

1990

W. Daniel English v. Standard Optical Company : Response to Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900422-CA

COURT OF APPEALS
STATE OF UTAH

W. DANIEL ENGLISH,)	
)	
Plaintiff/Respondent,)	RESPONSE TO PETITION FOR
)	REHEARING
vs.)	
)	PRIORITY NO. 16
)	
STANDARD OPTICAL CO.,)	Case No. 900422-CA
a Utah corporation,)	
)	
Defendant/Appellant.)	

APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH
HONORABLE MICHAEL R. MURPHY

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FILED

AUG 3 1991

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Bank of Wallowa County v. Gary Mac, Inc.</u> , 619 P.2d 1310 (Or. App. 1980).....	3
<u>Centric Corp. v. Drake Building Corp.</u> , 726 P.2d 1047 (Wyo. 1986).....	4
<u>Fuller v. Employment Security Department of State of Washington</u> , 762 P.2d 367 (Wash. App. 1988).....	8
<u>R.R. Gable Inc. v. Burrows</u> , 649 P.2d 177 (Wash App. 1982) <u>cert. denied</u> 103 S.Ct. 2429, 461 U.S. 957, 77 L.Ed.2d 1316.....	4
<u>Resource Management Co. v. Weston Ranch and Livestock Co.</u> , 706 P.2d 1028 (Utah 1985).....	2

RULES

Rule 24(a)(9), Utah Rules of Appellate Procedure.....	6
Rule 35, Utah Rules of Appellate Procedure.....	7

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Respondent W. Daniel English ("English") hereby files this Response to Petition for Rehearing pursuant to Rule 35, Utah Rules of Appellant Procedure, and as instructed by the Court Clerk of the Utah Court of Appeals by letter dated July 23, 1991. Appellant Standard Optical Company ("Standard") seeks a rehearing of the Opinion filed in the above-captioned matter by the Utah Court of Appeals on June 25, 1991 on the grounds that the Court misapprehended or overlooked two of Standard's arguments. Because the Court did not misapprehend or overlook Standard's arguments, a rehearing of this matter is not warranted and would

constitute a waste of the Court's and the parties' time and resources.

ARGUMENT

I. STANDARD WAS GIVEN CONSIDERATION FOR ITS AGREEMENT TO PAY RENT.

Standard argues that the Court misapprehended Standard's argument that English never gave any consideration in exchange for Standard's promise to pay rent after September 1, 1988. It is clear from Standard's Brief of Appellant, Reply Brief of Appellant and Petition for Rehearing that Standard equates consideration with actual possession. Standard repeatedly argues that it was deprived of possession by English and that as a result it was not given any consideration for its agreement to pay rent.

Contrary to Standard's assertion, it is Standard who misapprehends the law on consideration. It is well established that consideration is an act or a promise bargained for and given in exchange for a promise. Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028, 1036 (Utah 1985). The definition given to the concept of consideration by the Utah Supreme Court requires only bargained for promises. It is not necessary for a promisee to fulfill a promise in order for there to be consideration; the promise itself is sufficient

consideration to form a contract. See Bank of Wallowa County v. Gary Mac, Inc., 619 P.2d 1310, 1314 (Or. App. 1980).

There is no question in this case that the parties exchanged promises. The August 10, 1982, Lease Agreement evidences English's promise to give Standard possession of the leased premises for a term of ten years, which term included the three year period which is at issue in this action. According to the terms of the Lease Agreement, the parties promised:

That in consideration of the payments hereinafter reserved to be paid by the Lessee to the Lessor and the terms and provisions of this agreement to be kept and performed by each party to the other, the Lessor does hereby . . . lease unto the . . ., who does hereby agree to accept as leased property and premises and in accordance with the terms and provisions of the agreement, the following described office space and premises . . .

To have to hold said premises and office space under the terms of this agreement for a term of ten (10) years . . .

Trial Exhibit 4, p. 1 (emphasis added).

