

1968

Doris White Bagley v. Socony Mobile Oil Company, · Inc., A New York Corporation : Respondent's And Cross-Appellant's Brief

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In the Supreme Court of the State of Utah

DORIS WHITE BAGLEY,

*Plaintiff-Respondent,
and Cross-Appellant,*

vs.

SOCONY MOBIL OIL COMPANY,
INC., a New York corporation,

*Defendant-Appellant,
and Cross-Respondent.*

Case No.
11444

RESPONDENT'S AND CROSS-APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County, Honorable Stewart M. Hanson,
Jr.; and appeal from Judgment of the Third District
Court for Salt Lake County, Honorable A. H. Ellett.

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Civil Supreme Court Clerk

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RESPONDENT'S AND CROSS-APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a suit by lessor claiming lessee has improperly held over on a service station lease as a result of lessee's failure to renew for which lessor claims lessee should be liable for treble damages. Lessor further claims that the lessee has breached the lease during its period of existence.

DISPOSITION IN THE LOWER COURT

Because of the extensive nature of the pleadings, their importance to this appeal, their complicated nature and in view of the fact that two different summary judgments have been rendered in the lower court, which summary judgments are the sole issues on this appeal,

the pleadings will be set forth in detail with an indication of their disposition. The plaintiff's initial complaint set forth two causes of action. The first cause of action alleged that the plaintiff considered the options to renew, which were contained in the lease, as continuing offers and that she had revoked said offers and that therefore the options to renew could not be validly exercised by the lessee. The second cause of action sounded in fraud, claiming that there had been a material misrepresentation which had motivated the original lessor to enter into the lease. Lessor then filed a first amended complaint (R. 27). This first amended complaint incorporated the first two causes of action of the original complaint by reference and set forth a third cause of action claiming that the lessee had improperly charged lessor by withholding rent payments for improvements made on the premises. Lessor claimed that the lessee should actually be responsible for paying for those improvements. A fourth cause of action was also included alleging that the lessee had trespassed on property adjacent to that property which was demised in the lease. Judge Ellett granted summary judgment in behalf of the defendant on the plaintiff's first and second causes of action (R. 72). The plaintiff's third cause of action was dismissed with prejudice by stipulation (R. 81). A proposed second amended complaint was filed (R. 82) with a motion to allow the filing of the second amended complaint (R. 97), but the matter was never considered by the court and no order was entered allowing the filing of the proposed second amended complaint.

A motion to allow the filing of a third amended complaint was filed (R. 98) and an order was entered allowing the filing of the third amended complaint (R. 99). The third amended complaint (R. 101) listed as the first three causes of action those which had been disposed of previously. A fourth cause of action claimed that there had been a material alteration of the lease by the lessee which had voided the lease. The complaint set forth a fifth cause of action which alleged that the lessee, Socony Mobil Oil, Inc., had assigned the lease and as such the assignee, E. E. Terry, was the only party who could renew the lease and that Mobil Oil Company's attempt to do so was invalid. The causes of action alleged treble damages for wrongfully holding over. The complaint contained a sixth cause of action alleging that the lessee had contracted not to renew the lease by implied contract and estoppel and claimed treble damages for wrongfully holding over. The seventh cause of action of said complaint claimed that Mobil Oil Company was wrongfully occupying the building upon the premises demised for the reason that the building was not demised with the premises and that the lessee was not paying additional reasonable rental for the building. An eighth cause of action alleged a trespass in that it claimed that the lessee was occupying 742 square feet of adjacent property belonging to the lessor and not demised in the lease. A ninth cause of action claimed that the lessee by occupying more property than was demised in the lease breached the lease and that the lease was therefore subject to termination. A tenth cause of action

alleged lack of mutuality for the reason that the lease purports to bind the lessor for a potential period of 25 years while it allows the lessee the right to terminate upon giving 30 days' notice and that the additional burdens imposed by the alteration were also indicative of a lack of mutuality. An eleventh cause of action alleged an implied covenant in the lease for the lessor and lessee to mutually share profits emanating from the operation of the station.

Judge Hanson granted a summary judgment (R. 187) in favor of the plaintiff on her third amended complaint on the sixth cause of action, the eighth cause of action, the tenth cause of action and the eleventh cause of action as to the question of liability and reserved the question of damages for trial. In the same judgment Judge Hanson granted a summary judgment in favor of the defendant on the seventh cause of action.

In the pretrial order (R. 194) Judge Croft entered a judgment denying treble damages. A judgment (R. 213) was granted in favor of the plaintiff in the amount of \$7,517.00. The findings of fact (R. 212) contain a mistake in the first paragraph. In that paragraph \$280.00 per month should read \$180.00 per month.

STATEMENT OF THE FACTS

The plaintiff-respondent and cross-appellant agrees with the defendant-appellant and cross-respondent's

statement of facts in the main as far as it goes. She disagrees with certain pertinent aspects of that fact statement. Plaintiff entered into one not two written lease agreements (Exhibit P-1). The other document which was denominated as a lease (Plaintiff's deposition Exhibit No. 2) was a summary of the primary lease for recording purposes and did not in any way add or detract from the terms of the lease (Plaintiff's Exhibit No. 1)

There is no evidence in the record to the effect that the improvements on the property were not completed until May 1, 1955.

The lease with respect to termination provided as follows:

"7. Lessee may use the demised premises for the dispensing of petroleum products and for the conduct of a service station business thereon and for any other lawful purpose. In the event of the condemnation of said premises or any part thereof, or in the event the full use of said premises or any portion thereof in the conduct of a super service station business is interfered with or handicapped by any law, ordinance, or rule or regulation of any governmental office or body acting under authority or cover of authority, or by order of any court, lessee may at its option terminate this lease upon 30 days' written notice to the lessor. It is also agreed that in the event at any time or from time to time the demised

premises cease to be advantageous in the sole discretion of the lessee for the dispensing of petroleum products, then lessee may at its option terminate this lease upon thirty (30) days' written notice to lessor and paying to lessor an amount equal to that received by lessor as rental for calendar month next preceding the month in which notice of termination is given. The waiver of any provision hereof shall not be deemed a waiver of any other provision or provisions hereof, or of lessee's right to subsequently terminate this lease because of the occurrence of one or more of the conditions or circumstances herein set forth."

