

2000

James Dishinger and Nancy Dishinger d/b/a TCBY Yogurt v. Jana Potter d/b/a Silver Queen Hotel : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES DISHINGER and NANCY	:	
DISHINGER d/b/a TCBY YOGURT,	:	Court of Appeals No. 20000081-CA
	:	
Plaintiffs and	:	District Court No. 960600106PR
Appellants/Cross-Appellees,	:	
	:	
vs.	:	
	:	Priority No. 15
JANA POTTER d/b/a SILVER	:	
QUEEN HOTEL,	:	
	:	
Defendant and	:	
Appellee/Cross-Appellant.	:	
	:	

BRIEF OF APPELLANTS

Appeal from the
Third Judicial District Court, Summit County
Honorable Pat B. Brian, Presiding over Trial
Honorable Robert K. Hilder, Presiding over Final Judgment

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to UTAH CODE ANN. § 78-2a-3(2)(j) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Did the trial court incorrectly conclude that there had been no pretrial accord and satisfaction that set the rental rate at \$19 per square foot per year, even though the jury specifically found all of the elements of an accord and satisfaction? (R. 337, 343, 347-49, 429-31, 468-69).

The trial court's conclusion presents a question of law, which this Court reviews for correctness, giving the trial court's determination no deference. *See Fibro Trust, Inc. v. Brachman Fin., Inc.*, 1999 UT 13, ¶19, 974 P.2d 288 (whether trial court properly applied the law in a particular case is a question of law); *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (appellate court reviews legal questions under correctness standard), *cert. denied*, 119 S. Ct. 1803 (1999); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994) ("Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of the law.").

2. Did the trial court incorrectly conclude that Ms. Potter had not waived forfeiture of the lease by accepting the Dishingers' rent payments after Ms. Potter had served the Dishingers with a notice to quit, and that the Dishingers were in

unlawful detainer and therefore liable for treble damages? (R. 338, 343, 350, 426-28, 469-72).

In the context of this case, the trial court's conclusion presents a question of law, which this Court reviews for correctness, giving the trial court's determination no deference. *See Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (appellate court reviews legal questions under correctness standard), *cert. denied*, 119 S. Ct. 1803 (1999); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994) ("Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of the law."); *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700 701-02 (Utah 1977) (lessor's acceptance of rent payments after initiating unlawful detainer action constituted waiver of unlawful detainer).

3. Did the trial court incorrectly conclude that the Dishingers were not entitled to attorney's fees, when in fact the Dishingers were the prevailing party? (R. 343, 352-54, 509-10).

The trial court's conclusion presents a question of law, which this Court reviews for correctness, giving the trial court's determination no deference. *See Lee v. Barnes*, 1999 UT App 126, ¶7, 977 P.2d 550 (whether a party is entitled to attorney's fees is a question of law); *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (appellate court reviews legal questions under correctness

standard), *cert. denied*, 119 S. Ct. 1803 (1999); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994) (“Utah case law teaches that ‘correctness’ means the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of the law.”).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Resolution of the issues on appeal involves the interpretation of the following statutory provisions:

UTAH CODE ANN. § 78-36-3(1)(C) (1996):

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

* * *

(c) when he continues in possession, in person or by subtenant, after default in the payment of rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due[.]

UTAH CODE ANN. § 78-36-10 (1996):

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78-36-10.5. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;

(d) the amount of the rent due, if the alleged unlawful detainer is after default in the payment of rent; and

(e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

STATEMENT OF THE CASE

Plaintiffs, James and Nancy Dishinger, instituted legal action against Defendant, Jana Potter, asking the trial court to interpret the lease for commercial space between the parties and to declare that the prevailing rental rate was \$19 per square foot per year or, alternatively, that a rental rate of \$19 per square foot per year had been set by accord and satisfaction. (R. 001-043). Additionally, the Dishingers claimed that Ms. Potter had overcharged them for common area

maintenance expenses and requested reimbursement for those overcharges.

(*Ibid.*). Ms. Potter counterclaimed for unlawful detainer. (R. 046-55).

At the conclusion of the trial on the parties' claims, the jury found, in addition to other findings not critical to this appeal, that (1) there was a legitimate dispute as to the "then prevailing rental rate of similar buildings in the Main Street area of Park City" at the time the Dishingers made monthly rental payments based upon \$19 per square foot per year as satisfaction in full, (2) the Dishingers notified Ms. Potter that their rent payments were made in full satisfaction of the disputed rent amount, (3) Ms. Potter accepted the Dishingers' monthly rent payments, (4) the actual "prevailing rental rate" for the renewal period in issue was \$25 per square foot per year, (5) Ms. Potter accepted the Dishingers' monthly rent payments after Ms. Potter had served the Dishingers with a notice to quit, and (6) the Dishingers owed Ms. Potter \$8,730 for the balance of base rent (*i.e.*, the difference between the \$19 per square foot rate on which the Dishingers had calculated their monthly rent payments and the \$25 per square foot rate the jury had determined after-the-fact was the "prevailing rental rate"). (R. 336-40) (Addendum A).

After extensive post-trial motions and proceedings, the trial court ultimately entered a final judgment on January 6, 2000, which, in those parts relevant to this appeal, (1) awarded Ms. Potter the sum of \$26,190.00 (\$8,730.00—the back rent

the jury found the Dishingers owed to Ms. Potter—trebled under the damages provision of Utah’s unlawful detainer statute), (2) awarded the Dishingers a credit of \$8,372.61 plus a proportionate amount of the property tax refund received by Ms. Potter—the amount the jury found the Dishingers had been overcharged by Ms. Potter for common area maintenance expenses, (3) declared that Ms. Potter’s acceptance of partial rent “did not waive forfeiture of the lease,” (4) declared that \$25 per square foot was the “prevailing rental rate,” and (5) declined to award either party attorney’s fees. (R. 605-08) (Addendum B). The Dishingers appeal from that judgment.

STATEMENT OF FACTS

Beginning in May of 1990, the Dishingers’ predecessor in interest leased commercial space from Ms. Potter on historic Main Street in Park City, Utah, in which they operated a yogurt store. (R. 297, Plaintiffs’ Trial Exhibit 1) (Addendum C). Pursuant to the written lease agreement, the Dishingers had the option to renew the lease for successive three (3) year periods. (*Ibid.*). The rental rate for a renewal period was to be the “prevailing rental rate of similar buildings in the Main Street area of Park City.” (*Ibid.*).

In February of 1996, the Dishingers properly exercised the option to renew. (R. 297, Plaintiffs’ Trial Exhibit 6). The Dishingers obtained an appraisal report that indicated that the “prevailing rental rate” was \$19 per square

foot per year. (R. 297, Plaintiffs' Trial Exhibit 4). Based upon the appraisal report, the Dishingers notified Ms. Potter that they would be paying monthly rent based on the \$19 per square foot per year rental rate. (R. 297, Plaintiffs' Trial Exhibits 8, 10, 11, 13 and 15). Ms. Potter responded that she believed the prevailing rental rate was \$30 per square foot per year. (R. 297, Plaintiffs' Trial Exhibits 7, 9, 12).

At the commencement of the renewal period, the Dishingers began paying Ms. Potter rent at the \$19 per square foot rate, putting Ms. Potter on notice that the Dishingers were paying the full rent required under the terms of the lease relating to the renewal period. (R. 297, Plaintiffs' Trial Exhibits 8, 10, 11, 13 and 15). After Ms. Potter cashed a few of the Dishingers' rent checks for the renewal period, she served the Dishingers with a notice to pay or quit, claiming that additional rent was due. (R. 297, Plaintiffs' Trial Exhibit 14). The Dishingers then instituted this legal action. (R. 001-043). Ms. Potter continued to accept and cash the Dishingers' monthly rent checks (which were based on the \$19 per square foot per year rental rate) through the date of trial. (R. 297, Plaintiffs' Trial Exhibit 15).

SUMMARY OF ARGUMENT

The rental rate applicable to the current term of the lease between the Dishingers and Ms. Potter is set forth in the lease as the "then prevailing rental

rate of similar buildings in the Main Street area of Park City". A bona fide dispute as to what constituted the "prevailing rental rate" arose between the parties. The Dishingers tendered monthly rent payments based upon a rate of \$19 per square foot per year as payment in full of the unliquidated monthly rental amount, and Ms. Potter accepted those monthly rental payments. Therefore, an accord and satisfaction occurred prior to trial which irrevocably set the rental rate at \$19 per square foot per year, thus rendering inconsequential the jury's subsequent determination at trial that the "then prevailing rental rate" was \$25 per square foot per year. Accordingly, the Dishingers paid rent in full for all relevant periods, were not in breach of the lease, were not in unlawful possession of the premises, and were not liable for additional rent or treble damages.

