

1999

Litle Caesar Enterprises, Inc. v. Bell Canyon Shopping Center, L.C. : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LITTLE CAESAR ENTERPRISES, INC.,)
a Michigan corporation,)

Plaintiff and Appellee,)

vs.)

BELL CANYON SHOPPING CENTER,)
L.C., a Utah limited liability company,)

Defendant and Appellant,)

Case No. 990827-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM THE FINAL ORDER
OF THE THIRD JUDICIAL DISTRICT COURT OF SALK LAKE COUNTY,
JUDGE HOMER F. WILKINSON

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JURISDICTION OF COURT OF APPEALS

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78-2a-3(2)(j).

QUESTIONS PRESENTED

1. Did the district court correctly conclude that the lease renewal option was enforceable?

Standard of Review: Correctness. Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 362 (Utah App. 1998).

2. Did the district court correctly conclude that to the extent Bell Canyon's arguments concerning the lease renewal option create an ambiguity, the affidavit of an individual involved in the negotiation of the lease is admissible regarding the parties' intent regarding the lease renewal option?

Standard of Review: Correctness with broad discretion accorded to the district court. In re General Determination of the Rights to the Use of All the Water, Both Surface and Underground, within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab Counties in Utah, 982 P.2d 65, 72 (Utah 1999).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a declaratory judgment action to determine the respective rights and obligations of the parties under a lease renewal option provision. [R. 1-6, 40.] The lease

provides that Little Caesar Enterprises, Inc. (hereinafter, "Little Caesar"), the tenant under the lease, has the option to extend the lease for an additional five-year term by giving Bell Canyon Shopping Center, L.C. (hereinafter, "Bell Canyon"), the current landlord under the lease, notice of Little Caesar's intent to exercise the option. [R. 29.] The option further provides that the base rent, referred to interchangeably as the "minimum rent" or "basic monthly rent" for the first option period would be "at a market rate mutually agreed upon," but "shall not be higher than \$11.00 per square foot." [R. 29, 7-8.] The lease form utilized by the parties was a standard shopping center lease structured to permit percentage rent in addition to the base rent based on a percentage of sales. [R. 7-30, 167.] All of the percentage rent provisions, however, were specifically deleted from the lease so that only base rent applied. [R. 8.]

Little Caesar timely notified Bell Canyon that Little Caesar had elected to exercise the extension option and requested that the parties agree on the market rate. [R. 31.] Bell Canyon's response was that \$11 per square foot was not the ceiling on the base rent applicable during the option period, but was the floor. [R. 161.] Little Caesar subsequently notified Bell Canyon that Little Caesar would accept the maximum increase to \$11 per square foot provided by the lease. [R. 162-65.] Bell Canyon then asserted that the option is not enforceable and threatened to evict Little Caesar from the property. Little Caesar filed this action seeking a declaratory judgment that it properly exercised the right to extend the term of the lease for 5 years pursuant to the option and that the

monthly rent during the option period is \$11 per square foot, which is the maximum increase permitted by the lease language. [R. 1-6.]

B. Course of Proceedings.

Little Caesar filed this action seeking a declaration judgment that the lease option was valid and enforceable and that Little Caesar had properly exercised its rights thereunder. [R. 1-6.] Bell Canyon answered Little Caesar's Complaint and filed a Counterclaim seeking declaratory judgment. [R. 37-49.] Later, Bell Canyon moved for summary judgment, arguing that the lease option was unenforceable. [R. 92-94, 96-105.] Little Caesar filed a cross-motion for summary judgment, arguing that the lease option contained all essential terms, was valid and enforceable and had been properly exercised by Little Caesar. [R. 118-19, 121-33.] Little Caesar filed the Affidavit of Mark Whittle in support of its cross-motion for summary judgment. [R. 166-69.] Mr. Whittle negotiated the lease on behalf of Little Caesar and testified in the affidavit that the parties intended that percentage rent would be inapplicable to both the initial and renewal terms and that the terms "Basic Monthly Rent" and "Minimum Rent" were used interchangeably. [R. 167-69.] Bell Canyon moved to strike certain paragraphs of the Affidavit of Mark Whittle. [R. 213-14.] The district court denied Bell Canyon's motion to strike and motion for summary judgment and granted Little Caesar's motion for summary judgment. [R. 250, 287-90.] Bell Canyon filed this appeal. [R. 292-93.]

