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John O. Howe, Trustee; Robert E. Howe, husband and wife; William K. Evans and Carole H. Evans, husband and wife as Trustee; and Judith H. Steenblik v. Professional Maninvest Inc., a Utah corporation; and Maivest Corporation, a Utah corporation : Reply Brief

Utah Supreme Court

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BRIEF

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IN THE UTAH SUPREME COURT

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DOCKET NO. 91-0598-CA

JOHN O. HOWE, Trustee; ROBERT E. :
HOWE and BONNIE F. HOWE, husband :
and wife; WILLIAM K. EVANS and :
CAROLE H. EVANS, husband and :
wife, as Trustee; and JUDITH H. :
STEENBLIK, :

Plaintiffs and Appellees, :

vs. :

PROFESSIONAL MANIVEST, INC., :
a Utah corporation; and :
MANIVEST CORPORATION, a Utah :
corporation, :

Defendants and Appellants, :

Priority No. 16

Case No. [REDACTED]

91-0598-CA

REPLY BRIEF OF APPELLANTS

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable J. Dennis Frederick, presiding

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UTAH

IN THE UTAH SUPREME COURT

JOHN O. HOWE, Trustee; ROBERT E.	:	
HOWE and BONNIE F. HOWE, husband	:	
and wife; WILLIAM K. EVANS and	:	
CAROLE H. EVANS, husband and	:	
wife, as Trustee; and JUDITH H.	:	
STEENBLIK,	:	
	:	
Plaintiffs and Appellees,	:	
	:	Priority No. 16
vs.	:	
	:	Case No. 900430
PROFESSIONAL MANIVEST, INC.,	:	
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MANIVEST CORPORATION, a Utah	:	
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INTRODUCTION AND SUMMARY OF ARGUMENT

Manivest does not intend to reply to each and every argument in the Howes' brief, since most of those arguments are adequately addressed in Manivest's opening brief. Instead, Manivest will focus on those core issues that are at the heart of this case.

At page 32 of their brief, the Howes state: "This lawsuit is not about rent. It is about fairness and observance of agreements." The Howes are only half right. From Manivest's standpoint, the lawsuit is about fairness. However, it is clear from the record and from their own brief that, from the Howes' standpoint, this lawsuit is about their dissatisfaction with the amount of the rent fixed by the lease.

The Howes' crusade to extricate themselves from the lease has featured strategies that scorn the Howes' claim to fairness. In order to break the lease, the Howes have attempted to find lease defaults that could not be cured. The Howes relied upon alleged defaults that were never the subject of any notice to the Howes, which, of course, gave Manivest no opportunity to cure those alleged defaults. They relied upon alleged defaults that either occurred after the lease was already purportedly terminated, or were first raised after termination, and thus could not have been a basis for termination. They also relied upon alleged defaults that were not defaults, or that had been cured either before the Howes became aware of them, or before trial. Nonetheless, all of these same alleged defaults also formed the basis for the trial

court's ultimate decision allowing forfeiture. Now, in their brief on this appeal, the Howes rely upon a lease provision prohibiting assignments for the benefit of creditors, even though this provision was not relied upon below.^{1/}

Principles of fairness that find expression in Utah law will not sanction forfeiture in these circumstances. This Court has held that even absent express contractual language requiring notice of default and opportunity to cure, they are required as a condition precedent to forfeiture. Thus, even assuming that the standard of review is "manifest injustice," such an injustice has occurred here.

The Howes base their claim to attorneys' fees and costs upon the lease language. However, the lease defines attorneys' fees as costs. Under Rule 54(d)(2), Utah Rules of Civil Procedure, the Howes' application for attorneys' fees and other costs was submitted too late to be considered by the trial court. The Howes' contention that the attorneys' fees award should be affirmed, even if judgment on the merits is reversed, is another example of their overreaching.

As to the Howes' cross appeal, they argue that the lease requires Manivest to spend hundreds of thousands of dollars to improve the leased property, while at the same time arguing that the leasehold cannot be used to secure the financing needed for such improvements. Moreover, even if the

^{1/} The only reference to this provision was on pp. 5-6 of the Howes' trial brief (R. 435), which was submitted at the close of the evidence in lieu of oral argument, and to which Manivest had no opportunity to respond.

trial court erred in refusing to admit evidence related to the maintenance issue, which Manivest disputes, at most the Howes are entitled to a new trial. Manivest does not dispute the need for a new trial, given the taint created by the trial court's errors.

ARGUMENT

I.

CLEAR WRITTEN NOTICE AND AN OPPORTUNITY TO CURE
WERE REQUIRED AS TO EACH ALLEGED DEFAULT THAT
FORMED THE BASIS FOR LEASE FORFEITURE

At page 9 of their brief the Howes argue that the lease did not require written notice of default. See also, Verified Complaint, ¶ 29 (Add No. 2 to Manivest's opening brief.) Nonetheless, they also argue that they gave Manivest adequate written notice of the alleged defaults and an opportunity to cure. There is no merit to these arguments.

In Hansen v. Christensen, 545 P.2d 1152 (Utah 1976), the seller under an installment contract for the sale of real property (which is not dissimilar to a 50 year ground lease) contended that the buyer's interest had been forfeited, even though no written notice of default or opportunity to cure had been given. Unlike the standard Uniform Real Estate Contract, and like paragraph 9 of the lease at issue here (Add No. 1 to Manivest's opening brief), the contract in Hansen did not require notice of default or opportunity to cure. Instead, the contract "provided that after the continuance of a default for ninety days the seller had a right to exercise three options" (i.e. foreclosure, forfeiture, or other legal remedy). Id at 1154.