Alternatively, if an accord and satisfaction did not occur prior to trial, it is undisputed that subsequent to the service of a notice to pay or quit on the Dishingers, Ms. Potter continued to accept monthly rent and common area maintenance expense payments from the Dishingers pursuant to the lease. By doing so, Ms. Potter affirmed the ongoing effectiveness of the lease and waived forfeiture of the lease. Thus, at all relevant times the Dishingers have been in lawful possession of the premises. At most, Ms. Potter merely has contractual claims against the Dishingers for payments due pursuant to the terms of the lease,

and is not entitled to treble damages for unlawful detainer of the premises by the Dishingers.

Finally, the lease between the Dishingers and Ms. Potter expressly authorizes an award of attorney's fees to the prevailing party in any action under the lease. Because the Dishingers should be considered the prevailing party at trial and on appeal, they should be awarded their reasonable attorney's fees in an amount to be determined by the trial court on remand of this matter.

ARGUMENT

- A. An accord and satisfaction between the parties occurred prior to trial, which set the rental rate at \$19 per square foot per year, resulted in payment in full of rent by the Dishingers as of the date of trial, and thereby precluded a finding of unlawful detainer and an award of treble damages.**

The jury found that an accord and satisfaction had occurred between the Dishingers and Ms. Potter with respect to the rental rate for the leased space during the renewal period. The trial court, however, disregarded those findings and concluded that the Dishingers had not paid the rent in full and therefore were in unlawful detainer and liable for treble damages. The trial court rejected the Dishingers' argument that they were entitled to a judgement in their favor on their accord and satisfaction claim and on Ms. Potter's unlawful detainer claim. In doing so, the trial court committed legal error and thus, for the reasons that

follow, this Court should reverse and remand with an order that judgment be entered in favor of the Dishingers.

For there to be an accord and satisfaction concerning the rental rate at issue in this case, the jury had to find the following facts:

(a) The applicable rental rate was not a liquidated or set dollar amount, and there was a bona fide dispute or uncertainty regarding the applicable rental rate;

(b) The Dishingers tendered payment to Ms. Potter in full satisfaction of the disputed monthly rental amount; and

(c) Ms. Potter was on notice of the tendered payment by the Dishingers and accepted it.

See Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co., 844 P.2d 322, 325 (Utah 1992) (setting forth the elements of accord and satisfaction: “(i) a bona fide dispute over an unliquidated amount; (ii) a payment tendered in full settlement of the entire dispute; and (iii) an acceptance of the payment”).

The jury found each of those facts by answering “Yes” to the following questions contained in the Special Verdict:

1. Considering all of the evidence in this case, do you find by a preponderance of the evidence that a legitimate dispute existed as to the “then prevailing rental rate of similar buildings in the Main

Street are of Park City” at the time the plaintiffs made monthly rental payments based on \$19 per square foot as satisfaction in full?

2. Considering all of the evidence in this case, do you find by a preponderance of the evidence that the plaintiffs notified the defendant that these payments were made in full satisfaction of the disputed rent amount?

3. Considering all of the evidence in this case, do you find by a preponderance of the evidence that the defendant accepted monthly rent payments made by the plaintiffs which are calculated at a rate of \$19 per square foot?

Special Verdict, dated December 11, 1997, ¶¶ 1-3, at p. 2 (R.337)

(Addendum A).

Ms. Potter never has disputed those jury findings, nor has she argued that the evidence was insufficient to support them. Nor did the trial court express any concern about the validity of those findings. In short, the only issue before the trial court was whether, as a matter of law, the jury’s findings established a pretrial accord and satisfaction between the parties that disposed of Ms. Potter’s contention that the prevailing rental rate was something other than \$19 per square foot per year and that the Dishingers were in unlawful detainer. On that issue, the Utah Supreme Court’s decision in *Estate Landscape* is controlling.

In *Estate Landscape*, the issue was whether the trial court had committed reversible error in granting summary judgment against the defendant (Mountain Bell) on its claim that there had been an accord and

satisfaction between it and the plaintiff (Estate Landscape) concerning Estate Landscape's bill on a contract for snow removal services provided to Mountain Bell. *Estate Landscape*, 844 P.2d at 325. After its ruling on summary judgment, the trial court—subsequent to a trial to the bench—had entered a money judgment against Mountain Bell for an amount the trial court concluded was still owing to Estate Landscape on the snow removal contract. *Ibid*.

In its review of this Court's affirmance of the trial court's summary judgment ruling against Mountain Bell, the supreme court first determined that the undisputed facts made out each of the elements of an accord and satisfaction. *Id.* at 330-31.

Given the unchallenged findings of the jury with respect to accord and satisfaction in the instant case (which clearly establish that a pretrial accord and satisfaction between the Dishingers and Ms. Potter occurred), the result here should be similar to that in *Estate Landscape*.¹ The trial

¹ That the jury ultimately found the prevailing rental rate to be \$25 per square foot is of no consequence, in light of its findings concerning an accord and satisfaction—particularly the finding that the prevailing rate was in dispute when the Dishingers tendered rent payments in full satisfaction of the disputed rent amount. That is clear from *Estate Landscape*, where the supreme court said:

The mere fact that the trial court eventually identified the sum it believed to be in controversy does not mean that the damages were liquidated at the time Mountain Bell tendered the [payment in full satisfaction of the outstanding balance on Estate Landscape's bill]. * *

court plainly erred in ignoring the jury's findings and rejecting the Dishingers' accord and satisfaction claim. Because the matter should have ended with a judgment in favor of the Dishingers based on accord and satisfaction, the trial court further erred in entering a judgment in favor of Ms. Potter on her unlawful detainer claim.

Accordingly, this Court should hold that there was a pretrial accord and satisfaction between the parties concerning the rental rate for the option period, reverse the trial court's contrary judgment, and remand the case for entry of judgment in favor of the Dishingers.

B. Alternatively, Ms. Potter affirmed the ongoing effectiveness of the lease by accepting rent payments subsequent to the service of the notice to pay or quit, and thereby waived forfeiture of the lease and the ability to collect treble damages.

Alternatively, if this Court determines that an accord and satisfaction did not occur setting the rental rate at \$19 per square foot per year, then Ms. Potter still is not entitled to a judgment for unlawful detainer and treble damages, because she waived forfeiture of the lease by continuing to accept rent payments after service of the notice to pay or quit on the Dishingers. The trial court erred in entering such a judgment in Ms. Potter's favor.

* The relevant inquiry is not whether the claim was liquidated at the time of trial, but whether it was liquidated at the time Mountain Bell tendered its * * * payment.

At the outset, it is important to note the distinction between two different situations regarding the nonpayment of rent for leased property. The first situation is one in which a lease has been forfeited (for example, for nonpayment of rent), and the tenant no longer has any right to be in lawful possession of the premises. Such a tenant would be in "unlawful detainer" of the premises and subject to the provisions of UTAH CODE ANN. §§ 78-36-3 through -11, and potentially liable for treble damages. The second situation is one in which a tenant is in lawful possession of the premises pursuant to the terms of a lease, although the landlord may have contractual claims against the tenant (including a contractual claim for rent in accordance with the terms of the lease). The critical distinction between the two situations is that in the first situation the tenant is not in lawful possession of the premises because the lease is no longer in effect, and in the second situation the tenant is in lawful possession of the premises pursuant to an ongoing lease.

Against that backdrop, the Dishingers would be liable for unlawful detainer (and treble damages) only if they remained in possession of the leased premises after the lease with Ms. Potter had been forfeited (*i.e.*, was no longer in effect). *See, e.g., Monroc, Inc. v. Sidwell*, 770 P.2d 1022, 1025 (Utah Ct. App. 1989) (explaining the distinction between rents pursuant to a lease and damages for unlawful detainer). As explained below, the Dishingers were not in unlawful

possession of the premises, and thus the trial court erred in entering judgment against them for unlawful detainer and treble damages.

- 1. As a matter of law, Ms. Potter waived forfeiture of the lease by accepting rent payments from the Dishingers subsequent to the notice to pay or quit.**

It is undisputed that Ms. Potter accepted rent payments from the Dishingers after she served them with a notice to pay or quit. The jury answered “Yes” to the following question set forth in the Special Verdict:

Considering all of the evidence in this case, do you find by a preponderance of the evidence that the defendant accepted the monthly rent payments from the plaintiffs after the July 13, 1996 Notice to Quit?

