1972

E. A. Russell And Martel E. Russell : Respondent's Brief

INDEX

CASES CITED

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

E. A. RUSSELL and MARTEL E. RUSSELL,

Plaintiffs-Respondents,

v.

PARK CITY UTAH CORPORATION, a corporation,

Defendant-Appellant,

THE MAJOR-BLAKENEY CORPORATION, a corporation; and ROBERT W. MAJOR,

Defendants.

Case No. 12879

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Plaintiffs-Respondents brought this action seeking to have the Court determine that a certain Lease and Purchase Agreement executed by them and Defendant Major-Blakeney Corporation, whose interest had thereafter been assigned to Defendant-Appellant Park City Utah Corporation, "has

been and now is terminated and cancelled" and to recover $2,500.00 liquidated damages. (R. 2)

DISPOSITION IN THE LOWER COURT

Following discovery, which consisted primarily of the taking of the deposition of the Defendant Robert W. Major by Respondents, the latter filed a motion for summary judgment "upon the ground and for the reason that the pleadings and other documents on file herein, together with the deposition of Defendant Robert W. Major, show that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law." (R. 79) This motion was granted by the court after the submission of briefs and oral argument by the respective parties. (R. 127) On March 17, 1972, the lower court entered summary judgment in favor of Respondents and against Appellant,

determining that said Lease and Purchase Agreement "was and is properly terminated and cancelled and is no longer in force and effect" and awarded Respondents the sum of $2,500.00 liquidated damages. (R. 180)

RELIEF SOUGHT ON APPEAL

As stated by Appellant in its brief, it "seeks a reversal of the summary judgment granted by the lower court and a remand of the matter for trial; or, in the alternative, Appellant seeks a reversal of the lower court's denial of Appellant's order to show cause and a determination by this Court that Appellant is entitled to the restoration provisions of Section 78-36-10 Utah Code Anno., 1953 (as amended)."

STATEMENT OF FACTS

Since reference will be made to testimony and exhibits appearing in the deposition of Defendant Robert W. Major, as well as pleadings and exhibits thereto

appearing in the Record, reference to the Record will be by the designation "R" and to the deposition by "D" with the appropriate page number or exhibit number given. Plaintiffs-Respondents will be referred to as "Respondents" and Defendant-Appellant Park City Utah Corporation will be referred to as "Appellant." The other Defendants will be referred to by name or by Defendant.

Respondents entered into a "Lease and Purchase Agreement" with Defendant Major-Blakeney Corporation, Appellant's predecessor, which agreement is dated March 31, 1967. (R. 37-44) Thereafter, on or about August 7, 1968, Defendant Major-Blakeney Corporation assigned "all of its right, title and interest in and to" said lease to Appellant, by which assignment Appellant agreed "to faithfully perform" the obligations imposed under the agreement. (R. 33) The lease between Respondents and Major-

Blakeney Corporation was prepared by attorney William Richards who was acting as the attorney for the lessee, Defendant Major-Blakeney Corporation. (D. 10, 11) Although the lease year ran from March 31 of each year to March 31 of the succeeding year (commencing with the year 1967), the rental payments of $2.50 per acre for approximately 2,000 acres was payable on or before the 1st day of November of each year commencing with the year 1967 so that the annual rental payment did not become due until over half of the rental year had expired. (R. 37) The rental due and payable on November 1, 1967, was paid on said date. (Exh. P-1) For the next lease period--March 31, 1968, to March 31, 1969--the rent was paid by a check mailed with a letter dated December 5, 1968. (D. 26, 27; Exh. P-2) For the following year the lease payment was made on or about December

15, 1969. (D. 29; Exh. P-3) Thereafter, when the rent came due on November 1, 1970 (for the period March 31, 1970, to March 31, 1971), no payment was made (D. 31) even though payment was received by Appellant from the sublessee in the amount of $7,768.28. (D. 34, 35; Exh. P-4)