At the time the lease was executed each paragraph was stamped with an initial stamp in black ink and initialed by Lavine H. White in her own behalf and by B. F. Ball for and in behalf of the lessee. The lease at the time it was so executed provided in paragraph 20 (Plaintiff's Exhibit No. 1) :

"Lessee agrees to supervise the construction and installation of a service station upon the demised premises including buildings and equipment in accordance with plans and specifications first approved in writing by both parties, . . . "

At a later date the lessee unilaterally added paragraph 24 which does not bear the initials of Lavine H. White and which bears a different initial stamp (Plaintiff's Exhibit No. 1) and which paragraph is quoted as follows:

“24. Notwithstanding the provisions of paragraph 20 above, lessor agrees to cause to be constructed on the demised premises improvements and facilities and equipment adequate for the operation of a gasoline service station for the sale of gasoline and other petroleum products at a cost of approximately twenty thousand dollars (\$20,000.00), said amount to be in addition to lessee's contribution outlined in paragraph 20 above. In the event lessor is unable to complete construction of improvements within ninety (90 days) after an executed copy of this lease is delivered to lessor, it is mutually agreed that lessee may, at its option, complete construction of said service station and be reimbursed for such expenses from proceeds from the loan to be secured by lessor and referred to in paragraph 19 above.”

Paragraph 24 imposed an additional burden upon the lessor which was not contemplated at the time the lessor agreed to accept three hundred dollars (\$300.00) a month and was accepted by the lessor only subject to the condition that an additional amount of compensation be received in proportion to the value of the investment made by the lessor (Deposition of Doris White Bagley, pp. 19, 20). This testimony went unchallenged throughout the proceedings. Promises were continually made by the lessee throughout the period of the lease that the lessor would be reimbursed at some point for the improvements which had been put on the station by the lessor (Doris White Bagley's deposition, pp. 15 through 22).

On October 17, 1963, the following letter was sent to Mrs. Doris Bagley, the lessor herein:

“Dear Mrs. Bagley: Management has reported on the proposal we submitted on the property at 2950 East 33rd South, Salt Lake City, Utah.

“As proposed with your consent, the outline of the proposal was as follows:

“1. Firm up two five-year options to enable you to borrow money on the lease.

“2. Rental of 1.5 cents per gallon with a minimum of \$265.00 per month. The 1.5 cents per gallon would be computed on an annual gallonage basis.

“3. Mobil Oil Company to assume all maintenance.

“In factoring out the proposed rental versus rental Mobil is presently paying, it was felt that the present lease arrangement should not be changed.

“However, they are willing to propose for consideration a firming up of two five-year options and assuming maintenance on the basis of a rental of a flat \$265.00 per month.

“I know that management has carefully considered our proposal, and it would be appreciated if you would give their recommendation your consideration.

“Please advise me as soon as possible, as the proposal is being pended until we hear from you. Sincerely yours, H. O. Nichols.” (R. 152).

It was very clear from the record that the only basis upon which Mobil would renew the lease was at a lesser rental amount.

At page 40 of the Nichols' deposition the following statement is found:

“Q Isn't it true then that in your conversation with Mrs. Bagley, in regard to this letter, that this proposal was the only way that Socony would deal with her?

A Right.”

Referring to the \$265.00-per-month rental figure in the letter at page 41 of the deposition Nichols testified as follows:

“Q In other words, this is based, back to our conversation, is that was all she was going to get?

A That's right.”

This was Mobil's proposal that they were willing to pay at best \$265.00 per month in order to continue in the premises after the expiration of the initial period (R. 153 through 161). Mr. Nichols testified in his deposition (R. 154) as follows:

“A No. This letter was presented on a basis of what we were able to do under the present gallonage of the station.”

After receiving the H. O. Nichols letter and after discussions the lessor sent a letter to the lessee indicating that she was expecting that the lessee would in fact terminate at the end of 120 months (R. 158). Mobil knew that it was the lessor's intention to borrow money based upon a further lease commitment. This is demonstrated from page 34 of the deposition of Harold Nichols, an agent of Mobil. He states at lines 12 through 15:

“Q Now let's go back to the history. What prompted this particular letter?

A Because the Whites asked us to firm up two five-year options in order for them to borrow money.”

The foregoing testimony is completely inconsistent with the statement found on page 4 of the appellant's brief quoted as follows:

“The record is without evidence to show defendant made any representations not to renew the lease . . . ”

Appellant's statement with respect to this factual issue as to whether or not there is evidence in the record of Mobil's expression of its intent to renew the lease

is contravened by the respondent in the foregoing and the appellant's statement does not represent a fair resume of the evidence in the record. It presents none of the evidence favorable to the judgment and this failure to prevent any of the evidence favorable to the respondent makes that which is presented of questionable value. (*Douglas v. Duvall*, 304 P.2d 373, 5 Utah 2d 429, (1956).)

