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Ralph Jensen And J. Goldkn Jensen v. O.K. Investment Corporation, A Utah Corporation; Siegel Trailer & Auto Finance, A Utah Corporation; Trailer Mart, Inc., D/B/A Dan's Campers, A Utah Corporation; Homes American Style, A Utah Corporation; The Estate of Max Siegel, Deceased; Dan Siegel, An Individual; And John Does One Through Three : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

RALPH JENSEN and
J. GOLDEN JENSEN,

Plaintiffs - Respondents,

vs.

O. K. INVESTMENT CORPORATION, a Utah corporation;
SIEGEL TRAILER & AUTO FINANCE, a Utah corporation;
TRAILER MART, INC., d/b/a DAN'S CAMPERS, a Utah corporation;
HOMES AMERICAN STYLE, a Utah corporation; the ESTATE OF MAX SIEGEL, Deceased;
DAN SIEGEL, an individual; and JOHN DOES ONE THROUGH THREE,

Defendants - Appellants.

Case No. 12899

BRIEF OF RESPONDENTS

Appeal from summary judgment of the
District Court of Salt Lake County, State of Utah

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HOMES AMERICAN STYLE, a Utah corporation; the ESTATE OF MAX SIEGEL, Deceased;
DAN SIEGEL, an individual; and
JOHN DOES ONE THROUGH THREE,

Defendants - Appellants.

Case No. 12899

BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

Respondents accept the Statement of Nature of Case as set forth in Appellants' Brief except that the second sentence on page 2 of Appellants' Brief should read: "Respondents, owners of the property in question, claim that O. K. Investment Corporation (hereinafter referred to as "O. K.") leased the premises from the respondents and subsequently sublet the premises to MAX SIEGEL [rather than DAN'S CAMPERS as stated by the Appellant] . . ."

DISPOSITION BEFORE THE DISTRICT COURT

After the filing of a Complaint, an Answer and Counterclaim, a Reply to Counterclaim, affidavits and various other documents, Respondents filed a written motion for summary judgment and Appellants made oral motion for summary judgment at the hearing on said motion. On April 24, 1972, the Third Judicial District Court for Salt Lake County, State of Utah, Judge James S. Sawaya, presiding, denied Appellants' motion for summary judgment and entered summary judgment in favor of the Respondents. Appellants thereafter filed a notice of appeal and a supersedeas bond, which stayed execution of the judgment pending this appeal.

STATEMENT OF FACTS

Numerous statements set forth as "facts" in Appellants' brief are, in fact, merely counsel's interpolation of the evidence, are entirely unsupported, and in some cases are directly contrary to the evidence on file in this matter. By misrepresenting to this Court the facts, Appellants have avoided the main issues which were before the District Court on summary judgment. Before setting out its statement of facts, therefore, Respondents respectfully submit that the following critical statements set forth by the Appellants and italicized herein are not supported by the record:

> In June of 1948, *Max Siegel organized appellant,* Siegel Trailer and Auto Finance Company, a Utah corporation. . . .
>
> Later, in November of 1952, *he also organized appellant,* Trailer Mart, Inc., a Nevada corporation, which was authorized to do business in the State of Utah in January, 1968, under the name of Dan's Campers 'N Trailers. . . .

> Max Siegel was president, *director and major stockholder of both of these corporations* from their inception until his death on June 3, 1969. . . .
>
> On the same day [January 1, 1968, being the day the original lease was executed] respondents consented in writing to *a transfer* of the premises by O. K. for the purpose of establishing a recreational vehicle dealership. . . .
>
> Also on the same day, O. K. and Max Siegel, *acting for and on behalf of appellant, Dan's Campers, as president thereof,* entered into an agreement entitled "Lease" whereby the premises were *transferred to appellant, Dan's Campers,* for a period of one year with one option to renew for an additional two years and three additional options to renew which are identical with those provided in the original Lease. . . .
>
> On December 8, 1970, *appellant, Dan's Campers, sent a letter to respondent,* Ralph Jensen, accompanied by a check made payable to respondent, Ralph Jensen, in the sum of $250.00 for the proportionate share of the real property taxes due for the year 1970, *and explaining that appellant, Dan's Campers, was exercising the option to renew* the Lease for the period of January 1, 1971, through December 31, 1972, at the increased rental of $250.00, as per the original Lease. . . .
>
> Mr. Jensen indicated his approval of such *construction upon and improvement of the premises.* Thereafter, Homes American Style, Inc. installed a *sales office and located two modular display homes on the premises at the substantial expense of approximately* $40,000.