The parties' mutual promises entered into upon the execution of the Lease Agreement clearly constitute sufficient consideration for the agreement. However, even if English had denied Standard possession of the premises, that conduct does not deprive the Lease Agreement of previously exchanged consideration. If anything, English's alleged dispossession of Standard may constitute a breach of the lease or perhaps a trespass,

neither of which Standard has raised in its Petition for Rehearing as an issue. However, one party's breach of a contract does not automatically render the contract unenforceable. Moreover, a tortious act by one party to a contract generally does not constitute a defense to another party's action on the contract. Centric Corp. v. Drake Building Corp., 726 P.2d 1047, 1053-54 (Wyo. 1986).

In any event, English did not deprive Standard of possession of the leased premises. Standard's failure to occupy the premises after August 31, 1988, resulted from its own voluntarily decision not to do so. Record on Appeal "R." at 189, 191 (Findings of Fact, ¶ 4, 11). A true and correct copy of the trial court's Findings of Fact and Conclusions of Law is attached hereto as Exhibit "A." The trial court's Findings of Fact, which are not challenged on appeal, establish that Standard understood that it had the right to possess the premises.¹ On or about June 30, 1988, Steven Shubach proposed to "sublease" the leased premises after the expiration of the second three year period of the lease term. R. at 190 (Finding of Fact, ¶ 8). On July 5, 1988, Dr. English requested that Standard submit a list of proposed

¹ Findings of fact which are unchallenged on appeal are verities and the appellate court is bound by those findings. R.R. Gable Inc. v. Burrows, 649 P.2d 177, 180 (Wash. App. 1982) cert. denied 103 S.Ct. 2429, 461 U.S. 957, 77 L.Ed.2d 1316.

tenants for subletting the premises. R. at 190 (Findings of Fact, ¶ 10). On July 20, 1988, Steven Shubach wrote a letter to Dr. English indicating his desire to "sublet" the leased premises to someone other than a subsidiary of Standard Optical. R. at 191 (Findings of Fact, ¶ 13). Subsequently, on August 1, 1988, Steven Shubach wrote another letter to Dr. English proposing to pay a certain monthly rental amount for the third three year period of the lease term or, alternatively, proposing a "buyout" of the lease. R. at 191 (Finding of Fact, ¶ 16). On September 26, 1988, Steven Shubach and Dr. English discussed rental amounts. R. at 192 (Finding of Fact, ¶ 17). Steven Shubach later said that he would contact Weight Watchers as a potential sublessee. R. at 192 (Finding of Fact, ¶ 18).

Not only do the Findings of Fact support the conclusion that English and Standard understood that Standard had the right to possess the premises as of September 1, 1988, they also establish that, as of that same date, English had not even attempted to enter the premises and did not attempt to enter the premises and have an access key made until English was of the understanding that Steven Shubach had instructed him to find a tenant for the premises while the parties continued to negotiate a rent amount. R. at 192 (Findings of Fact, ¶ 17-19.)

Though the record establishes that English did not deprive Standard of possession of the leased premises, the proper focus in evaluating the issue of consideration is not whether the parties performed under the Lease Agreement, but rather whether the parties exchanged bargained for promises in the first place. That was clearly done in this case.

II. THE UTAH COURT OF APPEALS CORRECTLY HELD THAT STANDARD DID NOT COMPLY WITH RULE 24, UTAH RULES OF APPELLATE PROCEDURE.

The trial court correctly declined to address Standard's argument that there is no basis for finding Standard liable for damage or lack of repairs due to noncompliance with Rule 24(a)(9), Utah Rules of Appellate Procedure. Rule 24(a)(9) requires that appellate briefs contain an argument and that:

The argument shall contain the contentions and reasons of the Appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

Standard argues in its Petition for Rehearing that because it takes the position that there is a complete lack of evidence on the issue of damages, it need not present the Court with legal authorities or citations to the record. Contrary to Standard's position, a party can refer the court to testimony of witnesses through whom the missing testimony may have come in so that the court has the opportunity of reviewing the relevant

portions of the trial transcript to determine for itself whether or not there is in fact such a complete lack of evidence.

More significantly, Standard has failed to identify for the Court which of the trial court's rulings it challenges on the issue of damages.² Because Standard did not challenge any of the trial court's Findings of Fact, it appears that Standard contends that the trial court erred in its Conclusion of Law, paragraph 3, pertaining to Standard's liability for damages to the property. However, Standard utterly fails to provide the Court with any basis to overturn that or any other Conclusion of Law.

