

1994

Living Scriptures v. Michael John Kudlik : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Living Scriptures v. Kudlik*, No. 940200 (Utah Court of Appeals, 1994).

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DOCKET NO.

940200 CA

IN THE UTAH COURT OF APPEALS

LIVING SCRIPTURES, INC., a
Utah corporation,

Plaintiff/
Appellee,

vs.

MICHAELJOHN KUDLIK,
individually and doing
business as CALIFORNIA SUDS,

Defendant/
Appellant.

BRIEF OF APPELLEE

Case No. 940200-CA
(Priority No. 15)

Appeal from a Final Judgment
of the Second Judicial District Court
of Weber County, Utah
The Honorable W. Brent West

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FILED
Utah Court of Appeals

MAY 24 1994

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VS.

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I. JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). The Utah Supreme Court transferred this case to the Utah Court of Appeals by Order dated April 4, 1994.

II. ISSUE PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

The sole issue presented for review is:

In light of the record in this case, did the trial court commit reversible error in ruling that Living Scriptures, Inc. ("LSI") did not intentionally waive its right to insist on compliance with the payment terms of the Lease and the Memorandum and that LSI did not engage in conduct that would estop LSI from insisting on that right?

Waiver and estoppel are "highly fact-dependent" questions, which involve the application of broad legal standards to specific facts. See State v. Pena, 869 P.2d 932, 938 (Utah 1994). As such, their determination is one that an appellate court "cannot profitably review de novo." Id. Rather, in reviewing a trial court's ruling in this area, the appellate court must accord that ruling with "a measure of discretion." Id. at 939.

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules, or regulations that are determinative of the issue on appeal.

IV. STATEMENT OF THE CASE

A. Nature of the Case.

LSI brought this action against Appellant MichaelJohn Kudlik ("Kudlik") because of Kudlik's numerous breaches of the Lease and the Memorandum and to recover unpaid rent, interest thereon, attorney's fees and costs, treble damages for unlawful detainer, and possession of a certain building and property located at 3685 Harrison Boulevard, Ogden, Utah (the "Premises"). (R. 1-26.)

B. Course of Proceedings and Disposition in the Trial Court.

LSI filed its Complaint and a three-day Summons on August 27, 1993. On September 2, 1993, Judge West entered an Order Regarding Possession Bond. (R. at 93.) That same day, and again on September 4, 1993, LSI served Kudlik with a Notice of Filing of Possession Bond and of Remedies Available to Defendant in accordance with Utah Code Ann. § 78-36-8.5. (Id. at 94.) Kudlik requested a hearing within three days after service. (Id.)

Judge West held a hearing on the possession bond issue on September 8, 1993. Pursuant to that hearing, Judge West entered an Order Regarding Restitution dated September 13, 1993, directing Kudlik to pay the past-due rent, late fees, interest, and attorneys fees owing in order to maintain possession of the Premises pending a further hearing. (R. at 66-69, 94.) Kudlik did not comply with the terms of that Order.

On September 20, 1993, Judge West held a hearing on the two issues submitted by the parties, namely, to determine the

reasonableness of LSI's attorney's fees and to determine if LSI had waived or would be estopped from requiring timely performance from Kudlik based on Kudlik's having made four rental payments late. (Tr. of September 20, 1993 Hearing at 2-3.) At that hearing, Judge West determined that LSI's attorney's fees were reasonable, (id. at 36-37), that LSI had not waived its right to timely performance under the Lease or the Memorandum and that there was no basis for estoppel against LSI, (id. at 32-33; R. at 95), and that Kudlik had been in unlawful detainer of the Premises since August 27, 1993.¹ (Tr. of September 20, 1993 Hearing at 33; R. at 95.) Accordingly, Judge West entered an Order of Restitution directing Kudlik to restore possession of the Premises to LSI, (R. at 81-82), and ordered Kudlik to pay the past-due rent, treble rent from August 27, 1993 to the date of the hearing, LSI's attorney's fees and costs, and post-judgment interest. (R. at 98.)

C. Statement of Facts.

On or about June 26, 1985, Myrtle M. Crouch, as landlord, and Jay Anderson and Dale Minson, as tenants, entered into a certain

¹ Contrary to Kudlik's assertion in his brief, Judge West did not find that LSI had "tolerated \. . . a pattern of payments that were not being made.'" Brief of Appellant at 4. Rather, Judge West found that, prior to January 25, 1993, Kudlik had slipped into a pattern of making late payments, which caused LSI and Kudlik to enter into a Memorandum of Understanding that established a payment schedule for past-due payments and that required strict compliance by Kudlik with the payment terms of Lease between the parties thereafter. (Tr. of September 20, 1993 Hearing at 32.) Judge West's statement does not support Kudlik's new-founded assertion.