The facts as indicated by the record on file herein are more correctly stated as follows:

On or about January 1, 1968, RALPH JENSEN, and J. GOLDEN JENSEN, as lessors, leased a parcel of real property commonly known as 6210 South State Street, Salt Lake County

(hereinafter referred to as the subject premises) to O. K. INVESTMENT CORPORATION, a Utah corporation (Record at 104, paragraph 1). The Lease (hereinafter referred to as the "original Lease") provided for an initial or base term of three years at a monthly rental of $250.00 (Record at 104, last four lines) with options to renew for three consecutive periods of seven, eight and three years upon payment of increased monthly rentals (Record at 105, paragraph (b) (1-3)). The lessee was required to give notice of intent to exercise said options six months prior to their commencement date (Record at 105, paragraph (b) (1)) with said notices to be directed to "Ralph Jensen and Golden Jensen, 5914 Lupine Way, Salt Lake City, Utah." (Record at 107, second full paragraph.) The Lease could not be assigned nor underlet without the written consent of the lessor (Record at 105, paragraph (5)). A postscript approval to sublet the premises without releasing O. K. INVESTMENT appears at the bottom of the original Lease as follows:

> Lessors do hereby approve the subletting of above property to propose camper recreational vehicle dealer without releasing O. K. Investment Corporation of any responsibilities with respect to said lease.
>
> LESSORS:
> /s/ Ralph Jensen
> /s/ J. Golden Jensen

(Record at 107, last paragraph)

On the same day, January 1, 1968, a lease agreement covering the subject premises was entered into between O. K. INVESTMENT as lessor and "Max Siegel, of Salt Lake City, Utah, termed 'Lessee.'" (Record at 91, introductory paragraph.) This sublease provided for an initial or base term of

one year commencing January 1, 1968 (Record at 91, last two lines) at a monthly rental of $250.00 (Record at 92, paragraph (b)(1)) with options to renew for four consecutive periods of two, seven, eight and three years upon payment of increased monthly rentals (Record at 92, paragraph (b)(1-4)). The sublessee was required to give notice of intent to exercise said option six months prior to their commencement date (Record at 92, paragraph (b)(1)). Any notices to be sent to the lessee were to be mailed to "Max Siegel, 850 South Main, Salt Lake City, Utah 84101". (Record at 94, second full paragraph.) This Lease, in turn, could not be assigned or underlet without the written consent of the lessor O. K. INVESTMENT (Record at 92, paragraph 15).

The sublease has an addendum clause wherein the original lessors of the subject premises, Respondents, would consent to the terms of this particular sublease but Respondents never signed the same (Record at 94, last sentence).

The Record does not show that any other person than the named lessee pursuant to the terms of the sublease paid the first year's rental of $250.00 to O. K. INVESTMENT. The record does show that DAN'S CAMPERS paid monthly rental payments to O. K. INVESTMENT from December 31, 1968, to January 28, 1969 (Record at 33-37). The Record further shows that DAN'S CAMPERS made rental payments to the Respondent RALPH JENSEN from September 30, 1969, through June 30, 1971 (Record at 28, paragraph 7, through page 29, paragraph 8; compare Record, pages 38-48). HOMES AMERICAN STYLE, INC., has made rental payments of $250.00 from July 29, 1971, through January 3, 1972 (Record at 49-51). In addition, DAN'S CAMPERS paid the taxes

on the subject premises in 1969 and 1970 (Record at 29, paragraph 10; record at 52, 53) and HOMES AMERICAN STYLE, INC. paid the taxes for 1971 (Record at 30, paragraph 13; Record at 55).