C. Statement of Facts.

On or about December 11, 1992, Little Caesar, as tenant, entered into a Shopping Center Lease (the "Lease") with Wallace Associates Management - Receiver covering property located in the Bell Canyon Shopping Center. [R. 2.] The Lease was not actually executed by the parties until February and March of 1993. [R. 21.] As a practicable matter, the Lease operated as an extension of a lease for the same property that was nearing its expiration date at the time the parties executed the Lease. [R. 167.] Bell Canyon subsequently acquired title to the leased property and succeeded to the rights and interests of the landlord under the Lease.

The original term of the Lease was for a period of five years commencing April 1, 1993 and expiring on March 31, 1998. [R. 7.] The monthly rent under the Lease for the initial term was \$1,190 per month, plus Little Caesar's share of common area maintenance expenses. [R. 7-10.]

An Addendum attached to the Lease and executed by Little Caesar and Wallace Associates Management concurrently with the Lease contains the following provisions:

3. Tenant's minimum rent payable for the remainder of the existing Lease term shall be reduced as of January 1, 1993, from \$1,350.65 to \$1,190.00 per month.

4. Tenant shall have two (2) options to extend this Lease for a period of five (5) years for each option. Tenant shall give Landlord written notice of its intent to exercise or not exercise said options one hundred and twenty (120) days prior to the expiration of the lease term or first option period. The Minimum Rent for the first option period shall be at a market rate mutually agreed upon by Tenant and Landlord. In the first option period, the Minimum Rent shall not be higher than \$11.00 per square foot. Rent in the second option period shall also be at market rates. Market rates shall be at

the then prevailing market rates for similar space in similar shopping centers within 5 miles of the Shopping Center. Landlord and Tenant shall mutually agree on the market rate within 30 days of Tenant's notification to Landlord that Tenant wishes to exercise an option period.

(Emphasis added.)[R. 29.] The "minimum rent" of \$1,190 per month referenced in paragraph 3 of the Addendum is the same as the "Basic Monthly Rent," which is defined in paragraph 1 of the Lease as the rent payable for years 1 through 5 of the Lease. [R. 29, 7.]

By a letter dated November 25, 1997, Little Caesar notified Bell Canyon that Little Caesar had elected to exercise its option to extend the lease for a term of five years commencing April 1, 1998 and expiring on March 31, 2003. [R. 31.] That notification was provided to Bell Canyon more than 120 days prior to the expiration of the original term of the Lease. [R. 31, 7, 29.] As provided by paragraph 4 of the Addendum, Little Caesar's letter requested that Little Caesar and Bell Canyon mutually agree on the market rate which, in no event, was to "be higher than \$11.00 per square foot." [R. 31, 29.]

By a letter dated December 8, 1997, Bell Canyon asserted that paragraph 4 of the Addendum to the Lease did not establish a cap of \$11 per square foot for monthly rent during the option period. [R. 161.] Rather, Bell Canyon asserted that "the minimum rent that [Bell Canyon] will accept on the exercise of the subject option is \$11.00 per square foot and that negotiations between [Bell Canyon] and [Little Caesar] start at that floor for the subject 5 year period." [R. 161.] As a result, Bell Canyon insisted on rent greater than the \$11 per square foot maximum set forth in paragraph 4 of the Addendum to the Lease. [R. 161.]

After efforts to establish the market rent, Little Caesar agreed to pay Bell Canyon the monthly rent calculated at \$11 per square foot, the maximum rent permitted by paragraph 4 of the Addendum to the Lease. [R. 159, 162-63.] Little Caesar has continued to make its monthly rent payments to Bell Canyon based on \$11 per square foot since the original lease term expired on March 31, 1998. [R. 196.]

