

1990

# W. Daniel English v. Standard Optical Co. : Brief of Respondent

Utah Court of Appeals

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COURT OF APPEALS  
STATE OF UTAH

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	)	BRIEF OF RESPONDENT
Plaintiff/Respondent,	)	
	)	PRIORITY NO. 16
vs.	)	
	)	
STANDARD OPTICAL CO.,	)	Case No. 900422-CA
a Utah corporation,	)	
	)	
Defendant/Appellant.	)	

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APPEAL FROM THIRD DISTRICT COURT OF UTAH

---

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### JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(j) (1953 as amended) for the reason that this matter was transferred to the Utah Court of Appeals from the Utah Supreme Court.

### ISSUES PRESENTED FOR REVIEW

1. Did Standard waive its right to interpose the statute of frauds as a defense to the oral agreement to pay \$1,000 per month for the third 36-month period of the written lease as a result of Standard's admission in its pleadings and at trial that it agreed to pay \$1,000 per month?

2. Did the lower court err by failing to conclude that the written lease and Standard's written checks dated October 20, 1988, and December 1, 1988, were insufficient to satisfy the statute of frauds?

3. Did the trial court err by failing to conclude that English's change of the lock on October 18, 1988, precludes English from enforcing Standard's agreement to pay rent?

4. Is the trial court's conclusion that English is entitled to damages for repairs and renovations made to the premises correct?



### STATEMENT OF THE CASE

This case involves a landlord/tenant dispute. The case was tried in the Third Judicial District Court, County of Salt Lake, State of Utah, before the Honorable Michael R. Murphy on December 21 and 22, 1989. At the conclusion of the trial, Judge Murphy took the case under advisement, after which he ruled in favor of English. The Court entered Findings of Fact and Conclusions of Law and a Judgment on or about February 9, 1990. On May 17, 1990, the Court entered an Order denying Standard's Motion to Amend the Judgment. Standard filed a Notice of Appeal on June 7, 1990.

### STATEMENT OF FACTS

1. In 1974, plaintiff/respondent Dr. Daniel English ("English") constructed a building located at 3525 Market Street, West Valley City, Utah (the "Leased Premises"), to be occupied by defendant/appellant Standard Optical Co. ("Standard") as the tenant. See Trial Transcript ("Transcript"), Vol. I, p. 60-61.

2. Standard took possession of the building and continuously occupied it as the tenant under the lease dated May 21, 1973 (Trial Exhibit 3), and a subsequent lease dated August 10, 1982 (the "Lease") (Trial Exhibit 4). See Transcript, Vol. I, pp. 60, 61, 65.

3. Until June, 1989, Standard was the only tenant to ever occupy the Leased Premises. See Trial Exhibits 3 and 4; Transcript, Vol. I, pp. 60-61, 65.

4. Significant portions of the Lease are stated as follows:

(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.

See Trial Exhibit 4 (emphasis added).

5. In September, 1985, the parties negotiated a rent increase from \$1,000 to \$1,200 per month pursuant to the terms of paragraph (c) of the Lease for the second 36 month period of the Lease term. See R. at 189 (Findings of Fact, ¶ 3).

6. In 1986 and 1987, Standard made the decision to convert its optical stores to "superstores" where possible, and in early 1988 began negotiations with Valley Fair Mall, located one block away from the Leased Premises. In June, 1988, Standard executed a lease with Valley Fair Mall for a superstore in the mall. See R. at 189 (Findings of Fact, ¶ 4).

7. Despite the fact that the written Lease expressly provided for a ten-year lease term (and thus would expire in 1992), prior to June, 1988, Standard understood the Lease term to expire at the end of August, 1988, with an option to negotiate a renewal. See R. at 190 (Findings of Fact, ¶ 6).

8. On June 20, 1988, Klaus Rathke ("Rathke"), general manager of Standard, told English that Standard was moving the optical store located in the Leased Premises to the Valley Fair Mall. English informed Standard that the term of the Lease did not expire in 1988. See R. at 190 (Findings of Fact, ¶ 7).

9. Paragraph (c) of the Lease provides that the parties would negotiate a rental amount every 36 months. The second 36-month period concluded on August 31, 1988. See Trial Exhibit 4.

10. On or about June 30, 1988, Standard proposed to sublease the Leased Premises. English responded in writing that he would consider a proposal to sublease the Leased Premises. See R. at 190 (Findings of Fact, ¶ 8).

11. On July 5, 1988, English requested that Standard submit a list of proposed tenants for subletting the Leased Premises and suggested a meeting on September 15, 1988, to negotiate a new rental amount. See R. at 190 (Findings of Fact, ¶ 10).

12. July 17, 1988, was Standard's last day of business at the Leased Premises. See R. at 191 (Findings of Fact, ¶ 11).

13. On or about July 18, 1988, Standard moved its records and inventory from the Leased Premises and also moved attachments to the building, including built-in cabinets and counters in violation of Paragraph (g) of the Lease. See R. at 191 (Findings of Fact, ¶ 12), Trial Exhibit 4.

14. Several large signs were placed on the Leased Premises stating that Standard had moved. See R. at 191 (Findings of Fact, ¶ 12).

15. By letter, dated July 20, 1988, Standard informed English that Standard had abandoned its plans to have a subsidiary of Standard sublet the Leased Premises but that Standard still wanted to sublet the premises to someone else. See R. at 191 (Findings of Fact, ¶ 13).

16. In its July 20, 1988 letter, Standard further suggested "an outright buyout of the lease." See Trial Exhibit 7.

17. On July 22, 1988, English wrote Standard stating that he needed to know more about the proposed subtenant before he could give his approval. See R. at 191 (Findings of Fact, ¶ 14).

18. On August 1, 1988, Standard wrote English stating that Standard intended to negotiate for an \$800 per month rent

amount beginning September 1, 1988. Alternatively, Standard proposed a buy out of the Lease for \$4,800 to be paid on September 15, 1988. See R. at 191 (Findings of Fact, ¶ 16).

19. On September 26, 1988, Stephen Schubach ("Schubach"), president of Standard, Rathke and English met to discuss the lease. English suggested that if Standard wanted to sublease, they should consider calling Weight Watchers. Schubach declared, "We're not in the leasing business, you are. Our business is the optical business." See R. at 192 (Findings of Fact, ¶ 17).