Lease agreement (the "Lease") concerning the Premises.² (R. 92.) All right, title, and interest of Myrtle M. Crouch under the Lease and in and to the Premises was transferred and assigned to LSI. (Id.) The interest and obligations of Jay Anderson and Dale Minson as tenants under the Lease were assigned to Kudlik. (Id.) Kudlik is obligated to make all payments to LSI that were to be made as a tenant under the Lease, including all rents during the term of the Lease. (Id.) Kudlik is also obligated to perform all of the covenants and obligations of a tenant under the Lease. (Id.)

By February of 1993, Kudlik had failed to pay 1991 and 1992 real property taxes, as required by the Lease, and was two months arrears in rent. (Tr. of September 8, 1993 Hearing at 7; Tr. of September 20, 1993 Hearing at 3, 23; Exhibit P-2 to September 20, 1993 Hearing, Memorandum of Understanding, R. 169, 182-84.) LSI contacted its attorney, who notified Kudlik that he was in default under the Lease. (Tr. of September 8, 1993 Hearing at 6-7; Tr. of September 20, 1993 Hearing at 23.) To assist Kudlik in curing his defaults under the Lease, LSI and Kudlik entered into a Memorandum of Understanding dated as of January 25, 1993 (the "Memorandum") pursuant to which, among other things, Kudlik agreed to cure existing defaults by making payments according to a specified payment schedule and to thereafter make timely payments under the

² The Lease is included as Exhibit "A" to the Appendix hereto.

Lease.³ (R. 92; Tr. of September 8, 1993 Hearing at 7; Tr. of September 20, 1993 Hearing at 23.) With regard to the timeliness of payments required under the Lease, Paragraph 1 of the Memorandum provides, in relevant part:

Any payment hereunder or under the Lease which is not received by LSI on or before its due date shall not be timely made and shall constitute a breach. . . . Kudlik hereby expressly waives any defense, offset, recoupment, reduction and/or counterclaim and any right of defense, offset, recoupment, reduction and/or counterclaim for or on account of any reason or event whatsoever to any liability of Kudlik under this Agreement and/or the Lease.

(R. 182 ¶ 1 (emphasis added).) Similarly, Paragraph 2 of the Memorandum provides, in relevant part:

Kudlik shall make all other payments which are or become owed under the Lease in full and on time.

(Id. at ¶ 2 (emphasis added).)⁴

The Memorandum also specifies that upon any default by Kudlik, LSI is entitled to immediately terminate the Lease and all of Kudlik's rights thereunder. Paragraph 3 of the Memorandum provides:

In the event that Kudlik fails to timely make any payment in full as due under this Agreement or the Lease or is otherwise in breach or default under the Lease, LSI may, without any notice to Kudlik and in addition to any other rights and remedies available to LSI under this Agreement, under the Lease, in equity or at law, immediately terminate

³ The Memorandum is included as Exhibit "B" to the Appendix hereto.

⁴ The Lease provides that "[m]onthly lease payments shall be paid in advance and shall commence on the effective date of this Lease." (Lease § III, at 3.) The Lease also provides that "[t]ime is of the essence of this Lease." (Id. § XV, at 6.)

the Lease and all of Kudlik's and his predecessors' rights thereunder. Any such termination shall be effective upon a declaration by LSI to that effect or upon LSI's sending to Kudlik a notice to that effect.

(Id. at ¶ 3.)

Moreover, pursuant to the Memorandum, LSI and Kudlik agreed that any waiver by either party of any breach was not to be construed as a continuing waiver of, or consent to, any subsequent breach by the other party. Accordingly, Paragraph 4.d. of the Memorandum provides:

Any waiver by any party hereto of any breach of any kind or character whatsoever by any other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of, or consent to, any subsequent breach of this Agreement on the part of the other party.

(Id. at ¶ 4.d.)