Nonetheless, this Court held that these contractual provisions "are not self executing. They require some affirmative act on the part of the seller." The Court also held that mere notice of termination, without opportunity to cure, was not enough:^{2/}:

[T]he seller must give the defaulting buyer a reasonable time within which to cure the default. Without this notice the defaulting buyer would not know what to do. He would not have certain knowledge his tenancy was at an end. He could assume that the seller may have waived default, or would elect to enforce the contract rather than forfeit it; or he could assume he would be permitted to perform."

(Id. Footnote omitted.)^{3/}

Hansen applies here, even in the face of paragraph 9 of the lease, which states that in the event the lessees "fail

^{2/} In Johnston v. Austin, 748 P.2d 1084 (Utah 1988), this Court held that where the seller chooses the remedy of acceleration of the contract rather than forfeiture, notice of default and an opportunity to cure are not necessary unless required by the contract. To that extent only, the Court overruled Hansen. However, the Court reaffirmed Hansen, as applied to contractual forfeitures: "Forfeiture is a harsh remedy, and a seller must therefore give a buyer notice of default and a reasonable period of time in which to cure the default before exercising a forfeiture provision." 748 P.2d 1086-1087 (citations omitted). That this requirement applies regardless of the contractual provisions is shown by the next sentence of the Court's opinion: "In fact, written notice of default is expressly required by . . . the contract." Id. at 1087.

^{3/} See Also, Restatement of the Law (Second) Property 2d Landlord and Tenant, Vol 1, § 13.1, comment h. at p. 389 (1976):

The landlord may hold the tenant in default, under the rule of this section, for the tenant's failure to perform a promise contained in the
(Footnote continued on next page)

to keep any covenant herein contained to be performed by Lessees, or within sixty (60) days thereafter, then in that event, without notice from the Lessors, this Agreement shall cease and terminate...."

First, this provision is not self-executing, even though forfeiture is the only remedy expressly provided. As suggested in Hansen, the lessors could waive the default, or they could elect to affirm rather than forfeit the contract and sue for damages, specific performance or some other remedy, or they could allow the lessees to cure.^{4/}

Second, the fact that the Howes did give notices of default and of forfeiture either evidences their belief that paragraph 9 was not self-executing, or constitutes a waiver or estoppel as to any claim that it was self-executing.

Third, the requirement of notice in Hansen is not simply to inform the lessee which remedy the lessor has elected to invoke upon the lessee's default. The notice mandated by Hansen is a product of simple fairness, by giving the lessee facing forfeiture "a reasonable time within which to cure the default". Hansen at 545 P.2d 1154. Under Hansen, opportunity

(Footnote continued from previous page)

lease only if the landlord has requested the tenant to perform and given him a reasonable opportunity to do so.

^{4/} Also, paragraph 11 of the lease, now also relied upon by the Howes in their brief, is expressly not self-executing. Paragraph 11 provides that in the event of lessees' assignment for the benefit of creditors, "the Lessor may terminate this Lease . . ." (Emphasis added.) As in Hansen, forfeiture is optional, not automatic.

to cure is required regardless of which remedies are otherwise available, even the remedy of a "self-executing" forfeiture.

Attached as Addenda "A", "B" and "C" hereto (Trial Ex. 30, and 31) are copies of the three notices (dated March 30, 1988, April 29, 1988 and May 31, 1988) offered up by the Howes to justify forfeiture of Manivest's leasehold. The only defaults complained of in these notices are the December 1987 - January 1988 lease pledges to Valley Bank as security for financing, and "piles of Christmas-time trash and last year's crop of obnoxious weeds . . . and . . . the surface of the parking lot is not and for some period of time has not been in good order or repair . . .". (Add. "A", p. 2).

Nonetheless, at trial the Howes summoned up a host of other alleged defaults that were never the subject of any notice of default prior to termination. These same alleged defaults also found their way into the trial court's Findings of Fact (Add. No. 4 to Manivest's opening brief) and were the foundation for the trial court's imposition of the harsh judgment of forfeiture. These "notice-less" alleged defaults included:

1. Purported encroachments in 1983 (Trial Ex. 10, Finding No. 5);
2. A May, 1978 pledge of the lease to First Security Bank as security for financing (Trial Ex. 11, Finding No. 6), which was subsequently released (Tr. 253, 254);
3. A pledge of the lease to Valley Bank as security for financing in 1982 (Trial Ex. 12-14, Finding No. 7), which also was subsequently released (Tr. 254);

4. Lease assignments between Manivest controlled entities in 1976 and 1978 (Trial Ex. 22, Finding No. 19);

5. A purported assignment to the Manivest Liquidating Trust on April 28, 1988 (Trial Ex. 21, 40, Finding No. 20);

6. Alleged violations of Murray City ordinances in 1983, and in 1989 after the lease had already been purportedly terminated (Trial Ex. 23, 26, 28, 37, Findings No. 21, 22);

7. Alleged health and safety violations observed in 1989 or 1990, again long after the lease had purportedly been terminated (Trial Ex. 39, Tr. 168, Finding No. 23);

8. Underground Storage Tanks (Finding No. 24).

The Howes' brief bristles with contentions that Manivest enjoyed "grace periods" (p. 45) and the opportunity to cure these defaults. This assertion is belied not only by the Howes' failure to give notice of the alleged defaults enumerated above, but also by the content of the notices they did give.