On March 24, 1998, Little Caesar filed this action seeking a declaratory judgment that it properly exercised its right to extend the lease for the first option period of five years and that the monthly rent under the lease for the first option period shall not exceed \$11 per square foot (or \$1,636.25 per month). [R. 1-6.] Subsequently, both parties moved for summary judgment, [R. 92-94, 96-105, 118-19, 121-33.] and Bell Canyon moved to strike certain paragraphs from an affidavit filed by Little Caesar in support of its motion for summary judgment. [R. 213-14.] The district court denied Bell Canyon's motion to strike and motion for summary judgment and granted Little Caesar's motion for summary judgment, [R. 250, 287-90.], ruling that (i) Little Caesar properly exercised its option to extend the Lease for 5 years, (ii) during the renewal period the rent is \$11 per square foot, and (iii) the conditions of the lease, including the deletion of percentage rent, continue during the 5-year renewal period. [R.289-90.]

SUMMARY OF ARGUMENTS

The district court correctly determined that the renewal option in the Lease is valid and enforceable and has been properly exercised by Little Caesar. The renewal option sets forth all essential terms, including the amount of rent, for the renewal term, and Little

Caesar, the tenant, has agreed to the maximum rent provided by the formula set forth in the Lease. Bell Canyon's attempted obfuscation of the certainty regarding the amount of rent by suggesting that percentage rent should be added to the rent set forth in the renewal option must fail, because all percentage rent provisions in the Lease were plainly deleted.

Because the renewal option plainly and unambiguously is valid and enforceable, it is not necessary to address whether the district court properly ruled that "[t]o the extent that [Bell Canyon's] interpretation of the Addendum's use of the words 'minimum rent' creates an ambiguity, the Affidavit of Mark Whittle is admissible regarding the parties' intent." Nevertheless, the district court did correctly conclude that the Affidavit of Mark Whittle is admissible to the extent that Bell Canyon's arguments create an ambiguity.

Consequently, if this Court were to determine that the district court erred in concluding that the renewal option plainly and unambiguously is valid and enforceable on account of an ambiguity, the Affidavit of Mark Whittle, which is unrefuted, would eliminate any such ambiguity and render the renewal option valid and enforceable. Accordingly, the district court's Final Order enforcing the renewal provision should be affirmed by this Court.

ARGUMENT

A. The District Court Correctly Concluded that the Renewal Option in the Lease is Valid and Enforceable and was Properly Exercised by Little Caesar.

Bell Canyon contends that the district court erred by granting summary judgment in favor of Little Caesar because the renewal option found in paragraph 4 of the Addendum is allegedly too vague and indefinite to be enforced. According to Bell

Canyon, the option is too vague because it uses the term “minimum rent” instead of “basic monthly rent,” which is used in the main body of the Lease, and the option language does not specifically address percentage rent. [Appellant Br. 10-15.] When viewed in the context of the plain provisions of the Lease, however, Bell Canyon’s void for vagueness argument is totally without merit.

It is accurate that a contract will not be enforced “unless the obligations of the parties are ‘set forth with sufficient definiteness that it can be performed.’” Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979). A lease contract, however, “is not fatally defective as to price if there is an agreement as to some formula or method for fixing [rent].” Id. With respect to rent, all that is required for an option to be enforceable is that the rate of rent be set forth with a degree of certainty that leaves nothing to future determination. Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988). The Lease satisfies these requirements.

1. The term “Minimum Rent” is used interchangeably with “Basic Monthly Rent” and is clearly and unambiguously capped at \$11 per square foot during the first option period.

It is well-established that contracts should be construed to make sense, rather than be inconsistent, and interpretations which avoid invalidating a contract are favored under Utah law. Coulter & Smith. Ltd. v. Russell, 966 P.2d 852, 854 (Utah 1998); Hofmann v. Sullivan, 599 P.2d 505, 507 (Utah 1979). Thus, the district court was required to interpret the Lease as a whole and to attempt to give effect to the intent of the parties and not render the Lease absurd. See Nielsen v. O’Rielly, 848 P.2d 664, 665 (Utah 1992).

