

1990

W. Daniel English v. Standard Optical Co. : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
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900422-CA

COURT OF APPEALS

STATE OF UTAH

W. DANIEL ENGLISH,

Plaintiff/Respondent,

vs.

STANDARD OPTICAL CO., a Utah
corporation,

Defendant/Appellant.

BRIEF OF APPELLANT
Priority No. 16

Case No. 900422-CA

APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH

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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii, iii
<u>JURISDICTION</u>	1
<u>ISSUES PRESENTED FOR REVIEW</u>	1
<u>DETERMINATIVE AUTHORITY</u>	2
<u>RELATED APPEAL</u>	2
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF FACTS</u>	3
<u>SUMMARY OF ARGUMENT</u>	10
<u>POINT I</u>	
THERE WAS NO ENFORCEABLE LEASE BETWEEN THE PARTIES AFTER AUGUST 1988.	11
A. <u>There Was No Sufficient Writing Under The Statute Of Frauds To Extend The Enforceable Term Of The Rental Agreement Past August 31, 1988.</u>	15
B. <u>Summary.</u>	20
<u>POINT II</u>	
ENGLISH'S REPOSSESSION OF THE LEASED PREMISES PRECLUDED THE EXTENSION AND/OR ENFORCEMENT OF THE LEASE AGREEMENT.	21
A. <u>The 1982 Lease Agreement Was Not Extended For Lack Of Consideration From English.</u>	22
B. <u>Assuming There Was An Enforceable Lease, English Himself Breached It By Unlawfully Repossessing The Premises.</u>	27
C. <u>Summary.</u>	30
<u>POINT III</u>	
THERE IS NO BASIS FOR FINDING STANDARD LIABLE FOR DAMAGE OR LACK OF REPAIRS.	30
<u>CONCLUSION</u>	32
<u>ADDENDUM</u>	33

TABLE OF AUTHORITIES

Cases

<u>Aldrich v. Olson</u> , 531 P.2d 825 (Wash. App. 1975)	27, 28
<u>Bass v. Planned Management Services</u> , 761 P.2d 566 (Utah 1988)	25
<u>Bentley v. Palmer House Co.</u> , 332 F.2d 107 (7th Cir. 1964)	22
<u>Bodden v. Carbonell</u> , 354 So.2d 927 (Fla. App., 1978)	22
<u>Candid Productions, Inc. v. International Skating Union</u> , 530 F.Supp. 1330 (S.D.N.Y. 1982)	12
<u>City of Monticello v. Christensen</u> , 788 P.2d 513, 516 (Utah 1990)	2
<u>Collett v. Goodrich</u> , 231 P.2d 730, 732 (1951)	20
<u>Cottonwood Mall Co. v. Sine</u> , 767 P.2d 499 (Utah 1988)	13, 14
<u>Executive House Bldg., Inc. v. OPTIMUM Systems, Inc.</u> , 311 So.2d 604, 607 (La. 1975)	22
<u>Gage v. City of Topeka</u> , 468 P.2d 232 (Kan. 1970)	22
<u>Honolulu Water Front Ltd. Partnership v. Aloha Tower Development Corp.</u> , 692 F. Supp 1230 (Dist. Hawaii, 1988)	12, 13
<u>Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher</u> , 436 N.Y.S.2d 247 (1981)	12, 13
<u>Karamanos v. Hamm</u> , 513 P.2d 761, 762 (Oregon 1973)	12
<u>Machan Hampshire v. Western Real Estate</u> , 779 P.2d 230, 234 (Utah App. 1989)	19
<u>Matter of Minges</u> , 602 F.2d 38, 41 (Id Cir. 1979)	22
<u>Olin v. Goehler</u> , 694 P.2d 1129, 1132 (Wash. App. 1985)	29
<u>Pingree v. Continental Group of Utah, Inc.</u> , 558 P.2d 1317 (Utah 1976)	13, 14
<u>Slayter v. Pasley</u> , 264 P.2d 444 (Oregon 1953)	13, 14

<u>Tuschoff v. Westover</u> , 395 P.2d 630 (Wash. 1964)	28
<u>Valcarce v. Bitters</u> , 362 P.2d 427 (Utah 1961)	12
<u>Wash-o-Matic Laundry Corp. v. 621 Lefferts Ave. Corp.</u> , 82 N.Y.S.2d 572 (1948)	22
<u>Wishod v. Kibel</u> , 496 N.Y.S.2d 544, 545-46 (1985)	26

Statutes

Utah Code Ann. § 78-2-2(j)	1
Utah Code Ann. § 78-2-2(4)	1
Utah Code Ann. § 25-5-1	10
Utah Code Ann. § 25-5-3 (1989)	2, 16, 17

Other Authorities

<u>Century Park Offices, Ltd. v. William R. Bireley</u> , Case No. 900462-CA	2
<u>2A Corbin On Contracts</u> , § 512 (1950)	20
<u>Restatement Second of Property-Landlord and Tenant, Section 1.2</u> (1977)	22

COURT OF APPEALS

STATE OF UTAH

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Plaintiff/Respondent,

vs.

STANDARD OPTICAL CO., a Utah
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BRIEF OF APPELLANT
Priority No. 16

Case No. 900422-CA

APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH

JURISDICTION

The Utah Supreme Court has original jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(j) because this is an appeal from a final judgment and order in a civil matter in the Third Judicial District Court in and for Salt Lake County, State of Utah. This matter was transferred from the Utah Supreme Court to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) in an order dated August 31, 1990.

ISSUES PRESENTED FOR REVIEW

1. Whether the Rental Agreement could be extended for an additional 36 months without a written addendum specifying the amount of rent to be paid, the term of the extension and signed by the parties.

2. Whether English deprived Standard of possession of the leased premises and is consequently barred from claiming an enforceable lease after August 31, 1988.

3. Whether there was sufficient evidence presented at trial to support the finding that Standard failed to return the premises to English in as good a condition as it was at the commencement of the Rental Agreement.