The appellant refers to the fact that plaintiff did not record in the record evidence to demonstrate that she detrimentally relied upon the representations referred to above. In this respect the plaintiff admits that there are certain shortcomings in this regard, but excuses herself for two reasons; first, the entire scope of the discussion at the motion for summary judgment presupposed that counsel for both parties were assuming as a fact that the loan had been secured by Doris Bagley which was of a large and substantial amount beyond that which would be paid by the current monthly rentals based upon her assumption that she had secured a new lease to third parties. This fact did not seem to be questioned by the defendant and plaintiff on the basis of excusable neglect asks the Court to accept her affidavits in this regard at the present time. The second reason the Court should disregard any shortcoming in this connection is that there was no prejudicial error suffered by the defendant for the reason that there is no legitimate factual dispute as to whether or not the plaintiff actually secured the larger loan referred to and a new trial on that

issue would most certainly result in a finding to that effect. The record reflects that the plaintiff would have been able to secure a new lease had the premises been vacated at the end of the initial period (plaintiff's deposition, p. 25).

In the plaintiff's third amended complaint in the sixth cause of action the following paragraphs are found (R. 107) :

"7. The plaintiff relying upon the statement of the lessee did seek a new future lessee and did obtain a commitment to rent the property for \$600.00 per month.

"8. That in reliance upon the statements of the defendant, the plaintiff did negotiate a loan based upon the assurance that she would have an income of \$600.00 per month from the subject premises which income would come from the new lessee who was obtained in view of the defendant Socony Mobil's representation that they were not going to exercise their option to renew the lease.

"9. That the loan which was obtained did commit the plaintiff to make payments in excess of an amount which she could reasonably pay based upon the amount of income which she receives from the defendants under the present arrangement."

To this allegation the defendant-respondent in its answer to plaintiff's third amended complaint at page 125 of the record stated as follows:

“5. Has insufficient information to admit or deny the allegations of paragraphs 7, 8 and 9 and therefore denies the same.”

The record does not contain any factual demonstration that the plaintiff ever received personally a notice that the defendant wished to exercise its option to renew the lease and the record does not demonstrate any factual proof that the notice was sent to the address listed in the lease. The record does not contain any factual proof that the notice which was sent was sent to an address at which the defendant was residing at the time the notice was delivered.

The defendant leased the premises in question to one E. E. Terry for a period which extended longer than the prime period under the lease (R. 61, Plaintiff's Exhibit No. 1).

ARGUMENT

POINT I

THERE IS AMPLE EVIDENCE OF AN IMPLIED CONTRACT BETWEEN PLAINTIFF AND DEFENDANT TO THE EFFECT THAT DEFENDANT WOULD NOT RENEW AND EXTEND THE LEASE, AND THERE IS AMPLE EVIDENCE OF CONDUCT ON THE PART OF DEFENDANT WHICH ESTOPPED IT FROM RENEWING AND EXTENDING THE SAME.

The extensive statement of facts includes ample evidence supporting the legal conclusion that an implied contract existed whereby the defendant was prevented from renewing its lease. The case of *Chandler v. Roach*, 319 P.2d 776, Cal.App. (1968), insofar as it is in point, actually supports the plaintiff's case more than it does the defendant's. The issue involved was the propriety of instructing the jury that the novelty and correctness of an idea were essential to the creation of a contract by implication to pay for the idea. The court held that the instruction was improper but in the process cited numerous statutory provisions of the California Code defining implied contracts. These statutory provisions are to a large extent a reduction of the common law to statute and are cited as follows in order to relate them to the case before the Court:

The California Civil Code, Section 1619, provides as follows:

"A contract is either express or implied."

Section 1620 provides:

"An express contract is one, the terms of which are stated in words."

Section 1621 provides:

"An implied-in-fact contract is one, the existence and terms of which are manifested by conduct."

Section 1584 provides :

“Performance of the conditions of proposal, or the acceptance of the conditions offered with a proposal is an acceptance of the proposal.”

Section 1589 provides :

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known to the person accepting.”

Section 1605 provides :

“Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person to which the promisor is not lawfully entitled, *or any prejudice suffered*, [emphasis added] or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.”

Certainly a prejudice has been suffered within the meaning of this code section by the plaintiff in the above-entitled action. By definition this prejudice constitutes a valid consideration in order to support the implied contract found by the lower court in the instant case.

Section 1606 provides :

“An existing legal obligation resting upon the promisor, or a moral obligation originating in some

benefit conferred upon the promisor, *or prejudice suffered by the promisee*, [emphasis added] is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

Likewise this provision presents a theory adequate to support the finding of the lower court in the instant case. The detrimental reliance of plaintiff herein upon the statement by Mobil to the effect that it would not renew the lease constituted sufficient consideration to imply a contract not to do so.

In the case of *Kelly v. Richards, et al.*, 83 P.2d 731, 95 Utah 560 (1938), at page 743 the court stated:

"This estoppel arises when one by his acts, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for the truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained."

Both the above-quoted section and that section of the case quoted in the defendant's brief from the same case demonstrate that the necessary elements have been met by the plaintiff. The defendant had reasonable grounds

to think that because of its representation the plaintiff would change her position because of the facts stated earlier in this brief. First, she indicated in her deposition that she could rent the station for more money and that she had indicated this to the defendant. Also, in the deposition of Mr. Nichols, a representative of the defendant, he stated that the reason the plaintiff wished to firm up the two additional five-year options was for the purpose of borrowing money based upon the lease as security. It would only have been logical for the defendant's agent to have assumed that upon his making a statement to the plaintiff to the effect that they were not in a position to renew the lease because of its low gallonage that the plaintiff would immediately take steps in order to secure a new tenant and to negotiate the loan which she told the defendant she was going to negotiate. In the *Petty v. Gindy Manufacturing Corporation* case, 404 P.2d 30, 17 Utah 2d 32 (1965), also cited by defendant, this Court in addition to those sections cited by defendant stated the following at page 31:

“. . . Section 90 of the Restatement of Contracts as follows:

“A promise which the promisor [Gindy] should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee [Petty] and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.”

The court stated that this section was being used by the court as a criterion to determine the case. In that case the court affirmed the lower court's decision denying relief to the promisee and stated at page 31 :

“In such circumstances we review the evidence in the light most favorable to the findings.”

