

1991

Lily Pond Associates; and Shopko Stores Inc., dba
Uvalco, a Minnesota Corporation v. Lyman W.
Hemmert, Michael Hemmert, Linda Hemmert,
and Bushnell Motel, and John Does I through X :
Brief of Appellee

Utah Supreme Court

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STATE OF UTAH
BRIEF

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~~IN THE SUPREME COURT OF THE STATE OF UTAH~~

LILY POND ASSOCIATES; and :
SHOPKO STORES INC., dba :
UVALCO, a Minnesota Corporation, : BRIEF OF APPELLEE

Plaintiff/Appellee

v.

91-0227-CA

LYMAN W. HEMMERT, MICHAEL : Case No. 900362
HEMMERT, LINDA HEMMERT, and :
BUSHNELL MOTEL, and JOHN DOES :
I THROUGH X, : Priority No. 14.b.

Defendant/Appellants

APPEAL FROM SUMMARY JUDGEMENT ORDER OF THE FIRST JUDICIAL
DISTRICT COURT OF BOX ELDER COUNTY, STATE OF UTAH
HONORABLE F. L. GUNNELL, JUDGE

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FILED

NOV 26 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

LILY POND ASSOCIATES; and	:	
SHOPKO STORES INC., dba	:	
UVALCO, a Minnesota Corporation,	:	BRIEF OF APPELLEE
Plaintiff/Appellee	:	
v.	:	
LYMAN W. HEMMERT, MICHAEL	:	Case No. 900362
HEMMERT, LINDA HEMMERT, and	:	
BUSHNELL MOTEL, and JOHN DOES	:	
I THROUGH X,	:	Priority No. 14.b.
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Utah Code Ann. § 78-2-2(3)(j) (Supp 1990)

Utah Code Ann. § 78-12-13

Utah Code of Judicial Administration (Amended 1990)

Rule 4-501(5), Utah Code of Judicial Administration

Rule 3(a), Utah Rules of Appellate Procedure.

Rule 33(b), Utah Rules of Appellate Procedure.

Rule 56(c), Utah Rules of Civil Procedure

Other sources

Vanderbilt Law Review, 111 (1986)

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(j) (Supp. 1990) and Rule 3(a) of the Utah Rules of Appellate Procedure to consider this appeal from the order of the First Judicial District Court for Box Elder County, granting the motion of Plaintiffs for summary judgment against Defendants.

III STATEMENT OF ISSUES PRESENTED FOR REVIEW

The sole issues presented by this appeal are:

(1) Whether the lower court erred in entering summary judgment against Defendants. The standard of review is whether or not there was a genuine issue of material fact upon which these issues could properly be submitted to a trier of fact. Utah Rules of Civil Procedure 56(c); Webber v. Sill, 675 P.2d 1170 (Utah 1983).

(2) Whether or not the Appellants appeal is frivolous or made for purposes of delay so as to subject to the Appellant to damages under the provisions of Rule 33 Utah Rules of Appellate Procedure. That standard of review for this determination is whether the appeal was not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

IV. DETERMINATIVE RULES AND STATUTES

Rule 56(c) of the Utah Rules of Civil Procedure and Rule 4-

501 of the Utah Code of Judicial Administration (Amended 1990) are critical to this appeal. Rule 56(c) provides in pertinent part:

(c)...The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law...

(e)...When a motion for summary judgment is made and supported [by affidavit] as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment,, if appropriate, shall be entered against him.

Rule 4-501(5) of the Utah Code of Judicial Administration provides in part:

The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the propose of summary judgment unless specifically controverted by the opposing parties' statement.

The statute which is determinative of one of the primary issues raised in this appeal is Utah Code Annotated § 78-12-13; which is reproduced as an exhibit in Appendix A.