According to the provisions of the original Lease, O. K. INVESTMENT was to give six months' written notice of its intent to exercise its option to renew. The first of such notices should, therefore, have been sent on or before July 1, 1970, and be directed to RALPH JENSEN and GOLDEN JENSEN at the address specified. On December 8, 1970, less than one month prior to expiration of the original Lease, Respondent RALPH JENSEN received from DAN SIEGEL, president of SIEGEL TRAILER & AUTO FINANCE COMPANY (Appellants' Brief, page 4), the following letter:

December 8, 1970

Ralph Jensen
5914 Lupine Way
City 84121

Dear Mr. Jensen:

We are pleased to enclose our check for the 1970 property taxes for the property leased from you by us at 6210 South State Street, in the amount of $250.00, as you advised by telephone this week.
We also wish to exercise the right and option to renew and extend the lease for the second option period, January 1, 1971, until December 31, 1977. The monthly rental for that period of time, according to the lease, is $250.00 per month. We will forward checks in that amount beginning January 1, 1971.

Best regards,
DAN SIEGEL

(Record at 57)

Said letter is the only notice claimed to have been given by Appellants regarding exercising the option given by Respondents to O. K. INVESTMENT under the original Lease (Record at 85, paragraph 3). In the District Court, Appellants relied exclusively on the claim there existed a valid lease because "O. K. Investment Corporation, did assign said lease to Max Siegel, as agent for and on behalf of Trailer Mart, Inc., doing business as Dan's Campers 'N Trailers, via agreement dated the 1st day of January, 1968, . . ." (Record at 85, first paragraph 2, second paragraph 3.)

On July 28, 1972, Respondents served upon each of the Appellants a notice required under Section 78-36-3(2) of the Utah Code Annotated (1953), as amended, indicating Respondents considered Appellants DAN'S CAMPERS and HOMES AMERICAN STYLE tenants from month to month and directing said Appellants to surrender and deliver possession of the subject premises by March 1, 1972 (Record at 108). When Appellants refused to quit the premises, Respondents commenced this action in unlawful detainer.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS WERE MERE TENANTS FROM MONTH TO MONTH, OR, AT BEST, SUBTENANTS, AND AS SUCH HAD NO RIGHT TO EXERCISE THE ORIGINAL LESSEE'S OPTION TO RENEW.

The case law is unanimous in holding that privity of contract between an optioner and an optionee is an absolute prerequisite to the existence of a valid option capable of exercise

by an optionee, and that the lessor's giving of an option to renew a lease to his lessee does not vest in a subtenant of that lessee the right to exercise the option. The general rule is succinctly stated as follows:

> Generally, it would seem that a sublessee by virtue of his sublease from the lessee is not entitled to any of the rights or privileges of renewal given to the lessee as against the lessor or owner of the premises, since there is no privity of contract as between the sublessee and the lessor, and whatever rights the sublessee has are derived solely from his lease contract with the lessee. (127 A.L.R. 948 at 949; 51 A.L.R. 2d 1424.)
>
> * * *
>
> A renewal option expressly conferred upon the lessee, its successors or assigns does not extend to a sublessee, but only to an assignee. (*Loudave Estates, Inc. v. Crossroads Improvement Company, Inc.,* 214 NY Supp. 2d 72 (1961).)
>
> * * *
>
> Nor was appellant entitled, as a subtenant, to a renewal of the lease. He had no privity with the landlord, is not liable on the tenant's covenants, and cannot take advantage of the landlord's covenants with the lessee. . . . So, while a lawful assignee of the lease may exercise his assignor's authority of renewal, I find no authority holding that this option may be exercised by an undertenant as such . . ., and is quite clear that no such right exists. Hence, even if it be considered that the acceptance of rent directly from the appellant as subtenant, and notice to quit served upon him, amounted to a recognition of his subtenancy, such recognition did not give him the rights of the original tenant to a renewal. (*Cifelli v. Santamaria,* 75 A. 434 (New Jersey, 1910).)
>
> * * *