4. Whether English's failure to notify Standard of damage and/or the necessity of refurbishing prior to English's commencing repairs and refurbishing precludes him from recovering related damages.

Regarding questions of law, the appellate court accords no deference to the trial court's conclusions, and the standard of review is "correctness." City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990).

DETERMINATIVE AUTHORITY

Utah Code Ann. § 25-5-3 (1989). See Addendum hereto for full text.

RELATED APPEAL

Appellant believes that Century Park Offices, Ltd. v. William R. Bireley, Case No. 900462-CA, presently on appeal to this Court involves similar issues to the instant appeal.

STATEMENT OF THE CASE

This case involves a landlord-tenant dispute. In 1982 defendant/appellant, Standard Optical Company ("Standard"), and

plaintiff/respondent, W. Daniel English ("English"), entered into a written Rental Agreement for commercial space. On or about January 30, 1989, English filed the instant lawsuit against Standard. English claimed that Standard defaulted under the Rental Agreement by failing to pay rent due. English requested an award of damages for past and future rent and for expenses relating to repairs and re-renting of the leased premises.

After discovery was conducted, a trial was held on December 21 and 22, 1989 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy presiding. The Findings of Fact, Conclusions of Law and Judgment appealed from were entered on or about February 9, 1990. On or about February 15, 1990 Standard filed its Motion to Amend the Judgment on the general grounds of error in law, insufficiency of the evidence to justify the decision, and abuse of discretion. After both parties submitted memoranda, the trial court entered its order denying Standard's motion to amend the judgment on May 17, 1990. On June 7, 1990 Standard filed a notice of appeal from the trial court's February 9, 1990 Judgment and the trial court's May 17, 1990 Order denying defendant's Motion to Amend the Judgment.

STATEMENT OF FACTS

The following facts are undisputed and derived from the court's Findings of Fact, Conclusions of Law and from the Trial Transcript and Exhibits.

1. On August 10, 1982, English and Standard 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 ("the leased premises"). See R. at 186 (Findings of Fact, ¶ 1).

2. The Lease Agreement provides in relevant part:

(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.

(b) The Lessee does hereby unconditionally agree to pay his rent for the demise 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 sections above shall be negotiated every 36 months.

. . .

(o) The Lessee does hereby agree to return 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.

See R. at 186-189 (Findings of Fact, ¶ 2); Trial Exhibit 4P.

For the Court's convenience, a copy of the 1982 Lease Agreement is included in the Addendum hereto.

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. See R. at 189 (Findings of Fact, ¶ 3); Trial Exhibit 37D. For the Court's convenience a copy of the 1985 addendum is included in the Addendum to this Brief.

4. At the time of execution of the written addendum to the 1982 Rental Agreement, English understood that changes or amendments to the Agreement were required to be in writing and signed by the parties. See Trial Transcript, Volume III, pp. 12-13.

5. Prior to June 1988, Standard understood the Rental Agreement term to expire at the end of August 1988, with an option to negotiate a renewal. See R. at 190 (Findings of Fact, ¶ 6).

6. Standard kept all rental payments to English current through August 1988. See R. at 190, 191 (Findings of Fact, ¶¶ 5, 9 and 15).

7. On or about July 1, 1988, English met with Stephen Schubach ("Schubach"), president of Standard at English's office. Schubach then informed English that Standard intended to move out of the leased premises at the end of July. See Trial Transcript, Volume I, pp. 82-83.

8. On or about July 5, 1988, the parties began to discuss a new rental amount and the possibility of subletting the leased premises. See R. at 190 (Findings of Fact, ¶ 10).

9. On or about July 18, 1988, Standard ceased doing business at the leased premises and moved out some of its personal property. See R. at 190 (Findings of Fact, ¶ 10).

10. The parties continued through August and September 1988 to negotiate for a lease renewal at a new rental amount beginning September 1, 1988. See R. at 190-192 (Findings of Fact, ¶¶ 10-17).

11. On or about September 26, 1988, the parties met to negotiate rent and discuss the possibility of subletting the leased premises. The parties failed at that meeting to agree on a rental amount. See R. at 192 (Findings of Fact, ¶ 17).

12. Prior to October 18, 1988, English began negotiating with subcontractors to have extensive work done in the leased premises. See Trial Transcript, Volume I, p. 131.

13. On or about October 18, 1988, English changed the locks on the leased premises. See R. at 193 (Findings of Fact, ¶ 23); Trial Transcript, Volume I, p. 132.

14. Before English changed the locks on the leased premises, he did not notify Standard or obtain Standard's consent. See Trial Transcript, Volume II, pp. 18-19.

15. On October 20, 1988, English's attorney, Gary Doctorman, wrote a letter to Standard. The letter stated that Standard 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. See R. at 193 (Findings of Fact, ¶ 25); Trial Exhibit 12P.

16. As of October 20, 1988, the parties had failed to negotiate a lease renewal and rental amount. See R. at 194 (Findings of Fact, ¶ 26).

17. The subcontractors hired by English began work on the interior of the leased premises in the latter part of October 1988. See Trial Transcript, Volume I, p. 45.

18. Plaintiff never made any mention to Standard of damage to the leased premises or demanded repairs or cleaning of the premises at any time prior to November, 1988. See Trial Exhibits 11 and 12; and See Trial Transcript, Volume II, p. 63.

19. On November 2, 1988, Schubach called English at his home and told English that Standard would pay \$1,000 per month. In the same conversation, English asked Schubach to have

Standard's property removed from the leased premises. See R. at 194 (Findings of Fact, ¶ 28); Trial Transcript, Volume I, p. 140.

20. At the time of his November 2, 1988 telephone conversation with English, Schubach was unaware that English had changed the locks to the leased premises and engaged contractors to do work in the premises. Trial Transcript, Volume II, p. 64.