Bell Canyon's arguments regarding the Lease violate these key rules of contract interpretation. First, it is patently absurd to interpret the words "minimum rent" in paragraph 4 of the Addendum to mean something different than the same words in the immediately preceding paragraph. The term "minimum rent" clearly refers to and is used interchangeably with the term "basic monthly rent," which is defined in paragraph 1 of the Lease. Paragraph 3 of the Addendum to the Lease provides: "Tenant's minimum rent payable for the remainder of the existing Lease term shall be reduced as of January 1, 1993, from \$1,350.65 to \$1,190.00 per month." [R. 29.] There can be no question that this use of the term "minimum rent" refers to the basic monthly rent because the basic monthly rent being paid by Little Caesar on execution of the Lease was \$1,190. Indeed, paragraph 1 of the Lease defines "basic monthly rent" as the amount of \$1,190 paid per calendar month. [R. 7.] There is nothing to suggest that the use of the term "minimum rent" in paragraph 4 of the Addendum defining the monthly rent for the option period was intended to refer to something different than had been referred to in the immediately preceding paragraph. Consequently, Bell Canyon's assertion that the terms "minimum rent" and "basic monthly rent" are not synonymous is absurd.¹ Second, Bell Canyon's arguments, if accepted, would invalidate the Lease. For these reasons, the district court

¹Bell Canyon acknowledges in its brief the absurdity of its own argument. At page 13 of its brief, Bell Canyon states: "Minimum rent in commercial leases is commonly understood to mean the base or guaranteed rent to which a percentage rent may be added." [Appellant's Br. 13.] Consequently, there can be no question that "minimum rent" and "basic monthly rent" mean the same thing.

correctly concluded that “[t]he term ‘minimum rent’ is used in the Addendum to refer to the monthly rent defined in the body of the Lease as ‘basic monthly rent.’” [R. 288.]

Paragraph 4 of the Addendum specifies that the monthly rent during the first option period “shall be at a market rate mutually agreed upon by Tenant and Landlord,” but “shall not be higher than \$11.00 per square foot.” The language further states that “[m]arket rates shall be at the then prevailing market rates for similar space in similar shopping centers within 5 miles of the Shopping Center.” This language does not invalidate the option because it sets forth a specific formula or method for fixing the rent during the option period, clearly and unequivocally providing, “In the first option period, the Minimum Rent shall not be higher than \$11.00 per square foot.” More importantly, Little Caesar has agreed to pay \$11 per square foot, the maximum amount provided for in the Addendum.

There can be no ambiguity or uncertainty regarding the amount of rent during the first option period since Little Caesar has accepted the rate of \$11.00 per square foot. That is the cap on rent during the first renewal period that the landlord agreed to at the time the Lease was executed. Under Utah law, it is well established that there is an implied covenant of good faith and fair dealing in every contract. See Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991). “Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party’s right to receive the fruits of the contract.” St. Benedict’s Development Co. v. St. Benedict’s Hosp., 811 P.2d 194, 199

(Utah 1991). Little Caesar, as tenant, negotiated a renewal provision with the landlord establishing an \$11.00 per square foot cap on rent during the first renewal period. Little Caesar would be deprived of the fruits of the contract if Bell Canyon were permitted to act in bad faith and disavow its agreement to the cap. Thus, Bell Canyon's argument that the renewal option is unenforceable because it never agreed to the "market rate" is without merit. Accordingly, the district court correctly (a) rejected Bell Canyon's argument that the option is enforceable only if Bell Canyon had agreed upon the market rate for the rent and (b) concluded that the option is enforceable as a matter of law at the \$11 per square foot maximum amount set forth in the Addendum.

2. The Lease clearly and unambiguously deletes the percentage rent provisions.

Bell Canyon's contention that the rent for the option period is fatally vague because it fails to state what additional or "percentage rent" applies, is likewise misplaced. According to Bell Canyon, the option is unenforceable because the Lease does not provide a formula or mechanism for calculating percentage rent.