Kudlik made the past-due tax and rental payments according to the payment schedule in the Memorandum. (Exhibit P-6 to September 20, 1993 Hearing, R. 169, 197.) Soon thereafter, however, Kudlik once again fell in arrears by being delinquent in making his March, April, and May 1993 rent payments. (R. 197.) During that time, LSI had continually "bird dogged" Kudlik to make his payments. (Tr. of September 8, 1993 Hearing at 7.) In late July of 1993, when it became clear to LSI that its efforts to get Kudlik to make his rental payments on time had been unsuccessful, LSI once again contacted its attorney. (Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25.)

On August 2, and again on August 3, 1993, LSI's attorney contacted Kudlik and informed him that LSI continued to insist on strict performance with the terms of the Lease and the Memorandum. Specifically, LSI's attorney demanded that Kudlik immediately pay all past due amounts in full, that he make all future payments on time when due, and that he pay \$200.00 in attorney's fees pursuant to Section X of the Lease and Paragraph 4.g. of the Memorandum. (R. 93; Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25.) LSI's attorney informed Kudlik that if he did not cure the existing defaults and thereafter make payments on time, LSI would pursue its eviction remedies. (R. 93; Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25.)

Kudlik told LSI's attorney that he would call him back to discuss the matter further. (Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25-26.) Kudlik never called back. (Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25-26.)

On or about August 19, 1993, Kudlik paid the June 1993 rent (but not the July and August 1993 rent) to Escrow Specialists. (R. 197) The next day, upon learning of Kudlik's failure to pay the July 1993 and August 1993 rent, LSI served Kudlik with a Notice to Quit by certified mail in full compliance with Utah Code Ann. §§ 78-36-3 and -6. (R. 93; Tr. of September 8, 1993 Hearing at 8; Tr. of September 20, 1993 Hearing at 26; Exhibit P-3 to September 20,

1993 Hearing, R. 169, 185.) On August 23, 1993, LSI served Kudlik with a second Notice to Quit by hand delivery and by United States mail. (R. 93; Tr. of September 8, 1993 Hearing at 8; Exhibit P-4 to September 20, 1993 Hearing, R. 169, 186.) By these Notices to Quit, LSI was, among other things, demanding payment of all past-due rent.

Kudlik failed to pay the amounts due or to vacate and quit the Premises. (R. 93.) On August 27, 1993, LSI filed its Complaint in this action. (Tr. of September 8, 1993 Hearing at 8.) Thereafter, on or about September 2, 1993, Judge West entered an Order Regarding Possession Bond. (R. at 93.) That same day, and again on September 4, 1993, LSI served Kudlik with a Notice of Filing of Possession Bond and of Remedies Available to Defendant in accordance with Utah Code Ann. § 78-36-8.5. (Id. at 94.) Kudlik requested a hearing within three days after service. (Id.)

On or about September 3, 1993, Kudlik filed a written Tender of Performance to Plaintiff. (Id. at 39-40.) LSI objected to the purported "tender" on the grounds, inter alia, that it is not a remedy or right available to Kudlik under Utah's unlawful detainer statute and that it did not include an amount for the September rent then due, the accrued interest on the past-due amounts, and the attorney's fees and costs owed under the Lease and the Memorandum. (Id. at 48-51.)

Judge West held a hearing on the possession bond issue on September 8, 1993. At that hearing, LSI's attorney learned for the

first time that Kudlik had delivered a check the preceding Friday, September 3, 1993, to Escrow Specialists in an amount equivalent to two-month's rent.⁵ (See Tr. of September 8, 1993 Hearing at 5-6, 17; Tr. of September 20, 1993 Hearing at 9-10.) LSI's attorney objected to Kudlik's attempt to surreptitiously "cure" the defaults by delivering a check for a portion of the rent and other monies owed under the Lease and the Memorandum to Escrow Specialists after the commencement of litigation.⁶ (Tr. of September 8, 1993 Hearing at 17.) Despite this objection and the commencement of this litigation, LSI's attorney indicated that LSI still would be willing to allow Kudlik to cure the defaults and retain possession of the Premises, if done so within the time period specified by the unlawful detainer statute.⁷ (Id. at 10-11.) LSI's attorney stated

⁵ Kudlik erroneously gives this date as September 7, 1993. See Brief of Appellant at 12.

⁶ Following the hearing, LSI's attorney contacted Escrow Specialists and requested Escrow Specialists to determine if Kudlik's check would clear. (Tr. of September 20, 1993 Hearing at 9-10.) Escrow Specialists called the bank upon which the check was drawn and was informed that the account contained insufficient funds to cover the check. (Id.) Upon receiving this information, LSI's attorney returned the check to Kudlik's attorney. (Id. at 10.)