21. On or about November 7, 1988, Klaus Rathke, an employee of Standard ("Rathke"), met with English at the leased premises. At that time, Rathke asked English for a key to the premises so that Standard's workmen could get into the premises to remove the remaining pieces of Standard's property. See Trial Transcript, Volume I, p. 139.

22. Sometime shortly after the November 7, 1988 meeting with Rathke, employees of Standard obtained a key to the premises from English's secretary and removed Standard's remaining property from the premises. See Trial Transcript, Volume I, p. 139.

23. Standard did not attempt to enter the leased premises again until December 16, 1988 when Rathke again met with English in the leased premises at English's request. At that meeting, English walked Rathke through the premises to show him the extensive work he had done on the premises since October 1988. See Trial Transcript, Volume I, p. 145.

24. On or about November 21, 1988, English received a check from Standard for \$1,600. See Trial Transcript, Volume I,

p. 141; Trial Exhibit 17P. A copy of this check is included in the Addendum hereto.

25. On December 2, 1988 English sent a letter to Standard demanding payments for the months of October, November and December and informing Standard that he had three prospective tenants and was nearing completion refurbishing the premises. Trial Exhibit 13P. A copy of this letter is included in the Addendum hereto.

26. On or about December 5, 1988, English received a check dated December 1, 1988 from Standard in the amount of \$1,000. See Trial Transcript, Volume I, p. 142; Trial Exhibit 18P. A copy of this check is included in the Addendum hereto.

27. English did not endorse the checks received from Standard on November 21 and December 5, 1988, but did negotiate them. See Trial Transcript, Volume I, pp. 141-143; Plaintiff's Exhibits 17 and 18. See Addendum hereto.

28. English never made any demand on Standard to return the premises to the condition in which it had been at the commencement of the 1982 Lease Agreement. See Trial Transcript, Volume II, p. 23.

29. English's understanding of the Lease Agreement was that after October 5, 1988, Standard had no rights under the lease. See Trial Transcript, Volume II, p. 23.

30. After a bench trial was held in this action on December 21 and 22, 1989, the trial court found that "pursuant to

the terms of the written lease, the parties negotiated at the end of the second thirty-six month term and on or about November 2, 1988 the parties agreed that the rent for the next thirty-six month term from September 1, 1988 to August 1, 1991 would be \$1,000.00 per month." R. at 197 (Conclusions of Law, 1).

31. The trial court further found that "Standard Optical failed to pay the rent as agreed and breached the written lease." And that "Standard Optical breached the written Lease Agreement between the parties as they failed to maintain and repair the premises, including the furnace . . ." R. at 198 (Conclusions of Law, ¶¶ 2 and 3).

SUMMARY OF ARGUMENT

The trial court erred in determining that the Rental Agreement could be extended for an additional 36 months without a written addendum signed by English and specifying the amount of rent to be paid and the term of the extension. Standard's checks together with English's December 2, 1988 demand letter do not satisfy the requirements of statute of frauds, Utah Code Ann. § 25-5-1. Under the statute of frauds and fundamental principles of contract law, Standard's oral agreement to pay English \$1,000 per month was insufficient to extend the Rental Agreement for an additional term of years. English deprived Standard of possession of the leased premises and in doing so he failed to provide consideration for an extension of the lease term.

English was entitled only to receive the leased premises in as good a condition as they were at the commencement of the lease with only ordinary wear and depreciation being accepted. There was insufficient evidence presented at trial to support the trial court's finding that Standard failed to return the premises to English in as good a condition as it was in at the commencement of the Rental Agreement. Furthermore, English's failure to notify Standard of damage and/or the necessity of refurbishing prior to English's commencing repairs and refurbishing precludes him from recovering related damages.

POINT I

**THERE WAS NO ENFORCEABLE LEASE BETWEEN
THE PARTIES AFTER AUGUST 1988.**

Despite the stated 10-year term in the Lease Agreement entered into by the parties in 1982, the lease was an enforceable contract only with respect to the terms for which a rental amount has been agreed upon. In effect, there was an option to renew the lease every 36 months, provided the parties could agree upon the monthly rent. This was Standard's understanding of the effect of the lease and the basis for the testimony at trial that Standard informed English that they believed the lease terminated on September 1988. See Trial Transcript, Volume I, p. 82.

Standard's interpretation of the Lease Agreement is supported by fundamental principles of contract law.

A condition precedent to the enforcement of any contract is that there be a meeting of

the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced . . .

Valcarce v. Bitters, 362 P.2d 427 (Utah 1961). Even where the parties may believe themselves bound under a contract, if the terms of the contract are so vague and indefinite that there is no basis or standard for determining whether the agreement had been kept or broken, or to fashion a remedy, and where there are no means by which the terms may be certain, then there is no enforceable contract. Candid Productions, Inc. v. International Skating Union, 530 F.Supp. 1330 (S.D.N.Y. 1982). Several courts have applied these fundamental principles of contract law to contracts for the lease of real property. See e.g., Honolulu Water Front Ltd. Partnership v. Aloha Tower Development Corp., 692 F. Supp. 1230 (Dist. Hawaii, 1988).

There are three essential elements in an agreement for a lease of real property: (1) a description of the property, (2) the duration of the term, and (3) the rental consideration.

Karamanos v. Hamm, 513 P.2d 761, 762 (Oregon 1973).

It is well settled in the common law of contracts that a mere agreement to agree, in which a material term is left open for future negotiation, is unenforceable. This is especially true with respect to the amount to be paid for the sale or lease of real property.

Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 436 N.Y.S.2d 247 (1981).

It is well-established that because the amount of rent is an essential term to a contract for the lease of real property, leases such as the 1982 Lease Agreement in this case, providing for future negotiation of the rent with no specified method for determining the amount, are unenforceable. Honolulu Water Front, 692 F.Supp 1230, 1235; Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1988); Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976); Slayter v. Pasley, 264 P.2d 444 (Oregon 1953); Joseph Martin, Jr. Delicatessen, 436 N.Y.S.2d 247. This is the majority position on this issue and it has been expressly adopted by the Utah Supreme Court in Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976). Cottonwood Mall Co., 767 P.2d at 502.

