 1998 in accordance with the "modified" Lease.

conduct necessary to constitute a representation upon which D&K could reasonably rely. See Living Scriptures, 890 P.2d at 9-10. Indeed, the cases cited by D&K to the trial court are distinguishable because in those cases the landlord and tenant had engaged in a course of dealing allowing the tenant to breach without any penalty for an extended period of time. See Gonsalves v. Gilbert, 356 P.2d 379, 352-53 (Haw. 1960); Stephens v. Alaska, 501 P.2d 759, 761 (Alaska 1972) (requiring course of dealing); Riverside Dev. Co. v. Ritchie, 650 P.2d 657, 663 (Idaho 1982) (repeatedly accepted rental payments late).

Finally, in this case IHCHS not only did not agree that D&K could make its payments untimely, IHCHS specifically informed D&K that rent had to be paid timely. In the letter sent by IHCHS to D&K notifying D&K that IHCHS had purchased the premises, IHCHS stated that payments “will be collected by the Rideouts at the regularly scheduled time each month.” (emphasis added.) This letter makes clear that the payments were to be made at the “scheduled time,” which, according to the Lease, was on or before the first of each month. D&K’s argument implies that this means that the payments could continue to be made late. However, that argument ignores the word “scheduled.” D&K’s alleged modification that it could make the payment when convenient is certainly not a “scheduled time.” Accordingly, IHCHS’ statement that payments must be made at the time scheduled in the Lease put D&K on notice that payments were to be made on or before the first of each month.

3. D&K Did Not Rely Upon IHCHS

Even if IHCHS somehow represented that D&K could make rent payments untimely, (which it did not) D&K must prove that it relied upon IHCHS' representations. The undisputed facts of this case prove that D&K did not rely upon any representation by IHCHS when it failed to make the March payment. Indeed, Kent Bangerter ("Bangerter"), D&K's person responsible for ensuring compliance with the Lease, testified that he believed March's rent had been paid timely. (Bangerter Dep. at 42.) Bangerter added that he did not find out the March rent was late until April 16, 1998, undoubtedly when he received the formal notice of termination. Id. Accordingly, it cannot be argued that D&K changed its actions in reliance upon any representation made by IHCHS. D&K was not intending to make its payment late in reliance on any promise made by IHCHS. Instead, D&K simply breached the agreement by its own negligence. That cannot form the basis of equitable estoppel.¹²

¹² D&K also argued to the trial court that the Lease provision requiring rent to be paid by the first of each month had been modified by the course of conduct between the parties. This argument is legally unsupportable. The Utah Statute of Frauds mandates that all leases with a duration of one year or more be in writing. Utah Code Ann. § 25-5-3. "Every contract for the leasing for a longer period than one year . . . shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease . . . is to be made" Id. Utah law is equally well settled that "if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable." Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985). The Utah Supreme Court has specifically held that while a "course of dealing" may be considered in construing an ambiguous contract, it will not suffice to create an agreement "especially when the agreement must be in writing to satisfy the statute of frauds." Hector, Inc. v. United Savings and Loan Ass'n, 741 P.2d 542, 546 (Utah 1987). Thus as a matter of law, a writing would be necessary between the parties to vary the rental due date specified in the Lease. Moreover, the course of conduct

4. The Trial Court Did Not Misunderstand The Facts.

D&K finally seeks a reversal by claiming that the trial court misunderstood the facts and entered judgment on misperception. D&K makes this claim on the grounds that the trial court “found” that IHCHS returned the “April check” when actually IHCHS (unknowingly) cashed the check.

Appellant is correct that IHCHS did unknowingly cash one of the two checks tendered in April. However, it denies that the trial court materially misunderstood the facts. The trial court did write that “IHC promptly returned the March and April checks to D&K” (Mem. Decision at 2; R. 631.) which is technically incorrect. But it had earlier noted that the “April rental payment was timely, but the method of tender was incorrect.” Id. This latter statement is correct. Additionally, since the payment tendered by D&K for “March rent” was delivered in April, and IHCHS returned that check, a claim that the “April check” was returned is technically correct. In any event, the semantics are immaterial. The trial court’s conclusion notes that judgment on the pleadings was granted because “D&K failed to pay its March 1998 rental payment.” As such, D&K is in default, and IHC’s Notice of Forfeiture is valid.” (Mem. Decision

between the parties could not be considered by the trial court as evidence of modification since course of conduct may only be examined to interpret an ambiguous written term. Here, the provision requiring rents to be paid in advance of the first of each month is unambiguous.