20. English left the September 26, 1988, meeting with the understanding that Standard was not going to use the Leased Premises as a retail optical shop and that English was responsible for finding a tenant for the Leased Premises and that the parties would continue to negotiate a rent amount. See R. at 192 (Findings of Fact, ¶ 18).

21. No subtenant was ever presented to English by Standard. Standard's only effort toward obtaining a subtenant was to call and leave a message for Rick Trentman of Weight Watchers who English had previously suggested that Standard call. See R. at 193 (Findings of Fact ¶ 22).

22. In compliance with his understanding that he was responsible for finding a tenant, English had an access key made

for the Leased Premises on September 29, 1988, and upon entering the premises to inspect them, English found damage to the premises. See R. at 192 (Findings of Fact, ¶ 19).

23. On October 18, 1988, English changed the lock to the premises for the purpose of protecting the tools of the repairmen who would be working on the premises. See R. at 193 (Findings of Fact, ¶ 23).

24. On October 20, 1988, Standard issued a check in the sum of \$1,600, the check stub indicating that \$800 was for September's rent and \$800 was for October. See R. at 193 (Findings of Fact, ¶ 24).

25. English subsequently returned the \$1,600 check to Standard because the parties had not yet agreed on a rent amount. See R. at 194 (Findings of Fact, ¶ 26).

26. During the first week of November, 1988, Schubach called English at his home and agreed that Standard would pay \$1,000 per month rent. See R. at 194 (Findings of Fact, ¶ 28).

27. Each time Standard sought access to the premises after the lock was changed, access was achieved. See R. at 194 (Findings of Fact, ¶ 29).

28. On or about November 7, 1988, English's office gave the key to the premises to an employee of Standard. See R. at 194 (Findings of Fact, ¶ 30).

29. Between September 1, 1988, and January 31, 1989, Standard only attempted to enter the Leased Premises on November 5 or 7, 1988, the first part of October, 1988, November 4, 1988, and December 16, 1988. Standard was not denied access on any occasion it attempted to enter the Leased Premises. English's actions never deprived Standard of access to the premises. See R. at 194 (Findings of Fact, ¶ 32).

30. There is nothing in the record to show that Standard ever complained or was concerned about any alleged lack of possession until it filed an Answer to the Complaint.

31. On November 21, 1988, English received back the \$1,600 check, with the check stub notations changed to indicate that \$1,000 was for September's rent and the remaining \$600 was to be applied as a partial payment for October's rent. See R. at 195 (Findings of Fact, ¶ 34).

32. On November 21, 1988, Standard paid Utah Power and Light for electricity supplied to the Leased Premises up through October 18, 1988. See R. at 195 (Findings of Fact, ¶ 35).

33. On December 5, 1988, English received a check from Standard for rent in the sum of \$1,000. See R. at 195 (Findings of Fact, ¶ 37).



34. On December 6, 1988, Standard paid Utah Power and Light for electricity supplied to the Leased Premises through November 18, 1988. See R. at 195 (Findings of Fact, ¶ 38).

35. In the Lease, Standard represents and agrees, on three separate occasions, regarding the condition of the premises at the beginning of the lease term:

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

Trial Exhibit 4 (p. 2).

Lessee hereby accepts the Leased Premises in a condition of good repair . . .

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).

36. Standard 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. See R. at 196 (Findings of Fact, ¶ 39).

37. Standard removed attachments from the building and failed to maintain the furnace in a reasonable state of repair. See R. at 196 (Findings of Fact, ¶ 40, 41).

38. English's and English's contractors' inspection of the premises revealed that it was reasonably necessary to repair

the following items which English did repair at a reasonable cost as follows:

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

(b) Standard had removed numerous fixtures, including books built-in cabinets and counters. The removal left large and small holes in the walls and 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 which had damaged the bathroom walls, cabinets and left the floor tiles curling. The damage to the walls, ceiling and bathroom trim was repaired with like materials. The bills for those repairs were: Gordon Hellstrom, \$2,031.82; Butterfield Lumber, \$366.42; Fred Burns, \$4,142.30; Perschon, \$113.99; and Perschon, \$1,472.01.

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

(d) The above repairs totalled \$9,852.66 which English substantially paid on or before December 31, 1988. See R. at 196-97 (Findings of Fact, ¶ 42).

### SUMMARY OF ARGUMENT

It is not clear from Standard's Brief of Appellant ("Appellant's Brief") which findings of fact and conclusions of law Standard challenges an appeal. Standard appears to argue that the lower court should have entered a conclusion of law that the parties' agreement to reduce the rent from \$1,200 to \$1,000 per month for the third 36-month period of the lease term is unenforceable as a matter of law because the writings that discuss it are insufficient to satisfy the statute of frauds. However, admissions of the rent agreement made by Standard in its pleadings and at trial bar Standard from interposing the statute of frauds as a shield to liability. Even if the statute of frauds were to apply, the statute is satisfied by the Lease, the rent checks and check stubs written by Standard, and the parties' written correspondence, together with the parties' trial testimony that they had agreed on a rent amount.

Standard claims that English unlawfully evicted Standard when English changed the lock to the Leased Premises. However, English did not enter the premises or change the lock until after Standard had moved out of the premises and directed English to obtain a subtenant. Standard's instruction to obtain a subtenant effectively authorized English to enter the premises to repair them so that they could be shown to prospective tenants.

Furthermore, the lower court found that English's actions never deprived Standard of access to the Leased Premises; that each time Standard sought access, it was achieved; that English changed the lock for the purpose of protecting the workmen's tools; and that Standard was given a key to the new lock, all findings which are unchallenged by Standard on appeal.

Finally, Standard contends that English is not entitled to recover the amounts he expended in repairing and refurbishing the premises on the grounds that there was no evidence adduced at trial of the condition of the premises at the commencement of the lease term. On the contrary, the Lease itself, executed by Standard, recites in three different places that the Leased Premises were in a condition of "good" and/or "excellent" repair. Moreover, having been directed by Standard to obtain a subtenant and with Standard being in breach of its rent agreement, English had a duty to mitigate the damages caused by the accruing unpaid rent. The leading case of Reid v. Mutual of Omaha Insurance Company, 776 P.2d 896 (Utah 1989), mandates that landlords take commercially reasonable steps to relet premises and authorizes recovery of the reasonable costs of repairs and refurbishing incurred in reletting the premises.