⁷ LSI's attorney stated:

I think I am sympathetic to Mr. Anderson's position and I think that my client, although they feel that they have been strung along, would be--still be willing to allow Mr. Kudlik to elect Option 2(a), which is to pay us within the three-day period, and that period expires at the close of business tomorrow. If Mr. Kudlik pays what the statute requires him to pay and what he's obligated to pay under the lease, I think Living Scriptures would be happy to

that the unlawful detainer statute gave Kudlik until the end of the following business day. (Id. at 10.) Kudlik's attorney, however, requested Kudlik be given until September 13, 1993 to pay. (Id. at 35.) Although, by statute, LSI could have insisted on a cure of all defaults by September 8, 1993, LSI's attorney agreed to give Kudlik until noon on September 13, 1993 to cure the defaults. (Id. at 36.)

Pursuant to the hearing, on September 13, 1993, Judge West entered an Order Regarding Restitution ("Restitution Order"). (R. at 66-69, 94.) The Restitution Order provided that, in order for Kudlik to retain possession of the Premises pending a further hearing, Kudlik must pay the rent, late fees, and interest owing to LSI and make a partial payment of the attorney's fees incurred by LSI to date, by cashier's check to LSI's attorney by noon on September 13, 1993. (Id. at 68.) In addition, the Restitution Order required Kudlik to post a \$5,000.00 bond to cover any issues remaining in dispute, pending a further hearing. (Id.) In the event Kudlik failed to make the required payments and to post the specified bond, the Restitution Order provided that LSI would be entitled to an order of restitution of the Premises. (Id.) Finally, the Restitution Order provided that a hearing would be held at a later date to determine the following issues: the amount

work with Mr. Kudlik to try to keep him on track
(Id. at 10-11.)

of attorneys fees owing by Kudlik to LSI; the legal significance, if any, of Kudlik's purported tender to Escrow Specialists; the extent, if any, to which LSI's claims against Kudlik were barred by the doctrines of estoppel and waiver; and any claim for damages that either party may have against the other. (Id. at 69.)

Needless to say, Kudlik failed to comply with the conditions of the Restitution Order. (Id. at 94.) On September 20, 1993, Judge West held a hearing to determine the two issues submitted by the parties, i.e., the reasonableness of LSI's attorney's fees and whether LSI had waived or would be estopped from requiring timely performance from Kudlik based on Kudlik's having made four late rent payments late. (Tr. of September 20, 1993 Hearing at 2-3.) At that hearing, Judge West made a specific finding of fact that LSI gave Kudlik reasonable notice before insisting on strict performance of payment terms of the Lease and the Memorandum. (R. at 94.) In addition, Judge West determined that LSI had not waived its right to timely performance under the Lease and the Memorandum, that there was no basis for estoppel against LSI, (Tr. of September 20, 1993 Hearing at 32-33; R. at 95), and that Kudlik had been in unlawful detainer of the Premises since August 27, 1993.⁸ (Tr. of September 20, 1993 Hearing at 33; R. at 95.) Accordingly, Judge West entered an Order of Restitution directing Kudlik to restore

⁸ Judge West also found the attorneys fees claimed by LSI to be reasonable. (Id. at 36-37.) That finding is not at issue on this appeal.

possession of the Premises to LSI, (R. at 81-82), and ordered Kudlik to pay the past-due rent, treble rent from August 27, 1993 to the date of the hearing, LSI's attorney's fees and costs, and post-judgment interest. (R. at 98.)

V. SUMMARY OF ARGUMENT

Kudlik's sole argument on appeal is that, as a consequence of LSI's acceptance of four late rental payments, LSI has waived, or should be estopped from asserting, its right to receive timely performance under the Lease and the Memorandum. Kudlik's argument is without merit for at least three reasons. First, the concept of waiver or estoppel by the acceptance of late payments is inapplicable where, as in this case, the parties have agreed in advance that such conduct would not constitute a waiver. In the case at hand, the parties agreed in the Memorandum that a waiver by either party of any breach was not to be construed as a consent by that party to any future breach by the other party.