In Pingree a lease granted the lessee the option to renew for two separate additional five-year terms upon the same terms and conditions of the original lease, except that the rental amount would be renegotiated subject to a cap of \$900 per month. The lease further provided the factors of tax increase, cost of business increases or decreases, business volume and success, insurance costs and other reasonable allowances, would be the basis for the terms of negotiation. Pingree, 558 P.2d at 1320. When the time for renewal arose, the parties were unable to agree upon rent and the lessor brought an action to recover possession. The lessee counterclaimed for enforcement of a five-year period at \$500 per month which was the amount the lessee had insisted

upon during negotiation. The Utah Supreme Court held that the option to renew was too vague and indefinite to be enforceable. Id.

The court in Pingree followed a majority rule set forth by an Oregon court in Slayter v. Pasley which stated:

A provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement it is not enforceable.

Pingree, 558 P.2d at 1321 (citing Slayter, 264 P.2d 444, 446 (Oregon 1953)). Following Slayter, the Utah Supreme Court expressly refused to fix a reasonable rent for the parties when their own negotiations failed. Pingree, 558 P.2d 1317; Cottonwood Mall Company, 767 P.2d at 502.

Under Pingree, the Lease Agreement in the instant case created no more than a 36-month lease with an option to renew every 36 months. Applying the majority rule adopted by the Utah Supreme Court, the Lease Agreement was not enforceable when the parties failed to agree upon a rental amount and term beginning on September 1, 1988.

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 to be paid for an additional specified period of time. This interpretation is not only wholly consistent with Pingree, but it was also the

undisputed understanding of the parties. This was established at trial by the introduction of Exhibit 37D, the written addendum to the Lease Agreement entered into between Standard and English on September 1, 1985.

The addendum to the Lease Agreement specified the amount of rent to be paid and the term of the extension. Furthermore, it was signed by both parties to the lease. See Addendum attached hereto. English himself testified at trial that it was his understanding that if the 1982 Lease Agreement was to be changed or amended, it was necessary to have any such change or amendment put in writing and signed by the parties to the lease. See Trial Transcript, Volume II, pp. 11-13. Such a writing, moreover, is required by the Statute of Frauds.

A. There Was No Sufficient Writing Under The Statute Of Frauds To Extend The Enforceable Term Of The Rental Agreement Past August 31, 1988.

The undisputed evidence at trial was that the last written addendum to the lease was executed in 1985 between the parties and that addendum expired by its terms on September 1, 1988. See Trial Exhibit 37D (included in the addendum hereto). No further written addendums were entered.

The court's conclusion that the Lease Agreement was extended in November 1988 in the absence of any written addendum specifying the amount of rent to be paid, the term, and signed by both parties is not only inconsistent and contrary to the prior conduct of the parties and their stated understanding of the

necessity of an express written addendum for the extension of the lease, but it is also directly contrary to the requirements of the Statute of Frauds.

At trial, defendant raised the defense of the Statute of Frauds, Utah Code Ann. § 25-5-3 (1989), contending that any amendment, renewal or extension of the 1982 Rental Agreement had to be in writing sufficient to satisfy the statute.¹ Trial Transcript, Vol. I, pp. 76-77 and Vol. III, p. 54-55. It was the trial court's conclusion that:

[The] Statute of Frauds did not apply to the renegotiation since the 1982 lease was the writing in question, and that was the writing subject to the Statute of Frauds, and there was full compliance with the Statute of Frauds and the renegotiated price was not subject to the statute of frauds.

Trial Transcript, Vol. IV, pp. 4-5.

The trial court went on to say that even if the renegotiation of the Lease was subject to the Statute of Frauds, it found that the two checks from Standard to English indicating \$1,000 payments together with a demand letter from English demanding payments for rent and refurbishing of the premises constituted the specific writing necessary to amend or extend the

¹ During the course of the trial, the Court granted a Motion by English to amend the Complaint to include a claim that the parties reached an oral agreement on rent on November 2, 1988. The Court also then granted Standard's motion to amend its Answer to include a defense based upon the statute of frauds, Utah Code Ann. § 25-5-3. Trial Transcript, Vol. II, pp. 41-45.

Lease Agreement. Trial Transcript, Vol. IV, p. 5. These conclusions are contrary to the law and amount to the court writing an agreement never reached by the parties.

Utah Code Ann. § 25-5-3 (1989) provides:

Every contract for the leasing for a period longer 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, or by his lawful agent thereunto authorized in writing.

There is no question that the 1982 Lease Agreement falls within the scope of contracts required to be in writing pursuant to § 25-5-3 and it is axiomatic that any material modification, amendment or renewal of a contract required to be in writing must likewise be in writing. Contrary to the trial court's conclusion, any modification of rent and extension of the 1982 Lease Agreement was also required to be in writing and signed by English, "the party by whom the lease is to be made."

The trial court also erred in its alternative conclusion that the two checks from Standard together with the December 2, 1988 letter from English satisfy the writing requirement. The checks are insufficient writings in two fundamental respects.

First, neither check is signed by either party. Testimony at trial indicated that the checks, Exhibits 17 and 18, were signed only by Standard's bookkeeper and financial officer, neither of whom was authorized to enter into a Lease Agreement or even purported to be so authorized. See Trial Transcript

Volume III, p. 28. English did not sign the checks at all. See Trial Exhibits, 17P and 18P (included in Addendum hereto). He testified only that he negotiated them. The negotiation of a check is evidence of nothing more than an intent to receive money. In fact, if anything is to be inferred from English's failure to endorse the checks it is that he intended to avoid their being construed as some evidence of an agreement with another party.

Second, neither check contains any reference to a rental term. This, too, is an essential term to a Lease Agreement as acknowledged by English when he signed the 1985 Addendum to the Lease Agreement (Exhibit 37D). See also Trial Transcript, Volume II, pp. 11-13.