The sublease is a new contract . . . . The Lessor is not a party to the sublease, and the subtenant is not a party to the original lease. There is no contractual tie between the subtenant and the owner or lessee. . . . The subtenant cannot defeat the original lessor suing to be reinstated in the possession of the property after his lease had expired. It is true that the subtenant has all the lessee's rights to enjoy the property. This right does not go farther. It does not include in addition the right of renewal given by the first lessor to his lessee. A subtenant has no action against the owner or original lessor for a renewal of the lease by reason of the fact that there is no contract between him and the original lessor, and no legal tie which he can invoke. (*Audoban Hotel Company v. Brunnig,* 46 So. 33, 34 (La., 1908).)

* * *

There is no privity of contract between a sublessee and the original lessor . . . and so it is held that a sublessee does not acquire or succeed to the option of a lessee . . . to renew the lease. . . . Since Davis [sublessee] had no legal right to exercise the option and thus to extend the term of his lease, *his misinterpretation of the lease and the detrimental conduct under the misinterpretation would not confer on him the right to exercise the option belatedly or estop the lessors from asserting that the option had not been timely exercised by Landry* [lessee, sublessor]. (*M. B. Zeidman v. A. Davis,* 342 S.W. 2d 555, 558 (Texas, 1961); see also *Novosat v. Clary,* 431 S.W. 2d 422, 427 (Texas, 1968).) [Emphasis added.]

POINT II

APPELLANT DAN'S CAMPERS AND HOMES AMERICAN STYLE, INC. ARE SUBTENANTS AND NOT ASSIGNEES OF THE ORIGINAL LEASE.

Respondents respectfully submit that one fact exists which is dispositive of this entire case and which has been completely and purposefully omitted from discussion in Appellants' Brief and that is that the second lease agreement (be it an assignment or sublease) is not made by the parties Appellants' claim to now hold the subject property as assignees. Appellants claim:

> That defendant O. K. Investment Corporation did assign said lease to Max Siegel, as agent for and in behalf of Trailer Mart, Inc., doing business as Dan's Campers 'N Trailers. . . .
>
> That on the same day, January 1, 1968, Max Siegel as agent for and on behalf of Trailer Mart, Inc., dba Dan's Campers 'N Trailers, entered into an agreement with O. K. Investment Corporation. . . . (Record at 85, first paragraph 2 and second paragraph 2.)

In support of its position that said agreement was not made with DAN'S CAMPERS as claimed by Appellants, Respondents placed in evidence a copy of the second lease wherein it clearly and unequivocably states that the sublessee is not DAN'S CAMPERS but is in fact MAX SIEGEL individually. The lease is between O. K. INVESTMENT CORPORATION and "Max Siegel, of Salt Lake City, Utah, termed 'Lessee.'" (Record at 91, first paragraph.) The lessee is again identified under the provision directing sending of written notices:

> Lessees, Max Siegel, 850 South Main, Salt Lake City, Utah 84101. (Record at 94, second full paragraph.)

The Agreement is signed:

LESSEES:
/s/ Max Siegel

(Record at 94.)

There is absolutely no mention of a Nevada corporation known as TRAILER MART, INC. doing business in Utah under the assumed name of DAN'S CAMPERS 'N TRAILERS, or that MAX SIEGEL was acting in behalf of and as president of that corporation or that he was in any way connected with said corporation. There is not one scintilla of evidence that anyone other than MAX SIEGEL as shown by the written document was the contracting party.