Second, Kudlik has failed to meet his burden of proof of demonstrating the existence of either waiver or estoppel. With regard to waiver, Kudlik has failed to show that LSI's acceptance of a few late rental payments is sufficient, in light of the circumstances of the case, to support a reasonable finding that LSI voluntarily and intentionally relinquished its right to terminate the Lease upon Kudlik's continued failure to make timely payments thereunder. With regard to estoppel, Kudlik has failed to prove the existence of any of its elements. Specifically, Kudlik has

failed to prove (1) a statement, admission, act, or failure to act by LSI inconsistent with LSI's claim that LSI is entitled to terminate the Lease as a result of Kudlik's failure to make payments under the terms of the Lease and the Memorandum; (2) reasonable reliance on the part of Kudlik; and (3) an injury resulting from LSI's conduct.

Third, even if this Court were to find that LSI temporarily waived its right to receive timely payments under the Lease and the Memorandum, or should be estopped from asserting that right absent reasonable notice to Kudlik of its intent to require strict compliance with the payment terms of the Lease and the Memorandum, LSI gave Kudlik such notice. Following that notice, Kudlik neither paid the past-due amounts nor complied thereafter with the payment terms. Accordingly, Judge West's ruling must be affirmed.

VI. ARGUMENT

A. Kudlik's Assertion of Waiver or Estoppel is Barred by the No-Waiver Provision in the Memorandum.

Although Kudlik correctly quotes the Restatement of Property for the proposition that "[t]he landlord may waive his right to the prompt payment of rent by acting in such a manner that the tenant is led to believe that a later date of payment than specified in the lease is acceptable," Brief of Appellant at 8 (quoting Restatement (2d) of Property, Landlord and Tenant, § 12.1, comment c. (1977) [hereinafter the Restatement]), Kudlik conveniently fails to tell this Court that the quoted statement is

predicated on the absence of a no-waiver provision in the agreement between the parties. Indeed, the sentence immediately following the one quoted by Kudlik provides: "A no-waiver provision in the lease preserves the landlord's right to the payment of the rent on the due date." Restatement § 12.1, comment c (emphasis added). The Restatement applies that principle in illustrations 2 and 4 to section 12.1.

Illustration 2 provides the general rule in the absence of a no-waiver provision in the Lease:

L leases to T for five years, rent to be paid in advance at the beginning of each month. The rent includes the payment of the previous month's utility charges, but the utility bill is regularly sent too late to be paid on the first of the month. After a few months, T, without an express agreement, begins paying his rent late enough in the month to include the utility bill. L accepts each late check without objection. L has waived the right to require prompt payment of the rent, and T is not in default if he continues his past practices. If, however, L gives T notice that the rent is to be thereafter paid on the first of the month and T fails to comply, he will be in default on his rent obligation. . . .

Id., comment c., Illustration 2.

Illustration 4 explains the effect of a no-waiver provision in the lease between the parties:⁹

⁹ Illustration 4 cross-references illustration 2, quoted above, and Illustration 3, which provides as follows:

L orally leases an apartment to T from week to week, rent to be paid in advance. For several months L calls at the apartment each Sunday and picks up the rent check. For three weeks L fails to pick up the checks, which are ready for him. The relevant statute provides that if rent is in arrears for fifteen days, whether demanded or not, the landlord may reenter or recover possession of the premises. T finds L and tenders

Assume that the lease in Illustration 2 or in Illustration 3 contains the following provision:

"The waiver of one breach of any term, condition, covenant, obligation, or agreement of this lease shall not be considered to be a waiver of that or any other term, condition, covenant, obligation, or agreement or of any subsequent breach thereof."

In such case T is in default in both Illustrations 2 and 3.

Id., comment c., Illustration 4 (emphasis added).

A number of courts have accepted the principle articulated in the Restatement regarding the effect of a no-waiver provision. The California Court of Appeals first relied on this principle in Brown v. Chowchilla Land Co., 210 P. 424 (Cal. Ct. App. 1922), a decision quoted approvingly by the Utah Supreme Court in Pacific Dev. Co. v. Stewart, 113 Utah 403, 195 P.2d 748 (1948).¹⁰

In Brown, the parties entered into a series of three separate contracts for the purchase of real estate (the "Contracts") over a term of seven and one-half years. Brown, 210 P. at 424. The Contracts provided for monthly payments of principal and interest

the checks to him. L refuses to take the checks, and declares the lease is terminated. T is not in default, because the conduct of the parties established a time and manner of payment which were followed by T.

Id. Illustration 3.