## ARGUMENT

### I. STANDARD OF REVIEW

Standard has not specifically identified which findings of fact it challenges on appeal. A review of Standard's Appellant's Brief suggests that Standard has not expressly assigned err to any of the findings. To the extent that any of Standard's arguments impliedly contests any of the trial court's findings of fact, those findings shall not be set aside on appeal, unless Standard satisfies the requirements of Rule 52(a), Utah Rules of Civil Procedure.

Governing findings entered by the trial court, Rule 52, Utah Rules of Civil Procedure, states in part as follows:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Utah Supreme Court has stated that a finding is "clearly erroneous" only where it is "against the clear weight of the evidence" or where the appellate court otherwise reaches "a definite and firm conviction that a mistake has been made." State v. Walker, 743 P.2d 191, 193 (Utah 1987); Special Service District 1 v. Jackson Cattle, 744 P.2d 1376, 1377 (Utah 1987). A trial court's findings should be affirmed where they are supported by

substantial evidence. See Jackson Cattle, 744 P.2d at 1377. The Utah Supreme Court, quoting C. Wright & A. Miller, Federal Practice and Procedure § 2585 (1971), has stated:

"The appellate court. . .does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law."

Walker, 743 P.2d at 193 (emphasis added). In Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1989), the court explained that for an appellant to challenge a trial court's findings of fact, the appellant:

must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in the light most favorable to the court below.

Reid, 776 P.2d at 899.

In its appeal, Standard also has not directly challenged any of trial court's conclusions of law or at least has not identified which conclusions it contends are erroneous. Nevertheless, this Court is not bound by the lower court's conclusions of law and reviews them for correctness. City of West Jordan v. Utah State Retirement Bd., 767 P.2d 530, 532 (Utah 1988). A trial court's conclusions of law, if correct, will be affirmed

on any grounds even if they are different from those stated by the trial court. See Foss Lewis & Sons Construction Co. v. General Insurance Co. of America, 517 P.2d 539, 540 (Utah 1973).

**II. STANDARD'S ADMISSION OF THE RENT AGREEMENT IN ITS PLEADINGS AND AT TRIAL BARS STANDARD FROM RELYING ON THE STATUTE OF FRAUDS AS A DEFENSE TO LIABILITY.**

Standard seeks to use the statute of frauds<sup>1</sup> to shield itself from liability for the lease payments which accrued after September 1, 1988. Standard argues that the writings that discuss the parties' agreement to pay \$1,000 rent are insufficient to satisfy that statute of frauds. Historically, the statute of frauds was designed to protect property owners from the fictitious claims of supposed transferees. However, the underlying purpose of the statute of frauds is satisfied where both parties admit the terms of the alleged oral agreement. Failure to enforce an agreement under these circumstances would result in the same injustice the statute of frauds is intended to prevent.

Consistent with the underlying purpose of the statute is the rule that a party who seeks to avoid enforcement of an oral agreement waives its right to rely on the statute of frauds

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<sup>1</sup> Utah's statute of frauds relating to leases and contracts for interest in lands, Utah Code Ann. § 25-5-3 (1989), provides as follows: "Every contract for the leasing for a longer period than one year . . . shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease . . . is to be made. . . ."

as a defense to the agreement where that party has admitted the terms of the agreement. The Utah Supreme Court recognized this rule in Bentley v. Potter, 694 P.2d 617 (Utah 1984).

In Bentley, the plaintiffs alleged that the defendant had orally agreed to guarantee a corporation's obligation to purchase a truck from the plaintiffs. At trial, the defendant admitted that at the time he signed the bill of sale for the truck on behalf of the corporate buyer, he intended and understood that he was a guarantor of the debt.

In determining whether the defendant should be held to his oral promise to guarantee the debt, the court stated:

The statute of frauds is a defense that can be waived by . . . admitting its existence in the pleadings [citations omitted]; or admitting at trial the existence and all essential terms of the contract [citations omitted].

Bentley, 694 P.2d at 621. On the basis of the defendant's in-court admission, the Court in Bentley held that the defendant had waived the statute of frauds as a defense and accordingly was bound by his promise to guarantee the debt despite the fact that it was not in writing as required by the statute of frauds. Id. The court reasoned as follows:

Since a purpose of the statute of frauds is to prevent fraud and perjury on the part of one claiming that another had guaranteed a debt, the one opposing the claim cannot complain if he admits the existence of the guarantee. [Citations omitted.] "It cannot give a court any great satisfaction to permit a



defendant to escape from performing a contract he admits he has made." 2 Corbin on Contracts § 320 at 153 (1950).

Id.

In the instant case, Standard has admitted the existence of an oral agreement for lease payments of \$1,000 per month both in its pleadings and at trial. In its Trial Brief, dated December 15, 1989, Standard asserts in paragraph 22 of the Statement of Facts as follows:

22. On or about November 2, 1988, Stephen Schubach called Dr. English at his home and proposed that Standard Optical pay \$1,000 a month for the Premises.

R. at 94. The trial testimony of Stephen Schubach, President of Standard, confirms the statement made by Standard in its Trial Brief. Schubach testified at trial that during the conversation which took place on or about November 2, 1988, he agreed to pay \$1,000. See Transcript, Vol. II, p. 194, line 20-22. Further confirming Schubach's testimony, English testified at trial that Schubach called English at his home on or about November 2, 1988, and agreed to \$1,000 as the rental figure. See Transcript, Vol. I, pp. 139-40.