In the present case the court found in favor of the plaintiff and the Court in this case should likewise reivew the evidence in the light most favorable to the findings. We would suggest to the Court that the instant case provides a much clearer case in favor of granting relief to the promisee for the reason that equity in good conscience can only clearly be served in the instant case if the plaintiff is allowed the relief prayed for, the reason being that she was reasonably entitled to rely upon the promise made by Mr. Nichols in his letter and in his oral statements to her to the effect that the lease would not be renewed. It was a clearcut and concise promise concerning a specific and defined act from which the defendant would abstain, that is, the renewing of the contract. There can be no question that the record accurately reflects the fact that this was indeed the position of the defendant.

In the present case if any uncertainty exists in the language of the contract, the holding in *Charlton v. Hackett*, 360 P.2d 176, 1 Utah 2d 389 (1961), should be applied. In that case the court held that when there is such uncertainty in the language of a contract, it is the prerogative of the trial court to determine the proper inter-

pretation to be placed upon the transaction in the light of the evidence; and also to determine whether the plaintiff acted reasonably under the circumstances. Here where there were undisputed facts the court was well within its discretion in finding as it did and the Court in this case should uphold the lower court as it upheld the lower court in the *Petty* case even though the effect would be to give the promisee in the instant case rather than the promisor as in the *Petty* case the relief for which it prayed.

There are almost as many definitions of express and implied contracts as there are cases involving the interpretation of those words. In addition to the foregoing statutory definitions which have been cited in conjunction with the *Chandler* case, the following common law definitions are frequently quoted (*Black's Law Dictionary*, P. 395) :

Contract.

"An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing." 2 BL. Comm. 443; 2 Kent, Comm. 450; *Linn v. Rosse*, 10 Ohio 414, 36 Am Dec. 95; *A. J. Yawger Co. v. Joseph*, 184 Ind. 228; 108 N.E. 774, 775; *In re Pierce, Butler & Pierce Mfg. Co.*, D.C.N.Y., 231 Fed. 312, 318.

"An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and

justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that the contract existed between them by tacit understanding." *Miller's Appeal*, 100 Pa. 563, 45 Am. Rep. 394; *Landon v. Kansas City Gas Company*, C.C.A. Kan., 10 Fed. 2d 263, 266; *Caldwell v. Missouri State Life Ins. Co.*, 148 Ark. 474, 230 S.W. 566, 568; *Cameron to Use of Cameron, v. Eynou*, 332 Pa. 529, 3 A.2d 423, 424; *American LaFrance Fire Engine Co., to Use of American LaFrance & Foamite Industries v. Borough of Shenandoah*, C.C.A. Pa., 115 Fed. 2d 866, 867.

"Implied contracts are sometimes divided into those 'implied in fact' and those 'implied in law,' the former being covered by the definition just given, while the latter are obligations imposed on a person by the law, not in pursuance of his intention and agreement, either expressed or implied, but even against his will and design, because the circumstances between the parties are such as to render it just that the one should have a right, and the other a corresponding liability, similar to those which would arise from a contract between them. This kind of obligation therefore rests on the principle that whatsoever it is certain a man ought to do that the law will suppose him to have promised to do. And hence it is said that, while the liability of a party to an express contract arises directly from the contract, it is just the reverse in the case of a contract 'implied in law,' the contract there being implied or arising from the liability." *Bliss v. Hoyt*, 70 Vt., 534, 41 A. 1026; *Kellum v. Browning's Adm'r*, 231 Ky. 308, 21 S.W. 2d 459, 465.

“But obligations of this kind are not properly contracts at all, and should not be so denominated. There can be no true contract without a mutual and concurrent intention of the parties. Such obligations are more properly described as ‘quasi contracts.’” *Union Life Ins. Co. v. Glasscock*, 270 Ky. 750, 110 S.W. 2d 681, 686, 114 A.L.R. 373.

The facts of this case qualify under the foregoing definitions of implied contracts and support the finding of the lower court in that regard.

POINT II

A PROVISION IN THE LEASE GRANTING DEFENDANT THE OPTION TO TERMINATE THE LEASE UPON GIVING 30 DAYS' NOTICE AND PAYMENT OF ONE MONTH'S RENT TOGETHER WITH THE OTHER PROVISIONS OF THE LEASE INCLUDING THE ADDITION OF PARAGRAPH 24 AND THE OTHER FACTS SURROUNDING THIS OCCURENCE CONSTITUTE LACK OF CONSIDERATION AND MUTUALITY SO AS TO RENDER THE ENTIRE LEASE NULL AND VOID.

At first blush the *Keck v. Brookfield* case, 409 P.2d 583, 2 Ariz. App. 424 (1966), would appear to be in point; however, there is a very material element in which that case is distinguishable from the present case. The distinguishing factor is set forth in the facts at page 584 as follows:

“On June 1, 1953, J. N. Brookfield and Ruth Brookfield, husband and wife, and Buster Jenkins and Dorothy Jenkins, husband and wife, lessees, executed a lease agreement with Mr. and Mrs. Dorris, as lessors. The lease was for a one year period ending on June 1, 1954. It provided that the \$1,500.00 rent be paid in monthly installments of \$125.00 and granted to the lessee an option to renew the lease on the same terms for an additional 20-year period upon the giving of proper notice. The leased premises were described as ‘. . . that certain barn located at 2552 Oracle Road, Pima County, Arizona.’

“On February 26, 1954, J. N. Brookfield, Lester Jenkins and the Dorrises, in each other’s presence, signed their names in the right-hand margin of the lease dated June 1, 1953, for the purpose of giving effect to the following written addition to the instrument made at that time by J. N. Brookfield.