Even the affidavit of DAN SIEGEL, who subsequently became president of DAN'S CAMPERS, does not claim that MAX SIEGEL signed said Lease on behalf of that corporation. Said testimony would not be admissible in any event since the parol evidence rule prohibits oral testimony which would establish an agency where the written document contains no ambiguity as to the contracting party:

> To permit an agent who has signed his own name unqualifiedly to a contract to introduce extrinsic evidence to show that he is not a party, the contract itself must contain some provision which shows that he is acting in a representative capacity and which creates an ambiguity as to the party intended to be bound. (*Coughlin v. Blaire,* 41 Cal. 2d 587, 262 P.2d 305 (1953); see also *Otis Elevator Company v. Barry,* 28 Cal. App. 2d 430, 82 P.2d 704 (1938); *Dries v. Trenton Oil Company,* 86 A.2d 427 (New Jersey, 1952).)

Where the lease is clear and concise as to the contracting parties, the District Court had no alternative but to conclude that the sublessee from O. K. INVESTMENT was MAX SIEGEL and not DAN'S CAMPERS or HOMES AMERICAN STYLE, and, therefore, even if the second lease was an assignment and not a sublease, it was an assignment to MAX SIEGEL and DAN'S CAMPERS was not in privity with the Respondents and acquired no right to exercise an option given to O. K. INVESTMENT in the original Lease. Again, Respondents submit that this fact alone is dispositive of Appellants' claim that DAN'S CAMPERS is the assignee of O. K. INVESTMENT'S lease with Respondent.

POINT III

ASSUMING ARGUENDO DAN'S CAMPERS AND NOT MAX SIEGEL IS THE LESSEE UNDER THE SECOND LEASE AGREEMENT, THE SECOND LASE IS A SUBLEASE AND NOT AN ASSIGNMENT OF THE ORIGINAL LEASE, AND THE SUBLESSEE HAS NO RIGHT TO EXERCISE THE OPTION TO RENEW THE ORIGNAL LEASE.

Appellants have argued that the second lease agreement was in fact an assignment of O. K. INVESTMENT'S interest under the original Lease and DAN'S CAMPERS' subsequent exercise of the option to renew places Appellants in "lawful possession of the premises under a valid and binding lease." (Appellants' Brief, pages 8-9.)

Respondents take no issue with the numerous citations set forth in Appellants' Brief regarding substance or operation of a lease controlling over definition. In other words, an

agreement entitled "sublease" may, by its operation, be an assignment if the entire interest of the sublessor is transferred and if other criteria are met. (See *Weintraub v. Weingart,* 277 P. 752 (Cal., 1929).)

Respondents, however, submit that the second lease agreement was and is, in fact, by intention and operation, a sublease and not an assignment. In regards to the intent, the original Lease required Respondents' written approval to "assign or underlet". (Record at 105, paragraph (5).) Consequently, when the original lease was executed, the following authorization was added:

> Lessors do hereby approve the *subletting* of above property to proposed camper recreational vehicle dealer without releasing O. K. Investment Corporation of any responsibilities with respect to said lease. (Record at 107.) [Emphasis added.]

As between Appellants and O. K INVESTMENT, the second lease could be an assignment without being an effective assignment as between Appellants and Respondents:

> An assignment in violation of a restriction is not void, but voidable at the option of the lessor. Such an assignment is good as between the assignor and assignee, subject to whatever rights the lessor may have. (*Morrison v. Nelson,* 213 P.2d 335 (Wash., 1951).)

Since Respondents consented only to "subletting" the subject premises and not an assignment, even if the second lease was an assignment from O. K. INVESTMENT to MAX SIEGEL, it would be voidable by the Respondents since it was made without their written consent.

Appellants' principal contention, however, is that O. K. INVESTMENT conveyed its *entire interest* in the leased premises to MAX SIEGEL, thereby creating an "assignment", however otherwise denominated. Appellants acknowledge that Respondents granted O. K. INVESTMENT a lease for a base term of three years with an option to renew for three periods totalling an additional 18 years. Under the terms of the second lease, O. K. INVESTMENT granted to MAX SIEGEL a one-year lease with four options to renew for an additional period equalling 20 years. Appellants maintain that O. K. INVESTMENT by granting MAX SIEGEL a one-year base term together with an option to renew the remaining two years of its own base term in its lease with Respondents, and since the remaining three option renewal periods are identical in each lease, O. K. INVESTMENT in effect conveyed to MAX SIEGEL its entire interest in the original lease.