It is true that tenants in a shopping center often pay a percentage rent based on sales in addition to the minimum monthly rent. See generally annot. Rent Due Under Commercial Percentage Lease, 58 A.L.R. 3d 384, 398 n.53 (1974) (the most commonly used type of percentage lease is "one with a guaranteed minimum rental plus additional rental based upon a stated percentage of gross sales.")). The lease form used in this instance is designed to permit a percentage rent component to be added to the minimum or basic monthly rent. The percentage rent provisions, however, do not apply because

they were intentionally and unambiguously deleted from the Lease. The definition of “percentage rent” found in paragraph 1 of the Lease states that the percentage rent is zero percent. [R.7.] Moreover, the parties’ clear intent that percentage rent would not apply to the Lease is graphically shown by the rent provisions in paragraph 4 of the Lease, which provides in its entirety:

4. Rent.

4.1 Basic Monthly Rent. Tenant covenants to pay to Landlord without abatement, deduction, offset, prior notice or demand the Basic Monthly Rent in lawful money of the United States in consecutive monthly installments at such place as Landlord may designate, in advance on or before the first day of each calendar month during the Term, commencing on the Commencement Date. If the Commencement Date occurs on a day other than the first day of a calendar month, on the Commence date [sic] the Basic Monthly Rent shall be paid for the initial fractional calendar month prorated on a per-diem basis and for the first full calendar month occurring after the Commencement Date. If this Lease expires or terminates on a day other than the last day of a calendar month, the Basic Monthly Rent for such fractional month shall be prorated on a daily basis.

4.2 Consumer Price Index Escalation. Deleted

4.2.1 Escalation. Deleted

4.2.2 Index. Deleted

4.3 Percentage Rent. Deleted

4.3.1 Calculation and Payment of Percentage Rent. Deleted

4.3.2 Definition of Gross Sales. Deleted

4.3.3 Deductions and Exclusions From Gross Sales. Deleted

4.3.4 Recordkeeping. Deleted

4.3.5 Landlord’s Right to Audit. Deleted

[R. 8.]

Ignoring the parties' clear intent that percentage rent not apply to the Lease, Bell Canyon persists in its argument that percentage rent could apply to the rent during the renewal term. [Appellant Br. 13-14.] Bell Canyon's argument ignores the fact that it has long been established under Utah law that "[w]here the covenant for a renewal is general and does not state the terms of the renewal lease, the new lease is to be upon the same general terms and conditions as the old lease, which are applicable to the renewal period." Cummings v. Rytting, 207 P.2d 804, 805-06 (Utah 1949). In the instant case, the renewal provision in the Addendum does not indicate that the renewal term would be on any different terms than the initial Lease term, except that the monthly rent is increased to no more than \$11.00 per square foot.² Because percentage rent was deleted from the Lease, the district court correctly ruled that it does not apply during the renewal term.

3. Bell Canyon's reliance on the holdings in *Brown's Shoe* and *Pingree* is misplaced.

Bell Canyon erroneously contends that the decision in Brown's Shoe Fit Co. v. Olch, 955 P.2d 357 (Utah App. 1998), renders unenforceable the extension option in this case. In Brown's Shoe, the parties had signed a one page document entitled "Basic Lease

² Thus, it is absurd at best for Bell Canyon to rely upon Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 364 (Utah App. 1998), to argue that the renewal option is unenforceable because no percentage rent provisions were set forth in the renewal provision. [See Appellant Br. 13.] Unlike the lease provisions at issue in Brown's Shoe, there can be no serious argument in the present case that the Lease provides for percentage rent during the renewal term but failed to provide the details for calculating such rent.

Provisions,” which the court concluded was too vague and indefinite to be specifically enforced. The court concluded that the “Basic Lease Provisions” were nothing more than an agreement to agree:

The BLP, on its face, is an agreement to agree. The first paragraph states that the terms within the BLP are “to be incorporated into a final lease document executed by both parties.” Additionally, the BLP did not specify the percentage rental that Brown’s Shoe would have to pay during the option periods or any mechanism for determining that rental amount. The rental amount that Brown’s Shoe would pay during the option periods was left for future agreement—a sort of agreement to agree within an agreement to agree.