“ ‘February 26, 1954, it is agreed by all signatures attached that this lease shall run for the 20-year period stated above and that the lessees can revoke said lease at the end of any given year by giving a 30-day written notice.’ ”

Therefore it is seen that the option to renew in the *Keck* case was executed by all parties to it and became an executed rather than an executory covenant. For this reason the lack of mutuality, if any, which may have existed was corrected.

“Alleged defective mutuality applies only to executory contracts and it does not apply to an executed contract nor to the executed portion of a contract.” *In re Turner's Estate*, 341 P.2d 376, 171 C.A. 2d, 591.

The District Court's holding in the instant case related to the lack of mutuality as to the option to renew together with other surrounding circumstances. The option to renew was executory and as such could be stricken down as lacking in mutuality as to that aspect of the contract.

The doctrine of mutuality is closely related to the doctrine of lack of consideration and both of these elements have been codified in the present Uniform Commercial Code which provides in 70A-2-302 as follows:

“Unconscionable contract of clause. — (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

“(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”

It is the position of the plaintiff that the contract was unconscionable at its commencement for the reason for the wrongful adding of paragraph 24; however, the contract was ratified by its recognition by both parties over a period of years. However, this ratification only became effective as to the paragraph and created the contract after the date the Uniform Commercial Code became effective on December 31, 1965, and as such it is suggested that the provisions of the Uniform Commercial Code should be applied to govern the instant interpretation of the option to renew. In this case the entire contract must be reviewed with respect to the issue of lack of mutuality and particular attention must be given to the unilateral addition of paragraph 24 by the lessee. In this respect it must be recalled that it was the undisputed testimony of the plaintiff that the defendant throughout the continued existence of the contract claimed and re-affirmed that an allowance would be made for the increased value of the property as a result of the construction of the station and a contribution of \$20,000.00 made by plaintiff's predecessor in conformity with the requirements imposed by paragraph 24 of the lease. The addition of this paragraph imposed a substantial additional burden upon the lessor which was complied with by the lessor subject to the condition that the additional rentals be paid. This testimony went undisputed and was presented in that context before the lower court and in view of the addition of this clause an intolerable burden was placed upon the lessor and there was indeed a lack of mutuality when the contract was viewed in its entirety. This condition of lack of

mutuality was compounded by virtue of the facts supporting the first point of the brief herein, that is, that there was actually a contract not to renew the option. Therefore, if any mutuality existed it was to the effect that the contract embodied in the lease in its total contained a clear understanding that the option to renew was ineffective.

The plaintiff must readily agree that the mere fact that the defendant had the option to cancel the lease upon giving 30 days' notice was insufficient in and of itself to create a lack of mutuality so as to void the lease. There is a small minority of cases to the contrary and most courts construing the question have considered it a rather close one. Plaintiff basically agrees with the assertion in this regard set forth in Point II of defendant's brief wherein it cites 17 *Corpus Juris Secundum*, Section 100. More particularly in point is Volume 51C, *Corpus Juris Secundum*, Section 91, quoted as follows:

“Although a lease for a term of years cannot be terminated at the option of one of the parties in the absence of a provision thereof, the lease may provide for its termination before the expiration of the term fixed at the option of either of the parties to the lease agreement. It has been held that whether such an option exists, and, if it exists, whether it may be exercised by either of the parties, or solely by the lessor, or the lessee, depends on the terms of the particular lease. An agreement is not invalid although it gives the lessor or the lessee alone the right to terminate the lease.

“Under Missouri law, a filling station lease has been held not invalid for lack of mutuality, notwithstanding the provision giving the lessee the option to cancel the lease at any time after giving 30 days’ notice to the lessor, the court holding that the payment of the stipulated rent was sufficient consideration for the cancellation clause.” *Bowen v. Shell Oil Co.* (D. C. Mo.) 71 Fed. Supp. 649.

The court pointed out that this is the majority position but that wherever the question has been construed it is a very close question and that the balance of the lease provisions must be inquired into.

The plaintiff’s position stated in its simplest terms with respect to the issue of mutuality is that the unilateral addition of the 24th paragraph imposing upon the lessor the burden of contributing \$20,000.00 to the construction of the service station and the promise by the lessee that it would not renew the lease combined with repeated oral statements to the effect that additional amounts would be paid to the lessor in accordance with the reasonable valuation of the improvements of the service station completely destroys the mutuality of the agreement in view of the lessee’s conduct with respect to all issues and particularly in view of its failure to pay additional sums when combined with the option to terminate.

The notion of mutuality is closely related to the theory of consideration and the same fact situations have

been construed in different cases under these separate headings. (*Williston on Contracts*, Vol. 1, Sec. 501A.)

This position is also set forth by James in his text *Option Contracts*, Section 117, as follows:

“A contract covering a period of time but containing the condition that it may be terminated before that time, will remain effective for the full term, unless the condition of termination is fully complied with. Where, therefore, a particular notice, or a specified time, is required to make the notice effective, a notice not conforming to the contract, or not given at the time specified, does not have the effect of terminating the contract. With reference to mutuality, it would seem the rule is that unless the option to terminate the contract is reserved to either party, it is lacking in that essential. Thus, a contract between a railroad company and a telephone company which gives the latter the privilege of placing telephones in two depots, of the former, in consideration of free telephone service for it, but subject to termination at the will of one, with the stipulation that no corresponding right shall be exercised by the other, lacks mutuality.”

It is therefore the position of the plaintiff that although the contract itself did not lack mutuality as a result of the option to renew for a total lease period of 25 years while the lessee could terminate at any time, the covenant allowing the option to renew was not supported by consideration and therefore the option itself could not be exercised although the prime term was a valid rental period. The cases construing the issue apply to the prime

term and do not involve themselves with the question of the validity of the option to renew. Cases construing the issue which state that the contract does not lack mutuality as a result of the right to terminate on the part of the lessee are not in point here because it is the plaintiff's claim that the covenant itself lacks mutuality; therefore, although the plaintiff admits the lease for the prime term was not destroyed by lack of mutuality, it is suggested that the covenant for the option to renew is invalid for that reason irrespective of the other facts present in the case.