Where is the "grace period" in the Howes' initial notice of March 30, 1988? That notice simply stated: "Based upon these defaults, it is our position that we are entitled to terminate Manivest's rights under the Lease" (Add. "A", p. 2). The Howes' April 29, 1988, notice demanded performance^{5/} but

5/ However, the April 29 notice addressed only the lease pledge to Valley Bank, not the allegations regarding weeds, debris and potholes in the parking lot.

did not specify what the purported "grace period" was: "On behalf of the lessors, I hereby advise you that time is of the essence [sic] and that we insist upon strict performance" (Add. "B", p. 2).

Other than indicating that time was of the essence, this second purported notice gave no inkling of the period in which cure was expected. Was it 60 days, as one might infer from paragraph 9 of the lease, or a longer or shorter period? Did the period begin to run from April 29, 1988, when performance was first demanded, or from March 30, 1988 when the Howes attempted to terminate the lease without giving any opportunity to perform? The third notice dated May 31, 1988 (Add. "C"), purported to terminate the lease effective upon receipt of the notice, even though it was sent only 32 days after the April 29 notice first requesting performance.^{6/}

Thus, even the notices of default that the Howes did give were too "indefinite or uncertain" to sustain a forfeiture. First Security Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983). Also, forfeiture is permitted only where the agreement itself has "clear and unequivocal terms." Id. Here, even if the Howes' tortured interpretations of the lease were correct, it suffers from "ambiguity or lack

^{6/} The Howes also argue that Manivest was remiss in failing to cure even after the date upon which its interest in the lease was forfeited, which the trial court found to be June 1, 1988 (Conclusion No. 8). However, based upon this finding, Manivest no longer owed the Howes any contractual duties after that date.

of clarity" fatal to a claim for forfeiture, because it failed to provide Manivest adequate notice of what was required in order to avoid forfeiture.¹⁷ Id.

It is no answer for the Howes to argue that Manivest was put on notice of the newly alleged defaults by inclusion of some documents on a pre-trial exhibit list, or that Manivest was required to send out interrogatories to ferret out allegations of default not contained in any notice, or even the Complaint. By this time Manivest's leasehold interest had already been forfeited, at least according to the trial court. Moreover, Hansen and Maxwell establish that it is the duty of the party seeking forfeiture to provide adequate notice of default, not the burden of the party against whom forfeiture is sought to play a guessing game. In short, allegations of default, even if proven to be true, will not support the harsh remedy of forfeiture, if not included in a notice of default. Reeploeg v. Jensen, 490 P.2d 445, 447 (Wash. App. 1971), rev'd on other grounds 503 P.2d 99 (Wash. 1972), cert. den. 414 U.S. 839 (1973); Tower v. Halderman, 782 P.2d 719, 720-721 (Ariz. App. 1989).

¹⁷ Another example of this ambiguity is the 60-day period referenced in paragraph 9. When does this period begin to run? Is some notice required to start the period, even though that same paragraph purports to eliminate any notice requirement? Can the lessor secretly observe a default on day one, hope the lessee doesn't discover or cure the default, and then declare a forfeiture on day 61 as a "gotcha"? To permit such a result is to forsake fairness and to ignore the drastic consequences of forfeiture.

Manivest argued the notice issues at trial in the context of its objections, on grounds of surprise, to the Howes' eleventh-hour default allegations. (Tr. 44-52, 96.) Because these allegations did not appear in any pleading filed by the Howes before trial, and because the trial court abused its discretion in denying Manivest's motion to adjourn the trial to permit Manivest to prepare a defense to the new claims, Manivest had no opportunity to raise the notice defects in any other context.

In any event, the trial court committed plain error in premising the forfeiture on the belated default allegations. Accordingly, the Judgment of Forfeiture and Order of Possession must be reversed, and the lease must be reinstated and possession returned to Manivest.

II.
THE TRIAL COURT'S FORFEITURE OF THE LEASE
WAS MANIFESTLY UNJUST.

Forfeiture here was manifestly unjust not only because of the absence of notice and opportunity to cure, but also because it was based upon assignments that did not violate the lease, and upon technical, non-material defaults.

A. Manivest Did Not Violate any Prohibitions Against Assignment of the Lease or Covenants Against Encumbrance of the "Demised Premises".

The Howes concede that Manivest's assignments as security for financing did not violate the prohibition against lease assignments in paragraph 4 of the lease. Instead, they continue to argue that these assignments breached the covenant in paragraph 6 against encumbering the "demised premises".

However, if the Howes (or their predecessors-in-interest) intended to prevent the lessors from using the value of the leasehold to secure financing, it was incumbent on the Howes to clearly articulate this prohibition in the lease. General restraints on lease assignments or encumbrances, which do not unambiguously apply to pledges of the leasehold for security, do not suffice, particularly when the consequence of a transgression is forfeiture.

At page 43 of their brief, the Howes rely on R. Powell's treatise on real property for an expansive definition of the word "encumbrance". However, the Howes overlook Professor Powell's comments which bear most directly on the facts here:

Modern courts almost universally adopt the view that restrictions on the tenant's right to transfer are to be strictly construed. Thus it has been held that lease provisions prohibiting 'assignments' were not violated by . . . mortgaging the lease term; by sale of the controlling stock in the tenant corporation or change in the personnel of the tenant partnership . . .

R. Powell, The Law of Real Property Volume 2, ¶ 248[1] at pp. 17-43, 17-44 (1991 ed.) (footnotes omitted). See also, Restatement of the Law (Second) Property 2d Landlord & Tenant, Vol. 2, § 15.2, comment e., at p. 102 (1976) and illustrations thereto. Powell similarly states:

A lease, which creates a present possessory interest in the tenant, is an entirely separate interest from the landlord's future reversionary interest in the property. Thus, the tenant in the absence of a covenant in the lease or a statutory restriction, has the right to mortgage his interest in the property separately.