V. STATEMENT OF THE CASE AND FACTS RELEVANT TO APPEAL

The facts pertinent to this appeal are those set forth in

the Memorandum of Points and Authorities in support of Plaintiff's Motion for Summary Judgment. Since Defendants did not specifically controvert any of those facts in opposition to Plaintiffs motion, this Court must take those facts as established under Rule 56(c) of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. Those facts, as set forth in the record below, as well as relevant procedural facts, are as follows:

1. Plaintiff, Shopko Stores Inc. (hereinafter referred to as "SHOPKO"), purchased the subject property, upon which the Defendants' sign is located, from the Co-Plaintiff, Lily Pond Associates (hereinafter "Lily Pond"), on or about August 9, 1989.

2. Lily Pond purchased the property from the Brigham City Redevelopment Agency, a governmental agency, on or about June 5, 1987.

3. Brigham city Redevelopment Agency acquired the property by Warranty Deed for Brigham City Corporation, a municipal corporation, on or about July 18, 1985.

4. Brigham City Corporation acquired the property from the United States of America, Department of Interior, by deeds dated May 11, 1977; March 29, 1983; and January 22, 1985.

5. The United States of America acquired the property for the purpose of establishing a Veteran's Hospital in September 1942.

6. Therefore, the property was continuous ownership by governmental entities from September, 1942 to June, 1987, a

period of approximately 45 years.

7. The property was in private ownership, in the name of the Plaintiffs, for a period of only 26 months prior to the filing of Plaintiffs' Complaint.

8. Plaintiffs have desired to develop the property for commercial purposes and have commenced construction of a shopping center on the property.

9. The Defendants are the purported owners of a sign advertising the Bushnell Motel. That sign is located on a portion of the above-described property.

10. The sign was located on the portion of Plaintiffs' property which is adjacent to the Main Street in Brigham City, is within an existing 20 foot utility easement, and the sign has overhung the public sidewalk, contrary to local ordinances.

11. A search of the records at the Box Elder County Recorder's Office establishes that there has never been an instrument recorded establishing a legal interest, in favor of Defendants, in the property upon which the sign is located.

12. Plaintiffs' counsel, by letter dated May 18, 1989, made demand on Defendants that they remove the sign from the premises.

13. Defendants, through their attorney, advised Plaintiffs that it claimed an interest in the property and refused to move the sign. Defendants claimed they have either a valid "prescriptive easement", "appurtenant easement". and/or "easement by implication".

14. According to the information provided by Defendants,

the sign has been located on the property for forty years.

(Defendants' Answer to Interrogatory No. 8). Defendants purchased the motel, together with any interest in the sign, in 1967.

Even though the facts recited above are conclusively established by Defendants failure to controvert them below, Defendants attempt to introduce new alleged facts and inferences in their brief on appeal. This attempt to introduce new allegations does not create a genuine issue of material facts; accordingly, the Court should not even consider those alleged facts. Nevertheless, Plaintiff disputes the following alleged facts contained in Appellants statement of the case with appropriate citations to the record as to the true facts:

1. Contrary to Defendants assertion, agreement for sale between Defendant and his predecessor in interest, did not warrant the property on which the sign was located. Paragraph 7 of exhibit "B" attached to Defendants' exhibit "A" in response to Plaintiff's First Request for Production of Documents clearly shows that the seller warranted title to the sign but merely quit-claimed whatever interest they may have had in the property upon which the sign was located. (See Exhibit B) The specific language used by sellers should have placed the Defendants on notice they had no real interest in the property upon which the sign was located.

2. Contrary to Defendants assertion, Plaintiffs did not purchase the property from Brigham City Redevelopment Agency

subject to any appurtenances or encroachments existing thereon, as evidenced by the Warranty Deed dated June 8, 1987, a copy of which is attached hereto as Exhibit C.