D&K appears to have abandoned this argument on appeal.

at 6; R. 635.) That statement is undisputedly true. Therefore, the award of partial judgment was based upon a correct, undisputed, fact.

VII. SUMMARY AND CONCLUSION

As IHCHS has attempted to demonstrate above, D&K's bases for appeal in this matter are without merit. In summary, the issues D&K has raised should be disposed of as follows:

Issue 1: Did the trial court err in concluding that IHCHS did not waive its right to forfeit the Lease, based upon D&K's failure to pay March 1998 rent on time, by accepting April 1998 rent and other benefits under the Lease after IHCHS had notice that D&K had missed the March payment?

Answer: No. IHCHS did not knowingly accept April rent after it knew of D&K's default. This is proven, among other ways, by merely reading the Notice of Default which informs D&K that IHCHS had not received March or April rent when it declared the default. D&K side-stepped the designated property managers, thus causing IHCHS' parent company to unknowingly cash a check. Because, as a matter of law, a waiver must be an intentional act to relinquish a known right, the inadvertent cashing of rent by a parent company, in the face of numerous other acts of direct intent to terminate the Lease, cannot be a waiver.

Issue 2: Did the trial court err in concluding that IHCHS did not accept the April 1998 rent but returned it to D&K?

Answer: No. First, the trial court correctly stated its understanding that IHCHS had not knowingly accepted April rent because it was not delivered to the

property managers, and instead was taken to an unknowing corporate employee of IHCHS' parent company. Second, the trial court specified that its ruling was based solely upon D&K's failure to pay March 1988 which is an undisputed fact. This makes the April rent immaterial.

Issue 3: Did the trial court err by concluding that there was no disputed issue of material fact regarding whether IHCHS' other actions constituted a waiver?

Answer: No. Even assuming all of D&K's allegations to be true, the acts complained of (i.e., demanding the holdover tenant maintain insurance, etc.) do not manifest an intent to relinquish its right to terminate the Lease. Rather, steps were taken in conjunction with a stipulated reservation of rights to allow D&K to remain in the property during litigation, and to protect IHCHS' legitimate interest during that period.

Issue 4: Did the trial court err by not concluding that there were material disputed facts surrounding whether Ms. Rideout irrevocably accepted March 1998 after Notice of Default?

Answer: No. The undisputed facts show that the check was returned, uncashed, to D&K, and as a matter of law "acceptance" requires receipt with knowledge and an intent to retain.

Issue 5: Did the trial court err by not addressing D&K's argument that its course of dealing with the prior landlord should estop IHCHS from enforcing the payment deadlines in the Lease?

Answer: No. The trial court disposed of this argument factually by finding that when IHCHS took ownership of the property, it put D&K on notice that IHCHS

expected payments to be made on the scheduled date. Additionally, as a matter of law, estoppel does not lie because D&K stated that it negligently missed the March rent payment, it did not rely on any statement of IHCHS in not making the payment. Finally, the issue is duplicative of D&K's waiver argument which the trial court did address—IHCHS engaged in no conduct which would relinquish its right to forfeit the tenant, and hence, engaged in no conduct which would reasonably lead the tenant to believe it had relinquished that right.

For the foregoing reasons, IHCHS asks this Court to uphold the trial court's ruling granting IHCHS an award of partial judgment on the pleadings.

DATED this 3 day of December, 2001.

STOEL RIVES LLP

A handwritten signature in black ink, appearing to read 'D. Moscon', is written over a horizontal line.

D. Matthew Moscon
Attorneys for Plaintiff

PROOF OF SERVICE

I hereby certify on December 3, 2001, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** were served by hand-delivery to:

Michael N. Zundel, Esq.
PRINCE YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, UT 84111

A handwritten signature in dark ink, appearing to be 'M. Zundel', is written over a horizontal line.

**IN THE SUPREME COURT OF THE
STATE OF UTAH**

IHC HEALTH SERVICES, INC., a)	
Utah non-profit corporation,)	
)	Priority No. 15
Plaintiff/Appellee,)	
)	Case No. 20010508 SC
v.)	
)	
D&K MANAGEMENT, INC., a Utah)	
corporation.)	
)	
)	
Defendant/Appellant.)	