English's letter to Standard also fails to satisfy the statute, even when considered together with the checks and circumstances at the time. The letter contains the following language:

I am writing concerning the lease payments due for October, November and December. I appreciate your full payment of September and part of October. There still remains, however, \$400.00 for October, \$1000.00 for November, \$1000.00 December, for a grand total of 2400.00. I would appreciate it if your bookkeeper would send us a check in that amount in full.

We have three prospective tenants and are nearing completion of the required refurbishing.

I am hopeful we can get the unit rented, our settlement completed, and get back to business-as-usual soon. (emphasis added)

Trial Exhibit 13P (included in addendum hereto). At the very most, this language could be evidence of an understanding on English's part that he had agreed to settle with Standard if it would pay \$1000 a month until he was able to find a new tenant. The language of the letter is, in fact, inconsistent with an agreement for extension of the 1982 Lease Agreement in that it suggests no intent to provide Standard with possession or any control of the premises, and it discusses completion of "settlement." There is no indication that an agreement was reached to pay a rent of \$1000 a month over three more years.

No further significance is given to English's letter by the check English subsequently received on December 5, 1988 from Standard. Trial Exhibit 18P (included in addendum hereto). That check predated English's letter by one day and indicates nothing, other than a payment of \$1000 to English. Id.

The Statute of Frauds may be satisfied by consideration of one or more writings, not all of which are signed by the parties only if there is a nexus between them. Machan Hampshire v. Western Real Estate, 779 P.2d 230, 234 (Utah App. 1989). The nexus requirement may be satisfied either by an express reference in the signed writing to the unsigned writing or by a reference implied by the contents of the writings and the circumstances

surrounding the transactions. Id. In the instant case, neither type of reference is present.

In addition, this Court has recognized that, to constitute a sufficient writing, the memoranda "must set out the conditions of the contract with adequate certainty." Id. (citing Collett v. Goodrich, 231 P.2d 730, 732 (1951)).

[W]ritings must so clearly evidence the fact that a contract was made, what its terms are, "that there is no serious possibility that the assertion of the contract is false."

Id. (citing 2A Corbin On Contracts, § 512 (1950)). Even assuming that a sufficient nexus between the various writings exists, there are no written memoranda containing the essential terms and provisions for renewal of the 1982 Lease Agreement. This is especially true when one considers the writings in light of the circumstances and actions of English surrounding their creation. See discussion under POINT II, infra.

B. Summary.

There was no evidence presented at trial which would provide any reason for inferring that the parties agreed to extend the valid period of the Lease Agreement. Both parties knew that a written addendum was necessary and they had prepared one for the previous extension. Their failure to make any effort to prepare a similar addendum on or after September 1, 1988 indicates only that no agreement extending the Lease under a new rental term was

reached. There is no legal or factual basis for a conclusion that an enforceable lease existed after August, 1988.

POINT II

ENGLISH'S REPOSSESSION OF THE LEASED PREMISES PRECLUDED THE EXTENSION AND/OR ENFORCEMENT OF THE LEASE AGREEMENT.

As of September 1, 1988, there was, as a matter of law, no enforceable contract between the parties. The lease could not be extended without the parties agreeing on a rental amount to be paid for a subsequent term.

While the evidence is unrefuted that between September 1, 1988 and November 2, 1988 no rental amount had been agreed upon, the court did find that a rental amount was orally agreed upon on November 2, 1988. R. at 194 (Findings of Fact, p. 10). The court also found that English subsequently received a check for \$1,600 with markings indicating that \$1,000 was to be applied to September rent and \$600 to be applied to a partial payment for October rent and that a second check was issued by Standard to English in the amount of \$1,000 on December 1, 1988. R. at 195 (Findings of Fact, 11).

Based upon these findings, the court concluded that the parties had agreed upon a rental term for the next 36-month term from September 1, 1988 to August 1, 1991 and that the lease remained in effect after September 1, 1988. These conclusions, however, are contrary to established law. Even assuming that Standard did promise on November 2, 1988 to pay \$1,000 a month

through August 1991, such a promise or "agreement" was insufficient to extend the lease past August 1988.

A. The 1982 Lease Agreement Was Not Extended For Lack Of Consideration From English.

It is fundamental that a lease, like any other contract, requires consideration to be given by both parties. In exchange for a tenant's agreement to pay rent, the landlord must deliver consideration to the tenant in the form of possession of the property. The characteristics of a lease contract in the common law include "a conveyance of a right of exclusive possession." Bentley v. Palmer House Co., 332 F.2d 107 (7th Cir. 1964); Bodden v. Carbonell, 354 So.2d 927 (Fla. App., 1978); Gage v. City of Topeka, 468 P.2d 232 (Kan. 1970); Wash-o-Matic Laundry Corp. v. 621 Lefferts Ave. Corp., 82 N.Y.S.2d 572 (1948); Restatement Second of Property-Landlord and Tenant, Section 1.2 (1977).

In the absence of this consideration from the landlord there cannot be an enforceable lease. As the Second Circuit Court of Appeals has stated, "A lease is partly the conveyance of an estate, which is deemed fully executed once the tenant takes possession." Matter of Minges, 602 F.2d 38, 41 (Id Cir. 1979). "[I]f the lessee is deprived of peaceable possession, the consideration for the contract fails. It necessarily follows the lessee's obligation to pay rent for these rights and privileges conferred by the lease is extinguished." Executive House Bldg., Inc. v. OPTIMUM Systems, Inc., 311 So.2d 604, 607 (La. 1975).

The evidence at trial was unrefuted that English proceeded to take possession of the leased premises during October 1988 and never varied from that course of action. On October 5, 1988, English sent a letter to Standard giving "notice of pending lessee default for lease payments due September 1, 1988 and October 1, 1988." See R. at 192-193 (Findings of Fact, ¶ 21), and Trial Exhibit 11P. There was no evidence at that time that the parties had agreed upon any rental amount.