In its Petition for Rehearing, Standard boldly makes the assertion, unsupported by any citation to the record, that there was a lack of evidence to support the trial court's ruling on damages. In taking this position, Standard entirely ignores four Findings of Fact which Standard has not challenged on appeal. In those Findings of Fact, the trial court found that Standard had failed to maintain the premises in a clean and sanitary condition, R. at 196 (Findings of Fact, ¶ 39), that it had removed attachments from the building, R. at 196 (Findings of Fact, ¶ 40), that it had failed to keep the furnace in a state of

² Rule 35, Utah Rules of Appellate Procedure, requires that Petitions for Rehearing, "shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended."

reasonable repair, R. at 196 (Findings of Fact, ¶ 41), and that Standard's acts resulted in a damaged ceiling and damaged walls, carpets, trim and floor tiles. R at 196-197 (Findings of Fact, ¶ 42.) Because Standard did not challenge any of the findings, it stands to reason that Standard cannot now challenge the Conclusion of Law which is supported by those unchallenged findings.³

Finally, Standard contends that there was no evidence of the condition of the premises at the commencement of the lease. As discussed in English's Brief of Respondent, Standard's position entirely overlooks the language of the lease which unequivocally establishes that the premises were in "good" and/or "excellent" repair at the beginning of the lease term. When it executed the lease in 1982, Standard agreed, in three different places in the lease, to accept the premises in "good" and/or "excellent" condition:

It is mutually understood and agreed
that the premises herein leased are in a con-
dition of excellent repair. . .

Trial Exhibit 4, p. 2.

The lessee does hereby accept the Leased
Premises in a condition of good repair . . .

³ Where the findings of fact are not challenged on appeal, the appellate court's review is generally limited to determining whether the findings of fact support the conclusions of law. Fuller v. Employment Security Department of State of Washington, 762 P.2d 367, 369 (Wash. App. 1988).

Trial Exhibit 4, p. 2.

The lessee does hereby agree to accept
the demised premises in a state of good
repair . . .


Trial Exhibit 4, p. 3.

In view of Standard's express acknowledgment of the good and/or excellent condition of the premises at the beginning of the lease, the trial court had ample evidence on which to conclude that the damage found by English had resulted from Standard's occupancy of the premises. Standard simply has not presented the Court with any basis to overrule the trial court's findings.

CONCLUSION

The Utah Court of Appeals neither overlooked or misapprehended Standard's "consideration" and "damages" arguments. The trial court's Findings of Fact on both those issues are not challenged on appeal and the Conclusions of Law were not erroneous as a matter of law. Accordingly, English respectfully requests that the Court decline to put the parties and the Court to additional time and expense in this matter and deny Standard's Petition for Rehearing. English further requests an Order granting him his reasonable costs and attorney's fees incurred in responding to Standard's Petition for Rehearing.

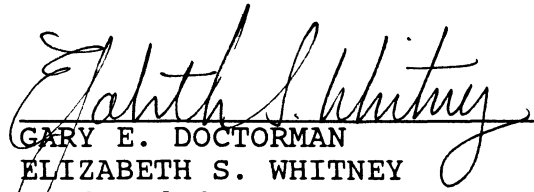
DATED this 7 day of August, 1991.


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of and for
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CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered, four true and correct copies of the foregoing RESPONSE TO PETITION FOR REHEARING to the following on this 7 day of August, 1991:

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ESW/080491A

EXHIBIT "A"

Third Judicial District

FEB 1990

By Mark B. [Signature]
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

W. DANIEL ENGLISH,)	
)	FINDINGS OF FACT,
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
STANDARD OPTICAL CO., a Utah)	
corporation,)	Civil No. 89-0900580CN
)	
Defendant.)	Judge Michael R. Murphy

* * * * *

This matter came for trial before the Honorable Judge Michael R. Murphy on December 21, 1989 and continued into December 22, 1989. Plaintiff, W. Daniel English ("Dr. English") appeared in person and through his attorney, Gary E. Doctorman of Parsons, Behle & Latimer and defendant Standard Optical Company ("Standard Optical") appeared through its president, Stephen Schubach and its general manager, Klaus Rathke, and through their attorneys, George Hunt and Kurt Frankenberg of Snow, Christensen & Martineau. The court having heard the testimony of the witnesses called by the plaintiff, Fred Burns, Gordon Helstrom,

Willard Helstrom, Dr. English and Nikkie Dore and the witnesses called by the defendants, Stephen Schubach and Klaus Rathke, and pursuant to Rule 52, Utah Rules of Civil Procedure, the court makes the following findings of fact.