While Standard admits in its Trial Brief and Schubach testified at trial that Schubach called English and agreed to \$1,000 per month as rent, Standard suggests in its brief that the agreement to pay \$1,000 per month rent may have been an agreement

only for the period until a new tenant was obtained.<sup>2</sup> See Appellant's Brief at 19. There is, however, a complete absence of support in the record for the assertion that the agreement to pay \$1,000 per month rent occurred in any context other than an agreement to pay \$1,000 per month for the third 36-month period of the Lease. At no place in his deposition or trial testimony did Schubach assert that Standard's agreement to pay \$1,000 per month rent was not in the context of the negotiations for a rent amount under the lease. At no place in his deposition or trial testimony did Schubach assert that the agreement to pay \$1,000 per month rent was in the context of a settlement.

Moreover, the trial court found that Standard agreed to pay \$1,000 per month for the premises. Standard has not challenged and this Court must accept that finding. Additionally, and as discussed below in Argument III, the parties' trial testimony regarding their negotiations and the parties' correspondence during those negotiations establish that the agreement to pay

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<sup>2</sup> While the evidence establishes that the agreement to pay \$1,000 per month rent was for the third 36-month period of the lease term, it should be noted that the damages awarded by the trial court equal the amount suggested by Standard, i.e., \$7,400 which represents the amount of unpaid rent which accrued prior to the date English leased the premises to another tenant (approximately seven and one-half months).

\$1,000 per month rent related to the third 36-month period of the lease term.

III. THE LOWER COURT WAS CORRECT IN NOT CONCLUDING THAT THE STATUTE OF FRAUDS BARS RECOVERY.

A. The Cases Cited by Standard do not Govern the Facts of This Case.

In its brief, Standard cites a number of cases for the proposition that leases providing for the negotiation of rent with no specified method of determining the amount are unenforceable. Each case cited by Standard is distinguishable in that none of the parties involved in those cases actually agreed on a rent amount and made payments pursuant to that agreement. Accordingly, those cases do not govern. However, because Standard places special emphasis on Pingree v. Continental Group of Utah, Inc., 558 P.2d 1321 (Utah 1976), it is useful examine that case for its applicability to the case at bar.

Pingree involves a lease which expressly granted the tenant two options to renew for two five-year terms upon the same terms and conditions as the original lease, except that the rental amount would be renegotiated. As pointed out by Standard in its brief, the parties were unable to agree upon a rent amount for the renewal period. Pingree, 558 P.2d at 1321. Because the parties could not agree on a rent, the Utah Supreme Court in Pingree refused to fix a reasonable rent. Id. Standard contends

that Pingree governs the facts of this case and requires the conclusion that the Lease is not enforceable because the parties failed to agree on a rent amount after September 1, 1988.

Standard's analysis of Pingree entirely disregards the trial court's finding of fact, unchallenged on appeal, that English and Standard did agree on a rent amount. See R. at 194 (Finding of Fact, ¶ 28). Standard also disregards the undisputed fact that the parties' agreement for a \$1,000 per month rent amount was memorialized by Trial Exhibits 17 and 18, Standard's two written rent checks, and Trial Exhibit 13, English's signed letter. Accordingly, Pingree and the other cases cited by Standard relating to options to renew where the parties fail to agree on a rent amount are inapposite.

**B. The Parties' Writings and Parol Evidence Satisfy the Statute of Frauds.**

The Utah statute of frauds requires that a lease with a duration of more than one year must have some memorandum thereof, in writing and signed by the party by whom the lease is to be made. Utah Code Ann. § 25-5-3. It is well established that the writing necessary to satisfy the statute of frauds need not contain all of the terms and conditions of the agreement, but rather may be comprised of several memoranda which, taken together,

contain the terms of the agreement.<sup>3</sup> 72 Am.Jur. 2d, Statute of Frauds, § 371; In re Estate of Bonny, 600 P.2d 548, 549 (Utah 1979).

In the instant case, the parties' agreement on a rent amount for the third 36-month period of the lease term is memorialized by the Lease (Trial Exhibit 4); the October 20, 1988, rent check written by Standard (Trial Exhibit 17); and the December 1, 1988, rent check written by Standard (Trial Exhibit 18). Standard argues that because English, the party to be charged, did not sign the checks, they cannot be considered as satisfying the writing requirement of the statute of frauds. However, it is well established that not all of the writings memorializing an agreement need to be signed by the parties to be charged. Gregerson v. Jensen, 617 P.2d 369, 372-73 (Utah 1980); 72 Am. Jur. 2d, Statute of Frauds, § 371. While English did not sign the two checks when he deposited them into his bank, it is undisputed that he did sign the 1982 Lease.

Though Standard further contends that the checks do not contain references to the rental term, express words of reference

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<sup>3</sup> Standard's assertion in its brief that "The only way the Lease Agreement could be enforced after August 1988 was if the parties entered into a written addendum to the lease specifying the amount of rent. . .," unsupported by any case authority, is patently inaccurate. Appellant's Brief at 14.

are not required to sufficiently connect a signed writing to an unsigned writing. 2 Corbin on Contracts, § 514 (1963). However, where signed and unsigned writings are relied on to satisfy the statute of frauds, there must be some "nexus" between the writings. Gregerson, 617 P.2d at 373. According to the Utah Supreme Court, this "nexus" may be shown by:

express reference in the signed writing to the unsigned one, or by implied reference gleamed from the contents of the writings and the circumstances surrounding the transaction. In the latter instance, parol evidence may be used to connect an unsigned document to one that has been signed by the persons to be charged.

Id. In the instant case, the parties' written correspondence from July, 1988, through November, 1988, and the parties' trial testimony regarding their negotiations during that period, establish that the October 20, 1988, and December 1, 1988, rent checks written by Standard referred to the Lease and memorialized the rent amount for the third 36-month period under the lease term.

The Lease provides for all of the terms of the parties' agreement (e.g., ten year lease term, description of premises, payment of maintenance expenses, taxes and insurance), except the amount of the monthly lease payment after September 1, 1988, which was to be negotiated pursuant to paragraph (c) of the Lease. Standard's two checks sent to English indicating payment for September, October and part of November's lease payments

memorialize the parties' agreement that the amount of the monthly lease payment after September 1, 1988, would be reduced from \$1,200 to \$1,000. Significantly, Standard did not send English the first post-September 1, 1988, rent check, with the check stub notations indicating a \$1000 rent amount until November 21, 1988, approximately three weeks after Schubach had called English at his home and agreed on a rent amount of \$1,000. Thereafter, Standard sent another check also in the sum of \$1,000. The rent checks, both paid after Standard had agreed to pay \$1,000 per month rent, together with the Lease contain all the material terms of the parties' agreement and thereby satisfy the statute of frauds.