Subsequently, sometime on or before October 18, 1988, English contacted Gordon Hellstrom and other workmen with respect to beginning to refurbish or "repair" the leased premises. Trial Transcript, Vol. 1, pp. 28 and 45. At that time, Standard had not been informed of English's intent to have work done on the interior of the leased premises.

On October 18, 1988, English changed the locks on the leased premises without discussing it with Standard or receiving Standard's consent. Trial Transcript Volume II, pp. 18-19. At the same time, or shortly thereafter, at English's request, workmen began to do extensive interior work on the leased premises. See Trial Transcript Vol. I, p. 45. On October 20 English's lawyer, Gary Doctorman sent a letter to Standard declaring that Standard was in violation of the Lease Agreement and demanding payment of rent. R. at 193 (Findings of Fact, ¶ 25); Trial Exhibit, 12P. Standard sent a check to English on October 20, but English subsequently returned it "because the

parties had not yet arrived at an agreed amount." R. at 194 (Findings of Fact, ¶ 26).

On or about November 2, 1988, a telephone conversation between Schubach of Standard and English took place. According to English's testimony at trial, Schubach called him to say that he agreed upon "the thousand dollars per month as the rental figure." Trial Transcript, Vol. I, p. 140. English testified that there were no subsequent writings signed by him or anyone at Standard confirming this conversation. Trial Transcript, Vol. II, pp. 22-23. Nonetheless, it is upon this conversation that the court bases its conclusion that the parties came to a sufficient agreement to effectively extend the lease for 36 months beginning September 1, 1988. R. at 197-198 (Conclusions of Law, ¶ 1).

The evidence at trial, however, established nothing more than the fact that on November 2, 1988 Schubach said he would pay \$1,000 per month. There was no offer by English to convey possession of the premises to Standard. In fact, in the same conversation on November 2, English asked Schubach to remove Standard's remaining property from the premises. Trial Transcript Vol. 1, p. 140. English did not tender the keys to the premises to Standard nor did he indicate any intent whatsoever to give Standard possession of the premises.

English's course of action, beginning in the middle of October 1988, was only to repossess the premises and to exercise

complete control thereof. In fact, it was English's testimony at trial that, after October 5, 1988, his understanding was that Standard "basically had no rights under the lease." Trial Transcript Vol. II, p. 23. Consistent with his understanding, English's actions after October 5, 1988 never suggested any intent to deliver possession of the premises to Standard. There was thus no intent to give the necessary consideration in return for an extension of Standard's obligation to pay rent.

The court found that Standard was never denied access to the leased premises. R. at 194 (Findings of Fact, ¶¶ 29-32). While this may be true, it does not contradict the fact that Standard never had or was offered possession of the premises after English changed the locks on October 18, 1988. The evidence presented at trial indicated only that Standard employees were able to obtain a key to the premises from English for the purpose of removing Standard's remaining property as English requested. Trial Transcript, Vol. I, p. 139 and Vol. II, p. 36.

The Utah Supreme Court has recognized that where a landlord changes the locks on a leased premises he has deprived the tenant of possession, even where the lessee is able to obtain access upon demand. In Bass v. Planned Management Services, the Utah Supreme Court stated "A person should not have to demand access to a home which he or she is entitled to possess." 761 P.2d 566 (Utah 1988). Other courts have similarly recognized that a tenant is deprived of possession although the landlord allows him

a key to remove his belongings. See, e.g., Wishod v. Kibel, 496 N.Y.S.2d 544, 545-46 (1985). Thus, as a matter of law, the fact that English allowed Standard to enter the premises to remove its remaining property does not indicate that Standard had possession of the premises. The evidence is unrefuted that English took possession of the premises on or before October 18, 1988 and never again offered or conveyed possession to Standard.

Because the evidence at trial indicates that English never gave any consideration to Standard in exchange for a promise to pay rent, there is no basis for any finding that the parties extended the valid term of the lease beyond September 1, 1988. To impose additional obligations on Standard beyond those imposed by the 1982 Lease Agreement and 1985 Addendum, additional consideration was required of English. The evidence is unrefuted that he never gave or offered Standard any additional consideration after October 18, 1988. It defies common sense to suggest that Standard would agree to be bound under the lease for three additional years in exchange for nothing.

All the evidence presented at trial indicates English's intent to not offer the consideration required of the landlord in any enforceable lease. The trial court's Judgment, holding that from September 1, 1988 on, an enforceable lease existed between the parties, should be reversed.

B. Assuming There Was An Enforceable Lease, English Himself Breached It By Unlawfully Repossessing The Premises.

Assuming arguendo there was an enforceable lease after August 31, 1988, English breached that lease when he changed the locks on October 18, 1988 and unlawfully repossessed the premises.

In Aldrich v. Olson, 531 P.2d 825 (Wash. App. 1975), the Court of Appeals of Washington considered a case very similar to the instant one. In that case defendant, Olson, occupied a house owned by Aldrich. On September 17, 1971 Aldrich became concerned when she had not received rent from Olson which was due on September 1, 1971. Aldrich attempted to contact Olson by telephone at his home and work. She learned that Olson had quit his job and his previous employer was unaware of his whereabouts. Aldrich subsequently entered the lease premises with her own key and discovered rotten food, garbage, and that certain items of furniture and belongings had been removed from the property. Aldrich thereupon cleaned up the garbage in the premises and changed the locks on the doors without giving notice to defendant Olson. Several days later, Olson returned to the premises, broke the lock, and removed his remaining property. 531 P.2d at 827-28. The Court of Appeals assumed the validity of the trial court's inference that Olson was no longer staying at the premises and was intending to remove the remainder of his things, but, nonetheless, stated:

The most that can be said of those facts is that Olson no longer intended to occupy the premises. Intention not to occupy is not necessarily an intention to surrender the premises to the landlord and abandon the leasehold estate. Legal abandonment contemplates both an act or omission and an intent to abandon. . . . abandonment must be established by clear, unequivocal and decisive evidence.