While the proposition that a lessee's conveyance of an entire interest in a lease constitutes an assignment of the lease is a correct statement of the law as set forth in *Groth v. Continental Oil Company,* 373 P.2d 548 (Idaho, 1952), cited in Appellants' Brief, Appellants took the citation out of context in their brief and ignored one important qualification to the "entire interest" factor as set forth in that decision.

The facts in *Groth* are somewhat complex in that it involves the purchase and lease together with a leaseback to the original lessor, but one of the contentions of Continental Oil is that because they had an option period as a lessee, which, when added to the base term of their lease, constituted a longer term than they gave to their sublessee, Continental Oil in effect retained a reversionary interest in the lease and therefore had

not assigned the entire term of their lease. The court refused to include the option period in determining whether Continental had a reversionary interest, holding that the option was wholly executory until exercised and created no interest until that time:

> Conoco contends that the option to renew, contained in its lease from Wilkie, had the effect of extending the term for the full ten years permitted by the terms of the option; thus, it held a longer term than that which it granted to Wilkie in the lease-back; 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 conditional option, for renewal, not a covenant to extend the term. [The only condition, however, was that the optionee give 60 days' written notice.] 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. (373 P.2d at 550.)

From its own base lease term of three years, O. K. INVESTMENT conveyed to MAX SIEGEL a lease term of only one year, with an option to renew for two years, thus retaining a reversionary interest in the event the contingency, timely notice of the intent to exercise the option, was not met. Having retained a reversionary interest, O. K. INVESTMENT did not "assign" its "entire interest" in the lease to MAX SIEGEL, and SIEGEL was a sublessee and did not acquire the rights to exercise an option to renew given to O. K. INVESTMENT under the original Lease.

Assuming arguendo the second lease was an assignment, it was an assignment by O. K. INVESTMENT to MAX SIEGEL, and not to DAN'S CAMPERS, as evidenced by the written agreement itself, and thus DAN'S CAMPERS obtain-

ed absolutely no interest or right in the subject premises by the payment of monthly rent other than establishing a tenancy from month to month.

POINT IV

THE DOCTRINE OF ESTOPPEL, IF APPLICABLE IN THIS CASE, WOULD CREATE ONLY A TENANCY FROM MONTH TO MONTH AND WOULD NOT VEST OR TRANSFER TO APPELLANTS RIGHTS BELONGING SOLELY TO THE ORIGINAL LESSEE.

Appellants maintain that by accepting monthly rental payments and taxes, Respondents are estopped to deny that DAN'S CAMPERS is in possession as assignee under a valid and binding lease. Respondents have never maintained that they incurred *no* obligation to Appellants by accepting their monthly rental checks, but the question arises as to the scope and ambit of the resultant obligations. Appellants would have the court accept the theory that by accepting a check from any other person than the lessee named in the lease, a substitution of lessees occurs and the lease is enforceable by anyone who has paid or contributed to payment of the rent. Appellants DAN'S CAMPERS and HOMES AMERICAN STYLE, INC. take the position that since they paid monthly rent for two years they acquired MAX SIEGEL'S rights to exercise the option he had as an assignee and that they could therefore continue in possession for twenty-one years under the original lease. To assert such a claim is to entirely misconstrue the doctrine of equitable estoppel as it applies to the payment of rent.

It is clear that DAN'S CAMPERS and HOMES AMERICAN STYLE are not in possession under a valid lease. The original Lease between Respondents and O. K. INVESTMENT

had previously expired and the purported exercise of option by SIEGEL TRAILER & AUTO FINANCE (or DAN'S CAMPERS and HOMES AMERICAN STYLE) is wholly invalid since there is no privity of contract between the optionor and optionee. Appellants therefore occupied the premises under an invalid lease but paid the monthly rental and taxes reserved in the lease. A relationship therefore arises of landlord and tenant between Respondents and Appellants, but the law is clearly to the effect that the original Lease is not incorporated into that relationship, but only that a tenancy from month to month arises.