Special Verdict, dated December 11, 1997, ¶ 8, at p. 3. (R. 337) (Addendum A).

Ms. Potter never has challenged that finding.

Under Utah law, it is clear that a landlord who serves a notice to pay or quit pursuant to the unlawful detainer statute may not thereafter accept rent payments from the tenant and continue to pursue an unlawful detainer action. *See, e.g., Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700, 701-702 (Utah 1977) (holding that by accepting rent after serving a notice to quit, landlord waived forfeiture of the lease and right to pursue unlawful detainer action). Under *Woodland Theatres*, in order to enforce the forfeiture of a lease and collect treble damages for unlawful detainer, a landlord plainly may not accept rent (including purported partial payments). If a landlord does accept rent

after initiating an unlawful detainer action (by serving a notice to pay or quit upon the tenant), the unlawful detainer statute no longer provides a vehicle for relief; at that point the landlord is relegated to seeking damages on a contract action based on the lease.

In the trial court, Ms. Potter relied on a non-waiver provision at page 19 of the lease in an effort to avoid the *Woodland Theatres* rule. Lease, dated May 23, 1990, at p. 24. (R. 297, Plaintiffs' Trial Exhibit 1) (Addendum C). However, that provision does not even reference forfeiture, but rather merely provides that the acceptance of rent by Ms. Potter "shall not be deemed to be a waiver of any preceding default by [the Dishingers] . . . of any term, covenant or condition of this Lease" *Ibid.* In other words, by accepting rent, Ms. Potter does not waive any contractual remedies that she may have against the Dishingers regarding other existing breaches of the lease by the Dishingers. Ms. Potter's non-waiver of such contractual remedies is entirely consistent with the Dishingers' lawful possession of the premises notwithstanding potential contractual claims in favor of Ms. Potter.

2. The Dishingers were in lawful possession of the premises at all relevant times.

Although Ms. Potter attempted to effect a forfeiture of the lease by the service of a three day notice to pay or quit regarding the Dishingers' alleged underpayment of rent, it is undisputed that through the trial of this matter and

beyond that Ms. Potter continued to accept monthly rental payments from the Dishingers, continued to accept monthly payments for common area maintenance expenses from the Dishingers, and continued to bill the Dishingers for monthly payments—all pursuant to the terms of the lease.

Additionally, Ms. Potter made no argument at trial as to any damages (*i.e.*, fair rental value of the premises) she allegedly suffered as a result of the alleged unlawful detainer of the premises by the Dishingers. Instead, Ms. Potter simply argued that she was entitled to additional rent beyond what had previously been paid by the Dishingers, that she was entitled to common area maintenance expenses, and that she was entitled to administrative and late fees—all pursuant to the terms of the lease. (R. 297, Defendant's Trial Exhibit D).

Moreover, Ms. Potter never affirmatively requested at trial that the court declare the lease to be forfeited by the Dishingers, and never requested an order of restitution (*i.e.*, an order compelling the Dishingers to restore possession of the premises to Ms. Potter). Accordingly, the trial court granted no such relief. Had the Dishingers actually been in unlawful detainer, the trial court should have expressly found a forfeiture of the lease and ordered the Dishingers to vacate the premises and restore possession thereof to Ms. Potter. *See* UTAH CODE ANN. § 78-36-10(1) (1996).

In reality, the lease between the Dishingers and Ms. Potter was in full force and effect at all relevant times, the Dishingers were in lawful possession of the premises, and at most Ms. Potter had only contractual claims against the Dishingers pursuant to the terms of that lease—but not a claim for unlawful detainer and treble damages.

C. The Dishingers should be awarded their reasonable attorney's fees.

The lease between the Dishingers and Ms. Potter expressly authorizes an award of attorney's fees to the prevailing party in "any action or proceeding brought by either party against each other under this Lease" Lease, dated May 23, 1990, at p. 21. (R. 297, Plaintiffs' Trial Exhibit 1) (Addendum C).

Assuming the Dishingers prevail in this appeal, they will be the prevailing party for purposes of the lease's attorney's fee provision. In that case, the Dishingers will have (1) defeated Ms. Potter's unlawful detainer claim, (2) recovered a substantial amount from Ms. Potter (\$8,372.61, plus a proportionate amount of the property tax refund received by Ms. Potter) for prior overcharges by Ms. Potter for common area maintenance expenses, and (3) successfully compelled Ms. Potter to provide the Dishingers with a further detailed accounting of common area maintenance charges for 1996 and 1997, which accounting Ms. Potter had flatly refused to provide. Amended Judgment, dated January 6, 2000, ¶¶ 2-4, at pp. 2-3 (Addendum B).

Accordingly, on remand, this Court should order the trial court to award the Dishingers their reasonable attorney's fees at trial and on appeal.

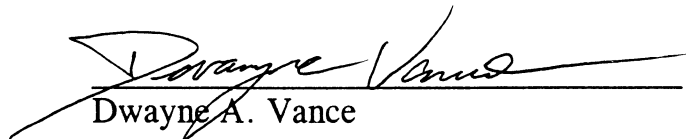
CONCLUSION

Based upon the foregoing arguments, this Court should reverse the trial court's finding of unlawful detainer by the Dishingers and its award of treble damages to Ms. Potter, and remand the case to the trial court for (1) entry of judgment in favor of the Dishingers on their accord and satisfaction claim and (2) calculation of the Dishingers' reasonable attorney's fees at trial and on appeal.

Dated this 19th day of July, 2000.

Respectfully submitted,

TESCH, THOMPSON & VANCE, LLC

A handwritten signature in black ink, appearing to read "Dwayne A. Vance", is written over a horizontal line.

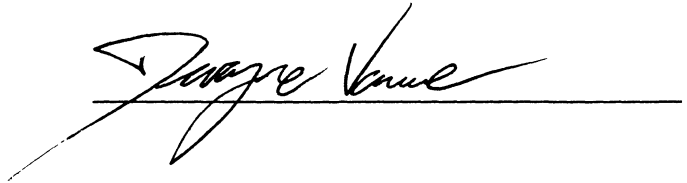
Dwayne A. Vance
David B. Thompson

Counsel for James and Nancy Dishinger,
Plaintiffs/Appellants/Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2000, I caused two (2) copies of the foregoing Brief of Appellants to be mailed, postage prepaid, to Robert M. Felton, counsel for Defendant/Appellee/Cross-Appellant herein, at the following address:


Robert M. Felton
Attorney at Law
39 Exchange Place, Suite 200
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "J. Wayne Vane", is written over a horizontal line.

ADDENDUM A

No.
FILED

DEC 11 1997

By Third District Court
Deputy Clerk, Summit County 

THIRD DISTRICT COURT

COALVILLE DEPARTMENT, 1st DIVISION

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES DISHINGER and NANCY
DISHINGER d/b/a TCBY YOGURT,

Plaintiffs,

vs.

JANA POTTER d/b/a SILVER QUEEN
HOTEL,

Defendant.

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SPECIAL VERDICT

Civil No. 960300106 PR

Judge Pat B. Brian

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

0336

1. Considering all of the evidence in this case, do you find by a preponderance of the evidence that a legitimate dispute existed as to the "then prevailing rental rate of similar buildings in the Main Street area of Park City" at the time the plaintiffs made monthly rental payments based on \$19 per square foot as satisfaction in full?

ANSWER: Yes X No _____

2. Considering all the evidence in this case, do you find by a preponderance of the evidence that the plaintiffs notified the defendant that these payments were made in full satisfaction of the disputed rent amount?

ANSWER: Yes X No _____

3. Considering all the evidence in this case, do you find by a preponderance of the evidence that the defendant accepted the monthly rent payments made by the plaintiffs which are calculated at a rate of \$19 per square foot?

ANSWER: Yes X No _____

4. Considering all of the evidence in this case, what dollar amount per square foot of leased premises do you find by a preponderance of the evidence that the term "prevailing rental rate of similar buildings in the Main Street area of Park City" as used in the lease relates to regarding the current three year term of the lease?

ANSWER: \$ 25.00 per square foot

5. Considering all of the evidence in this case, do you find by a preponderance of the evidence that the terms of the lease regarding the rental rate applicable to the current three year term of the lease are so vague and indefinite as to not be enforceable?