In Volume 51C of *Corpus Juris Secundum*, under Landlord and Tenants, at Sections 91 and 92, it is pointed out that where an option does exist in the lessee to terminate the contract pursuant to notice this clause will be construed most strongly against the lessee. In summary it is the position of the plaintiff that the lower court was correct in ruling that the lease lacked mutuality in view of all the factors present combined with the fact that it was terminable by the lessee in 30 days and particularly that the option to renew was void because it lacked mutuality.

POINT III

THERE IS AMPLE EVIDENCE TO SUPPORT A FINDING OF AN IMPLIED COVENANT TO INCREASE RENTAL OR SHARE PROFITS UNDER THE LEASE.

This point is largely a question of fact not law and the facts to support this contention are set forth at length in the statement of the facts and the legal implication of these facts have largely been discussed under Points I and II. In view of the addition of paragraph 24 and of the uncontroverted oral representations testified to by the plaintiff herein to the effect that on numerous occasions both before the contract was entered into and throughout its existence the defendant's agents and representatives indicated that an additional amount of rent would be paid in accordance with the increased evaluation of the property based upon the contribution of the \$20,000.00 by the lessor in addition to the other requirements imposed initially under the lease and in view of the increasing property evaluation as a result of inflation and population increase in the area in question. The lower court would not have needed to rest its findings upon the theory of implied contract but would have been well within its discretion to have found an express covenant to the effect that an increase in rental or a share in the profits did exist under the contract and that the lessee had breached its obligation in this regard. Defendant's quote from the *Cousins* case in connection with this case clearly sets forth the applicable law with respect to implied covenants. The plaintiff accepts it, agrees with it and suggests that it requires that this Court affirm the lower court's holding. The contract itself provided for a lease payment in the amount of \$300.00 per month and the depositions demonstrate that this was not sufficient to make the payments

at the bank on the \$200,000.00 loan and to pay the property taxes and insurance on the property in question. At page 13 of her deposition the plaintiff stated:

“ . . . \$265.25 went to Walker Bank to repay the loan taken out to furnish the construction money to build the service station for General Petroleum. It took ten years to pay off the loan.

Q. Right. That was a loan taken out by your mother, is that correct?

A. For the construction money to build the service station to put General Petroleum in business.

Q. Did you have any thing to do with the loan? That is, were you a signer or—

A. No.

Q. Strictly in your mother's name?

A. Yes.

Q. Now, what happens to the balance of that money?

A. The \$34.75 balance was sent to my mother for some time and that wasn't even enough to pay taxes on the property. So I was having trouble getting the taxes paid, so finally all of the money was sent to Walker Bank. They set up a tax escrow with this additional money.”

The only reasonable and logical conclusion to be drawn is that the parties clearly intended that there would be some consideration flowing to the lessor and the only possible profit which could have emanated to the lessor in connection with this transaction would have been a payment of some additional amount above the \$300.00. All the money borrowed from the bank went into the service station construction and it was necessary for the lessor each month to come up with additional money sufficient to meet the insurance and property taxes as they were amortized. It would be unthinkable to conclude that it was the intention of the parties that the lessee should pay a total rental payment in the amount of \$300.00 per month to the lessor, that the lessor should take that amount, pay it to the bank for the improvements being used by the lessee, and pay additional money out of her pocket each month for taxes and insurance so the lessee could operate a profitable service station upon the leased premises and retain all profits derived therefrom.

IT IS THE POSITION OF THE PLAINTIFF THAT THE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR GRANTED BY JUDGE HANSON SHOULD BE UPHELD. HOWEVER, IN THE EVENT THAT IT IS REVERSED THE PLAINTIFF THEN ASKS THAT THE COURT REVERSE JUDGE ELLETT'S EARLIER SUMMARY JUDGMENT AND RELIES ON THE FOLLOWING POINTS TO SUPPORT THAT POSITION: PLAINTIFF SEEKS A JUDGMENT IN HER FAVOR OR IN THE ALTERNATIVE A NEW TRIAL ON ALL ISSUES.

POINT IV

THE CONTRACTUAL ARRANGEMENT ENTERED INTO BETWEEN SOCONY MOBIL OIL COMPANY AND E. E. TERRY WAS AN ASSIGNMENT OF SOCONY MOBIL OIL COMPANY'S LEASEHOLD INTEREST WHICH OPPOSED THE CONDITION THAT ONLY THE ASSIGNEE, E. E. TERRY, COULD VALIDLY EXERCISE THE OPTION TO RENEW.

The property which is the subject of this lawsuit was leased to General Petroleum by Lavine H. White on August 17, 1954, for a period of 120 months (Plaintiff's Exhibit No. 1). The defendant commenced occupancy of the premises on May 1, 1955 (R. 60). The defendant, Socony Mobil, leased the premises in question to one E. E. Terry for a three-year term commencing the 1st day of September, 1963, and continuing through the 31st day of August, 1966 (R. 63, 64).

The lease agreement between Mobil and Terry incorporates the dealer's contract which provides at paragraph 11 (R. 64) as follows:

"Relationship of parties. It is the intent of the parties that dealer's status shall be that of an independent business man, and that neither dealer nor any of dealer's employees shall be employees or agents of Mobil . . ."

The lease does not contain any right of re-entry except in the event of a breach of any applicable provision contained therein.

There was no attempt by E. E. Terry personally or through any person who was his agent to exercise the option to renew which was contained in the original lease between Lavine White and General Petroleum, which is the lease in question in this case. Under any view of the facts in this case, that lease expired at the very latest on May 1, 1965.