1. On August 10, 1982, Dr. English and Standard Optical entered into a written Lease Agreement for the lease of commercial real property and a building located at 3525 Market Street, West Valley City, Utah.

2. The significant portions of the signed written Lease in controversy are described below:

(a) To have and to hold said premises and office space under the terms of this agreement for a term of ten (10) years beginning on the first day of the month following written notice to lessee from lessor and terminating at midnight on the last day of the same month 10 years hence [i.e. 1992].

(b) The Lessee does hereby unconditionally agree to pay as rent for the demised premises and to lessor, or order, at West Valley City, Salt Lake County, Utah, the sum of \$1,000 each month for 36 months with the first such installment to be due and payable on or before the first day of September, 1982, and each installment payment to be due thereafter on or before the same calendar day during the term of the Agreement. A grace period of five days is given for the making of such installment payment.

(c) The monthly rent specified in the section above shall be negotiated every 36 months.

(d) It is mutually understood and agreed by these parties that the demised premises herein will be used by the lessee as a retail optical business and lessee does hereby agree to use said premises for no other purpose without the written consent of lessor first had and obtained. However, such consent will not be unreasonably withheld.

(e) It is mutually understood and agreed that the premises herein leased are in a condition of excellent repair

(f) The Lessee does hereby agree to at all times during the term of this agreement keep the heating and air conditioning units in a condition of good repair.

(g) The Lessee hereby accepts the leased premises in a condition of good repair and does hereby agree to at all times during the term of this agreement to maintain the interior of the demised premises and to keep the same in a condition of good repair at all times, and agrees not to make any alterations to the demised premises without the written consent of the lessor first had and obtained, and then that all such alterations shall be made at the sole expense of the Lessee and that any such alterations as are then made a part of or attached to the building shall remain with the premises and become the property of the Lessor at the end of this lease term.

(h) The Lessee does likewise agree to provide suitable floor covering (carpet, tile, etc) of his choice in said premises, to be responsible for all repairs done or needed to be done to the interior of the demised premises during the term of this agreement.

(i) The Lessee does hereby agree to be responsible for all breakage to windows and doors in the demised premises and not to install any signs on the demised premises without the permissions of the Lessor.

(j) The Lessee shall not sublet any portion of the leased premises without the written consent of lessors first had and obtained. Nor shall the Lessee assign this lease in whole or in part without the written consent of the Lessors. . . .

(k) It is agreed that the Lessor will not be liable to the lessee on account of any damage to any property of the Lessee in the demised premises on the count of lack of repairs to any equipment in the demised premises as is the responsibility of the Lessee to repair and maintain, and that the Lessor shall have the right to any reasonable inspection of the demised premises at any reasonable time during the term of this agreement. The Lessee does hereby agree to at all times keep the interior of the demised premises in a clean and sanitary condition in accordance with all good and reasonable standards of like commercial units.

(l) It is mutually agreed that in the event of the failure, neglect or default of the Lessee to make payments herein provided, as they become due, or within the grace period, that the Lessor shall have the right and option to proceed under the terms of the following provisions or either of them:

(m) To declare this agreement terminated and proceed, with or without legal process to take possession of the demised premises and in which event this agreement will be terminated and each of the parties will be excused from any further performance of the terms and provisions herein set forth, or

(n) To take any action necessary to evict the Lessee from the demised premises, and to proceed to make any and all necessary repairs to the property and to proceed to rent the same to any other person, and in the event it is necessary for Lessor to take a reduction of the rental rate on said demised

premises that the Lessee will pay the Lessor all expenses, in connection with such repairs, re-renting and any loss of rentals as may be determined by the rates set forth herein. In this respect it is agreed that time is of the essence of this agreement and that the terms and provisions herein set forth will extend to and become binding upon the respective heirs, executors, administrators and assigns of these parties, and that the Lessee shall have no right to make any assignment of any rights under the terms of this agreement.