VI. SUMMARY OF ARGUMENTS

Defendants brief is an impermissible attempt to reargue the motion lost below based upon new factual allegations unsupported by the record and legal arguments that they failed or chose not to raise at any time in the summary judgment proceedings below. Since these new factual allegations and legal theories could not in any way have formed the basis of the lower Court's decision, Defendant improperly attacks that decision as erroneous. The uncontroverted facts conclusively established that Plaintiff is entitled to judgment as a matter of law; therefore, the lower Court's judgment in favor of Plaintiff must be affirmed.

Even though Defendant's brief is filled almost entirely with new factual allegations and legal arguments that were not sufficiently presented below, those arguments still lack merit and in no way require reversal of the lower Court's judgment. The fundamental flaw in Defendants' arguments is that they fail to recognize that there are factual prerequisites necessary to establish a right of easement in another's property and that those prerequisites are totally absent in this case.

Prescriptive easement can only be obtained through adverse use and possession of another's property and adverse possession could not legally have occurred in this case because the property

in question was owned by a governmental entities for a period exceeding the life of the sign.

Further, Defendants claim of appurtenant easement also fails because of Defendants failure to establish the factual basis upon which this claim could be granted, as a matter of law.

The lower Court correctly granted Plaintiff's Motion for Summary Judgment since there were no genuine issues of material fact. Appellants failed to controvert any of the material facts set forth in the memorandum and affidavit Plaintiff submitted to the Court below. Since, as a matter of undisputed fact, there was absolutely no notice of any easement or any other interest in the subject property available through the usual means at the Box Elder County Recorder's Office, Defendants' claim of some property right must be based upon the existence of facts sufficient to give rise to those claims; and the lower Court's judgment should be affirmed.

VII. ARGUMENT

A. TRIAL COURT PROPERLY RULED THAT DEFENDANTS HAD NOT ESTABLISHED ANY FACTUAL OR LEGAL BASIS FOR THEIR CLAIM OR APPURTENANT EASEMENT.

To establish the existence of an "appurtenant easement" there must be both a dominant and a servient estate. The trial Court that Defendants' claim of appurtenant easement was not supported by the facts presented. The Defendant claims that property upon which it's motel is located must be the dominant estate and the Plaintiff's property, situated a block distant and upon which

Defendants' sign advertising the motel is located, must be the servient estate. There is no evidence and no claim that these two parcels were ever part of the same property or under common ownership. The time an appurtenant easement is created, the grantor must have some interest in the property being affected by the easement, otherwise the permission for that use would be a trespass and without authorization. An appurtenant easement was not granted in this case as there is no record of its being granted and there is no factual allegation of its being granted by any person in the past. Defendants state that the contract, by which Defendants purchased the motel property, established some interest in the property now owned by Plaintiffs. This allegation is not supported by fact as evidenced by the Uniform Real Estate Contract dated February 1, 1967 and produced by the Defendants as Exhibit "A" to its response to Plaintiffs' Request for Production of Documents, a copy of which is attached hereto as Exhibit B. The sellers merely granted to Defendants whatever interest, if any, "which they may have to the property upon which the signs are located." Another requirement for establishing appurtenant easement is that the two estates be located adjacent to each other. Vanderbilt Law Review (1986 page 111). This element was not established by Defendants since the parcels are, in fact, separated by one block distance. Further, appurtenant easements have been traditionally imposed for ingress, egress, conveyance of water or similar uses, without which the benefitted parcel is essentially without value. The thing being benefitted

in this case is not the property itself, but the business of operating a motel upon the property. This is not a sufficient basis for an appurtenant easement. Nelson v. Johnson, 679 P.2d 662 (Idaho). The mere existence of a billboard sign on another's property does not give right to an appurtenant easement, Zinser, et al v. Luks, 235 S.W.2d 844. Defendant has merely had the free use of someone else's property for forty years. Defendants' claim of appurtenant easement failed, not because a single factual element was missing, but because no factual elements were established which could support Defendants' theory.