The demise from the defendant to E. E. Terry was for a period approximately 15 months beyond the prime term for which Mobil held the premises. The legal effect of this transfer was an assignment by the defendant of its entire leasehold interest which divested Mobil Oil of its right to extend its lease with plaintiff herein. In the case of *Stewart v. Long Island Railroad Company*, 102 N.Y. 601, 8 N.E. 200, 55 Am. Rep. 844, Judge Rapallo said:

“Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease.

. . . The rule is well settled that if the lessee parts with his whole term, or interest as lessee *or makes a lease for a period exceeding his whole term*, [emphasis added] it will, as to the landlord, amount to an assignment of the lease, and the es-

sence of the instrument as an assignment so far as the original lessor is concerned, will not be destroyed by its reserving a new rent to the assignor with a power of re-entering for non-payment."

Law to the same effect is found in *Tiffany on Real Property*, Section 48, page 114, quoted as follows:

"A grant of the entire interest remaining in the lessee in either the whole or part of the premises will constitute an assignment to the grantee, so far as the landlord is concerned, even though the instrument purported to be a lease, or a different rent be reserved. . . ."

A case in point is *Groth v. Continental Oil Company*, an Idaho case of 1962 found at 373 P.2d 548. The court stated at page 550 as follows:

"With little dissent, the general rule seems well settled that a transfer of a tenant's entire interest, in a part of demised premises for the remainder of the term constitutes an assignment pro tanto rather than a sublease, at least as between the landlord and the transferee."

"Conoco contends that the option to renew, contained in its lease from Wilkie, had the effect of extending the term for the full 10 years permitted by the terms of the option; thus it held a longer term than that which it granted to Wilkie in the leaseback; that it therefore held a reversionary interest in the leasehold, and the lease-back could not operate as an assignment.

"The provision involved is a conditioned option, for renewal, not a covenant to extend the term. As such it is merely an offer, and does not convey to, nor invest in, the optionee a present estate in the land, until it is exercised. *Gard v. Thompson*, 21 Idaho 485, 123 P. 497; *Cicinelli v. Iwasaki*, 170 Cal. App. 2d 58, 338 P.2d 1005; 51 C.J.S. Landlord and Tenant, § 54, 56. Cf. *Murray v. Odman*, 1 Wash. 2d 481, 96 P.2d 489.

"The option in this case is limited and conditioned by the clause, 'provided Lessee exercises said option by giving Lessor written notice of such intent at least 60 days prior to the termination of this lease.' No estate or interest in the property could pass until the conditions of the proviso were fully complied with."

It is of no importance that Mobil Oil termed their lease instrument to Terry a lease or sublease, for the deciding factor is the legal relationship created by an instrument which grants to a third party a longer term than the second party holds. Neither words, form, conditions or covenants prevented the transfer of Mobil Oil's leasehold estate when, by their own contract, they put a third party into their position. In *Craig v. Summers*, 47 Minn. 189, 49 N.W. 742, 15 L.R.A. 236, it was held that whether or not an assignment of a lease had been made is a question of the legal effect and not of the form of the instrument.

In the case of *Holden v. Tidwell*, 133 P. 54 (Okla.) the court states:

“The language employed or form used by the parties in interest does not necessarily determine the character of the instrument or the relation created thereby. The fact that a transfer may be in form a sublease or that it reserves rights against the transferees similar to such as ordinarily reserved in a lease is, as a general rule, immaterial.”

American Law of Property, Volume 1, Section 3.57, at page 297, states as follows:

“In determining whether a given transfer is a sublease or an assignment, the court in the majority of the cases, has said that the retention of the reversion is necessary to the creation of the landlord and tenant relation and held that the transfer by the lessee of his right to possession for the duration of this term is an assignment.”

By transferring the leasehold estate for a longer period than it held, and thus not retaining a reversion, Mobil Oil assigned its lease. The assignment transferred all the interest held by Mobil Oil, leaving it without any privity of estate.

32 *American Jurisprudence*, Landlord and Tenant, Section 318, at page 293, states:

“A lessee during his occupancy of the demised premises, holds both by privity of estate and of contract. When he assigns his lease, he divests himself of the privity of estate, although not of contract.”

The assignment transferred and set over the leasehold interest from Mobil Oil to Terry. Terry was an independent contractor and was not an agent of Mobil nor was Mobil an agent of Terry. Therefore, Mobil Oil effectively divested itself of such leasehold interest and no longer being the lessee, it had no ownership nor did it possess any right to exercise the option paragraphs. The attempted exercise by Mobil Oil of the option clause was of no effect for as an independent contractor with respect to Terry and having divested itself of its entire estate it no longer had a legal relationship entitling it to so exercise the option. In *Gilbert v. Van Kleeck*, 132 N.Y. Supp. 2d. 580, the court ruled:

“The assignment carried with it the option to purchase even though there was no express reference in the assignment to the option. An option to purchase is a covenant running with the land and the benefit of the covenant passes to an assignee of the lease without specific mention.”

The plaintiff, therefore, seeks a reversal of Judge Ellett's ruling in this connection and requests a ruling of this Honorable Court that Mobil could not exercise the option to renew for the reason that E. E. Terry had been assigned the right to do so and he was the only person capable of exercising that right. Such a ruling would necessitate a ruling by the Court that the lease was not renewed and that the plaintiff is entitled to the damage judgment and an immediate order of occupancy.

POINT V

NO PROPER NOTICE WAS GIVEN BY MOBIL FOR THE REASON THAT NO ACTUAL NOTICE WAS RECEIVED BY THE PLAINTIFF NOR WAS NOTICE SENT TO THE ADDRESS DESIGNATED IN THE LEASE.