Id. at 362. The “Basic Lease Provisions” provided that prior to the beginning of each of the three option periods, the parties “would agree on the gross volume figure from which to base additional rent during each year” of the option period. Id. at 359. Because the gross volumes were not defined and there was no mechanism provided by the lease to establish the gross volume, the court determined that the document was unenforceable. In doing so, the court reaffirmed the standard established by the Utah Supreme Court in Pingree v. Continental Group of Utah Inc., 558 P.2d 1317 (Utah 1976), Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1998), and Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368 (Utah 1996). In each of those cases, the Utah Supreme Court held that:

The majority rule, in essence, is that a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination.

Brown’s Shoe, 955 P.2d at 363 (quoting Pingree, 558 P.2d at 1321). This standard is met in the instant case. The lease Addendum specifies the option period: “Tenant shall have

two (2) options to extend this Lease for a period of five (5) years for each option. [R. 29.]

A mechanism for determination of the rent is also stated: “the Minimum Rent for the first option period shall be at a market rate In the first option period, the Minimum Rent shall not be higher than \$11 per square foot.” As discussed above, “minimum rent” plainly refers to the “basic monthly rent” or base rent under the Lease. There can be no question or uncertainty regarding the amount of the base rent during the first option period because defendant has accepted the stated rate of \$11 per square foot. The notion that this case is anything like Brown’s Shoe where no mechanism was specified for the determination of percentage rent, is obviously without merit. As established above, the provisions relating to percentage rent were deleted. There is nothing in the language of the lease or the Addendum that would support an argument that percentage rent would apply at all. Consequently, the Brown’s Shoe decision has no application and certainly does not render unenforceable the option provision negotiated by the parties as an integral part of the Lease.

Bell Canyon’s reliance on Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976), is equally misplaced. In Pingree, the Utah Supreme Court held unenforceable a lease renewal provision that required the parties to renegotiate the rent but which had a cap on the renewal rent. The Pingree decision, however, is easily distinguishable from the facts in the instant case. The lessor in Pingree demanded that the new rental rate be the \$900.00 per month cap. The tenant on the other hand was willing to pay only \$500.00 per month. Because the parties were unable to agree, the Utah

Supreme Court concluded that it was reversible error for the trial court to set the rental rate during the renewal period at \$900.00 per month. In stark contrast to the Pingree case, Little Caesar has agreed to pay the maximum amount that Bell Canyon could require. Consequently, there is no need for the district court to review any factors or to create an agreement where none previously existed. The district court merely enforced the agreement between the parties to have the rent for the renewal term equal the maximum amount permitted under the Lease. The covenant of good faith and fair dealing does not permit Bell Canyon to refuse to agree to the maximum amount of rent that it was entitled to receive under the Lease. Therefore, the district court correctly ruled that the renewal provision in the Lease was plain and enforceable in accordance with its terms and that Little Caesar properly exercised the renewal option for an additional five-year term at the \$11.00 per square foot maximum amount of rent.

B. The District Court Correctly Exercised its Discretion in Denying Bell Canyon's Motion to Strike Portions of the Affidavit of Mark Whittle.

Bell Canyon contends that the district court erred by denying Bell Canyon's motion to strike portions of the Affidavit of Mark Whittle. [Appellant Br. 17.] According to Bell Canyon, the district court does not have the authority to admit affidavits concerning a contract under consideration for summary judgment unless the district court has previously entered a finding that the particular contract is ambiguous. Contrary to Bell Canyon's argument, the district court properly exercised its discretion in denying Bell Canyon's motion to strike and correctly ruled that the Affidavit of Mark Whittle is

admissible to the extent that Bell Canyon's arguments created any ambiguity as to the meaning of provisions the Lease Addendum.