ANSWER: Yes ~~_____~~ No X

6. Did either party violate the covenant of good faith and fair dealing?

ANSWER: Yes X No _____

7. If you answered "Yes" to Question No. 6, which party was it?

ANSWER: Both

8. Considering all the evidence in this case, do you find by a preponderance of the evidence that the defendant accepted the monthly rent payments from the plaintiffs after the July 13, 1996 Notice to Quit?

ANSWER: Yes X No _____

9. Considering all the evidence in this case, do you find by a preponderance of the evidence that the defendant has overcharged the plaintiffs for their proportionate share of common area expenses?

ANSWER: Yes X No _____

10. If you answered "Yes" to Question No. 9, considering all the evidence in this case, what is the total amount of the overcharges regarding the plaintiffs' proportionate share of common area expenses based upon the accountings provided thus far by the defendant?

ANSWER: \$ 8,372.61 + proportionate amount of taxes refund when received by defendant.

11. Considering all the evidence in this case, do you find by a preponderance of the evidence that the plaintiffs are entitled to a further detailed accounting of total actual common area expenses for 1996 and 1997 for which the defendant has charged the plaintiffs?

ANSWER: Yes X No _____

12. Considering all the evidence in this case, do you find by a preponderance of the evidence that the defendant is entitled to recover any amount from the plaintiffs in addition to what the ~~defendants~~ ^{plaintiffs} have already paid the defendant?

ANSWER: Yes X No _____

13. If you answered "Yes" to Question No. 12, considering all the evidence in this case, for what items do the plaintiffs still owe the defendant an additional amount?

ANSWER: balance of base rent

14. If you answered "Yes" to Question No. 12, considering all the evidence in this case, what is the total amount that is owing to the defendant by the plaintiffs?

ANSWER: \$ \$8730.00

DATED this 11th day of December, 1997.

Foreperson

ADDENDUM B

NO. FILED
JAN - 6 2000 9:12
By Third District Court
Deputy Clerk, Summit County

DAVID B. THOMPSON (4159)
DWAYNE A. VANCE (7109)
TESCH, THOMPSON & VANCE, LLC
P.O. Box 3390
314 Main Street, Suite 201
Park City, Utah 84060-3390
Telephone: (435) 649-0077

THIRD DISTRICT COURT
COALVILLE DEPARTMENT, 1st DIVISION
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JAMES DISHINGER and NANCY	*	
DISHINGER d/b/a TCBY YOGURT,	*	AMENDED JUDGMENT
	*	
Plaintiffs,	*	
	*	
vs.	*	
	*	
JANA POTTER d/b/a SILVER QUEEN	*	Civil No. 960300106
HOTEL,	*	
	*	Judge Robert K. Hilder
Defendant.	*	

This matter came on before the Court for a jury trial on Thursday, December 11, 1997, before the Honorable Pat B. Brian. The Court heard the testimony of the parties and witnesses, received evidence and obtained a special verdict from the jury. Based upon the evidence and the special verdict, the Court enters judgment as follows:

1. Defendant is hereby awarded judgment against the Plaintiffs in the sum of \$8,730.00. Pursuant to § 78-36-10 U.C.A. (as amended), the sum is trebled to \$26,190.00. Jury Answers 4, 12, 13, 14 make it clear that the \$19 per square foot per month payments made by the plaintiffs did not represent a payment in full of the base rent. Although Defendant received

payments from Plaintiffs after the July 13, 1996 Notice to Quit (Jury Answer 8), these were not payments in full of the base rent. Furthermore, Jury Answers 12-14 are clear that the amount received by the Defendant from the Plaintiffs did not represent a full payment of the base rent; therefore, there was no accord and satisfaction of the lease. Thus, Plaintiffs are found to have been in unlawful detainer of the premises, allowing the Defendant to recover treble damages.

2. Plaintiffs are entitled to a credit for overcharges of common area expenses in the amount of \$8,372.61 plus a proportionate amount of the tax refund when received by Defendant. Defendant asserts that the charges made are in strict accordance with the lease and that the inclusion of a judgment for overpayment of common area expenses are inappropriate. Defendant's assertions are without merit. Jury Answers 9 and 10 are clear that Defendant overcharged Plaintiffs by the amount stated above. If Defendant felt that the questions presented to the jury were inappropriate, Defendant should have made the appropriate objections before the special verdict was returned.

3. Defendant is not entitled to administrative fees or late charges. Jury Answers 12-14 read as follows (with emphasis added):

Answer 12: Considering all the evidence in this case, do you find by a preponderance of the evidence that the defendant is entitled to recover **any amount** from the

plaintiffs in addition to what the plaintiffs have already paid the defendant? Answer: Yes.

Answer 13: If you answered "Yes" to Question No. 12, considering all the evidence in this case, **for what items** do the plaintiffs still owe the defendant an additional amount? Answer: Balance of base rent.

Answer 14: If you answered "Yes" to Question No. 12, considering all the evidence in this case, what is the total amount that is owing to the defendant by the by the plaintiffs? Answer: \$8,730.00.

Questions 12-14 clearly ask the jury to consider if there were any items or any amounts owing to Defendant by the Plaintiffs. Defendant submitted the claims for administrative fees and late fees to the jury. The jury clearly saw fit to decline an award to Defendant for these claims.

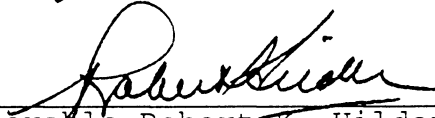
4. Defendant is ordered to provide the Plaintiffs with "a further detailed accounting of total actual common area expenses for 1996 and 1997 for which the defendant has charged the plaintiffs." (Jury Answer 11). Similar to paragraph 2 above, if Defendant felt that Jury Question 11 was inappropriate, Defendant should have raised a timely objection, but chose not to.

5. The Lease Agreement executed by the parties provides at page 19, that acceptance of partial rent is not a waiver and by accepting partial payment of rent during these proceedings, the Defendant did not waive forfeiture of the lease.

6. For the purposes of the current three year term of the lease between Defendant and Plaintiffs, \$25.00 per square foot per month is the "prevailing rental rate of similar buildings in the Main Street area of Park City."

7. Inasmuch as both parties prevailed on their claims, ^{Award RHH} there is no ~~reward~~ of attorney's fees to either party. In the lease provided to this Court by the Defendant, section "General Provisions," subsection "Attorney's fees," states, "In the event of any action or proceeding brought by either party against each other under this Lease the prevailing party shall be entitled to recover for the fees of its attorney in such action or proceeding" Defendants recovered on their counterclaim and Plaintiffs recovered on their second and third causes of action.

Dated this 6th day of January, 2000.

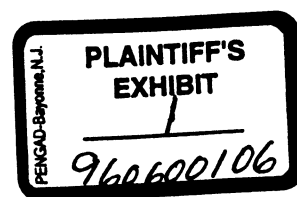


Honorable Robert K. Hilder
Third District Court Judge

0608

ADDENDUM C

LEASE



LEASE

This Lease, dated this 23rd day MAY of 1990, is made by
and between Silver Queen

(herein referred to as "Landlord") and Eric S. Ziskend, doing business as TCBY Yogurt (herein referred to as "Tenant").

Landlord does hereby lease to Tenant and Tenant does hereby Lease from Landlord that certain space (herein called Premises), having an approximately 970 square feet of floor area. The location and dimensions are delineated on Exhibit "A" attached herein. Said Premises are located in the City of Park City County of Summit, State of Utah with the permitted use of the Premises as: Frozen Yogurt Shop

Tenant agrees to pay Landlord as Minimum Rent, without notice or demand the monthly sum of (as per rental schedule attached hereto and made a part hereof) in advance, on or before the first day of each and every successive calendar month during the term hereof. The rental shall commence on the 1st day of July, 1990, or when the Tenant opens for business whichever is sooner.

Rent for any period which is for less than (1) month shall be a prorated portion of the monthly installment herein based upon a prorated portion of the monthly installment herein based upon thirty (30) day month. Said rental shall be paid to Landlord, without deduction or offset, in lawful money of the United States of America and at such place as Landlord may from time to time designate in writing.

TERM

This lease term shall be THREE (3) full calendar years, The parties hereto acknowledge that certain obligations under various articles hereof may commence prior to the lease term, i.e.

construction, hold harmless, liability insurance, etc.,; and the parties agree to be bound by these articles prior to commencement of the lease term.