Defendant Robert W. Major, who at all times was Appellant's agent (D. 36), testified that prior to the end of the calendar year 1970 he was aware that Appellant had not paid Respondents (D. 41) and that after discussing it with the accountant for Appellant corporation it was decided that Appellant would seek to have the sublessee pay the rental rather than Appellant paying it. (D. 39-41) Subsequently, under date of March 3, 1971, the law firm of Richards and Richards wrote a letter to Respondent E. A. Russell stating that "the sublessee through its

president, Mr. Robert W. Ensign, is being requested to pay you directly in this instance, for which my client will credit their account to that extent." (D. 47-49; Exh. P-6) Thereafter, under date of March 9, 1971, a letter was sent to Mr. Major stating that the sublessee "does not accept your attempted unilateral assignment to the Russells of any override which may be owing in the future. This 'convenient' way of attempting to avoid your responsibility to the Russells should not impress them any more than it does" the sublessee. A copy of this letter was also sent to Appellant's attorney. (D. 50; Exh. P-7)

Thereafter, on March 12, 1971, a notice was sent by the lessors, pursuant to the provisions of paragraph VIII of the lease, directed to Appellant Park City Utah Corporation in c/o William S. Richards, its attorney, advising Appellant of the

default in the payment of rent and specifying that unless such default is corrected "on or before 45 days from receipt of this notice, lessor shall consider this lease terminated and cancelled." This notice was received by Appellant on March 12, 1971. (Exh. P-8) The notice of default was sent to Appellant in c/o Richards and Richards, attorneys for said corporation, at 1610 Walker Bank Building pursuant to the assignment from "Defendant Major-Blakeney Corporation to Appellant and further pursuant to the notice given by Appellant to Respondents under date of December 5, 1968. (R. 34, deposition Exh. P-2) The notice which was sent certified mail was receipted for Park City Utah Corporation by Lala Gallegos at the address indicated on March 12, 1971. (Exh. P-8)

The notice was followed up by a subsequent letter dated March 29, 1971,

sent to Defendant Robert W. Major, Jr., with a copy to William S. Richards, attorney, in which it was stated that the default "must be corrected on or before April 26, 1971, in accordance with the terms of the Russell lease." (Exh. P-9)

No attempt was made to correct the default in the lease until June 7, 1971, at which time a letter was sent to Respondents' attorney enclosing a check in the amount of $4,855.18 which represented the principal amount of the rent due the preceding November 1, 1970, but without inclusion of any interest. (Exh. P-10)

The only reason given for the failure to pay the lease payment due November 1, 1970, was that Appellant was going to seek to have the sublessee pay it because Appellant felt that the sublessee owed Appellant various sums of money on account of other transactions between the parties.

(D. 63-67) Appellant "Park City Utah Corporation had the money to pay the rent if it had wanted to pay it" during the entire period of time. (D. 67) As stated in Respondents' answers to Appellant's interrogatories, the attempted tender of rent on June 7, 1971, "was wholly inadequate and insufficient to pay the rent, together with interest which had accrued thereon, or to satisfy the terms and conditions of said lease and purchase agreement." (R. 124)

Because of the Appellant's failure to pay the annual rental due and owing November 1, 1970, in the amount of $4,855.20 after formal notice given as required by the terms of said lease, said lease agreement was terminated, forfeited and cancelled; and on June 24, 1971, Respondents filed an action in the District Court of Summit County, State of Utah, requesting the Court to adjudge and determine that

said lease and purchase agreement "has been and now is terminated and cancelled" and further requesting the Court to award Plaintiffs the sum of $2,500.00 damages as provided by paragraph VIII of the said agreement." (R. 1, 2)

Defendants Major-Blakeney Corporation and Robert W. Major respectively filed separate motions to quash service of summons and to dismiss. (R. 49, 50) Thereafter Plaintiffs filed a motion to dismiss without prejudice as to those Defendants (R. 169) which was granted. (R. 182)