ADDENDUM OF APPELLEE

Exhibit A



INTERMOUNTAIN HEALTH CARE

36 South State Street, 22nd Floor
Salt Lake City, Utah 84111-1486
(801) 442-2000

April 14, 1998

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

D&K Management, Inc.
5142 South State Street
Murray, UT 84107
Attention: Mr. Ken Bangerter

Re: Notice of Default and Forfeiture of Lease Agreement

Dear Mr. Bangerter:

As you know, IHC HEALTH SERVICES, INC. ("IHCHS"), acquired the property subject to, and took an assignment of, that certain Lease Agreement, dated July 18, 1994 (the "Lease"), relating to the premises at 5142 South State Street, Murray, Utah (the "Premises") (a copy of which is enclosed for your reference). As you also know, on or about January 26, 1998, IHCHS notified D&K MANAGEMENT, INC. ("D&K") of the purchase and assignment¹ and, at that time, instructed D&K that rents should be made to IHCHS and would be collected on behalf of IHCHS at the regularly scheduled time each month. A copy of the form of that letter is enclosed.

Although rents were paid by D&K as scheduled for February 1998, and notwithstanding efforts by the Rideouts to collect rent on behalf of IHCHS (as indicated in the enclosed letter), no rent payments have been made by D&K for March or April 1998. As outlined in Paragraph 3.1 of the Lease, D&K as Tenant is bound to pay to IHCHS a minimum monthly rental payment of \$3,280.00 on the first calendar day of each month. D&K has failed to pay IHCHS rent as required, inasmuch as it has failed to make payments for March and April 1998. Pursuant to Paragraph 17.1 of the Lease, IHCHS has the option of invoking any of the remedies enumerated in the Lease if D&K "fails to pay any rental or any other sum due hereunder within ten [10] days after the same / shall be due." D&K's failure to timely pay rents to IHCHS represents a default under the terms of the Lease entitling IHCHS to the remedies identified in Section 17.2 of the Lease. Specifically, subparagraph 17.2(c) of the Lease provides, in part, that upon default by D&K, including without limitation nonpayment of rent, IHCHS may terminate the Lease by written notice. Accordingly, you are hereby notified of the exercise by IHCHS of its option to terminate the Lease and of the forfeiture and termination of the Lease.² In connection with IHCHS's decision to terminate the Lease, you are referred to subparagraph 17.2(c) of the Lease, which provides, in pertinent part, as follows:

¹ By correspondence and in conversations between IHCHS's legal counsel and D&K's lawyers, D&K also was made aware of the purchase and assignment.

² IHCHS has chosen, at this time, to exercise this option rather than to pursue an action for unlawful detainer as provided by the Utah Code.

D&K Management, Inc.
April 14, 1998
Page Two

... In the event of such termination, tenant agrees to immediately surrender possession of the Demised Premises. Should Landlord terminate this Lease, Tenant shall have no further interest in this Lease or the Demised Premises and the Landlord may recover from the Tenant all damages it may incur by reason of Tenant's breach, including [1] the cost of recovering the Premises, [2] reasonable attorney's fees, and [3] the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then reasonable rental value of the Demised Premises for the remainder of the state term, all of which amounts shall be immediately due and payable at Landlord's election from Tenant to Landlord. In determining the rent which would be payable by Tenant hereunder subsequent to default, the rent for each year of the unexpired term shall be equal to the average Minimum Monthly Rent paid by Tenant from the Commencement Date to the time of default.

D&K is hereby directed to surrender possession of the Premises as identified in the Lease within thirty (30) days of the date of this letter or May 14, 1998. D&K's failure to peaceably surrender the Premises in good condition to IHCHS shall cause IHCHS to initiate formal legal proceedings to eject D&K and to recover, without limiting the exercise of other rights to which IHCHS may be entitled, attorneys' fees allowed under the Lease (see, for instance, Paragraph 23).

Thank you for your attention to these matters.

Sincerely,

IHC HEALTH SERVICES, INC.



Thomas Uriona
Corporate Real Estate Manager

Enclosures

cc: Douglas Hammer, Esq. (w/encls.)
Guy P. Kroesche, Esq. (w/encls.)