R. Powell, supra, ¶ 258[1], p. 17A-57 (footnote omitted).

The covenant against encumbrances of the "demised premises" in paragraph 6 fails to differentiate between the lessor's interest in those premises and the lessee's interest, and thus cannot be construed as prohibiting mortgages of only the lessee's interest under the rule of strict construction suggested by Powell.

At page 36 of their brief, the Howes argue that paragraph 6 was designed to protect their presumed right to collect rentals from Manivest subtenants in the event Manivest's interest was terminated. However, the Howes had no such right because they had no privity of contract with the subtenants. R. Powell, supra, at ¶ 248[1], p. 17-39. See also, the portion of paragraph 4 of the lease prohibiting any subleases from binding the Howes. Instead, termination of the Manivest lease would terminate the subleases and any assignments thereof. Accordingly, Manivest's pledges of its leasehold interest or subleases could not jeopardize any "right" of the Howes, whether at law or reserved by the lease.

Nor did the assignments among the Manivest controlled entities violate paragraph 4 of the lease. The Howes' attempts to distinguish Prince v. Elm Inv. Co., Inc. 649 P.2d 820 (Utah 1982) because it involved a tenant's right of first refusal are to no avail. The relevant issue both in Elm and here was whether a stranger has been inserted into the transaction. The fact that the Elm plaintiff sought to enforce a right of first refusal rather than compel a forfeiture does not diminish Elm's precedential value. Under the principles of Elm (at pp. 822-823), limited partnerships that have the same general

partner, or wholly owned corporate subsidiaries, are not "strangers" to the transaction, contrary to the Howes' argument at p. 32 of their brief.^{8/} The quotes from Powell above suggest that, if anything, the principles of Elm apply with even greater force to the issue of who is a stranger to the lease for purposes of construing a prohibition on lease assignments.

Also, the testimony of Larry Leeper or Swen Mortenson about their understanding of the relationship between Manivest and the Manivest Liquidating Trust, or about their relationship with the two entities, could not change the clear language of the trust document. That language provides that the lease at issue here was excluded from the assets transferred to the trust, and was retained by Manivest. (Manivest Liquidating Trust and Workout Plan, Note 1 to the Balance Sheet of Diversified Realty, Ltd., Trial Ex. 22, 40). Accordingly, there was no assignment in violation of either paragraph 4 or paragraph 11 of the lease.

B. The Forfeiture of the Lease Constituted
A Windfall to the Howes.

In addition to the "assignments" discussed above, Manivest also disputes the Howes' other allegations of default,

^{8/} The Howes acknowledged as much here, by suing not National Realty, Ltd., the limited partnership that was the named successor tenant on the lease, but its general partner Manivest, which was also the general partner of the assignee limited partnerships (Tr. 262), and the parent of the wholly-owned subsidiary assignee, Westco Realty, Inc. (Trial Ex. 40, p. 2).

as set forth in Manivest's opening brief.^{9/} Manivest will not restate those arguments here. Instead, Manivest will revisit the issue of materiality, specifically the trial court's failure to properly consider and apply standards for assessing the materiality of Manivest's alleged defaults.

Among other things, the trial court failed to put the effect of the forfeiture into context. At the time of trial, the parties were 30 years into a 50-year ground lease. What was a weed patch when the lease was consummated in 1960, had become a thriving shopping center--a transformation achieved solely through the efforts and dollars of Manivest and its predecessors-in-interest. The Howes argue that the \$2,000,000 in tenant improvements (Trial Ex. 47) should be ignored. This is easy for them to argue, since they invested not one penny towards those improvements.^{10/}

The value of the improvements is relevant not in determining the value of the leasehold that Manivest stood to

^{9/} At page 23 of their brief, the Howes state: "Notably, Manivest does not contest the fact of default." This is patently false, since Manivest has contested the default allegations at every stage of these proceedings, including this appeal.

^{10/} Perhaps this fact also explains the relatively low fixed rental. Moreover, the reason the parties agreed upon a 50-year lease term was to encourage the magnitude of tenant investment in improvements that only such a term would justify. The Howes reneged on that agreement, when, slightly over midway through the lease period, they began to look for any excuse to forfeit the lease.

lose through forfeiture,^{11/} but in measuring what the Howes stood to gain. The trial court improperly disregarded the size of the windfall to be bestowed on the Howes in evaluating whether Manivest's conduct merited forfeiture.

The Howes' windfall may actually be somewhat less than \$2,000,000, since, in any event, the Howes would have acquired the improvements in the year 2010. Nevertheless, the Court failed to consider and assess the scope of the gain to be enjoyed by the Howes, in ascertaining whether a forfeiture would bring about an excessively disproportionate economic dislocation. Instead, the Court improperly compared apples to oranges by purporting to "offset" the unascertained value of the Howes' reversionary interest, against the value of the Manivest leasehold. (Add No. 3 to Manivest's opening brief, p. 7.)

At page 45 of their brief, the Howes concede in effect that they could not prove "numerical damages" but go on to baldly assert that "the fact of great harm to the Howes is established" (emphasis in original). What is this "great harm to the Howes? The only discussion of it is at pages 20-21 of their brief:

1. Underground storage tanks and health and safety violations allegedly "exposed the Howes to severe

^{11/} Contrary to the suggestion in the Howes' brief, although Manivest disagrees with the finding that the leasehold had a present value of \$500,000-\$600,000, using a discounted cash flow analysis, Manivest does not appeal from that finding.

liabilities." However, the Howes presented no evidence that any such claims were asserted against them by governmental agencies or otherwise. Moreover, these alleged defaults were first raised at trial, when it was too late for Manivest to do anything about them.