Appellant Park City Utah Corporation filed an answer and counterclaim in which it admitted the execution of the Lease and Purchase Agreement and the assignment thereof by Major-Blakeney Corporation to Appellant by which Appellant assumed the obligations of said Lease and agreed "to faithfully perform the same. (R. 53, 32)

The only defense raised by Appellant was a denial and the claim that Respondents "waived that certain provision of said Lease and Purchase Agreement relating to a rental payment date of November 1 by and through their past practice and conduct which consistently permitted and allowed this defendant to make the rental payment in the spring of the year following the November 1 date" (R. 54); and further that it had tendered payment of $4,855.18 on June 7, 1971 "as the full rental payment then due" which had been refused; and Appellant stood ready and willing to pay said sum to Respondents. (R. 54)

With respect to the allegation of the complaint that Respondents should be awarded the sum of $2,500.00 liquidated damages, Appellant admitted that the Lease and Purchase Agreement provides for the payment of the sum of $2,500.00 as

liquidated damages in the event of default but alleged that there was no default in the lease and further that the provision relating to liquidated damages "is invalid and unenforceable for the reason that it constitutes an illegal penalty." (R. 53)

This was the posture of the pleadings in the case at the time Respondents filed their motion for summary judgment. However, following the hearing in court on the motion for summary judgment on February 7, 1972 (R. 81), Appellant filed a motion for leave to file an amended counterclaim purporting to set forth new and additional defenses to the complaint. This motion was denied by the court (R. 180) and no claim is made on this appeal of any error of the court in such action.

STATEMENT OF ISSUES

Appellant has assigned as error the granting of Respondents' motion for summary judgment because Appellant claims "there

exists general disputes as to material issues of fact." Appellant also contends that the lower court "erroneously applied the law to the undisputed facts presented by the instant matter." In this connection Appellant contends:

A. There was no default by Appellant on which to predicate a forfeiture;

B. Even if there was a default, Appellant is entitled to equitable relief from the forfeiture;

C. Appellant is entitled to invoke the provisions of Section 78-36-10, UCA, 1953 (as amended);

D. The lower court erred in awarding $2,500.00 "liquidated damages;" and

E. By granting Respondents' motion for summary judgment, Appellant was denied "severable and distinct privileges" inuring to it under the lease agreement.

These claims will be argued in the

sequence in which they appear in Appellant's brief.

ARGUMENT

I

ALLEGED ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The issues, as framed by the pleadings at the time of the hearing on the motion for summary judgment, consisted of the following:

1. Whether there was a default in the payment of rent;

2. Whether such default had continued after proper notice had been given to correct the same;

3. Whether there had been any waiver of the provisions for the prompt payment of rent by reason of past conduct; and

4. Whether the provision for $2,500.00 liquidated damages was enforceable.

At the risk of being repetitious, Respondents call attention of the Court to the following undisputed facts appearing in

the Record:

1. Appellants entered into a "Lease and Purchase Agreement" with the Defendant Major-Blakeney Corporation under date of March 31, 1967. (R. 37-44)

2. The agreement was prepared by the attorney for Defendant Major-Blakeney Corporation, the lessee. (D. 11-12)

3. Thereafter, said Defendant Major-Blakeney Corporation assigned its rights and obligations in and to said Lease and Purchase Agreement to Appellant corporation which assumed all obligations of lessee in connection therewith. (R. 32-34)

4. Said assignment further provides that all notices in respect thereto shall be mailed to the Park City Utah Corporation at the offices of its attorney in the Walker Bank Building, Salt Lake City, Utah. (R. 33, 34; D. 18) The lease was never thereafter assigned. (D. 19)

5. Although by its terms the lease commenced March 31, 1967, paragraph I relating to the payment of rent provides that "lessee agrees to commence the annual rental payments on the 1st day of November, 1967, and to make said payments the 1st day of November of each and every year thereafter during the term of this lease." (R. 37)

6. Paragraph VIII of the Lease and Purchase Agreement provides for the remedies of the lessor in the event of default in the provisions of the lease. It states as follows:

> "No default of Lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to Lessee specifying of what the default consists, and in the event Lessee fails to correct said default within such further time as is reasonably necessary to cure the same, Lessee shall quit and surrender the premises to Lessors subject to the reservation contained in paragraph II above. Because of the difficulties in ascertaining the

damages that would thus be sustained, if any, by Lessors, it is agreed that Lessee shall pay to Lessors the sum of $2,500 as exclusive, fixed and liquidated damages.