SECURITY DEPOSIT

Concurrently with Tenant's execution of this Lease, Tenant has deposited with Landlord a sum equivalent to the first months rent. Said sum shall be held by Landlord as security for the faithful performance by Tenant of all the terms, covenants, and conditions of this Lease to be kept and performed by Tenant during the term hereof. If Tenant defaults with respect to any provision of this Lease, including, but not limited to the provision relating to the payment of rent, Landlord may (but shall not be required to) use, apply or retain all or any part of this security deposit for the payment of any rent or any other sum in default, or for the payment of any monies which Landlord may spend or become obligated to spend by reason of Tenant's default, or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of said deposit is so used or applied Tenant shall, within five (5) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount and Tenant's failure to do so shall be a default under this Lease. Landlord shall not be required to keep this security deposit separate from its general funds, and Tenant shall not be entitled to interest on such deposit. If Tenant shall fully and faithfully perform every provision of this Lease to be performed by it, the security deposit or any balance therefor shall be returned to Tenant (or, at Landlord's option, to the last assignee of Tenant's interest hereunder) within ten (10) days following expiration of the Lease term. In the event of termination of Landlord's interest in this Lease, Landlord shall transfer said deposit to Landlord's successor in interest.

ADJUSTMENTS

In addition to the Minimum Rent provided hereinabove, and

commencing the same time as any rental commences under this Lease Tenant shall pay to Landlord the following items, herein called Adjustments:

(a) All real estate taxes and insurance premiums on the Premises, including land, building and improvements thereon. Said real estate taxes shall include all real estate taxes and assessments that are levied upon and/or assessed against the Premises, including any taxes which may be levied on rents. Said insurance shall include all insurance premiums for fire, extended coverage, liability, and any other insurance that Landlord deems necessary on the Premises. Said taxes and insurance premiums for the purpose of this provision shall be reasonably apportioned in accordance with the total floor area of the Premises as it relates to the total floor area of the first floor commercial.

(b) That percent of the total cost of the following items as Tenant's floor area bears to the total floor area of the building which is from time to time completed as of the first day of each calendar quarter.

(i) All real estate taxes, including assessments, all insurance costs, and all costs to maintain, repair, and replace common area, sidewalks, and other areas used in common by the tenants of the building.

(ii) All costs to supervise and administer said common areas, used in common by the tenants or occupants of the building. said costs shall include such fees as may be paid to a third party in connection with same and shall in any event include a fee to Landlord to supervise and administer same in an amount equal to ten (10%) of the total costs of (i) above.

(iii) Any parking charges, utilities surcharges, or any other costs levied, assessed or imposed by, or at the direction of, or resulting from statutes or regulation, or interpretations thereof, promulgated by any governmental authority in connection with the use or occupancy of the premises or the parking facilities serving the premises.

At the end of the first fiscal year, upon written request from Tenant, Landlord shall submit to tenant a statement of the anticipated monthly Adjustments for a period between such commencement and the following January and Tenant shall pay these adjustments on a monthly basis concurrently with the Rent. Tenant shall continue to make said monthly payments until notified by Landlord of a change thereof. By March 1 of each year Landlord shall endeavor to give Tenant a statement showing the total adjustments for the first floor commercial area of the building for the prior calendar year and Tenant's allocable share thereof, prorated from the commencement of rental. In the event the total of the monthly payments which Tenant has made for the prior calendar year be less than the Tenant's actual share of such Adjustments then Tenant shall pay the difference in a lump sum within ten days after receipt of such statement from Landlord and shall concurrently pay the difference in monthly payments made in the then calendar year and the amount of monthly payments which are then calculated as monthly adjustments based on the prior year's experience. Any overpayment by Tenant shall be credited towards the monthly adjustments next coming due. The actual Adjustments for the prior year shall be used for the purposes of calculating the anticipated monthly adjustments for the then current year with actual determination of such adjustments after such calendar year as provided; excepting that in any year in which a major repair or replacement is contemplated Landlord shall be permitted to include the anticipated cost of same as part of the estimated monthly adjustments. Even though the term has expired and Tenant has vacated the premises, when the final determination is made of Tenant's share of said adjustments for the year in which this Lease terminates, Tenant shall immediately pay any increase due over the estimated adjustments previously paid and, conversely, any overpayment made shall immediately be rebated by Landlord to Tenant. Failure of Landlord to submit statements as called for herein shall not be deemed to be a waiver of Tenant's requirement

to pay sums herein provided.

USES PROHIBITED

Tenant shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which is not within the permitted use of the premises which will in any way increase the existing rate of or affect any fire or other insurance upon the Building or any of its contents, or cause a cancellation of any insurance policy covering said Building or any part thereof or any of its contents. Tenant shall not do or permit anything to be done in or about the Premises which will in any way obstruct or interfere with the rights of other Tenants or occupants of the Building or injure or annoy them or use or allow the Premises to be used for any improper, immoral, unlawful or objectionable purpose; nor shall Tenant cause, maintain or permit any nuisance in, on or about the Premises. Tenant shall not commit or allow to be committed any waste in or upon the Premises.

COMPLIANCE WITH LAW

Tenant shall not use the Premises, or permit anything to be done in or about the Premises, which will in any way conflict with any law, statute ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated. Tenant shall, at its sole cost and expense, promptly comply with all laws, statutes, ordinances and governmental rules, regulations or requirements now in force or which may hereafter be in force and with the requirements of any board of fire underwriters or other similar bodies now or hereafter constituted relating to or affecting the condition, use or occupancy of the Premises, excluding structural changes not related to or affected by Tenant's improvements or acts. The judgement of any court of competent jurisdiction or the admission of Tenant in any action against Tenant, whether Landlord be a party thereto or not, that Tenant has violated any law, statute, ordinance or governmental rule, regulation or requirement, shall be conclusive of that fact as between the Landlord and Tenant.

ALTERATIONS AND ADDITIONS

Tenant shall not make or allow to be made any alteration, additions or improvements to or of the Premises or any part thereof without first obtaining the written consent of Landlord and any alterations, additions or improvements to or of said Premises, including but not limited to, wall covering, paneling and built-in cabinet work, but excepting movable furniture and trade fixtures, shall at once become a part of the realty and belong to the Landlord and shall be surrendered with the Premises. In the event Landlord consents to the making of any alteration, additions or improvements to the Premises by Tenant, the same shall be made by Tenant at Tenant's sole cost and expense. Upon the expiration or sooner termination of the term hereof, Tenant shall, upon written demand by Landlord, given at least thirty (30) days prior to the end of the term, at Tenant's sole cost and expense, forthwith and will all due diligence, remove any alterations, additions, or improvements made by Tenant, designated by Landlord to be removed, and Tenant shall, forthwith and with all due diligence, at its sole cost and expense, repair any damage to the Premises caused by such removal.

REPAIRS

By entry hereunder, Tenant shall be deemed to have accepted the Premises as being in good, sanitary order, condition and repair. Tenant shall, at Tenant's sole cost and expense, keep the Premises and every part thereof in good condition and repair (except as hereinafter provided with respect to Landlords obligations) including without limitation, the maintenance, replacement and repair of any storefront, door, window casements, glazing, plumbing, pipes, electrical wiring and conduits, heating and air-conditioning system (when there is an air-conditioning system). Tenant shall obtain a service contract for repairs and maintenance of said system, said maintenance contract to conform to the requirements under the warranty, if any, on said system. Tenant shall, upon the expiration or sooner termination of this

Lease hereof, surrender the Premises to the Landlord in good condition, broom clean, ordinary wear and tear and damage from causes beyond the reasonable control of Tenant excepted. Any damage to adjacent premises caused by Tenant's use of the Premises shall be repaired at the sole cost and expense of Tenant.

Notwithstanding the provisions hereinabove, Landlord shall repair and maintain the structural portions of the building, including the exterior walls and roof, unless such maintenance and repairs are caused in part or in whole by the act of neglect, fault or omission of any duty by the Tenant, its agents, servants, employees, invitee, or any damage caused by breaking and entering, in which case Tenant shall pay to Landlord the actual cost of such maintenance and repairs, Landlord shall not be liable for any failure to make such repairs or to perform any maintenance unless such failure shall persist for an unreasonable time after written notice of the need of such repairs or maintenance is given to Landlord by Tenant. Except as provided herein under RECONSTRUCTION clause. There shall be no abatement of rent and no liability of Landlord by reason of any injury to or interference with Tenant's business arising from the making of any repairs, alterations, or improvements in or to any portion of the Building or the Premises or in or to fixtures, appurtenances and equipment therein. Tenant waives the right to make repairs at Landlord's expense under any law, statute or ordinance now or hereafter in effect.