¹⁰ The lease in Stewart did not contain a no-waiver provision. Therefore, the Utah Supreme Court did not have occasion specifically to consider the effect of such a provision. The Court's opinion is consistent, however, with the conclusion that such a provision would have been given effect.

on the first day of each month and (as with the Lease in this appeal) stated that time was of the essence. Id. The Contracts also specified that the purchaser's rights in and to the property would terminate upon breach and gave the seller the option to declare a forfeiture of all monies paid by the purchaser upon a default in the payment of any sums due under the Contracts. Id. Finally, the Contracts each contained the following no-waiver provision:

The waiver by the seller of any breach of any covenant or agreement herein contained on the part of the purchaser shall not be deemed or held to be a waiver of any subsequent or other breach of said covenant or agreement, nor a waiver of any other covenant or agreement herein contained.

Id. at 425.

The purchaser made the first seven payments on time but then made payments under the Contracts sporadically and in varying amounts. Id. The seller accepted the purchaser's payments for nearly five and one-half years without objection but then sent the purchaser a notice cancelling the contracts because of the purchaser's failure to make payments on time. Id. The purchaser brought an action for specific performance of the Contracts, arguing that the seller had waived its rights to terminate the Contracts without notice and an opportunity to cure by its extended practice of accepting late payments. Id. The trial court disagreed, holding for the seller, and the purchaser appealed.

Although acknowledging the general rule that a vendor may waive strict compliance with the payment terms of a contract by accepting overdue payments without objection, the California Court of Appeals held the principle inapplicable where the parties had agreed beforehand that such conduct would not constitute a waiver. Id. at 427. The court stated:

The requirement of notice after the receipt of overdue payments without objection is based upon the equitable consideration that by his conduct the vendor has led the vendee into the belief that the former will continue to waive the strict performance of the contract. The principle of equitable estoppel is involved. But the reason for the rule does not exist where the parties have expressly agreed that such waiver shall not affect any subsequent breach or relinquish the right of the vendor to insist thereafter upon strict observance with the terms of the contract.

Id. The court found that the no-waiver provision in the Contracts constituted an adequate expression of the parties' intent that the acceptance of overdue payments was to be regarded as an indulgence to the purchaser, and not as a waiver of the seller's right to timely performance of the Contracts.¹¹ Id. Accordingly, the court held that the seller retained the right to declare a forfeiture

¹¹ Specifically, the court stated:

The parties could not fail to understand from the particular covenant in question that the acceptance of any overdue payment or payments was to be regarded as an indulgence to the vendee, but as to the future the whole contract remained in full force and effect and rendered the vendee subject to the penalty of forfeiture for any default thereafter.

Id. The court upheld the parties' legal right to agree to such a provision. Id.

upon the purchaser's failure to make timely payments, without providing the purchaser with advance notice of its intent to strictly enforce the payment terms of the Contracts. Id.

The California Court of Appeals reached the same result in the context of a commercial lease in Karbelnig v. Brothwell, 53 Cal. Rptr. 335 (Cal. Ct. App. 1966). In Karbelnig, the parties entered into a written lease for the rental of certain real property for a term of fifteen years. Id. at 336. The lease contained both a provision prohibiting assignment by the tenant without the consent of the landlord and a no-waiver provision.¹² Id. Despite the existence of the provision prohibiting assignment, the tenant assigned its interest in the lease without the consent of the landlord. Id. at 336-38. Upon being notified of the assignment, the landlord accepted rental payments from the assignees, but notified the tenant that such acceptance should not be construed as an acceptance or waiver to the assignment. Id. at 338. The trial

¹² The no-waiver clause provided:

The waiver by Lessor of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition or any subsequent breach of the same or any other term, covenant, or condition herein contained. The subsequent acceptance of rent hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant, or condition of this lease, other than the failure of Lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent.

Id.

court held such conduct constituted a waiver of the breach. Id. at 339.

The California Court of Appeals reversed. Id. at 340. The court began with the proposition that "[w]aiver is the intentional relinquishment of a known right after knowledge of the facts." Id. The court then noted that the intent to waive a breach normally may be inferred by the acceptance of rental payments after learning of the breach. Id. Looking to decisions from other jurisdictions, however, the court held that such an inference is rebutted where the parties agreed in the lease that the acceptance of rent is without prejudice to the rights of the Landlord.¹³ Id. The court explained:

The express agreement on the part of the lessees, which was binding upon their assignees, to the effect that the acceptance of rent by the lessor after knowledge of the breach of a covenant should not be deemed a waiver of such breach, is tantamount to a relinquishment of the right of the lessees and their assignees, to assert a waiver of [sic] estoppel, unless there has been an express waiver on the part of the lessor of the right reserved, or there has been conduct on the part of the lessor, other than the acceptance of rent, upon which the lessees or their assignees could lawfully assert an estoppel to declare a forfeiture.