(o) The Lessee does hereby agree to turn said premises back to the Lessor at the end of this lease term in as good a condition as the premises are at the commencement of this lease, with only ordinary wear and depreciation being accepted.

(p) It is mutually agreed that in the event it becomes necessary for either party to enforce the terms of this agreement with court action, after default, that the party determined to be in default will pay to the opposite party all court costs and reasonable attorneys' fees.

3. On or about September 1, 1985, plaintiff and defendant entered into a written addendum to the 1982 Rental Agreement specifying a monthly rent of \$1,200 to be paid for the 36-month period beginning on September 1, 1985.

4. In 1986 and 1987, Standard Optical made the decision to convert their optical stores to "super stores" where possible and in early 1988 began negotiations with the Valley Fair Mall, one block away from the leased premises, and in June, 1988, executed a lease with Valley Fair Mall for a super store.

5. Prior to September, 1988, plaintiff had never experienced any problems with Standard Optical promptly paying rent.

6. Prior to June 1988, Standard Optical understood the Rental Agreement term to expire at the end of August 1988, with an option to negotiate a renewal.

7. On June 20, 1988, Klaus Rathke, General Manager of Standard Optical ("Rathke") told Dr. English that Standard Optical was moving to the Valley Fair Mall. Dr. English informed Mr. Rathke that the Lease term did not expire in 1988. Mr. Rathke expressed he thought the lease term was up and Dr. English referred him to the Lease.

8. On or about June 30, 1988, Dr. English and Steven Schubach ("Schubach") discussed the leased premises and Schubach proposed to sublease the premises. Dr. English wrote back that he would consider a proposal and responded in writing as the Lease agreement required to, consent of the Landlord.

9. On July 1, 1988, Standard Optical promptly paid its July rent to Dr. English.

10. On July 5, 1988, Dr. English requested that Standard Optical submit a list of proposed tenants for subletting the premises and suggested a meeting on September 15, 1988 to negotiate a new rental amount.

11. July 17, 1988, was Standard Optical's last day of business at the leased premises.

12. On or about July 18, 1988, Standard Optical moved its records and inventory from the leased premises and also moved attachments to the building and built-in-cabinets and counters. Several large signs were placed on the premises stating Standard Optical had moved. Dr. English read the signs and concluded Standard Optical had moved.

13. On July 20, 1988, Schubach wrote to Dr. English stating that Standard Optical had abandoned their plans to have a subsidiary of Standard Optical sublet the space but wanted to sublet it to someone else.

14. On July 22, 1988, Dr. English wrote to Schubach stating that he needed to know more about the proposed subtenant before he could approve a subtenant.

15. On August 1, 1988, Standard Optical promptly paid its rent for the month of August.

16. Also on August 1, 1988, Mr. Schubach wrote to Dr. English indicating that Standard Optical intended to negotiate for an \$800 per month Lease beginning September 1, 1988, and alternatively proposing a buy-out of \$4,800 to be paid on September 15, 1988.

17. On September 26, 1988, Schubach, Rathke and Dr. English met to discuss the lease. Dr. English presented a document with rent comparables to Schubach. Schubach rejected the rent comparables. Schubach commented about rent in his Provo and Layton stores. Dr. English suggested if Standard wanted to sublease that they should consider calling Weight Watchers. Schubach stated "We're not in the leasing business, you are. Our business is the optical business."

18. Schubach later said he would contact Rick Trentman of Weight Watchers. Dr. English left the September 26, 1988, meeting with the understanding that Standard Optical was not going to use the premises as a retail optical shop and that Dr. English, who was in the leasing business, should find a tenant and the parties would continue to negotiate the Lease amount.

19. On September 29, 1988, in compliance with his understanding that he was to attempt to find a tenant, Dr. English had an access key made for the premises and upon entering the premises to inspect it he found damage to the Premises.