LIENS

Tenant shall keep the Premises and property in which the Premises are situated free from any liens arising out of any work performed, materials furnished or obligations incurred by or on behalf of Tenant. Landlord may require, at Landlord's sole option, that Tenant shall provide to Landlord, at Tenant's sole cost and expense, a lien completion bond in the amount equal to one and one-half (1 1/2) times the estimated cost of any improvements, additions, or alterations in the Premises which Tenant desires to make, to insure Landlord against any liability for mechanic's and

materialmen's liens and to insure completion of the work.

ASSIGNMENT AND SUBLETTING

Tenant shall not either voluntary, or by operation of law, assign, transfer, mortgage, pledge, hypothecate or encumber this Lease or any interest therein, and shall not sublet the said Premises or any part thereof, or any right or privilege appurtenant thereto, or allow any other person (the employees, agents, servants and invitee of Tenant excepted) to occupy or use the said Premises, or any portion thereof, without first obtaining the written consent of Landlord, which consent shall not be unreasonably withheld. A consent to one assignment, subletting, occupation or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by any other person. Consent to any such assignment or subletting shall in no way relieve Tenant of any liability under this Lease. Any such assignment or subletting without such consent shall be void, and shall, at the option of the Landlord, constitute a default under the terms of this Lease.

In the event that Landlord shall consent to a sublease or assignment hereunder, Tenant shall pay Landlord reasonable fees, not to exceed One Hundred and No/100ths (\$100.00) Dollars, incurred in connection with the processing of documents necessary to giving of such consent.

HOLD HARMLESS

Tenant shall indemnify and hold harmless Landlord against and from any and all claims arising from Tenant's use of the Premises or from the conduct of its business or from any activity work, or other things done, permitted or suffered by the Tenant in or about the Premises, and shall further indemnify and hold harmless Landlord against and from any and all claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease, or arising from any act of negligence of the Tenant, or any officer, agent, employee, guest, or invitee of Tenant, and from all cost's,

attorneys fees, and liabilities incurred in or about the defence of any such claims or any action or proceeding brought hereon and in case any action or proceeding be brought against Landlord by reason of such claim, Tenant upon notice from Landlord shall defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord. Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage of property or injury to persons in, upon or about the premises, from any cause other than Landlord's negligence; and Tenant hereby waives all claims in respect thereof against Landlord. Tenant shall give prompt notice to Landlord in case of casualty or accidents in the Premises.

Landlord or its agents shall not be liable for any loss or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water or rain which may leak from any part of the building, or from the pipes, appliances or plumbing works therein or from the roof, street or subsurface or from any other place resulting from dampness or any other cause whatsoever, unless caused by or due to the negligence of Landlord, its agents, servants or employees. Landlord or its agents shall not be liable for interference with the light, air, or for any latent defect in the Premises.

SUBROGATION

As long as their respective insurers so permit, Landlord and Tenant hereby mutually waive their respective rights of recovery against each other for any loss insured by fire, extended coverage and other property insurance policies existing for the benefit of the respective parties. Each party shall apply to their insurers to obtain said waivers. Each party shall obtain any special endorsements, if required by their insurer to evidence compliance with the aforementioned waiver.

LIABILITY INSURANCE

Tenant shall at tenant's expense, obtain and keep in force during the term of this Lease a policy of comprehensive public liability insurance insuring Landlord and Tenant against any

liability arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto. Such insurance shall be in the amount not less than \$500,000.00 for injury or death of one person in any one accident or occurrence, and in the amount of not less than \$500,000.00 for injury or death of more than one person in any one accident or occurrence. Such insurance shall further insure Landlord and Tenant against liability for property damage of at least \$500,000.00. The limit of such insurance shall not, however, limit the liability of the Tenant hereunder. Tenant may provide this insurance under a blanket policy, provided that said insurance shall have a Landlord's protective liability endorsement attached thereto. If Tenant shall fail to procure and maintain said insurance, Landlord may, but shall not be required to, procure and maintain same, but at the expense of Tenant. Insurance required hereunder shall be in Companies rated A:XII or better in "Best's Key Rating Guide". Tenant shall deliver to Landlord, prior to right of entry, copies of policies of liability to Landlord. No policy shall be cancellable or subject to reduction of coverage. All such policies shall be written as primary policies not contributing with and not in excess of coverage which Landlord may carry.

UTILITIES

Tenant shall pay for all water, gas, heat, light, power, sewer charges, telephone service and all other services and utilities supplied to the Premises, together with any taxes thereon. If any such services are not separately metered to Tenant, Tenant shall pay a reasonable proportion to be determined by Landlord of all charges jointly metered with other premises.

PERSONAL PROPERTY TAXES

Tenant shall pay or cause to be paid, before delinquency any and all taxes levied or assessed and which becomes payable during the term hereof upon all Tenant's leasehold improvements, equipment, furniture, fixtures, and any other personal property located in the Premises. In the event any or all of the Tenant's

leasehold improvements, equipment, furniture, fixtures and other personal property shall be assessed and taxed with the real property, Tenant shall pay to Landlord its share of such taxes within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's property.

RULES AND REGULATIONS

Tenant shall faithfully observe and comply with the rules and regulations that Landlord shall from time to time promulgate and/or modify. The rules and regulations shall be binding upon the Tenant upon delivery of a copy of them to Tenant. Landlord shall not be responsible to Tenant for the nonperformance of any said rules and regulations by any other tenants or occupants.

HOLDING OVER

If Tenant remains in possession of the Premises or any part thereof after the expiration of the term hereof with the express written consent of Landlord, such occupancy shall be a tenancy from month to month at a rental in the amount of the last Minimum Monthly Rent, plus all other charges payable hereunder, and upon all the terms hereof applicable to a month to month tenancy.

ENTRY BY LANDLORD

Landlord reserves, and shall at any and all times have, the right to enter the Premises to inspect the same, to submit said premises to prospective purchasers or tenants, to post notices of non-responsibility, to repair the Premises and any portion of the building of which the Premises are a part that Landlord may deem necessary or desireable, without abatement of rent, and may for that purpose erect scaffolding and other necessary structures where reasonably required be the character of the work to be performed, always providing that the entrance to the Premises shall not be unreasonably blocked thereby, and further providing that the business of the Tenant shall not be interfered with unreasonably. Tenant hereby waives any claims for damages or for any injury or inconvenience to or interference with Tenant's business, any loss

of occupancy or quiet enjoyment of the Premises, and any other loss occasioned thereby. For each aforesaid purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in, upon and about the Premises, excluding Tenant's vaults, safes, and files, and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency, in order to obtain entry to the Premises without liability to Tenant except for any failure to exercise due care for Tenant's property and any entry to the Premises obtained by Landlord by any of said means, or otherwise, shall not under any circumstances be construed or deemed to be a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from the Premises or any portion thereof.

TENANTS DEFAULT

The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Tenant.

(A) The vacating or abandonment of the Premises by Tenant.

(B) The failure by Tenant to make any payment of rent or any payment required to be made by Tenant hereunder, as and when due, where such failure shall continue for a period of three (3) days after written notice thereof by Landlord to Tenant.

(C) The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by the Tenant, other than described above, where such failure shall continue for a period of thirty (30) days after written notice thereof by Landlord to Tenant; provided, however, that if the nature of Tenant's default is such that more than thirty (30) days are reasonably required for its cure, then Tenant shall not be deemed to be in default if Tenant commences such cure within said thirty (30) day period and thereafter diligently prosecutes such cure to completion.

(D) The making by Tenant of any general assignment or general arrangement for the benefit of creditors; or the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt, or

a petition or reorganization or arrangement under any law relating to bankruptcy (unless in the case of a petition filed against Tenant, the same is dismissed within sixty (60) days); or the appointment of a trustee or a receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where possession is not restored to Tenant within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where such seizure is not discharged within thirty (30) days.

REMEDIES IN DEFAULT

In the event of any such default or breach by Tenant, Landlord may at any time thereafter, in his sole discretion, with or without notice or demand and without limiting Landlord in the exercise of a right or remedy which Landlord may have by reason of such default or breach:

(A) Landlord shall have the immediate right of re-entry and may remove all persons and property from the Premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Tenant.