B. THE TRAIL COURT PROPERLY RULED THAT DEFENDANTS HAD NOT ESTABLISHED ANY FACTUAL OR LEGAL BASIS FOR THEIR CLAIMS OF PRESCRIPTIVE EASEMENT OR ADVERSE POSSESSION.

Defendants appear to claim that by merely alleging an easement by prescription, a question of fact arises that must be determined by a jury. Defendants beg the critical question, to-wit: are there questions of fact which, if proven, are sufficient to establish elements for a prescriptive easement? Defendants fail to accept both established common law and statutory mandate that one cannot obtain an interest in the land of another by adverse use or possession when the other property owner is a governmental entity for governmental purposes. Averett v. Utah County Drainage District No. 1, 763 P.2d 428 and Utah Code Annotated § 78-12-13. The property owned by Plaintiff had been under governmental ownership for over 45 years at the time this action was filed. Defendants have claimed that the

sign in question had been in that location for forty years, the commencement of which period was five years into the governmental ownership period. The property in question has only been in private ownership since June, 1987, less than two years prior to Plaintiffs' written notice demanding Defendants remove the sign. It is clear that the period for obtaining an easement by prescription on public land does begin to run until the land has been transferred from public to private ownership. Herbertson v. Iliff, 775 P.2d 754 (New Mex 1989). That short period is insufficient, as a matter of law, to establish a prescriptive or adverse right to possession or use. Crane v. Crane, 683 P.2d 1062 (Utah 1984); Jensen v. Brown, 639 P.2d 150 (Utah 1982). The person claiming a prescriptive easement must establish the necessary elements by clear and convincing evidence. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989); Garmond v. Kinney, 579 P.2d 178 (New Mex 1978). Defendants would only have been entitled to a jury trial if there had been genuine issues of material fact. However, the factual issues were not in dispute, although the legal conclusions which could be drawn from the undisputed facts, were. Simply put, the Defendants provided no factual basis for a claim of prescriptive easement upon which the Court could rule in its favor, since a prescriptive easement requires adverse possession and adverse possession could not have occurred against this property which was owned by governmental entities since 1942.

C. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT
SHOULD BE AFFIRMED BECAUSE THERE IS NO GENUINE

ISSUE AS TO ANY MATERIAL FACT AND PLAINTIFF WAS
ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Defendants continue to assert that because some factual issues may have been in dispute, the Defendant is necessarily entitled to a trial in this case. The criteria is whether or not there are issues of material fact. Webber v. Sill, 675 P.2d 1170 (Utah 1983). Frankly, Defendants have failed to raise any "genuine issues of material fact".

The United States Supreme Court in Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986), ruled as follows:

"...the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

Further, that Court also ruled that

"...there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party...if the evidence is merely tolerable...or is not significantly probative...summary judgment may be granted."

Also, additional language, which is helpful in our case, stated that:

the mere existence of a scintilla of evidence in support of (the non-moving party's) position will be insufficient; there must be evidence on which the jury could reasonably find for (that party)."

There are no facts provided by Defendants upon which any of the alleged legal theories can be sustained. Clearly, the undisputed facts establish only that Defendants and their predecessors have enjoyed the unauthorized benefit of another's property without payment, without a recorded interest, and

without any attempt by them to perfect any of their alleged easement claims.

The purpose of summary judgment is well established; to-wit: to avoid the time, expense, and burden of a frivolous trial by reviewing a case as presented by the parties to determine if a genuine issue of fact exists. Webber, at 1172, the United States Supreme Court discussed the question of summary judgment criteria in great length in Celotex Corp. v. Katrett, 106 S.Ct 2548 (1986). The Court there ruled as follows:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all facts immaterial. The moving party is "entitled to judgment as a matter of law" because the non-moving party has failed to make a sufficient showing of an essential element of (its) case with respect to which (it) has the burden of proof. Celotex, 477 U.S. at 321.

Further, the Celotex Court went on to explain that:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action."

The trial judge below obviously applied these standards in his determination of Plaintiff's Motion for Summary Judgment and no authority is given which would lead to a contrary result.