20. On October 1, 1988, Standard Optical did not pay any rent.

21. On October 5, 1988, Dr. English sent a notice of default to Standard Optical and suggested the parties use the same Lease amount until they agreed and that they use MAI

appraisers to determine the amount. Dr. English did this because he believed Schubach had used Standard Optical's Provo and Layton stores as comparisons which Dr. English believed to be inappropriate.

22. No subtenant was ever presented to Dr. English by Standard Optical. Further, Stephen Schubach called and left a message for Rick Trentman but never made contact directly with Rick Trentman of Weight Watchers.

23. On October 18, 1988, Dr. English changed the lock to the premises for the purpose of protecting the tools of the repairmen who would be working on the premises.

24. On October 20, 1988, Standard Optical issued a check in the amount of \$1600: \$800 for September and \$800 for October rent. Schubach sent this amount because it was where Standard Optical left the negotiations. No mention was made that it was in response to a Demand Letter.

25. On October 20, 1988, Dr. English's attorney, Gary Doctorman, wrote a letter to Richard and Stephen Schubach at Standard Optical Company. The letter informed Standard Optical that it was "in violation of the terms of the lease" and that if it desired to "remain in possession of the leased premises," it should make rent payments for the months of September and

October. The amount of rent claimed due was not specified in the letter.

26. Dr. English subsequently returned the \$1,600 check to Standard Optical because the parties had not yet arrived at an agreed amount.

27. On November 1, 1988, no payment was made.

28. In the first week of November, 1988, Schubach called Dr. English at his home and agreed that Standard Optical would pay \$1,000 monthly rent.

29. Each time Standard Optical sought access to the property after the locks were changed, access was achieved.

30. On or about November 7, 1988, Dr. English's office gave the key to the premises to an employee of Standard Optical.

31. On or about November 5 and November 7, Standard Optical employees entered into the Premises and removed the remaining Standard Optical possessions.

32. Between September 1, 1988 and January 31, 1989, Standard Optical only attempted to enter the premises on November 5, 1988 or November 7, 1988, and during the first half of October, 1988, on November 4, 1988 and on December 16, 1988. At no time that Standard Optical attempted to enter the Leased Premises were they denied access. Dr. English's actions never deprived Standard Optical of access to the premises.

33. Sometime between the last week of October and before November 10, 1988, subcontractors hired by Dr. English commenced repairs to the Premises. At that time Dr. English had not yet arranged for any particular tenant to lease the Premises.

34. On November 21, 1988, Dr. English received \$1,600 in payment, the check markings indicated \$1,000 of which was to be applied to the September rent and \$600 to be applied to a partial payment for the October rent.

35. On November 21, 1988, Standard Optical paid Utah Power & Light for electricity supplied to the premises at 3525 Market Street up through October 18, 1988.

36. On December 1, 1988, Standard Optical issued a check to Dr. English in the amount of \$1,000.

37. On December 2, 1988, Dr. English sent a demand letter to Mr. Rathke at Standard Optical requesting "lease payments due for October, November and December." In his letter, Dr. English also indicated, that he had three prospective tenants for the premises. On December 5, 1988, Dr. English received a check from Standard Optical in the amount of \$1,000.

38. On December 6, 1988, Standard Optical paid Utah Power & Light for electricity supplied to the premises at 3525 Market Street through November 18, 1988.

39. Defendant Standard Optical failed to maintain the premises at all times in a clean and sanitary condition in accordance with good and reasonable standards of like commercial units.

40. Defendant Standard Optical removed attachments from the building.

41. Defendant Standard Optical failed to keep the furnace in a reasonable state of repair.

42. Dr. English and his contractors' inspection revealed the reasonable need to repair and Dr. English did repair at a reasonable cost as indicated as follows:

(a) The furnace was not working properly and plumbing was damaged and Willard Hellstrom charged \$619.86 for repairs.

(b) It appeared that Standard Optical had removed numerous fixtures, including built-in-cabinets and counters. The removal left large and small holes in the walls, damaged the ceiling, walls, and carpets. Also, the removal of the built-in cabinets left gaps in the trim. Additionally, Standard had failed to fix a plumbing leak damaging the bathroom walls, cabinets and left the floor tiles curling. The damage to the walls, ceiling, bathroom trim was repaired with like materials. The bills for repairs were: Gordon Hellstrom, \$2,031.82;

Butterfield Lumber, \$366.42; Fred Burns, \$4,143.30; Perschon, \$113.99 and Perschon \$1,472.01.