The parties' written correspondence from July, 1988, through November, 1988, together with the parties' oral negotiations and the circumstances of those negotiations establish the requisite nexus between the rent checks and the Lease.

Prior to June, 1988, Standard understood that the Lease expired at the end of August, 1988, with an option to negotiate a renewal of the lease. However, in a conversation on June 20, 1988, English informed Standard that the lease did not expire in 1988 and referred Standard to the Lease. The course of the parties' subsequent communications establishes that the parties were negotiating with reference to the amount of monthly lease

payments due under the Lease for the third 36 month period after September 1, 1988.

Memorializing an earlier conversation, English's July 5, 1988, letter states:

Also, as we discussed, we will negotiate a new monthly lease amount around the 15th of September, as per the lease agreement.

Trial Exhibit 5 (emphasis added).

In his responding letter dated July 20, 1988 (Trial Exhibit 6), Standard did not dispute English's statement that the parties would negotiate for a new monthly rent "as per the lease agreement." Additionally, Standard expressed a continued interest in "sublet[ting]" the premises and suggested "an outright buyout of the lease." Standard's suggestion that it "sublet" the premises indicates that it understood that even though it had vacated the premises, it continued to be bound under the lease. Moreover, Standard's reference to a "buy out of the lease" indicates that it understood that there must have been some lease term to buyout which extended beyond September 1, 1988.

English's July 22, 1988 letter (Trial Exhibit 7) confirms the conclusion that the parties were negotiating in reference to the Lease and not with regard to a month to month tenancy or a settlement agreement. In that letter, English responds to Standard's suggestion that the premises be sublet by stating that



his approval of a subtenant would not be "unreasonably withheld," language which echoes language contained in the Lease.

Standard's next correspondence dated August 1, 1988 (Trial Exhibit 8), states that in September Standard would be negotiating for an \$800 per month "lease amount." Standard also proposed, as it had before, a "simple buyout of our lease." Both statements indicate that Standard was negotiating with reference to the Lease and that it understood that the lease term extended beyond September 1, 1988.

In his next letter to Standard dated September 13, 1988 (Trial Exhibit 9), English expressed an interest in a meeting to "discuss the lease negotiations" (emphasis added).

In a letter dated October 5, 1988 (Trial Exhibit 11), English recounts the parties' inability to arrive at an "acceptable negotiated monthly lease payment for the remaining four [sic] year period of [Standard's] lease . . . ." English's language communicates his understanding that the parties were negotiating with reference to the 36-month period of the lease term beginning after September 1, 1988.

On or about October 20, 1988, Standard sent a check to English for \$1,600. (Trial Exhibit 16). The check stub indicated \$800 for September's rent and \$800 for October's. English

subsequently returned the check because the parties had not yet agreed on an amount.

Thereafter, Schubach called English at his home and agreed to \$1,000 per month as the rental amount. Approximately three weeks after Schubach's call to English, English received the same \$1,600 check he had previously received and sent back to Standard, except that the notations on the check stub had been changed to indicate a \$1,000 rent payment for September and a partial rent payment of \$600 for the month of October. (Trial Exhibit 17). On the same date, November 21, 1988, Standard paid Utah Power & Light bills for electricity supplied to the premises through October 18, 1988.

On December 5, 1988, English received from Standard a rent check in the sum of \$1,000. On the next day, December 6, 1988, Standard paid Utah Power & Light bills for electricity supplied to the premises through November 18, 1988.

Standard's statements and conduct over a six-month period of negotiations with English establish that Standard's agreement to pay \$1,000 per month rent was with reference to the third 36-month period of the Lease. Specifically, the parties' references to "lease payments" and "lease negotiations," to "subletting" the premises and to a possible "buyout of the lease" evidence that Standard understood that it was negotiating with

reference to the Lease and that it was bound under the Lease beyond September 1, 1988.

Moreover, there is an absence of support in the record for the assertion that the agreement to pay \$1,000 per month rent occurred in any context other than an agreement to pay \$1,000 per month for the third 36-month period of the 1982 Lease. At no place in his deposition or trial testimony did Schubach assert that Standard's agreement to pay \$1,000 per month rent was not in the context of the negotiations for a rent amount under the lease. Additionally, Standard has pointed to no testimony of any of the witnesses who testified at trial as support for the conclusion that the parties were negotiating for a settlement. The written Lease, the parties' rent agreement, the written checks paid pursuant to the agreement and the parties' oral negotiations and correspondence amply satisfy the statute of frauds. Use of the statute of frauds in this case to shield Standard from liability for a contractual obligation would promote the injustice the statute is intended to prevent.

**IV. ENGLISH'S ENTRANCE ONTO THE PREMISES DOES NOT PRECLUDE ENFORCEMENT OF THE LEASE.**

In its brief, Standard argues that English breached the Lease by unlawfully depriving Standard of possession of the premises and that English's repossession precludes him from recovering under the Lease. The assertion that English deprived Standard of possession is unfounded. Standard voluntarily chose not to occupy the building. Having found what it deemed to be a more desirable location, Standard voluntarily vacated the premises, leaving signs announcing the move. After considering all of the evidence, including the creditability and demeanor of the witnesses, the trial court entered findings of fact that English's actions did not deprive Standard of access to the premises; that each time Standard sought access to the premises, access was achieved; that Standard was never denied access to the premises; and that Standard was given a key to the premises. Despite the fact that Standard has not challenged any of these findings, Standard apparently requests this Court to rule that Standard was unlawfully deprived of possession as a matter of law. The single act upon which Standard relies as supporting its position that Standard was unlawfully deprived of possession is English's

change of the lock on October 18, 1988.<sup>4</sup> Standard relies on Bass v. Planned Management Services, 761 P.2d 566 (Utah 1988), and Aldrich v. Olson, 531 P.2d 825 (Wash. App. 1975), for the proposition that a landlord unlawfully deprives a tenant of possession when the landlord changes the locks. Both cases are distinguishable from the facts of this case.