The plaintiff in this connection seeks a determination by this Court that no notice was given and therefore the lease was not renewed and that the plaintiff is entitled to the damage judgment and to an immediate order of occupancy. In the alternative, the plaintiff seeks a new trial on this factual issue if the Court determines that the plaintiff may have received notice.

Respondent contends that with respect to the summary judgment granted against her on the issue of whether or not she received actual notice was improper for the reason that the evidence of record clearly shows that she did not receive notice of any option exercised by either Mobil Oil or Terry and therefore the original lease terminated by its own terms on May 1, 1965. At best a factual dispute exists in connection with this point.

The option paragraphs, being specifically conditioned upon notice to the landlord, have therefore never been properly exercised by Mobil Oil since the landlord never received the notice required by the provisions contained in the lease. Mobil Oil prepared the original lease instru-

ment on its own printed form, and any interpretation must, in law, be construed most strictly against Mobil and in favor of respondent.

The original lease, (Plaintiff's Exhibit No. 1) provides as follows:

"17. Lessee may, at its option, by serving notice of its election so to do at least thirty (30) days prior to the expiration of the term of this lease, renew or extend this lease for a period of sixty (60) months upon the same terms and conditions and at the same rental and payable in the manner specified in paragraph 1 hereof."

The evidence is not clear with respect to the question as to whether the lease expired for the reason that the lease instrument provides that the lease term would commence upon completion of the necessary improvements to the real property to allow the lessee to operate it as a service station (Plaintiff's Exhibit No. 1). It remains the contention of the plaintiff that this completion occurred in February of 1955 and that the lease should have commenced at that point, and as such the lease should have expired in March of 1965; and therefore the notice which was given was not timely in any event. Respondent contends that this question alone presents a sufficient factual issue for trial.

By the terms of its own printed lease form, lessee provided an address to which it could safely send legal

notice to the lessor, her successors or assigns, and further provided a method by which this address could be changed by lessor, successor, or assigns, if they so desired. The paragraph reads as follows (Plaintiff's Exhibit No. 1):

"10. Any notice from lessee to lessor may be given by sending same by registered mail addressed to lessor at 2833 East Millcreek Road, Salt Lake City 5, Utah, and lessor or his successors or assigns may at any time by written notice to lessee change the place of giving notice and after such written notice to lessee by registered mail, lessee shall send all notices intended for lessor or his successors or assigns to the address which may be so indicated."

This notification address has never been changed; therefore, the Salt Lake City address clearly typed in paragraph 10 is the place of giving notice under the terms of the original lease. Any other service of notice sufficient to renew the lease must be demonstrated by the lessee to have been actually received by the lessor personally.

The affidavit of the defendant herein demonstrates conclusively to the contrary. The mail receipt was signed by an individual who signed his name D. M. White (R. 22) The affidavit of plaintiff stated that she had never been notified by a D. M. White of the notice and that D. M. White was not an agent of hers and that she was not in Florida at the address where D. M. White received the

notice for a period of six months surrounding the time when it was received by the said D. M. White. The defendant had the opportunity had it so chosen to take the deposition of D. M. White to determine whether or not that individual actually notified Doris White Bagely in contravention of her testimony to that effect; however, the defendant failed to so depose D. M. White.

That the notice must actually be received by the lessor is a legal postulate supported in numerous cases, the following of which is representative:

Blumenthal v. Atkinson, 93 Ark. 252, 124 S.W. 510.

POINT VI

THE DEFENDANT DID NOT FILE ITS APPEAL IN SUFFICIENT TIME UNDER APPLICABLE STATUTES.

The plaintiff's action was in the nature of an unlawful detainer action under the Utah Forcible Entry and Detainer Act which provides in 78-38-11 as follows:

“Time for appeal. — Either party may, within ten days, appeal from the judgment rendered.”

This section was construed in the case of *Hunsaker v. Harris*, 109 P.1, 37 Utah 226. The court in that case stated:

“The time for taking an appeal in a forcible entry and detainer suit is governed by this section, which is valid, and the general provision providing for appeal is not applicable.”

If the Court finds that the 10-day appeal time is not applicable, then of course Rule 73A applies which provides in applicable part as follows:

“(a) When and how taken. When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of the judgment appealed from unless a shorter time is provided by law. . . .”

Also pertinent in this regard is Rule 72, the pertinent part of which is quoted as follows:

“(a) From final judgments. An appeal may be taken to the Supreme Court from all final judgments, in accordance with these rules; . . .”

The question then arises as to when the final judgment was entered and whether or not the appeal was filed within the appropriate time provided by either of the foregoing statutes.

Judge Hanson's judgment and decree were signed and entered on the 18th day of December, 1967 (R. 188). This was a final judgment as to the issues of liability.

The only question reserved for trial was the amount of damages. Trial was subsequently held and pursuant thereto a judgement was entered by Judge Leonard W. Elton November 1, 1968, determining that pursuant to Judge Hanson's judgment as to liability damages resulted in the amount of \$7,517.00 plus costs of court (R. 213). On the 8th day of November, 1968, an order was entered by Judge Elton allowing costs and disbursements in the amount of \$18.60 (R. 214). The notice of appeal was filed November 29, 1968, (R. 216), which was more than ten days after Judge Elton's judgment and subsequent order and was more than thirty days after Judge Hanson's judgment as to liability. Therefore, if Judge Hanson's judgment was a final judgment or if the ten day appeal time applies, then the appellant has not filed a timely appeal and its appeal should be dismissed.

CONCLUSION

For the reasons stated herein, the respondent respectfully prays this Court to issue its order:

1. Dismissing the appeal for the reason that the notice of appeal was not timely filed.
2. In the alternative, to sustain the summary judgment of Judge Hanson, or

3. In the alternative, to reverse the summary judgment of Judge Ellett and enter judgment in favor of the plaintiff, or

4. In the alternative, remand the case for a new trial on all issues.

Respectfully submitted,

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