> When an invalid lease reserves a rent payable in monthly installments, and the tenant pays and the landlord accepts one or more monthly payments, there is authority for the proposition that the tenancy becomes one from month to month. Moreover, it has been held in a number of cases that where a tenant enters under a lease for a term of years which is unenforceable under the Statute of Frauds, and pays the 'monthly' rent as agreed or as provided in the lease, he becomes a tenant from month to month. In other cases, the courts, without reference to the factor or the manner in which the rent was reserved or provided in the lease, have held or recognize that where there is entry under an invalid lease for a definite term and rent is paid monthly, the tenancy is one from month to month. (49 *Am. Jur. 2d* §50, p. 94, footnotes omitted.)

One of the cases cited in *Am. Jur.* in support of this proposition is a decision by this Court — *Utah Loan & Trust Company v. Garbutt,* 6 Utah 342, 23 P. 758 (1890). In that case the tenant went into possession of certain property under a letter-lease agreement which was invalid because it violated the Statute of Frauds. While in possession, however, the tenant paid a monthly rental provided in the invalid lease for a per-

iod of two years, and the rental was accepted by the lessor. The only difference between the *Garbutt* case and the case before this Court is that in the former the lease agreement was invalid because the *lessor* lacked authority to make a binding agreement, and in the latter the *lessee,* not being in privity with the lessor, lacked authority to exercise the option. In *Garbutt,* the lessor later served notice to quit the premises effective one month after date of service, and thereafter commenced an action for unlawful detainer. The trial court concluded that the landlord could not challenge the tenant's rights under the lease and granted judgment against the landlord. This Court reversed that decision and held that the acceptance of monthly rent as provided under the invalid lease created only a tenancy from month to month:

> And now the question arises, what effect did this acceptance of rent have upon the rights of the parties? The defendant was simply a tenant at will until the acceptance of rent by the lessor, and that converted the holding into a tenancy from month to month, and one month's notice to quit prior to July the 1st was sufficient to terminate the tenancy at that time. In the case of *Anderson v. Prindle,* 23 Wend. 616, the court said: 'It appears by the affidavit that Prindle went into possession under an agreement for a written lease for the term of one year and eight months from the 1st of September, 1835, and that a few days after he entered into possession, he violated the agreement by refusing to accept the lease, and execute the counterpart thereof. By that act he became a mere tenant at will or by sufferance, and liable to be ejected immediately. (*Hegan v. Johnson,* 2 Taunt. 149.) And he would have continued so, if Anderson had not changed the character of that tortious holding by receiving rent from him subsequent to that time, from month to month, at the rate specified in the verbal agreement for

> a lease. * * * The legal construction of the acts of the parties, in accepting and paying rent monthly, was to create a tenancy from month to month, commencing on the 1st of September, 1835. The tenant was therefore entitled to a month's notice to quit at the end of some months from the commencement of the tenancy.' To the same effect is Tayl. Landl. and Ten. §§57-60, 61 and 4 Kent, Comm. (12th Ed. 114.) The landlord, by permitting the tenant to take and retain possession of the property, and by accepting rent, does not bind himself to perform so much of the lease as remains executory. (23 P. at 758-759.)

The rule in *Garbutt* has been recognized more recently by this Court in *Greenwood v. Jackson,* 102 Utah 161, 128 P.2d 282 (1942). See also 6 A.L.R. at 725.