District courts are granted broad discretion in their decisions concerning striking of affidavits in cases like the instant case. As the Utah Supreme Court recently discussed in In re General Determination of the Rights to the Use of All the Water, Both Surface and Underground, within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab Counties in Utah, 1999 UT 39, ¶25, 982 P.2d 65, 72,

There is no established standard for reviewing a decision striking affidavits. However, since an affidavit is simply a method of placing evidence of a fact before the court, we look to our prior decisions regarding the admission of evidence more generally. The standard of review for the admission of evidence varies depending on the type of evidence at issue. For example, in State v. Pena, 869 P.2d 932, 938 (Utah 1994), we stated that the decision to admit evidence under Utah Rule of Evidence 403 was on the "broad end of the [discretion] spectrum" like "other rulings on the admission of evidence [that] also generally entail a good deal of discretion," but in cases involving other categories of evidence, such as the admission of evidence that might violate the Fourth Amendment, "we narrow the [discretion granted] considerably for policy reasons." See id. (citations omitted). The same is true of evidence that has a high potential for unfair prejudice. See, e.g., State v. Dibello, 780 P.2d 1221, 1229 (Utah 1997) (holding admission of gruesome videotape as error). In civil cases such as the present one, where the evidence sought to be introduced does not raise concerns of the type that have produced heightened standards of sensitivity, a trial court decision to admit evidence is reviewed under a broad grant of discretion. See Pena, 869 P.2d at 938.

Thus, the district court's denial of Bell Canyon's motion to strike should be affirmed unless this Court determines that the district court violated its broad discretion in admitting evidence by denying that motion.

There is no basis to overrule the district court's denial of Bell Canyon's motion to strike. As Bell Canyon itself complains, the final Order provides that the Affidavit of Mark Whittle is admissible "[t]o the extent that defendant's interpretation of the Addendum's use of the words 'minimum rent' creates an ambiguity." (Emphasis added.)([R. 288, Appellant Br. 17.] Accordingly, the district court has expressly ruled that the Affidavit of Mark Whittle is admissible only to the extent that there is an ambiguity in the Lease. Thus, the district court did not consider the Affidavit to create an ambiguity in the Lease. Rather, the district court merely stated that the Affidavit may be considered to the extent that there is an ambiguity as to the meaning of "minimum rent" in the Lease Addendum. [R. 288.]

Bell Canyon fails to cite or discuss the Utah Supreme Court's recent decision in Ward v. Intermountain Farmers Association, 907 P.2d 264 (Utah 1995), concerning the consideration of evidence in determining whether a contract is ambiguous. Ward was discussed in the parties' memoranda submitted to the district court. [R. 228-29, 242-44.] In Ward, the Utah Supreme Court stated:

When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely it is based solely on the "extrinsic evidence of the judge's own linguistic education and experience." . . . A judge should, therefore, consider any credible evidence offered to show the parties' intention.

. . . .

If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of

the contract, then the extrinsic evidence is admissible to clarify the ambiguous terms.

Id. at 268 (emphasis added). In light of the Supreme Court's express approval of the consideration of extrinsic evidence in determining whether a contract is ambiguous and the district court's decision that the Affidavit is admissible only to eliminate ambiguity, this Court should conclude that the district court did not abuse its discretion in denying Bell Canyon's motion to strike portions of the Affidavit of Mark Whittle.

CONCLUSION

For the foregoing reasons, Little Caesar respectfully requests that this Court affirm the final Order and award to Little Caesar the additional costs and attorneys' fees incurred on this appeal.

DATED this 26th day of April, 2000.

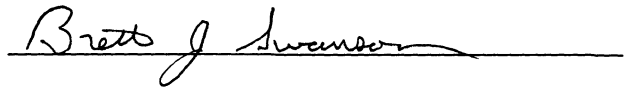
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CERTIFICATE OF SERVICE

I certify that on this 26th day of April, 2000, I caused two true and correct copies of the foregoing **APPELLEE BRIEF** to be served via United States Mail on the following:

Charles W. Dahlquist, II
Merrill F. Nelson
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Brett J. Swanson", is written over a horizontal line.