D. DEFENDANTS APPEAL HEREIN IS FRIVOLOUS AND THE COURT SHOULD AWARD TO THE PLAINTIFFS JUST DAMAGES.

Rule 33, Utah Rules of Appellate Procedure provides that the

Court may assess damages upon a finding that the appeal taken is either frivolous or for delay. A frivolous appeal is defined in Rule 33(b) as follows:

"...one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal... interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal..."

Defendants have been aware from the time counsel received written notice to remove the sign from the property in May, 1989, that the property was subject to a pending sale for use as a shopping center and that the existence of the sign on the property impeded that sale. Prior to filing this lawsuit, Plaintiff offered to pay for the relocation costs of the sign in addition to payment of other sums, as nuisance value to avoid the requirement of extended and expensive litigation. Plaintiff's counsel further provided Defendants with the same basic authority as was used in the motion for summary judgment to establish that Plaintiffs' claims were virtually without merit. Those requests were ignored, forcing the Plaintiffs to file quiet title action, resulting in considerable monetary loss to the Plaintiffs , in addition to legal fees and costs incurred in connection with this case, to date.

Plaintiffs assert that, under the circumstances, treble costs and reasonable attorney fees should be awarded to the Plaintiffs, in addition to affirming the Court's Order for Summary Judgment.

VIII. CONCLUSION

Based upon the foregoing reasons and the file herein, including Plaintiff's Memorandum of Points and Authorities, the decision of the trial Court in granting summary judgment should be sustained and Defendant's appeal denied. The trial Court's decision was well reasoned and based upon the issues raised and factual matters asserted by the parties. The lower Court correctly concluded that the Plaintiffs were entitled to quiet title in the subject property and that Defendants had no legal claim of easement thereto. The facts supporting the lower Courts conclusion are uncontroverted, and the law, which Defendants did not attack below, is clear. The Court should summarily dismiss the arguments and purported factual issues that Defendants seek to raise on appeal. Further, those arguments and purported issues lack merit and do not change the fact that Plaintiffs were and are entitled to quiet title and the Court should affirm in all respects the lower Courts judgment.

RESPECTFULLY SUBMITTED this ____ day of November, 1990.

MERRILL G. HANSEN
Attorney for Plaintiff/Appellee

not deemed a possession of any other lot of the same tract 1953

78-12-9. What constitutes adverse possession under written instrument

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases

- (1) where it has been usually cultivated or improved
- (2) where it has been protected by a substantial inclosure
- (3) where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant
- (4) where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated 1953

78-12-10. Under claim not founded on written instrument or judgment.

Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely 1953

78-12-11. What constitutes adverse possession not under written instrument.

For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only

- (1) where it has been protected by a substantial inclosure
- (2) where it has been usually cultivated or improved
- (3) where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre 1953

78-12-12. Possession must be continuous, and taxes paid

In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law 1953

78-12-12.1. Possession and payment of taxes — Proviso — Tax title

sessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession 1953

78-12-13 Adverse possession of public streets or ways.

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate, in which case an adverse title may be acquired 1953

78-12-14. Possession of tenant deemed possession of landlord.

When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of seven years from the termination of the tenancy, or, where there has been no written lease, until the expiration of seven years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord, but such presumption cannot be made after the periods herein limited 1953

78-12-15. Possession not affected by descent cast.

The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property 1953

78-12-16. Action to redeem mortgage of real property.

No action to redeem a mortgage [of] real property, with or without an account of rents and profits, may be brought by the mortgager, or those claiming under him, against the mortgagee in possession, or those claiming under him unless he or they have continuously maintained [an] adverse possession of the mortgaged premises for seven years after breach of some condition of the mortgage 1953

78-12-17. Redemption when more than one mortgagor.

If there is more than one such mortgagor, or more than one person claiming under a mortgagor some of

EXHIBIT "A"

EXHIBIT B.