"Any and all agreements, covenants and conditions hereinbefore stipulated shall apply to, benefit and bind the heirs, successors, executors, administrators and assigns of the respective parties hereto." (R. 44)

7. Mr. Richards, attorney for lessee, was responsible for putting this provision in the lease. (D. 17)

8. The rent due and payable to lessor under said lease for the first year of the lease was paid on or about November 9, 1967. (Exh. P-1)

9. Under date of December 5, 1968, Appellant directed a notice to Respondents advising them that Appellant was the assignee of Defendant Major-Blakeney Corporation and the "lessee on the lease insofar as you gentlemen are concerned." (Exh. P-2; D. 26)

10. At the same time Appellant paid the rent due on November 1, 1968. (Exh. P-2)

11. Under date of December 15, 1969, Appellant paid the lease payment due November 1, 1969, for the lease period March 31, 1969, to March 31, 1970. (Exh. P-3)

12. When the rent came due on November 1, 1970, no payment was made or attempted by Appellant. (D. 30, 31)

13. Around Christmas, 1970, there were discussions between and among the officers and directors of Appellant regarding what should be done about paying the rent. (D. 38-40)

14. Defendant Robert W. Major acted as agent for Appellant from the beginning and was its agent during this period of time. (D 36, 37)

15. Particularly, on one occasion prior to the end of the year 1970 and probably in December, Mr. Jim Allen (Appellant's accountant) talked to Robert W. Major concerning the payment of the rent due on November 1, 1970. Mr. Allen wanted to know

if he was to pay the rent due on November 1, 1970, before the end of the calendar year in order for the corporation to take a deduction for it in that year. At that time Mr. Major told Mr. Allen that it was the consensus of the group (referring to the officers and directors of Appellant Park City Utah Corporation) that the rent not be paid; that Mr. Major "was going to urge our attorneys" to urge the Ensign-Aspen group to pay the Russells and set off that amount against the amount which Appellant claimed was owing by the Ensign-Aspen group to it; that since the Ensign-Aspen group "were less than responsible people and had in the past been delinquent, measurably delinquent on payments owing us and innumerable other firms and people" that Appellant should attempt to get them to pay direct to Respondents rather than Appellant making the payment. (D. 38-40)

16. This was the plan discussed by

and agreed to by Robert W. Major, the "Slagles," the Nelsons and Allen Bunnage, officers and directors of Appellant corporation. It had also been discussed with the attorneys, Richards and Richards. (D. 44, 45)

17. At that time Mr. Allen was concerned "about why wasn't the payment being made so we could get a tax deduction for it." (D. 40, 41)

18. The general idea was to leave Respondents to collect the rent from the sublessee Ensign Company (D. 40), although the sublessee had already paid to Appellant the sum of $7,768.28 under date of November 9, 1970, as and for rent under the sublease for the period August 1, 1970, through July 31, 1971. (Exh. P-4)

19. This was the only reason for failure or refusal to pay the rent to Appellant. (D. 63-67)

20. Appellant had the money to pay

the rent at all times during the period in question and could have paid it if it had wanted to do so. (D. 67)

21. No attempt was made by Appellant to contact Respondents regarding the decision not to pay the rent (D. 42, 47) until on or about March 3, 1971, when Appellant's attorney, William S. Richards, wrote to Respondent E. A. Russell. (D. 47)

22. The letter (Exh. P-6) states that the sublessee, Ski Park City West, Inc., "is being requested to pay you directly in this instance;" and Respondent Russell was requested to contact Mr. Ensign in California.