With regard to the Appellants' claim of detrimental reliance on Respondents' acceptance of the rent, Respondents submit that the Appellants' claim of expenditure of $40,000 in permanent improvements upon the consent and approval of Respondents is without support and is interpolation of the facts. The sole evidence in this regard is found in the affidavit of DAN SIEGEL as follows:

> That during the month of April or May of 1971, affiant contacted Ralph Jensen, plaintiff in the above-entitled action, and visited the property in question with Mr. Jensen and informed him that affiant planned to sell modular homes through a business organization and anticipated locating a modular homes sales lot on a portion of the property in question and affiant explained to Mr. Jensen that two modular homes would be installed thereon as display units, and Mr. Jensen made no objection to the same at that time and did in fact indicate his approval. (Record at 31.)

There is no evidence of $40,000 in improvements nor that RALPH JENSEN knew or consented to any "permanent improvements" or "extensive and valuable improvements" — nor that the other co-lessee J. GOLDEN JENSEN was ever consulted by Appellants regarding this matter. Respondents have never laid claim to any "permanent fixtures" in the form of modular home displays whatever, and it is contemplated that all such modular homes will be removed by the Appellants and will remain their property. Certainly Appellants offered no evidence that even suggests that "the two modular homes [which] would be installed thereon as display units" are permanent fixtures, nor that MR. JENSEN indicated that Appellants could maintain the modular homes on the property for the same length of time Respondents had leased the property to O. K. INVESTMENT.

POINT V

THERE IS NO EVIDENCE OF THE EXISTENCE OF ANY MATERIAL FACT IN DISPUTE IN THIS MATTER AND SUMMARY JUDGMENT WAS PROPER DISPOSITION OF THIS MATTER.

It is hard to conceive of a more inconsistent posture than that assumed by Appellants in this case on the issue of the propriety of summary judgment. At the hearing before the District Court on Respondents' motion for summary judgment counsel for Appellants concurred with Respondents' statement that there was no genuine issue of any material fact in this case, and Appellants themselves moved the Court for a summary judgment in their favor. Having received an adverse ruling which denied their motion and granted Respondents' summary judgment, Appellants have asked this Court to reverse the District Court's ruling denying their motion for

summary judgment. On the one hand they represent to this Court, as they did to the District Court, that there is no genuine issue involving any material fact in dispute between the parties, and they are therefore entitled to a summary judgment. But on the other hand, if Appellants are not entitled to a summary judgment, they maintain that Respondents are also not entitled to a summary judgment because there now is a genuine issue of material fact in dispute.

Both Respondents and Appellants rely upon the written documents which have been placed into evidence. The statements in the affidavit of DAN SIEGEL are virtually uncontroverted and must be assumed to be true. The facts which Appellants claim constituted equitable estoppel were before the Court, and Respondents took no issue with those facts as stated by the Appellants. Respondents submit that with the facts accepted most favorably to the Appellants, the District Court properly granted summary judgment in favor of the Respondents.

POINT VI

RESPONDENTS TAKE NO ISSUE WITH THE ARGUMENTS SET FORTH IN POINT IV OF APPELLANTS' BRIEF AND WOULD CONSENT TO MODIFICATION OF THE DISTRICT COURT'S JUDGMENT OF UNLAWFUL DETAINER TO EXCLUDE FROM THE EFFECT THEREOF THE DEFENDANTS SIEGEL TRAILER & AUTO FINANCE COMPANY, THE STATE OF MAX SIEGEL AND DAN SIEGEL.

CONCLUSION

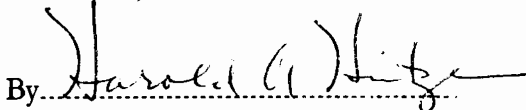
Appellants were not the assignees of the original Lease and consequently had no right or authority to exercise the original lessee's option to renew the lease. By going into possession

under an invalid agreement upon the payment of the rent reserved in the agreement, Appellants became tenants from month to month, which tenancy was terminable upon proper written notice.

Respondents respectfully urge this Court to deny Appellants' request to reverse the District Court's order denying their motion for summary judgment and to sustain the District Court's order granting summary judgment in favor of the Respondents and to award Respondents their costs incurred on appeal.

Respectfully submitted,

STRONG, POELMAN & FOX



By..

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