Id. at 341 (emphasis added).

In the case at hand, the parties agreed that a waiver by either party of a breach by the other shall not be construed as a waiver

¹³ The court distinguished other California decisions that found waiver as the result of the acceptance of rent, noting that none of those decisions involved the existence of a no-waiver provision in the leases at issue. Id. at 340.

of any other or subsequent breach. Paragraph 4.d. of the Memorandum specifically provides:

Any waiver by any party hereto of any breach of any kind or character whatsoever by any other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of, or consent to, any subsequent breach of this Agreement on the part of the other party.

Any inference of intent by LSI to waive its right to timely performance of the Lease and the Memorandum is precluded by the existence of the no-waiver provision in the parties' agreement.¹⁴ By agreeing to such a provision, Kudlik voluntarily and intentionally relinquished his right to assert a waiver or estoppel against LSI based on the LSI's acceptance of past-due payments. LSI relied on the above no-waiver provision in an attempt to work with Kudlik instead of immediately terminating the Lease and acting to evict him, which right was specifically granted to LSI in Paragraph 3 of the Memorandum. In these circumstances, Kudlik is precluded as a matter of law from arguing waiver and estoppel against LSI. Judge West's ruling must therefore be affirmed.

B. Kudlik Has Failed to Meet His Burden of Demonstrating Either Waiver or Estoppel.

Even assuming, arguendo, that this Court were to find that Kudlik is not precluded from arguing waiver or estoppel by his

¹⁴ Moreover, as discussed below, intent to waive its right to timely payment may not be inferred against LSI as a result of its acceptance of a few late rental payments, particularly where LSI urged Kudlik to make his payments on time and promptly acted to enforce its rights when it became clear that Kudlik was unwilling or unable to do so.

express agreement to the no-waiver provision, Judge West's ruling must be affirmed because Kudlik failed to meet his burden of proof of demonstrating either waiver or estoppel. The record overwhelmingly supports Judge West's ruling that neither doctrine precludes LSI from asserting its rights under the Lease and the Memorandum.

1. The Record Clearly Demonstrates that LSI Did Not Waive its Right to Insist on Timely Payments Under the Lease and the Memorandum.

Waiver is "the intentional relinquishment of a known right." Soters v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 939-40 (Utah 1993) (quoting Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, 1073 (Utah 1991)). As such, "[w]aiver requires three elements: (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right." Id. at 940. Because waiver is an affirmative defense, the burden of demonstrating each of its elements, including intent, lies with the party asserting it--Kudlik. See Utah R. Civ. P. 8(c); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah 1976). Kudlik must show from the evidence that the relinquishment was "clearly intended." Soters, 857 P.2d at 941. In the case at hand, Kudlik failed to sustain his burden of showing the existence of waiver. Judge West's ruling must, therefore, be affirmed.

Kudlik's sole evidence in support of his waiver argument is LSI's acceptance of four late rental payments. Conspicuously

absent from Kudlik's argument, however (and which Kudlik would like this Court to ignore), are the agreement between the parties, the context in which the four payments were accepted, the communications between the parties, and all of LSI's actions to enforce the Lease and the Memorandum.

In January of 1993, when Kudlik first began to slip into a practice of making late payments, LSI acted immediately to get Kudlik back on track and to emphasize that LSI insisted on timely payments under the Lease. To that end, LSI and Kudlik entered into negotiations to cure the past defaults. The parties' agreement was memorialized in the Memorandum. The Memorandum required payment of all past-due amounts according to a strict payment schedule and set forth in no uncertain terms that LSI insisted on strict compliance with the payment terms of the Lease. Accordingly, Paragraph 1 of the Memorandum provides, in relevant part:

Any payment hereunder or under the Lease which is not received by LSI on or before its due date shall not be timely made and shall constitute a breach.

(R. 182 ¶ 1 (emphasis added).) Similarly, Paragraph 2 of the Memorandum provides, in relevant part:

Kudlik shall make all other payments which are or become owed under the Lease in full and on time.

(Id. at ¶ 2 (emphasis added).)