(B) Terminate Tenant's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. In such event Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenants default including, but not limited to, the cost of recovering possession of the Premises; expenses of reletting, including necessary renovation and alteration of the Premises; reasonable attorney's charges and Adjustments called for herein for the balance of the term after the time of such award exceeds the amount of such loss for the same period that Tenant proves could be reasonably avoided; and that portion of any leasing commission paid by Landlord and applicable to the unexpired term of this Lease. Unpaid installments of rent or other sums shall bear interest from

the date due at the maximum legal rate; or

(C) Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or nor Tenant shall have abandoned the Premises. In such event Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease, including the right to recover the rent and any other charges and Adjustments as may become due hereunder; or

(D) Pursue any other remedy now or hereafter available to Landlord under the Laws or judicial decisions of the State in which the Premises are located.

DEFAULT BY LANDLORD

Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in no event later than thirty (30) days after written notice by Tenant to Landlord and to the holder of any first mortgage or deed of trust covering the Premises whose name and address shall theretofore been furnished to Tenant in writing, specifying wherein Landlord has failed to perform such obligation; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are required for performance then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecuted the same to completion. In no event shall Tenant have the right to terminate this Lease as a result of Landlord's default and Tenant's remedies shall be limited to damages and/or an injunction.

RECONSTRUCTION

In the event the Premises are damaged by fire or other perils covered by extended coverage insurance, Landlord agrees to forthwith repair same, and this Lease shall remain in full force and effect, except that Tenant shall be entitled to a proportionate reduction of the Minimum Rent from the date of damage and while such repairs are being made, such proportionate reduction to be based upon the extent to which the damage and making of such repairs shall reasonably interfere with the business carried on by

the Tenant in the Premises. If the damage is due to the fault or neglect of Tenant or its employees, there shall be no abatement of rent.

In the event the Premises are damaged as a result of any cause other than the perils covered by fire and extended coverage insurance, then Landlord shall forthwith repair the same, provided the extent of the destruction be less than ten (10%) percent of the full replacement cost of the Premises. In the event the destruction of the Premises is to and extent of ten (10%) percent of the then full replacement cost then Landlord shall have the option;

(1) to repair or restore such damage, this Lease continuing in full force and effect, but the Minimum Rent to be proportionately reduced as hereinabove provided; or

(2) give notice to Tenant at any time within sixty (60) days after such damage, terminating this Lease as of the date specified in such notice, which date shall be no more than thirty (30) days after giving of such notice. In the event of giving such notice, this Lease shall expire and all interest of the Tenant in the Premises shall terminate on the date so specified in such notice and the Minimum Rent, reduced by a proportionate reduction, based upon the extent, if any, to which such damage interfered with the business carried on by the Tenant in the Premises, shall be paid up to date of said such termination.

Notwithstanding anything to the contrary contained herein, Landlord shall not have any obligation whatsoever to repair, reconstruct or restore the Premises when the damage resulting from any casualty covered herein occurs during the last twenty-four (24) months of the term of this Lease or any extension thereof.

Landlord shall not be required to repair any injury or damage by fire or other cause, or to make any repairs or replacements of any leasehold improvements, fixtures, or other personal property of Tenant.

EMINENT DOMAIN

If more than twenty-five (25%) percent of the Premises shall

be taken or appropriated by any public or quasi-public authority under the power of eminent domain, either party hereto shall have the right, as its option, within sixty (60) days after said taking, to terminate this Lease upon thirty (30) days written notice. If either less than or more than twenty-five (25%) percent of the premises are taken (and neither party elects to terminate as herein provided), the Minimum Rent thereafter to be paid shall be equitably reduced. If any part of the shopping center other than the Premises may be so taken or appropriated, Landlord shall within sixty (60) days of said taking have the right at its option to terminate this Lease upon written notice to Tenant. In the event of any taking or appropriation whatsoever, Landlord shall be entitled to any and all awards and/or settlements which may be given and Tenant shall have no claims against Landlord for the value of any unexpired term of this Lease.

COMMON AREAS

The common areas shall be at all times available for the non-exclusive use of Tenant during the full term of this Lease or any extension of the term hereof, provided that the condemnation or other taking by any public authority, or sale in lieu of condemnation, of any and or all such common areas shall not constitute a violation of this covenant.

The Landlord shall keep said common areas in a neat, clean and orderly condition and shall repair any damage to the facilities thereof, but all expenses in connection with said common areas shall be charged and prorated in the manner set forth (under Adjustments) herein.

Tenant, for the use and benefit of Tenant, its agent, employees, customers, Licensees and sub-tenants, shall have the non-exclusive right in common with Landlord, and other present and future owners, tenants and their agents, employees, customers, licensees and sub-tenants, to use said common areas during the term of this Lease, or any extension thereof, for ingress and egress.

The Tenant, in the use of said common areas, agrees to comply

with such reasonable rules, and regulations. Landlord may adopt from time to time for the orderly and proper operation of said common areas.

Such rules may include but shall not be limited to the following: (1) The restricting of employee parking to a limited, designated area or areas; and (2) the regulation of the removal, storage and disposal of Tenant's refuse and other rubbish at the sole cost and expense of Tenant.

SIGNS

The Tenant may affix and maintain upon the glass panes and supports of the who windows and within twelve (12) inches of any window and upon the exterior walls of the Premises only such signs, advertising placards, names, insignia, trademarks and display qualities. Anything to the contrary in this Lease notwithstanding, Tenant shall nor affix any sign to the roof. Tenant shall, however, erect one sign on the front of the Premises not later than the date Tenant opens for business, in accordance with a design to be prepared by Tenant and approved in writing by Landlord.

DISPLAYS

The Tenant may not display or sell merchandise or allow grocery carts or other similar devices within the control of Tenant to be stored or to remain outside the defined exterior walls and permanent doorways of the Premises. Tenant further agrees not to install any exterior lighting, amplifiers or similar devices or use in or about the Premises any advertising medium which may be heard or seen outside the Premises, such as flashing lights, searchlights, loudspeakers, phonographs or radio broadcasts.

AUCTIONS

Tenant shall not conduct or permit to be conducted any sale by auction in, upon, or from the Premises whether said auction be voluntary, involuntary, pursuant to any assignment for the payment of creditors or pursuant to any bankruptcy or other insolvency proceeding.

HOURS OF BUSINESS

Tenant shall continuously during the entire term hereof conduct and carry on Tenant's business in the Premises and shall keep the Premises open for business and cause Tenant's business to be conducted therein during the usual business hours of each and every business day as is customary for business of like character in the city which the Premises are located to be open for business; provided, however, that this provision shall not apply if the Premises should be closed and the business of Tenant temporarily discontinued therein on account of strikes, lockouts or similar causes beyond the reasonable control of Tenant. Tenant shall keep the Premises adequately stocked with merchandise, and with sufficient sales personnel to care for the patronage, and to conduct said business in accordance with sound business practice.

In the event of breach by Tenant of any of the conditions contained herein, the Landlord shall have, in addition to any and all remedies herein provided, the right at its option to collect not only the Minimum Rent herein provided, but additional rent at the rate of one-thirtieth (1/30) of the Minimum Rent herein provided for each and every day that the Tenant shall fail to conduct its business as herein provided; said additional rent shall be deemed to be in lieu of any percentage rent that might have been earned during such period of the Tenants failure to conduct its business as herein provided.

GENERAL PROVISIONS

PLATS AND RIDERS

Clauses, plats, riders and addendum, if any, affixed to this Lease are a part hereof.

WAIVER

The waiver by Landlord of any term, covenant or condition herein contained shall not be deemed to be a waiver of such terms, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay particular rent also accepted, regardless of Landlord's knowledge of such preceding default at the time of the acceptance of such rent.

JOINT OBLIGATION

If there be more than one Tenant the obligations hereunder shall be joint and several.

MARGINAL HEADINGS

The marginal headings and article titles to the articles of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of any part hereof.

TIME

Time is of the essence of this Lease and each and all of its provisions in which performance is a factor.

SUCCESSORS AND ASSIGNS

The covenants and conditions herein contained, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of the parties hereto.

RECORDATION

Neither Landlord nor Tenant shall record this Lease, but a short form memorandum hereof may be recorded at the request of Landlord.

QUIET POSSESSION

Upon Tenant paying the rent reserved hereunder and observing and performing of all the covenants, conditions and provisions on Tenant's part to be observed and performed hereunder, Tenant shall

have quiet possession of the Premises for the entire term hereof, subject to all the provisions of this Lease.