Aldrich v. Olson, 531 P.2d 825 (Wash. App. 1975) involved a residential landlord/tenant dispute in which the plaintiff/landlord sought recovery of unpaid rent for the balance of a lease term. The defendant/tenant denied liability on the grounds that there was no default under the lease and further sought damages resulting from the landlord's alleged eviction. After not receiving a rent payment, the landlord had entered the premises with a key she had retained and discovered rotten food and that some of the tenant's property was missing, after which she changed the locks. Several days later, the tenant returned, broke one of the locks, reentered the premises and removed the rest of his property, together with some furnishings which he had installed under the terms of the lease.

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<sup>4</sup> There is no evidence in the record that Standard raised the issue of lack of possession or access with English until Standard filed its Answer to the Complaint.

Affirming the trial court's decision in favor of the tenant, the appellate court found that the tenant had not abandoned the premises and that the landlord's change of the locks constituted an unlawful eviction. Aldrich, 531 P.2d at 827. In discussing the significance of the landlord's actions, the court stated:

It is difficult to visualize an act of a landlord more specifically intended as a reassumption of possession by the landlord and a permanent deprivation of the tenant's possession than a "lockout" without the tenant's knowledge or permission [emphasis added]. Consequently, the real issue on appeal is whether or not changing the locks was an unlawful [original emphasis] act by the landlord.

Id. The court's language indicates that where the tenant has knowledge of the landlord's change of the locks or where the tenant has given the landlord permission to change the locks, the landlord's act of changing the locks might not be considered unlawful.

In the instant case, Standard effectively gave English permission to change the lock. In the parties' September 26, 1988, meeting, Standard declared that it was not in the leasing business and that it was English who was in the leasing business. The trial court found that English left the meeting with the understanding that English was responsible for obtaining a tenant for the unoccupied premises while the parties continued to

negotiate a lease amount. Standard's instruction to obtain a tenant for the premises necessarily implied that, at the very least, English could take those measures reasonably necessary to obtain a tenant, including repairing the premises and showing them to prospective tenants. The trial court found that English changed the lock for the purpose of protecting the tools of the workmen who English had hired to repair the premises. Moreover, the trial court found that English's actions did not deprive Standard of access to the premises; that each time Standard sought access to the premises, access was achieved; that Standard was never denied access to the premises; and that Standard was given a key to the premises. Standard has not challenged any of these findings.

Not only does Standard's authorization of English to find a subtenant distinguish this case from the facts of Aldrich, Standard's authorization also operates to bar Standard, under principles of waiver and estoppel, from asserting that English's change of the lock constituted an unlawful eviction. To evoke the doctrine of equitable estoppel, a party (the "first party") must show that another party made a statement inconsistent with a claim later asserted by that party; that the first party acted in reliance on the statement; and that the first party would be injured if the second were allowed to contradict or repudiate its

statement. Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689, 694 (Utah 1979). Under the doctrine of waiver, a party must knowingly and intentionally relinquish a right. Morgan v. Quailbrook Condominium Co., 704 P.2d 573, 578 (Utah 1985).

In this case, Standard made the statement that it would not continue to seek subtenants for the premises and that finding a tenant was English's business. English concluded from Standard's statement that it was his responsibility to obtain a tenant. To comply with Standard's instruction, English employed workmen to repair the damage done by Standard to the premises. For the purpose of protecting the workmen's tools, English changed the lock. Standard now argues that English's action unlawfully deprived it of possession, despite the facts that Standard effectively gave English permission to enter the premises and that Standard was never deprived of possession of the premises. Accordingly, Standard is estopped to claim that English's change of the lock constitutes an unlawful eviction. Similarly, Standard's instruction to English to obtain a subtenant constitutes a knowing and intentional relinquishment of Standard's right to exclusively enter the premise.

Standard also relies on Bass v. Planned Management Services, 761 P.2d 566 (Utah 1988), to support its claim that



English unlawfully deprived Standard of possession of the premises. In Bass, two of the defendants, the Trimbles, leased a mobile home to the plaintiffs, the Besses, who moved the mobile home to a park managed by defendant Planned Management Services, Inc. ("PMS"). After the Besses defaulted on their payments for the mobile home, the Besses employed a real estate agent to sell the mobile home and moved out some time around October 20, 1978, ten days before the expiration of the lease on October 31, 1978. Thereafter, PMS changed the locks on the mobile home and sold it to another party. The trial court held PMS liable for trespass in the amount of \$76.70, the reasonable rental value of the mobile for the ten day period of the trespass.

Conceding that it changed the lock prior to the expiration of the lease term, PMS asserted on appeal that the Besses were not actually denied access to the home or that any demand to enter after the locks were changed had been made. In affirming the trial court's finding, the appellate court emphasized that the result of PMS's actions was to actually deny access to Besses' real estate agent and that the Besses were also, in fact, denied access to the park on at least one occasion. Bass, 761 P.2d at 569.

While the court in Bass expressly found that the tenants had been denied access, the trial court in this case

expressly found that English's actions never deprived Standard of access to the premises.

Additionally, unlike the facts of this case, the tenant in Bass did not authorize the landlord to enter the premises. Standard's direction to obtain a subtenant for the Leased Premises, necessarily implied that, at the very least, English could enter the premises to perform repairs necessary to rereent the premises and to show the premises to prospective tenants. Indeed, the trial court found that English changed the lock to the premises "for the purpose of protecting the tools of the repairman who would be working on the premises." In view of the trial court's findings of fact, unchallenged on appeal, there is an insufficient basis to conclude that English's entrance onto the premises was unlawful.

**V. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S JUDGMENT AGAINST STANDARD FOR DAMAGES RESULTING FROM STANDARD'S FAILURE TO MAINTAIN THE PREMISES.**

Pursuant to the Lease, Standard agreed to at all times maintain the premises in a condition of good repair. In its findings of fact, the trial court found that Standard failed to maintain the premises. See R. at 196-97 (Findings of Fact, ¶ 39-42). In its conclusions of law, the trial court concluded that Standard breached the lease by failing to maintain and repair the premises and awarded damages on that basis. See R. at

198 (Conclusions of Law, ¶ 3). Asserting that English presented no evidence "whatsoever" of the condition of the premises at the commencement of the Lease, Standard argues that there was insufficient evidence for the trial court to conclude that Standard breached its obligations.<sup>5</sup> In making its argument, Standard 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 condition of excellent repair. . . .