2. While the Howes also claim potential harm from the alleged encroachments, they do not address Manivest's argument that they didn't own the property subject to the alleged encroachment. Again, this alleged default was also first raised at trial, as was the alleged assignment to the Manivest Liquidating Trust.

3. The Howes concede that there was no evidence that their predecessors-in-interest would not have entered into the lease if they could have foreseen the alleged defaults. However, the Howes suggest that this Finding of Fact "was another way of saying that the defaults were material." This begs the question. The Howes' reliance on similar unsupported conclusory adjectives used by the trial court, e.g. 'material breaches,' 'substantial nature,' 'primary importance', suffers from the same infirmity. Calling a breach material does not make it so.

4. The Howes also argue that they were "harmed" by their own refusal to accept rent after giving notice of termination, and by the attorneys' fees and costs they incurred as a result of their own decision to file suit. The paucity of these arguments is self evident.

5. Whether "[t]he condition of the property was a source of concern to the Howes" or, just as subjectively, "they

considered the defaults to be material" is irrelevant.

Forfeiture cannot be based upon the whims of the Howes.

6. Finally, at page 21 of their brief, the Howes rely upon the "[t]ime is of the essence" provision in the lease, and unabashedly misrepresent the record by stating that "all of the defaults persisted long after notice and a reasonable opportunity to cure" (emphasis added). As discussed above, most of the alleged defaults were not the subject of any notice or opportunity to cure and were first raised at trial. Thus, in response to the Howes' query at p. 21: "Why didn't Manivest just take care of them?", Manivest asks: Why wasn't it given any opportunity to do so, if these purported defaults were so important to the Howes? The answer is clear. The Howes didn't want "cures", they wanted the property.

Contrary to the Howes' arguments and the trial court's findings, Manivest did not simply ignore the default allegations that were the subject of the March 30, 1988 notice. Larry Leeper promptly responded by letter dated April 1, 1988 (Trial Ex. 30), properly disputing the contention that the Howes' consent was required for the pledge of the lease to Valley Bank as security for financing. This position was later reaffirmed by Manivest's legal counsel. (Trial Ex. 32). Mr. Leeper's April 1 letter further indicated that maintenance issues would be addressed.

In sum, Manivest invites this Court to scrutinize the record in search of defaults that would justify termination of a 50-year ground lease at midterm, without adequate notice or

opportunity to cure, and the transfer to the Howes of \$2,000,000 in tenant improvements and more than half of a million dollars in discounted cash flow. No such defaults can be found.

III.

THE HOWES' INTERFERENCE WITH MANIVEST'S FINANCING FROM VALLEY BANK VIOLATED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, AS ALLEGED IN MANIVEST'S COUNTERCLAIM.

The Howes violated the implied covenant of good faith and fair dealing in two ways. First, they wrongfully contended that their consent was required for use of the lease as security for the financing from Valley Bank. As shown above, their consent was not required. Second, they wrongfully withheld that consent for an improper purpose, i.e., to force renegotiation of the lease, specifically the amount of the rental. Accordingly, the trial court also erred in dismissing Maninvest's counterclaim.

At page 27 of their brief, the Howes state: "[T]here is no factual support for the argument that the Howes objected to the transfers to obtain increased rents." (Footnote omitted.) Then, at pp. 36-37, the Howes provide the allegedly missing support: "The practical consequence of this structure was that the parties would be required to negotiate if either wanted to use its respective interest for financing purposes other than for the original improvements." (footnote omitted.) What would be the subject of these negotiations? The answer is found in footnote 36 to the last quoted sentence, where the Howes complain that "there were no percentage rents and no cost of living adjustments."

This Court has held that there is an implied covenant not to withhold consent unreasonably. Elm, supra, at 649 P.2d 825 also stands for the proposition that where a contract requires the consent of one party before the second party may act (whether it be consent to a lease pledge or to any other act) the first party ". . . has no right to withhold arbitrarily his approval; there must be a reasonable justification for doing so." Id. (Citations omitted, emphasis added.)^{12/}

The Howes also argue that Manivest in effect waived the right to demand that the Howes act reasonably, by pledging the lease to Valley Bank before requesting their consent. Two argument dispatch this claim. First, Manivest correctly believed that the Howes' consent was not required. Their consent was sought only at the urging of Valley Bank, as a precautionary measure. Second, since the Howes intended to condition their consent on renegotiation of the lease, any advance request to the Howes would have been futile.

While both the Howes and the trial court accused Manivest of bad faith, it is the Howes, not Manivest, that wear the black hats here.

^{12/} The Howes present a novel "choice of law" argument at p. 28 of their brief. One must not only look to the place of contracting, but also to the status of the emerging case law at the precise instant in time when the contract is consummated. Suffice it to say that the Howes cite no authority for such a rule of law. Also, the Howes' attempt at p. 31, n.32, to distinguish Campbell v. Westdahl, 715 P.2d 288 (Ariz. App. 1985) on the basis that the landlord there "blatantly withheld consent to

(Footnote continued on next page)

IV.

IN THE EVENT THE FORFEITURE CLAIM IS NOT DISMISSED,
MANIVEST IS ENTITLED TO A NEW TRIAL FREE FROM
THE TAIN OF THE TRIAL COURT'S ERRORS.