Supplemental provisions of Uniform Real Estate Contract of February 1, 1967 between DAVID E. SORENSEN and VERLA A. SORENSEN, his wife, sellers, and LYMAN W. HEMMERT, buyer, covering sale of Brigham Motel, Brigham City, Utah:

1. Interest on the unpaid contract balance shall be charged at the rate of four and one-half (4½%) percent per annum until such time as the existing mortgage with Utah Mortgage Loan is paid in full; at such time as said mortgage is paid in full, interest on the unpaid contract balance shall be increased to six (6%) percent per annum.

2. Sellers shall execute no loans secured by the property as provided under paragraph 8 of the Uniform Real Estate Contract wherein the number of installments exceed the number of installments due sellers under this contract.

3. Buyer agrees to maintain the property in such a manner as to comply with all FHA regulations and requirements as disclosed by annual FHA inspections. Sellers represent that all existing FHA requirements have been met, with the exception of exterior painting of the interior court which must be done as soon as weather permits; said painting to be done by buyer.

4. In the event buyer defaults in this agreement, buyer agrees and by this agreement does hereby transfer and assign to sellers as additional security for said agreement, all future rents and rentals from the property to the extent necessary to bring the contract current, and consents that sellers may enter upon the premises and collect said rents and rentals and apply the same against any outstanding balances which may be due and owing. The exercise of this remedy shall not affect sellers' right to an election of remedies as provided in the Uniform Real Estate Contract herein.

5. Buyer agrees to maintain the inventory of personal property in the same or greater quantities as said inventory exists as of the contract date.

6. All rents, taxes, insurance and reserves shall be pro-rated between the parties as of February 1, 1967, and an appropriate credit or debit, as the case may be, shall be made against the contract balance.

7. All existing signs are included in this sale, and sellers warrant title to said signs, including the sign located on the corner one-half block west of the property and

the sign located at Perry, Utah. Sellers quit-claim to buyer all right, title and interest which they may have to the property upon which the signs are located. Sellers represent that the Perry sign is located upon leased premises presently at the rate of \$25.00 per month; sign rental to be pro-rated between the parties as of the date of this contract.

Don R. Seaman

Don R. Seaman

Sellers

Signer W. H. Seaman

Buyer

- 2 -

HILLAM AGENCY
H- 43943

Mail Tax Notice: LILLY POND ASSOCIATES, 60 East 42nd Street, New York, New York 10022
c/o William Lubliner

WARRANTY DEED

BRIGHAM CITY REDEVELOPMENT AGENCY grantor
of Brigham City County of Box Elder State of Utah, hereby
CONVEY and WARRANT to

LILLY POND ASSOCIATES, a Delaware general partnership grantee
of County , State of Utah
for the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 - - (\$1,500,000.00 DOLLARS

the following described tract of land in Box Elder County,
State of Utah, to-wit:


(See attached Exhibit A, Property Description)

Subject to the terms and conditions of the AGREEMENT FOR DISPOSITION OF LAND.
Dated June 5th, 1987, which is recorded concurrently herewith.

WITNESS the hand of said grantor, this

day of 8 June A. D. 1987

Signed in the presence of


PETER C. KNUDSON, Chairman
Brigham City Redevelopment Agency

STATE OF UTAH
COUNTY OF BOX ELDER

{ SS.

On the 8 day of June A. D. 19 87 personally
appeared before me PETER C. KNUDSON, Chairman of the Brigham
City Redevelopment Agency

the signer of the within instrument who duly acknowledged
to me that he executed the same, and was so authorized.

My Commission Expires:


Notary Public

Residing at Henryville, UT

10-1-90

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the BRIEF OF APPELLEE, to Dale M. Dorius, 29 South Main Street, P.O. Box U, Brigham City, Utah 84032, postage pre-paid, this 19th day of November, 1990.


Paralegal