Trial Exhibit 4, p. 2.

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

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.

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<sup>5</sup> As stated above, to successfully challenge any of the findings, Standard must demonstrate that the finding is "clearly erroneous" and "against the clear weight of the evidence." State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Accordingly, Standard was obligated under the Lease to return the premises to English in at least a condition of good repair. The trial court found, however, that the premises were not only in a state of disrepair but had been badly damaged. Standard removed attachments and cabinets and counters, leaving gouges in the ceiling, holes in the walls and gaps in the floor trip. Many of the light fixtures were not working. There was also damage to the bathroom walls, cabinets and floor tiles. The furnace had not been maintained and was not working properly. Furthermore, Standard has pointed to no evidence suggesting that when Standard vacated the premises, the premises were in the same, or better, condition than the beginning of the lease term. Standard has failed to demonstrate that any of the trial court's findings of fact relating to the damaged condition of the premises are clearly erroneous or that the conclusion of law relating to English's damages for repair costs is incorrect as a matter of law.

**VI. ENGLISH IS ENTITLED TO HIS ATTORNEY'S FEES INCURRED ON APPEAL.**

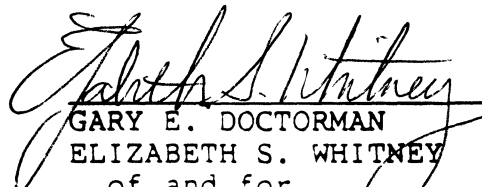
In Management Services Corp. v. Development Assoc., 617 P.2d (Utah 1980), the Utah Supreme Court held that where a contract provides for the payment of attorney's fees incurred in enforcing the contract, the prevailing party may recover both attorney's fees incurred at the trial level and those incurred on

appeal. Manaqement Services, 617 P.2d at 409; see also Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984); G.G.A., Inc. v. Leventis, 773 P.2d 841, 846-47 (Utah App. 1989). The Lease in the instant case provides for attorneys fees and costs incurred in enforcing the lease and was relied on by the trial court to award English fees and costs incurred at the trial level. Accordingly, respondent respectfully requests that in the event this Court affirms the trial court's decision, the case be remanded to the trial court for a determination of the attorney's fees incurred by English on appeal.

#### CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court affirm the trial court's Findings of Fact and Conclusions of Law and Judgment entered below and remand the case to the trial court for a determination of the attorney's fees incurred by English on appeal.

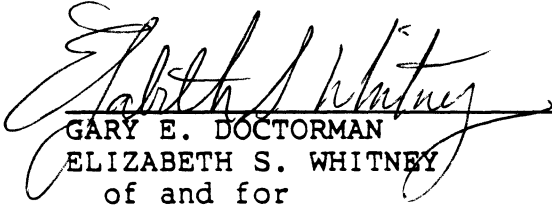
DATED this 3rd day of December, 1990.

  
GARY E. DOCTORMAN  
ELIZABETH S. WHITNEY  
of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered,  
four (4) true and correct copies of the foregoing BRIEF OF  
RESPONDENT to the following on this 3rd day of December, 1990:

George A. Hunt  
Kurt M. Frankenburg  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Suite 1100  
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388/120290A

## ADDENDA

FILED  
THIRD JUDICIAL DISTRICT

FEB 1990

By Michael R. Murphy  
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,

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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 9<sup>th</sup> day of February, 1992.

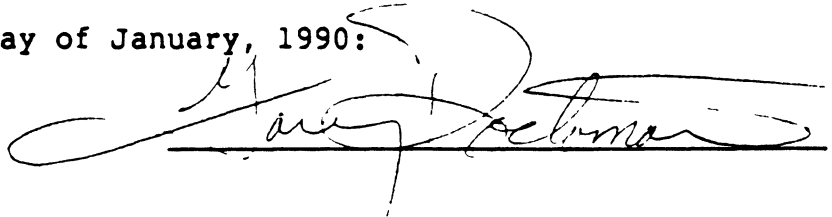
  
\_\_\_\_\_  
JUDGE MICHAEL R. MURPHY

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:



384:010290A

**SECRET**

710 199

By Martine Bills Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

## STATE OF UTAH

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This matter came for trial before the Honorable Michael R. Murphy and the trial was concluded on December 22, 1989. The court having entered its Findings of Fact, Conclusions of Law, and the court being fully informed and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That plaintiff, Daniel W. English is hereby granted judgment against defendant, Standard Optical, a Utah corporation as follows: \$17,252.66 in principal, prejudgment interest in the

00271



amount of \$ 1,355.27, attorneys' fees in the amount of \$ 11,968.40, costs of court in the amount of \$ 538.20. Interest shall accrue on this judgment at the rate of 12% from the date hereof until paid.

IT IS FURTHER ORDERED that this judgment shall be augmented in the amount of reasonable costs and attorneys' fees expended in collecting said judgment by execution or otherwise as shall be established by Affidavit.

IT IS FURTHER ORDERED that this judgment is enforceable immediately.

IT IS FURTHER ORDERED that the court retains jurisdiction of this matter and awards only those damages and rents that have come due at the time of the trial. The rents accruing after the trial may be recovered through supplemental proceedings for any further rents lost or damages incurred. However, plaintiff is imposed with its ongoing duty to mitigate its damages.

DATED this 2nd day of February 1990.

BY THE COURT:

Michael R. Murphy  
DISTRICT COURT JUDGE

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 JUDGMENT to George A. Hunt, Snow, Christensen & Martineau, 10 Exchange Place, Suite 1100, Salt Lake City, Utah 84111 on this 17 day of January, 1990:

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

384:010290C

A G R E E M E N T

THIS AGREEMENT made and executed in duplicate this 10th day of August, 1982 by and between W, Daniel English as party of the first part and hereinafter called the Lessor, and Standard Optical Company, of Salt Lake City, Salt Lake County, State of Utah, as party of the second part and hereinafter called the Lessee.