23. On March 10, 1971, Arthur H. Nielsen (then acting as attorney for Ensign) wrote to Defendant Robert W. Major, responding to a previous communication from Mr. Major to Mr. Ensign (Exh. P-5) in which Defendant was advised that the payment due by Ski Park City West on the "sublease" of

the property had been made to Appellant in the fall of 1970; that, in turn, Appellant had not paid Respondents the rent due on November 1, 1970, on the primary lease so that "it now stands in jeopardy of cancellation. A copy of this letter was also sent to William S. Richards, attorney for Appellant. (Exh. P-7)

24. On March 11, 1971, Appellant gave notice by certified mail to Appellant and to Defendants Major-Blakeney Corporation and Mr. Robert W. Major that there had been and was a default in the payment of rent due under the lease and that "unless such default in the payment of rent is corrected by paying the rent due and owing on November 1, 1970, together with interest thereon to date of payment as provided by law on or before 45 days from receipt of this notice, lessor shall consider this lease terminated and cancelled." (Exh. P-8)

25. This notice was duly received

and acknowledged by Appellant on March 12, 1971. (Exh. P-8)

26. The notice further provided that Respondents claimed damages in the sum of $2,500.00 pursuant to the provisions of paragraph VIII of the lease. (Exh. P-8)

27. Nothing thereafter was done to correct the default in the lease; but Defendant Robert W. Major refused to pick up his copy of the notice from the post office. (D. 57)

28. In consequence of this, on March 29, 1971, a further letter was written to Defendant Major, with a copy to William S. Richards, attorney for Appellant, in which notice was again given of the default and with the statement "such default must be corrected on or before April 26, 1971, in accordance with the terms of the Russell lease." (Exh. P-9)

29. It was not until June 7, 1971

(more than two months after the expiration of the year lease period and six weeks after the end of the 45-day notice period), that Appellant made any effort to pay the rent due the preceding November 1, 1970. At that time, on June 7, 1971, a check in the amount of $4,855.18 was tendered, together with a letter dated June 7, 1971, to Arthur H. Nielsen, attorney for Plaintiffs, in payment of the rent. (Exh. P-10)

30. The amount so tendered did not include any interest. (Exhs. P-10, P-11)

31. On June 15, 1971, said check was rejected and returned to Appellant with a letter accompanying stating that the lease had been terminated and that in any event the amount was insufficient and therefore the tender was rejected. (Exh. P-13)

Appellant claims that because the default provision of the lease (Par. VIII) provides that "in the event lessee fails to

correct said default within such further time as is reasonably necessary to cure the same, lessee shall quit and surrender the premises," there was an issue of fact to be tried as to what constituted "a reasonable time."

As stated herein before, the lease was prepared by lessee's attorney and therefore the provisions thereof should be construed against Appellant. Further, it would appear that this provision had no application to the payment of rent since such a clause is commonly used where the default consists of the failure to repair or other similar neglect which requires some form of continuing conduct to remedy. In such a situation, if the lessee has commenced to correct the default within the notice period, it is protected in being given further "reasonable time beyond the expiration of the" notice to complete the same.

In the present situation, however, there was only the single act of payment of

the rent which was required. This Appellant could have done without any additional time involved. In fact, as stated above, the money was apparently available at all times to pay the rent; but Appellant wilfully refused to comply with the terms of the lease or the notice of default.