Aldrich, 531 P.2d at 828 (citing Tuschoff v. Westover, 395 P.2d 630 (Wash. 1964)).

The court in Aldrich found no support for any conclusion that defendant intended to abandon his interest in the leasehold. Under the circumstances, there was no clear, unequivocal and decisive evidence that Olson had abandoned the leasehold prior to September 18, 1971. The court held that there was no support for Aldrich's action of changing the locks to the exclusion of Olson's rightful possession. "Accordingly, the 'lockout' constituted an unlawful eviction." Aldrich, 531 P.2d at 830. The Aldrich court approvingly cited a law review article stating:

An eviction by the lessor suspends the lessee's obligation to pay rent during the time he is kept out of possession. And instead of resorting to an action to recover possession, the lessee may treat the lease as terminated, thus relieving himself of any obligation to pay rent which would otherwise accrue thereafter. This rule applied when the eviction is constructive as well as actual.

In the instant case, the evidence at trial indicated that, while Standard had moved its operations for this particular store elsewhere, it still had property on the premises. Trial

Transcript, Vol. I, p. 139. Standard was furthermore still in the process of negotiating rent, as evidenced by English's letter of October 5, 1988. Trial Exhibit 11P. In addition, Standard continued to pay utilities and, unaware of the lockout, tendered payments to English on October 20th. Trial Transcript, Vol. I, p. 134.

English's unlawful repossession of the premises precludes him from recovering under the lease. Implied in every lease is a covenant of quiet enjoyment. An unlawful entry and eviction clearly constitutes a breach of this covenant. Where a landlord, in the absence of an abandonment by the tenant, unlawfully changes the locks on the leased premises, the landlord is himself in default under the lease and cannot "retrench and take advantage of his own reentry rights; he is precluded from recovering the rents thereafter accruing." Olin v. Goehler, 694 P.2d 1129, 1132 (Wash. App. 1985).

Generally recognized principles of contract law furthermore preclude a party from enforcing a contract which he himself has breached. That is the case here. Even assuming there was an enforceable lease agreement after August 31, 1988, English himself breached the agreement by unlawfully evicting Standard and is, thus, precluded from seeking any recovery for any obligations under the 1982 Lease Agreement or any renewal or extension thereof.

C. Summary.

Because of English's repossession of the premises, there is no basis for a finding of a default by Standard and, therefore, the Judgment awarding costs, attorneys' fees and lost rentals should be reversed. In addition, and for the reasons discussed above, the Judgment providing for retention of jurisdiction should be reversed.

POINT III

**THERE IS NO BASIS FOR FINDING STANDARD
LIABLE FOR DAMAGE OR LACK OF REPAIRS.**

Because there was no enforceable lease between the parties after August, 1988, Standard was obligated only to return the leased premises to English on September 1, 1988 "in as good a condition as the premises [were] at the commencement of this lease, with only ordinary wear and depreciation being accepted." See R. at 189 (Findings of Fact, ¶ 2). There was insufficient evidence presented at trial for the court to find that Standard failed to satisfy this obligation. Plaintiff presented no evidence whatsoever of the condition of the premises at the commencement of the 1982 lease.

Without any basis for a finding on the condition of the premises at the commencement of the lease, this Court cannot find that Standard failed to leave the premises in a sufficient condition on September 1, 1988. In addition, there is no evidence of the condition of the premises at the time of the

termination of the lease on or about September 1, 1988. There is thus no basis for any comparison of conditions upon which an award for damages to the premises can be based.

The 1982 Lease Agreement, by its express terms, obligated Standard only to do repairs to the "premises during the term of [the Lease Agreement]." See Trial Exhibit 4P, p. 3 (included in Addendum hereto). The record is devoid of any evidence that English gave notice to Standard of any breach of the lease with respect to repairs or damage prior to November, 1988 -- a full two months after expiration of the lease.

In fact, there is no evidence that any damage was done during the lease term and not repaired by Standard before September 1, 1988. Items such as the furnace were not inspected until late October or November 1988. Trial Transcript Vol. I, pp. 28, 31 and 33. It is perfectly possible that the furnace was operating properly as of September 1, 1988 and even through early October. There is no evidence to indicate otherwise. In the absence of an enforceable lease through November 1988, there is no basis other than mere speculation for a finding that Standard breached an obligation to maintain the premises in good repair.

At the very most, the evidence presented at trial was sufficient only to establish a removal of fixtures from the premises. Any damage resulting from the removal of fixtures was more than offset by the \$2,600 English received after October 1988.

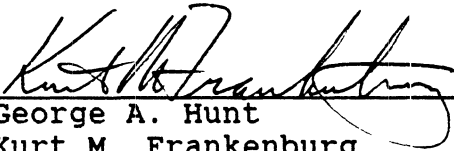
The judgment should accordingly be reversed to exclude all items of damage.

CONCLUSION

For the reasons set forth herein, the trial court erred in interpreting the law and awarding judgment in favor of W. Daniel English. The judgment below should be reversed and judgment entered in favor of Standard Optical Company.

DATED this 19th day of October, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By 
George A. Hunt
Kurt M. Frankenburg
Attorneys for
Defendant/Appellant

ADDENDUM

UTAH CODE ANNOTATED § 25-5-3

25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

History: R.S. 1898 & C.L. 1907, § 2463;
C.L. 1917, § 5813; R.S. 1933 & C. 1943,
33-5-3.

AUGUST 10, 1982 LEASE AGREEMENT

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 ¹⁹⁸²ten (10) years 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 ^{1982-1985 - 1988-1991}\$1000.00 each month for 36 months 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

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 on 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

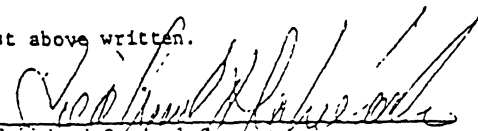
(b) To take any action necessary to evict the Lessee from the demised premises, and proceed to make any and all necessary repairs to the property and proceed to rent the same to any other person, and in the event it is necessary for the Lessor to take a reduction in the rental rate on said demised premises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

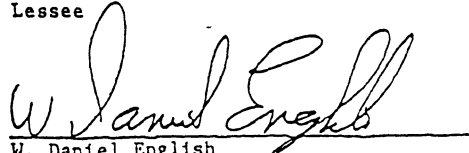
The Lessee does hereby agree to turn said premises back to the Lessor at the end of this lease term in as good a condition as the premises are at the commencement of this lease, with only ordinary wear and depreciation being excepted.