Even if the forfeiture claims survive the foregoing arguments, Manivest is at least entitled to a new trial. In Jack B. Parson Construction Co. v. State of Utah, 725 P.2d 614 (Utah 1986) (as amended on rehearing), this Court's initial opinion ruled that the trial court had committed numerous legal errors, but affirmed the judgment against the plaintiff based on the trial court's findings of fact, to which this Court deferred. On plaintiff's petition for rehearing, this Court withdrew that opinion and issued an amended opinion ordering a new trial. At p. 618, the amended opinion indicated that because this Court could not determine the extent to which the trial court's factual findings were infected with its legal errors, a new trial would be necessary.

Here, as in Parson, it is impossible to determine the extent to which the trial court's individual errors tainted its ultimate decision. For example, Finding No. 25 indicates that the trial court relied upon ". . . particularly the breaches regarding assignments, encumbrances and other related lease terms . . ." as the material defaults justifying forfeiture. If some or all of these alleged assignments or encumbrances

(Footnote continued from previous page)

transfer the lease in order to charge additional rent . .
." is similarly misplaced, given the identical position
taken by the Howes here.

were not defaults, or lacked necessary accompanying notice and opportunity for cure, would any remaining defaults have been sufficiently material that the trial court would have awarded forfeiture? The only way to tell is through a new trial.

V.

THE TRIAL COURT ALSO ERRED IN AWARDING THE HOWES ATTORNEYS' FEES AND COSTS.

The Howes argue that their claim for attorneys' fees and costs lives or dies by the terms of paragraph 25 of the lease. However, paragraph 25 defines "costs" to include attorneys' fees.^{13/} Accordingly, both the attorneys' fees and the other "costs" sought by the Howes were governed by the requirements of Rule 54(d)(2), Utah Rules of Civil Procedure, including the mandatory requirement of a timely bill of costs. The Howes' cost bill was untimely. Thus, even if the Howes prevail on the merits, the award of attorneys' fees and other costs must be reversed.^{14/}

At page 48, the Howes argue they are entitled to attorneys' fees and costs, even if the judgment is

^{13/} ". . . The defaulting party shall pay all costs and expenses, including a reasonable attorneys' fee, which may arise or accrue from enforcing this Agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder . . .".

^{14/} The Howes' brief also demonstrates that the amount of the award was excessive. At p. 47, n. 39 and p. 49, n. 43, the Howes indicate that the fees awarded included those in defending against Valley Bank's motion to intervene. Those fees are beyond the scope of paragraph 25.

reversed.^{15/} This is untenable. Even if one or more of the default findings is affirmed, reversal of the forfeiture means that the award of attorneys' fees must also be reversed. Forfeiture was the only remedy sought by the Howes. Upon reversal, they will not have succeeded in "enforcing" the lease, "obtaining possession" or "pursuing any remedy provided hereunder". To the contrary, Manivest will have succeeded in "enforcing" its rights under the lease, such as the right to make the assignments complained of by the Howes, or will have succeeded in "obtaining possession of the premises". Thus, it will be Manivest, not the Howes, that will be entitled to attorneys' fees and costs, both in the trial court and on this appeal.

VI.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE ON THE ISSUE OF STRUCTURAL MAINTENANCE OF THE IMPROVEMENTS.

At trial, the lower court ruled that the tenant's maintenance responsibilities under paragraph 5 were unambiguous and only applied to the property as it existed in its unimproved state at the time the lease was consummated. In their cross-appeal, the Howes argue that even though \$2,000,000

^{15/} Even according to the Howes' theory, at best, attorneys' fees would have to be prorated between the default allegations upon which the Howes prevailed, and those upon which they failed. This would be impossible to do from the affidavits of fees submitted by their counsel. Also, the reliance at page 50 note 46 of the Howes' brief on "current practice" regarding these affidavits is of no avail if this practice fails to comply with the rules of evidence.

in tenant-funded improvements have already been made, Manivest was in default for failing to expend an additional \$350,000 for structural roof and parking lot repairs. Again, these allegations of default were not the subject of any notice or opportunity to cure. Also, the evidence proffered by the Howes^{16/} was irrelevant because it pertained not to the status of the property as it existed prior to the May 31, 1988 termination notice, but to the status of the property in 1989 and 1990.

The thrust of the Howes' argument is that because the original parties to the lease contemplated that the tenant would build a shopping center, and because the lease is a "net" lease, the tenant is required to make massive structural improvements, even though there is no such specific requirement expressed in the lease. However, this argument overlooks two points. First, the lease did not require that the shopping center be built, but only gave the tenant the option to do so. The property could have remained unimproved. Second, even a "net" lease does not bind the tenant to make structural repairs, absent an express and specific lease term requiring such repairs.

Mobil Oil Credit Corp. v. DST Realty, Inc., 689 S.W.2d 658 (Mo. App. 1985) involved the lease of an eight-story office building, the lower three floors of which constituted a parking

^{16/} In addition to the Howes' proffers, much of the evidence on the maintenance issues came in through the back door, on the "health and safety" issues.

garage. The landlord contended the tenant was required by the lease to fund the cost of over \$400,000 in structural repairs to the parking garage. The lease was a long-term (10 years with an option to extend for an additional five years) "net" lease containing general requirements for the tenant to maintain the premises and make all repairs. However, the lease did not specifically address the structural repairs at issue, and the Court held that this was fatal to the landlord's claim.