Finally, even if it were to be assumed that Appellant should have a "reasonable time" in which to correct the default by paying the rent, as a matter of law such time had expired prior to June 7, 1971. This Court has heretofore passed on what constitutes a reasonable time in a situation involving a default for failure to make payments under a contract to purchase realty. In the case of Pacific Development Company v. Stewart, 113 Utah 403, 195 P.2d 748, the supreme court held, as a matter of law, that 23 days was, under the undisputed facts, a reasonable time in which to give a defaulting purchaser under contract

to make up delinquent payments of $557.50. In doing so, the court reversed the decision of the lower court. In that case the seller had advised the delinquent purchaser that unless the delinquent payments were brought current within seven days, the contract would be cancelled and forfeited. After stating that the purchaser was entitled to a "reasonable time" in which to make up such delinquent payments, the court held as a matter of law that he had been given such time.

We submit that under the authority of Gerard v. Young, 20 U.2d 30, 432 P.2d 343, summary judgment was proper. That case involved an action for termination of a cafe lease where summary judgment for plaintiff was granted by the trial court. The supreme court affirmed the determination of the trial court granting summary judgment, stating that "under our rules of civil procedure a 'summary judgment' shall be rendered forthwith if the pleadings,

depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Rule 56(c))"

II

THE LOWER COURT DID NOT ERRONEOUSLY APPLY THE LAW TO THE UNDISPUTED FACTS.

A. There was a default in the payment of rent.

Although Appellant apparently concedes the facts heretofore outlined, it argues that the notice given was ineffectual because it ignored "any additional time beyond a forty-five day period."

We believe that this claim has been clearly answered by what has been stated hereinabove. However, lest there be some confusion concerning the designation of 45 days, it should be pointed out that paragraph VIII of the lease specifically states that the basis

for forfeiture is the continuation of default "for more than forty-five (45) days after written notice."

Appellant further argues on page 11 of its brief "that it did not receive the notice of March 11, 1971, until after April 1st of the same year." This is absolutely contrary to the fact. The notice, Exhibit P-8, has attached thereto the signed receipt showing delivery to, and acceptance by, Appellant on March 12, 1971.

Finally, Appellant states that the termination on May 4, 1971 (after the 45-day grace period expired on April 26, 1971), rendered "further action by Appellant useless and futile." Why then did it thereafter make an attempt to pay the rent without interest on June 7, 1971? No explanation was given or attempted as to the failure to pay the rent within the "grace" period.

The case of Shoemaker v. Pioneer

Investments, 14 U.2d 250, 381 P.2d 735, involved an action by the landlord against the tenant to recover possession of realty, for damages for unlawful detention and for unpaid rent. The facts there disclosed that defendant failed to pay the taxes on the property or the rent for a period of two months, whereupon the plaintiff served the defendant a notice which required the defendant to pay the taxes and past due rent or vacate the premises. Although a check was issued for the payment of the rent, it was returned twice by the bank upon which it was drawn marked "return to maker." Thereafter, the defendant tendered a check in the amount of $300.00 in payment of the rent, which tender was refused by the plaintiff. The court determined that in view of the foregoing facts, plaintiff had served the defendant with a proper notice and that the plaintiff had the right upon giving of such notice to terminate the lease.

We submit that there was a default and that Appellant, as a matter of law, failed to cure the same after having been given proper notice so to do.

B. Appellant is not entitled to equitable relief from the forfeiture.

After having ignored every opportunity to pay the rent which was due November 1, 1970, until more than two months after the end of the year lease period and six weeks after the end of the 45-day grace period given in the notice, Appellant now urges this Court that it is entitled to "equitable relief."

In an attempt to bolster its position in this regard, Appellant goes outside the Record to develop alleged facts and draw therefrom completely false assumptions. There was never any "collusion" by Respondents with anyone to deprive Appellant of the lease. Every effort was made to get Appellant to pay; and Appellant acknowledges that it was able to pay

at all times.

In the case of Groendycke v. Ellis, 205 Kan. 545, 470 P.2d 832, the Supreme Court of Kansas held that although the court may grant relief from a forfeiture for non payment of rent, it will not do so where the failure to pay is wilful, calculated or persistent or under circumstances negating exercise of good faith.

If ever there was a case of wilful, calculated and persistent refusal to conform to the conditions of the lease, it is this one.