(c) Standard Optical left behind damaged light fixtures requiring repair of 34 lampholders, replacement of 120 lamps and other repairs by Willard Hellstrom totalling \$1,135.26.

(d) The above repairs totalled \$9,852.66 and Dr. English substantially paid these amounts on or before December 31, 1988.

43. Dr. English mitigated his damages and re-rented the premises for a period of one year to Weight Watchers, Inc. at a sum of \$990.00 per month commencing the 1st day of July, 1989.

44. Standard Optical refused to pay rent of \$1,400 for the rent due in 1988 and has paid no rent in the year 1989.

45. Reasonable attorneys' fees of \$11,968.40 were incurred by plaintiff, and plaintiff's expenses and filing fees of \$75.00, service of process fees of \$9.75 and deposition costs of \$453.45.

THE COURT HAVING MADE THE ABOVE FINDINGS OF FACT hereby enters its Conclusions of Law:

1. Pursuant to the terms of the written Lease, the parties negotiated at the end of the second 36-month term and on or about November 2, 1988 the parties agreed that the rent for

the next 36-month term from September 1, 1988 to August 1, 1991 would be \$1,000 per month.

2. Standard Optical failed to pay the rent as agreed and breached the written Lease. Dr. English has been damaged in the amount of lost rent for the year 1988 in the amount of \$1,400 and for lost rent from January 1, 1989 through the 1st day of July, 1990 in the amount of \$6,000. Plaintiff is entitled to the entry of judgment of these amounts.

3. Standard Optical breached the written Lease Agreement between the parties as they failed to maintain and repair the premises, including the furnace, and they removed attachments to the building and as a result of their failure to maintain and repair, Dr. English reasonably repaired the premises at a reasonable cost of \$9,852.66.

4. Dr. English incurred reasonable attorneys' fees in the amount of \$11,968.40 and is entitled to a judgment for that amount.

5. Dr. English is entitled to prejudgment interest on the damages and lost rent at the rate of 10%.

6. Dr. English incurred court costs in the amount of \$538.20 and is entitled to a judgment for that amount.

7. Interest shall accrue on the judgment at the rate of 12% from the date of the judgment.

8. Plaintiffs failed to meet its burden of proof to show defendants failed to negotiate in good faith.

9. Pursuant to the decision in Reid v. Mutual of Omaha Insurance Company, 110 Utah Adv. Rep. 12 (1989), this court will impose damage awards based on past events only and does not take into account the landlord's mitigation efforts in the future and therefore this court retains jurisdiction of this matter and awards only those rents that have come due as of the time of the trial, which judgment will be immediately enforceable. The rents and damages accruing after the trial may be recovered through supplemental proceedings for any further rents lost or damages incurred imposing the duty upon the landlord to fulfill its ongoing duty to mitigate. The initial determination of the tenant's liability would govern in the supplemental proceeding.

DATED this 9th day of February, 1992.



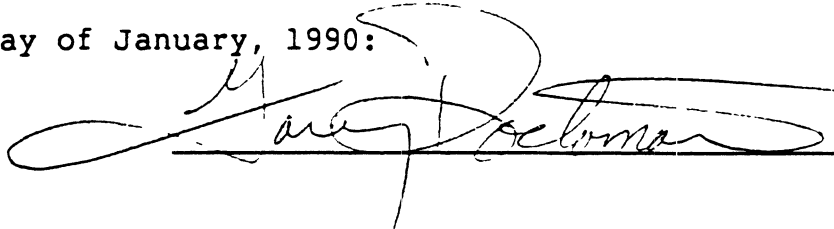
JUDGE MICHAEL R. MURPHY

Approved as to form:

George A. Hunt
Attorney for Defendant
Standard Optical Company

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW to George A. Hunt, Snow, Christensen & Martineau, 10 Exchange Place, Suite 1100, Salt Lake City, Utah 84111 on this 31 day of January, 1990:



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