The court first noted the general rule that ". . . a tenant cannot be held for substantial structural repairs unless it so specifically agrees in the lease. A general covenant of a tenant to make ordinary repairs does not require him to make structural repairs." 689 S.W.2d 660 (citations omitted). The court rejected the landlord's argument that a "net" lease necessarily requires the tenant to make such repairs "because of what it is called rather than what it does". Id. (citations omitted). "The . . . portions of the lease defining a 'net' lease . . . cannot be used to create a promise to make the present repairs." Id. (citations omitted).^{17/}

^{17/} Mobil Oil applies with even greater force here, because, unlike Mobil Oil, the improvements here were originally constructed by the tenant rather than the landlord. Thus, paragraph 3 of the lease here provides that these improvements ". . . shall remain the property of the Lessees so long as this Lease remains in full force and effect." Certainly Manivest retained discretion regarding structural maintenance of its own property, especially where the Howes' reversionary interest in that property would not have come to fruition (absent premature termination) for over 25 years.

Moreover, the Howes' position on Manivest's responsibility to fund hundreds of thousands of dollars in structural repairs is at odds with its position on use of the lease for tenant financing. How was Manivest to fund these repairs without using the lease as security for financing them? Once again, the Howes manufactured a default that couldn't be cured by requiring Manivest to make structural repairs, while depriving Manivest of the ability to finance those repairs.

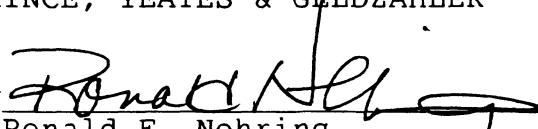
CONCLUSION

Ironically, in the conclusion to their brief at p. 54, the Howes focus on the equities: ". . . [A] party which invokes equity . . . must demonstrate that it comes with clean hands. Equity does not protect one who has been unfair . . .". However, these principles apply not just to parties seeking to avoid a forfeiture, but to parties seeking to cause a forfeiture as well. It is the Howes, not Manivest, who come to court with unclean hands, and who have acted unfairly. The equities require that the judgment of forfeiture be reversed and the lease reinstated, or at least that a new trial be held.

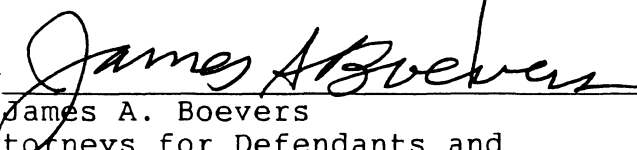
DATED this 16th day of July, 1991.

PRINCE, YEATES & GELDZAHLER

By


Ronald E. Nehring

By


James A. Boevers

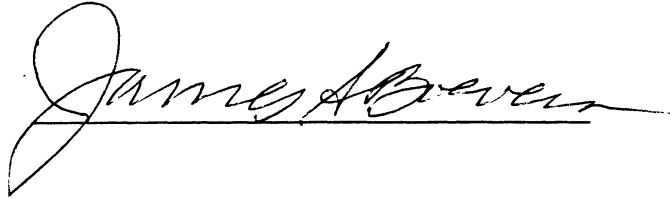
Attorneys for Defendants and
Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on the 16th day of July, 1991,
I caused the original and nine true and correct copies of the
foregoing REPLY BRIEF OF APPELLANTS to be hand-delivered to the
Utah Supreme Court and four true and correct copies to be
mailed, first-class postage prepaid thereon, to the following:

Michael R. Carlston
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Gerrit M. Steenblik
JENNINGS, STROUSS & SALMON
One Renaissance Square
Two North Central
Phoenix, Arizona 85004-2393

A handwritten signature in cursive script, reading "James A. Brown", written over a horizontal line.

8552G(S)
8553G(O)
071691

A D D E N D A

GERRIT M. STEENBLIK
Two North Central Avenue
Phoenix, Arizona 85004
(602) 262-5846

March 30, 1988

CERTIFIED MAIL

Mr. Larry K. Leeper
Professional Maninvest, Inc.
255 East 400 South, Suite 200
Salt Lake City, UT 84111

Re: South Lake Shopping Center

Dear Larry:

I am writing you on behalf of the current lessors pursuant to that certain Lease and Option Agreement dated October 14, 1960 first made by and among Earl E. Howe, Vivian Howe, John O. Howe and Maxine Howe, as Lessors, and J. E. Lehnherr, Herman L. Franks and Stanford L. Hale, d/b/a Valley Shopping Center, as Lessees (the "Lease").

It is our position that Maninvest, as the successor to the Lessees, is in default of covenants in the Lease, including but not limited to the following:

1. The covenant to keep the premises free and clear of all liens and encumbrances;
2. The covenant not to assign the Lease without our prior written consent; and
3. The covenant to maintain the premises and to keep them free from weeds and other obnoxious growth.

For example, Maninvest's letter of January 22, 1988 failed to disclose that on January 5, 1988, Maninvest encumbered the premises by recording a Trust Deed and Assignment of Rents and by filing a Financing Statement in favor of Valley Bank and Trust Company. These encumbrances and Maninvest's attempt to conceal them from us constitute flagrant violations of the Lease. Moreover, without seeking our "prior" consent, Maninvest assigned its leasehold interest to Valley Bank and Trust Company

Mr. Larry K. Leeper
March 30, 1988
Page 2

on December 8, 1987. Furthermore, we recently inspected the shopping center and discovered that there are piles of Christmas-time trash and last year's crop of obnoxious weeds still located on the Premises, and that the surface of the parking lot is not and for some period of time has not been in good order or repair.

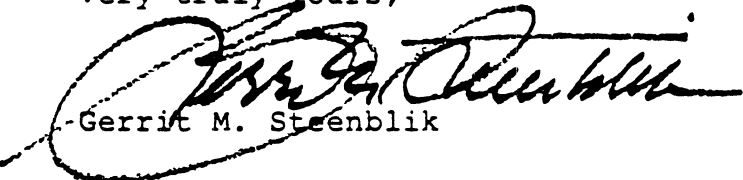
Based upon these defaults, it is our position that we are entitled to terminate Maninvest's rights under the Lease.