C. Appellant is not entitled to the "Redemption and Restoration Provisions" of Section 78-36-10, UCA, 1953, as amended.

A casual glance at Section 78-36-10, UCA, 1953, as amended, demonstrates that this statute has no application here. First of all, it reads "when the proceeding is for an unlawful detainer." Obviously this is not an action for unlawful detainer, as recognized by

Appellant in its initial recitation of the nature of action on page 1 of its brief.

Further, the statute does not apply even in unlawful detainer actions unless the lease "has not by its terms expired." By the terms of this lease, it has terminated by forfeiture where the rent has not been paid as required.

In Baker v. Lehrer, 210 Or. 635, 312 P.2d 1072, the court held that where the rent was tendered by a tenant 26 days after the time reserved in the lease and 16 days after the statutory grace period for paying the rent, there was a forfeiture for non payment of the rent even though payment was tendered before forfeiture was actually declared by the landlord.

We also point out that at the time judgment was rendered in this case (March 17, 1972) another rental year had gone by; and if the action were one to enforce payment of rent,

the judgment would have included not only the obligation to pay the rent for the year 1970-71 but also the rental year 1971-72, which amount would have exceeded $10,000.00, including interest and liquidated damages. At no time did Appellant tender into court the amount which would have accrued under the lease to the date of judgment. In this connection, the decision of this Court in Commercial Block Realty Company v. Merchant's Protective Association, 71 Utah 505, 267 Pac. 1009, is pertinent. There the court held that if the tender of rent is insufficient in amount, it constitutes no tender at all.

D. The lower court properly awarded $2,500.00 liquidated damages.

The Lease and Purchase Agreement specifically states that "Because of the difficulties in ascertaining the damages that would thus be sustained, if any, by Lessors, it is agreed that Lessee shall pay to Lessors

the sum of $2,500 as exclusive, fixed and liquidated damages."

Appellant states there was no evidence that the $2,500.00 was "reasonably related to the actual damages sustained by Respondents." This is not true. Respondents did not receive any rent at all for the period March 31, 1970, to March 31, 1971. This was the reason for cancelling the lease.

In Perkins v. Spencer, 121 Utah 468, 243 P.2d 446, this Court stated the law to be that where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained.

In Bramwell Investment Company v. Uggla, 81 Utah 85, 16 P.2d 913, 916, the supreme court held that the amount of forfeiture of $500.00 on a contract of $5,128.00 was "not

greatly disproportionate to the actual damage."

There is nothing to show that the amount of $2,500.00 is disproportionate to the loss sustained by Respondents in this case. The liquidated damage provision was inserted by Appellant's attorney and should be enforced.

E. The granting of the motion for summary judgment did not destroy "severable and distinct privileges" of Appellant.

Appellant contends in this regard that it has been deprived of an option to purchase and right of first refusal by the action of the lower court. This argument is quickly disposed of by the decision of this Court in the case of Shoemaker v. Pioneer Investments, supra. There the lower court found that the lease had been terminated by written notice. On appeal the supreme court affirmed. Likewise, the defendant in the court below filed a counterclaim seeking to exercise an option to purchase the premises in accordance with a

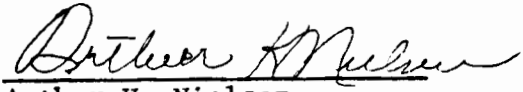
provision in the lease providing for such privilege. The supreme court held that the lower court, having found that the lease had been terminated some eight months prior, properly dismissed the counterclaim." (381 P.2d at p. 736).

In the instant matter Appellant did not seek to exercise its option to purchase and has not done so to this date. However, what was said by the supreme court in the Shoemaker case would indicate that it could not do so after the lease has been terminated for failure to pay rent.

SUMMARY

Respondents respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,



Arthur H. Nielsen
NIELSEN, CONDER, HANSEN & HENRIO
Attorneys for Respondents
410 Newhouse Building
Salt Lake City, Utah 84111