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

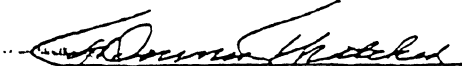
LESSEE

STATE OF UTAH) SS.
County of Salt Lake)

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

My Commission Expires:

June 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

ADDENDUM TO THE AUGUST 10, 1982 LEASE AGREEMENT

September 1, 1985

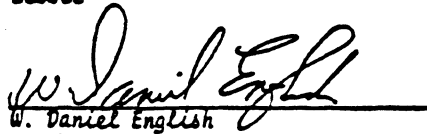
Addendum to lease agreement between Standard Optical Company of Salt Lake City, Utah hereinafter called the Lessee and W. Daniel English, hereinafter called the Lessor.

Paragraph 4, page 1 of agreement is changed to read as follows:

"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 \$1200.00 each month for 36 months with the first such installment payment to be due and payable on or before the 1st day of September, 1985, 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."

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

DECEMBER 2, 1988 LETTER TO KLAUS RATHKE
FROM DANIEL W. ENGLISH



W. Daniel English, D.D.S., Ltd.

2521 Market Street
Grenager, Utah 84118

December 2, 1988

Klaus Rathke
159 1/2 South Main
Salt Lake City, Utah 84111

Good Morning Klaus,

I am writing concerning the lease payments due for October, November and December. I appreciate your full payment of September and part of October. There still remains, however, \$400.00 for October, \$1000.00 November, \$1000.00 December, for a grand total of \$2400.00. I would appreciate it if your bookkeeper would send us a check in that amount in full.

We have had three prospective tenants and are nearing completion of the required refurbishing.

I am hopeful we can get the unit rented, our settlement completed, and get back to business-as-usual soon.

Sincerely,

W. Daniel English

W. Daniel English, D.D.S.

OCTOBER 20, 1988 CHECK TO W. DANIEL ENGLISH
FROM STANDARD OPTICAL COMPANY
IN THE AMOUNT OF \$1,600

STATEMENTS OF FISCAL CO.
SALT LAKE CITY, UTAH 84111

MEMO	DATE	INVOICE NUMBER	AMOUNT	DISCOUNT	NET AMOUNT
3510 SEPT			800.00		800.00
87370 867 SEPT			1000.00		800.00
OCT - partial			800.00 200.00 600.00		

DETACH BEFORE DEPOSITING

Nº 7065



159 1/2 SOUTH MAIN
SALT LAKE CITY, UTAH 84111

MAIN OFFICE
TRACY COLLINS BANK & TRUST
107 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111

31-61
1240
17065

PAY

PAY *****1.600* DOLLARS AND *00* CENTS

DOLLARS

TO
ORDER
OF

W DANIEL ENGLISH
GRANGER PLAZA SUITE #3
3531 SO MARKET ST
SALT LAKE CITY UT

84119

1007

10/20/88

\$1600.00*

DATE

PAY THIS AMOUNT

By

By

⑈007065⑈ ⑆124000614⑆

0015891 5⑈

#1

DATE RECEIVED 11.21.88 Office use

DECEMBER 1, 1988 CHECK TO W. DANIEL ENGLISH
FROM STANDARD OPTICAL COMPANY
IN THE AMOUNT OF \$1,000

STANDARD OPTICAL

007515

DATE	DESCRIPTION	AMOUNT	DEDUCTION	NET AMOUNT
#3	87370	1,000.00		1,000.00
rec 12-5-58				
CHECK DATE 12/01/88	CONTROL NUMBER 1007	TOTALS		1,000.00

STANDARD OPTICAL

007515

DATE	DESCRIPTION	AMOUNT	DEDUCTION	NET AMOUNT
	87370	1,000.00		1,000.00
CHECK DATE 12/01/88	CONTROL NUMBER 1007	TOTALS		1,000.00



STANDARD OPTICAL
159 1/2 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111

TRACY COLLINS BANK & TRUST
MAIN OFFICE
SALT LAKE CITY, UTAH 84111
31-81/1240

007515

17515

PAY *****1,000* DOLLARS AND *00* CENTS

BY
OF THE
ORDER OF

W DANIEL ENGLISH
GRANGER PLAZA SUITE #3
3501 SO MARIE ST
SALT LAKE CITY UT

84119

DATE CONTROL NO. AMOUNT
12/01/88 1007 \$1,000.00*

[Signature]
[Signature]
AUTHORIZED SIGNATURE

⑈007515⑈ ⑆124000614⑆

0015891 5⑈

COURT OF APPEALS

STATE OF UTAH

W. DANIEL ENGLISH,

Plaintiff/Respondent,

vs.

STANDARD OPTICAL CO., a Utah
corporation,

Defendant/Appellant.

CERTIFICATE OF SERVICE

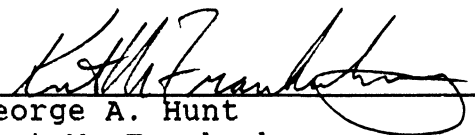
Case No. 900422-CA

I hereby certify that I served four copies of the foregoing
BRIEF OF APPELLANT upon the following parties by causing a true
and correct copy thereof to be hand-delivered:

Gary E. Doctorman, Esq.
PARSONS, BEHLE & LATIMER
50 West 300 South, Suite 400
Salt Lake City, UT 84101

DATED this 19th day of October, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By 
George A. Hunt
Kurt M. Frankenburg
Attorneys for
Defendant/Appellant