At this time, I am also forwarding a transmittal letter and four checks which Salt Lake County recently sent to Robert E. Howe and me. Apparently, these checks represent the 1987 property taxes refunded as a result of the appeal which Maninvest filed with the Salt Lake County Board of Equalization. The checks are as follows:

Check No. 29065--\$ 872.72
Check No. 29066--\$ 2,908.95
Check No. 29068--\$ 727.25
Check No. 29067--\$10,035.95

Robert E. Howe and I have both now had the opportunity to endorse these checks to Maninvest.

Very truly yours,


Gerrit M. Steenblik

GMS/pmn

Enclosures

cc: Mr. and Mrs. John O. Howe
Mr. and Mrs. Robert E. Howe
Mr. and Mrs. William K. Evans

GERRIT M. STEENBLIK
Two North Central Avenue
Phoenix, Arizona 85004
(602) 262-5846

April 29, 1988

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

Mr. Larry K. Leeper
Professional Maninvest, Inc.
255 East 400 South, Suite 200
Salt Lake City, UT 84111

Re: South Lake Shopping Center

Dear Larry:

We have considered your letter dated April 1, 1988, and, to say the least, we are very disappointed. "Running your business" does not give you the right to jeopardize ours.

But for the single first mortgage referred to in paragraph 14 of the Lease, there is no justification whatsoever for the Valley Bank loan. Notwithstanding statements to the contrary in your April 1st letter, the Valley Bank loan clearly is intended to and does affect our position as lessors. Among other things, the Assignment of Lease and accompanying Acknowledgement which you sent us on January 22, 1988 asked us to agree that

(1) Maninvest had the right to assign the Lease to the bank;

(2) the bank would be entitled to succeed to possession of the leased premises and to exercise all rights under the Lease;

(3) the bank would be entitled to 15 days notice of any claim or default; and

(4) Maninvest was thereby encumbering our interest in the property.

Moreover, the form of the deed of trust as recorded demonstrates your intent to encumber our interest, not merely yours.

Mr. Larry K. Leeper
April 29, 1988
Page 2

In our opinion, you are being less than candid to suggest that this kind of borrowing is in the "ordinary course" of your business, or that it "does not affect the lessor's position," or that "the assignment is only for security purposes." The existing encumbrances and Manivest's attempt to conceal them are flagrant violations of the Lease.

On behalf of the lessors, I hereby advise you that time is of the essence and that we insist upon strict performance of all of the covenants, restrictions and conditions in the Lease.

Very truly yours,



Gerrit M. Steenblik

GMS/pmn

cc: Mr. Robert E. Howe
Mr. John D. Howe
Ms. Carole Evans

RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

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PAUL H. RAY (1893-1967)
A. H. NEBEKER (1895-1980)
S. J. QUINNEY (1893-1983)

May 31, 1988

CERTIFIED MAIL AND PROCESS SERVER

Mr. Ernest C. Psarras
Professional Maninvest, Inc.
255 East 400 South, Suite 200
Salt Lake City, UT 84111

Re: South Lake Shopping Center

Dear Mr. Psarras:

This law firm represents the current lessors pursuant to that certain Lease and Option Agreement dated October 14, 1960, first made by and among Earl E. Howe, Vivian Howe, John O. Howe and Maxine Howe, as Lessors, and J. E. Lehnherr, Herman L. Franks and Stanford L. Hale, d/b/a Valley Shopping Center, as Lessees (the "Lease"). It is our understanding that Professional Maninvest, Inc. ("Maninvest") is the successor to the Lessees.

OUR CLIENTS HEREBY GIVE FORMAL NOTICE THAT THE LEASE IS TERMINATED EFFECTIVE IMMEDIATELY UPON YOUR FIRST RECEIPT OF THIS LETTER.

It is our clients' position that Maninvest has breached several covenants of the Lease, including but not limited to the following:

1. The covenant to keep the premises free and clear of all liens and encumbrances whatsoever;
2. The covenant not to assign the Lease without the Lessors' prior written consent; and

Mr. Ernest C. Psarras
Professional Maninvest, Inc.
May 31, 1988
Page two

3. The covenant to maintain the premises and to keep the premises free from weeds and other obnoxious growth.

The Lease provides an express forfeiture provision. Pursuant to paragraph 9, the Lease is automatically terminated upon Maninvest's failure to keep any covenant for a period of 60 days. The Lease expressly provides that there is no requirement for notice, and it does not grant any opportunity for cure.

Notwithstanding these terms, our clients have given Maninvest every reasonable opportunity to remedy these breaches. By letters dated March 30, 1988 and April 29, 1988, they formally demanded that Maninvest comply with its obligations. By ignoring these demands, Maninvest has left our clients with no alternative but to declare the Lease to be terminated and to retake possession of the premises.

Pursuant to paragraph 9 of the Lease, you are hereby instructed to surrender possession of the premises to our clients by promptly delivering to this law firm all necessary keys and operating documents pertaining to the premises. Our clients hereby formally assert their right to take possession of the premises and to lease the space for their own behalf.

Since our clients became aware of the foregoing breaches of the Lease they have not accepted or negotiated any rent checks. In connection with the termination of the Lease, our clients are prepared to, and do hereby, tender return of all such rent checks to you; provided, however, that such a return of rent checks does not constitute a waiver of our clients' right to the reasonable rental value of the premises after the date of default and termination. Please advise me as to where these checks should be delivered.

Very truly yours,

RAY, QUINNEY & NEBEKER

Larry G. Moore

LGM/dd