W I T N E S S E T H

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 by these presents hereby let and lease unto the Lessee, who does hereby agree to accept as leased property and premises and in accordance with the terms and provisions of this agreement, the following described office space and premises situated in West Valley City, Salt Lake County, State of Utah, and more particularly described as follows:

Commercial unit one (1) in the building located at 3525 Market Street, in West Valley City, Salt Lake County, State of Utah, containing approximately two thousand-one hundred (2100) square feet of floor space together with available parking space allocated on percentage of total square footage each tenant occupies of total building square footage.

To have and to hold said premises and office space under the terms of this agreement for a term of ten (10) years <sup>1982</sup> beginning on the 1st day of the month following written notice to Lessee from Lessor, and terminating at midnight on the last day of the same month ten years hence.

The Lessee does hereby unconditionally agree to pay as rent for the demised premises and to the Lessor, or order, at West Valley City, Salt Lake County, Utah, the sum of \$1000.00 each month for 36 months <sup>1982-1985 - 1988-1991</sup> with the first such installment payment to be due and payable on or before the 1st day of September, 1982, and each installment payment to be due thereafter by on or before that same calendar day during the term of the agreement. A grace period of five days is given for the making of any such installment payment.

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

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 purposes without the written consent of the Lessor first had and obtained, however, such consent will not be unreasonably withheld.

The Lessor does hereby agree to pay the general taxes assessed against the property and premises herein as belongs to the Lessor during the term of this agreement. The Lessor does also agree to furnish and pay for water for the leased premises and to maintain the exterior of the building in which these leased premises are located, except the glass, which shall be the responsibility of the Lessee and as hereinafter provided.

The Lessee does hereby agree to promptly pay the charges for gas, heat, electric service and telephone service, and to pay the taxes assessed against all personal property of the Lessee as may be in or on the leased premises, during the term of this agreement.

It is mutually understood and agreed that the premises herein leased are in a condition of excellent repair and that the heating units and air conditioning units, gas meters and electric meters are provided so as to furnish separate service to the respective tenants in this main building, and with respect thereto it is understood and agreed that the Lessee herein will be responsible for the installations of the gas and electric meters and deposits thereon in the event the same is required by such respective companies. 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.

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 said demised premises and 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.

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.

It is mutually understood and agreed that in the event the demised premises are damaged or destroyed by fire or other causes beyond the control of the parties herein, that the Lessor shall have the right and option as to whether or not the premises and building shall be repaired or rebuilt, and in the event the Lessor elects to make the needed repairs or to rebuild that an equitable rental adjustment will be made during such time as the repairs or rebuilding is being done, and on completion that the regular rental payments will again become due and payable. In the event the Lessor elects not to rebuild or repair the premises, then it is agreed that the Lessor may declare this agreement terminated in which event both parties will be excused of any further performance of the terms and provisions herein provided.

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 permission of the Lessor.

The Lessee does hereby agree to accept the demised premises in a state of good repair and be responsible for all costs for the installation of the equipment of the Lessee in said premises.

As a material part of the consideration for this lease, the Lessee covenants to carry adequate liability insurance, i.e. \$100,000 - \$300,000 in connection with the use of occupation of the leased premises and in connection with his business practice; and the Lessee covenants to save the Lessor's premises from any claim or suit which may arise for any injury to any person entering upon said leased premises, arising from the use of leased premises by Lessee or the entry or exit of any patient or other person, or from the failure of Lessee to keep the leased premises in a safe condition, with the exception of negligence of Lessor.

The Lessee shall not sublet any portion of the leased premises without the written consent of the Lessors first had and obtained. Nor shall the Lessee assign this lease in whole or in part without the written consent of the Lessors. Nor shall an assignment for the benefit of creditors or to a trustee in bankruptcy or the appointment of a receiver for any assets of the

Lessee, be deemed an exception to the prohibition against assigning or subletting the leased premises. If Lessee sublets any portion of the office, with written consent, over and above present agreed rent, then one-half of the sublet rental shall be added to total rent of Lessor.

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 or account of the lack of any 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.

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:

(a) 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 and both parties will be excused of any further performance of the terms and provisions herein set forth, or

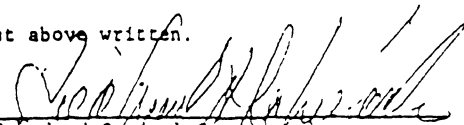
(b) To take any action necessary to evict the Lessee from the demised premises, and proceed to make any and all necessary repairs to the property and proceed to rent the same to any other person, and in the event it is necessary for the Lessor to take a reduction in the rental rate on said demised premises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

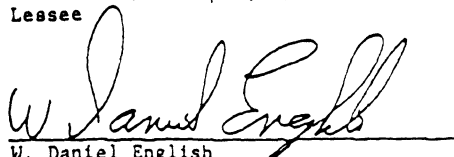
The Lessee does hereby agree to turn said premises back to the Lessor at the end of this lease term in as good a condition as the premises are at the commencement of this lease, with only ordinary wear and depreciation being excepted.

The Lessee does hereby agree that all rental charges due by the terms of this agreement will be a first lien upon all property of the Lessee in the demised premises and that no part of such fixtures or personal property will be removed from the demised premises until all rental charges are paid.

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 a reasonable attorneys fees.

IN WITNESS WHEREOF the said parties have hereunto placed their signatures on the day and the year first above written.

  
Standard Optical Company  
Lessee

  
W. Daniel English  
Lessor

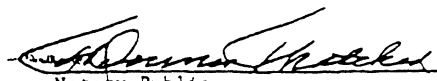
LESSEE

STATE OF UTAH ) SS.  
County of Salt Lake )

On the 1st day of October, 1982, personally appeared before me Richard H. Schaubach, the signer of the above instrument, who duly acknowledged to me that he executed the same.

My Commission Expires:

Jan 8, 1986

  
Notary Public  
Residing in Salt Lake City, Utah

LESSOR

STATE OF UTAH ) SS.  
County of Salt Lake )

On the \_\_\_\_\_ day of \_\_\_\_\_, 1982, personally appeared before me \_\_\_\_\_, the signer of the above instrument, who duly acknowledged to me that he executed the same.