LATE CHARGES

Tenant hereby acknowledges that a late payment by Tenant to Landlord of rent or other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Landlord by terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or any sum due from Tenant shall not be received by the 5th day of any month which base monthly rent, or other sums due, under the terms and conditions of this Lease, then Tenant shall pay to Landlord a late charge of ten (\$10.00) dollars per day until the amount due is paid in full. Tenant further agrees to pay any attorney's fees incurred by Landlord by reason of Tenant's failure to pay rent and/or other charges when due hereunder. Acceptance of such late charges by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of the other rights and remedies granted hereunder.

PRIOR AGREEMENTS

This Lease contains all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Lease, and no prior agreements or understanding pertaining to such matters shall be effective for any purpose. No provision of this Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors in interest. This Lease shall not be effective or binding on any party until fully executed by both parties hereto.

INABILITY TO PERFORM

This Lease and the obligations of the Tenant hereunder shall not be affected or impaired because the Landlord is unable to fulfill any of its obligations hereunder or is delayed in doing so,

if such inability or delay is caused by reason of strike, labor trouble, acts of God, or any other cause beyond reasonable control of the Landlord.

PARTIAL INVALIDITY

Any provision of this Lease which should prove to be invalid, void, or illegal shall in no way affect, impair or invalidate any other provision hereof and such other provision shall remain in full force and effect.

CUMULATIVE REMEDIES

No remedy or election hereunder shall be deemed exclusive but shall, whenever possible, be cumulative with all other remedies at law or in equity.

CHOICE OF LAW

This Lease shall be governed by the laws of the State in which the Premises are located.

ATTORNEYS' FEES

In the event of any action or proceeding brought by either party against each other under this Lease the prevailing party shall be entitled to recover for the fees of its attorney in such action or proceeding, including costs of appeal, if any, in such amount as the court may adjudge reasonable as attorney's fees. In addition should it be necessary for Landlord to employ legal counsel to enforce any of the provisions herein contained, Tenant agrees to pay all attorney's fees and court costs reasonably incurred.

SALE OF PREMISES BY LANDLORD

In the event of any sale of the Premises by Landlord, Landlord shall be and is hereby entirely freed and relieved of all liability under any and all of its covenants and obligations contained in or derived from this Lease arising out of any act, occurrence or omission occurring after the consummation of such sale; and the purchaser, at such sale or any subsequent sale of the Premises shall be deemed, without any further agreement between the parties or their successors in interest or between the parties and any such

purchaser, to have assumed and agreed to carry out any and all of the covenants and obligations of the Landlord under this Lease.

SUBORDINATION ATTORNMENT

Upon request from the Landlord, Tenant will in writing subordinate its rights hereunder to the lien of any mortgage or deed of trust, to any bank, insurance company or other lending institution, now or hereafter in force against the Premises, and to all advances made or hereafter to be made upon the security thereof.

In the event any proceedings are brought for foreclosure, or in the event of the exercise of the power of such sale under any mortgage or deed of trust made by Landlord covering the premises, the Tenant shall attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as the Landlord under this Lease.

The provisions of this Article to the contrary notwithstanding, and so long as Tenant is not in default hereunder, this Lease shall remain in full force and effect for the full term hereof.

NOTICES

All notices and demands which may or are to be required or permitted to be given either party on the other hereunder shall be in writing. All notices and demands by the Landlord to the Tenant shall be sent by United States Mail, postage prepaid, addressed to the Tenant at the Premises, and to the address hereinbelow, or to such other place as Tenant may from time to time designate in a notice to Landlord. All notices and demands by the Tenant to the Landlord shall be sent by United States Mail, postage prepaid, addressed to the Landlord at the address set forth herein, and to such other persons or place as the Landlord may from time to time designate in a notice to the Tenant.

TO LANDLORD AT: P.O. Box 2391, Park City, Utah, 84060

TO TENANT AT: _____

TENANTS STATEMENT

Tenant shall at any time and from time to time, upon not less than three days prior to written notices from Landlord, execute, acknowledge and deliver to Landlord a statement in writing (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease as so modified is in full force and effect), and the date to which the rental and other charges are paid in advance, if any, and (b) acknowledging that there are not, to Tenant's knowledge, any uncured defaults on the part of the Landlord hereunder, or specifying such defaults if any are claimed, and (c) setting forth the date of commencement of rents and expiration of the term hereof. Any such statement may be relied upon by the prospective purchaser or encumbrancer of all or any portion of the real property which the Premises are a part.

AUTHORITY OF TENANT

If Tenant is a corporation, each individual executing this Lease on behalf of said corporation represents and warrants that he is duly authorized to execute and deliver this Lease on behalf of said corporation, in accordance with the bylaws of said corporation, and that this Lease is binding upon said corporation.

ADDITIONAL PROVISIONS

1. If this Lease remains in full force and effect, and Tenant has abided by all the Covenants, Conditions, and Provisions of this Lease, Tenant shall have the option to renew this Lease as follows:

- (a) The first option of renewal upon expiration of this lease shall be for a term of Three (3) years with the Minimum Monthly Rent to be adjusted upward based on the Consumer

Price Index (cost of living index-National Average). Each year of this option will continue to be adjusted upward based on the Consumer Price Index.

(b) Tenant will thereafter have continuous 3 year options, with the rental to be adjusted upward, but not less than the current Minimum Monthly Rent being paid, to the then prevailing rental rate of similar buildings in the Main Street area of Park City, Utah.

(c) Tenant must exercise option in writing to Landlord 120 days prior to expiration of the then current Lease term.

2. Landlord understands that Tenant has until June 1, 1990 to obtain the necessary site approvals from the corporate offices of TCBY Yogurt, for this Lease to commence in full force and effect.

3. Any and all alterations, additions or improvements to the Premises are to be approved by Landlord with Tenant providing the necessary floor plans and specifications, at Tenant's sole cost and expense. Tenant is also responsible for obtaining all the required approvals and permits through the City of Park City. Tenant warrants that all additions, alterations or improvements to the Premises will be done according to all State of Utah, and Park City building codes and requirements. Any additions, alterations or improvements to be done by a Licensed and Insured Contractor(s). Tenant also understands that Landlord may require copies of all contractors, Business Licensees, Contracting Licensees, and Certificates of Insurance of adequate liability and workman compensation policies. Tenant also understands that Landlord requires that all alterations, additions and improvements to the Premises are to be supervised and approved by Robert A. Fuca Jr., General Contractor for the Landlord herein, in the event Tenant uses another General Contractor for work to be performed in the Premises. Any additional cost for Robert A. Fuca Jr., to supervise said construction shall be at the expense of Tenant herein.

RENTAL SCHEDULE

Year	Per Square Foot	Minimum Monthly Rent
1	\$15.00	\$1,212.50
2	\$17.00	\$1,374.17
3	\$17.00	\$1,374.17

Tenant: Eric A. Jikund Date: 6-9-90
Landlord: Opma Petter Fuca Date: 5-28-90

Exhibit "B"
Description of Landlord and Tenants Work

Landlord:

1. Landlord to remove existing restaurant hood.
2. Landlord to remove existing flooring, and repair any sub-flooring where needed.
- 3. Landlord to have Heating and Air-Conditioning system serviced and in good working condition.
4. Landlord to remove existing partition wall which presently divides the Kitchen and Retail areas.

Tenant:

1. Tenant to provide all other items and specifications as required by the TCBY Corporate Offices blueprints which will follow and are to be approved by Landlord and Tenant. TCBY to begin the drafting of the necessary architectural blueprints and specifications upon execution of this Lease agreement.
2. Tenant understands and agrees that he is responsible for any and all items as may be outlined on the prints and specifications issued by TCBY Corporate Offices. These shall include, but are not limited to, all necessary electrical, plumbing, ceiling adjustments, carpentry needs, cabinets fixtures, floor covering, etc., any cost for all additions alterations and improvements are at the sole cost and expense of the Tenant. Tenant is aware Landlord is to approve of all contractors involved in said alterations, additions and improvements as outlined in the Lease herein.

Landlord: Jana Potter Fucca Date: 5-28-80
Tenant: Em & Julie Date: 6-9-80

CONSULT YOUR ATTORNEY

If you have any questions regarding this Lease, please consult your attorney. Execution of this Lease acknowledges that you have read, understood and approved of all the covenants, conditions and provisions contained herein.

LANDLORD: Jana Potter Fuca
DATED: 5-28-90

TENANT: Em L. Junt
DATED: 6-10-90