From the time the parties entered into the Memorandum until the commencement of this action, LSI's actions were consistent with its intent to require strict compliance with the payment terms of the

Lease and the Memorandum. During the first few months following the execution of the Memorandum, LSI continually "bird-dogged" Kudlik to try to get him to honor his agreement. (Tr. of September 8, 1993 Hearing at 7.) It soon became clear to LSI, however, that they would have to resort to legal action to persuade Kudlik to meet his payment obligations. At that point, LSI contacted its attorney, who promptly called Kudlik, on two separate occasions, to demand that he immediately bring his payments current and thereafter comply strictly with the payment terms of the Lease and the Memorandum. (R. 93; Tr. of September 8, 1993 Hearing at 7-8; Tr. of September 20, 1993 Hearing at 25.) On August 20, 1993, after no response from Kudlik, LSI served Kudlik with a Notice to Quit. (R. 93; Tr. of September 8, 1993 Hearing at 8; Tr. of September 20, 1993 Hearing at 26.) Three days later, LSI served Kudlik with a second Notice to Quit.¹⁵ (R. 93; Tr. of September 8, 1993 Hearing at 8.) Kudlik did not respond to either Notice to Quit, leaving LSI with no alternative but to commence this action. (R. 93; Tr. of September 8, 1993 Hearing at 8.)

As the above actions show, LSI did not silently accept Kudlik's late payments. Instead, LSI insisted Kudlik make timely payments,

¹⁵ After serving the Notices to Quit, LSI learned that Kudlik made a partial payment to Escrow Specialists on August 19, 1993 of only one month's rent, omitting the July and August rent then past due, as well as the late fees, interest, and attorney's fees, which he was obligated to pay under the Lease and the Memorandum. (R. 197.) LSI accepted this partial payment in mitigation of its damages.

and each time Kudlik refused, LSI escalated its remedies, culminating in this lawsuit. The entire process, from Kudlik's first late payment following his execution of the Memorandum to LSI's filing of this action, took only a little over six months. LSI gave Kudlik no false assurances that he could continue to flout his obligations. Instead, every communication between the parties during this time reiterated LSI's insistence that Kudlik make his payments on time.¹⁶

¹⁶ Each of the cases cited by Kudlik that found a waiver are factually inapplicable to this case. For example, in Pacific Dev. Co. v. Stewart, 113 Utah 403, 195 P.2d 748 (1948), the seller accepted late payments from the purchasers over a period of approximately two years, without any objection, all the while assuring the purchasers that "no forfeiture of their rights was at that time contemplated, but that they should 'do the best you can' or they should catch it up as fast as they could." Id. at 749. Similarly, in Morris v. Sykes, 624 P.2d 681 (Utah 1981), the parties were negotiating a reinstatement of the contract up to the time of unilateral termination by sellers, id. at 682-84, and in Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980), the seller and purchaser had continually communicated regarding the purchaser's anticipated purchase of the property up to the point when the seller informed the purchaser, for the first time, that he had arranged the sale of the property to another. Id. at 346-47.

Grow v. Marwick Dev., Inc., 621 P.2d 1249 (Utah 1980), did not involve the acceptance of late payments, but holds merely that where a seller under a real estate contract sent the purchaser two notices of default and a notice of forfeiture, to which the purchaser did not respond, and thereafter sent a subsequent notice of default giving the purchasers 15 days to cure, the seller's latter notice controlled. Id. at 1251-52. Similarly, Hansen v. Christensen, 545 P.2d 1152 (Utah 1976), did not involve the acceptance of late payments, but rather holds that where a real estate sales contract offered the seller several alternative options upon default, none of which were self-executing, the purchaser is entitled to believe the contract continues in force until the seller elects a remedy and notifies the purchaser of the election. Id. at 1154. Finally, the cases of Girard v. Appleby, 660 P.2d 245, 248-49 (Utah 1983), Minshaw v. Chevron Oil Co., 575 P.2d 192, 194-95 (Utah 1978), and Woodland Theatres, Inc. v. ABC

The record is clear in the case at hand that LSI acted in accordance with the parties' agreement that past waivers would not be construed as a continuing waiver or consent to a future breach and attempted to work with Kudlik instead of immediately terminating the Lease. When, after a reasonable period of time, those efforts proved ineffective, LSI acted promptly to enforce its rights. The record overwhelmingly supports Judge West's ruling that LSI did not intentionally waive its right to insist on strict compliance with the payment terms of the Lease and the Memorandum. LSI respectfully requests that this Court affirm Judge West's ruling.

2. Kudlik Has Failed to Meet His Burden of Demonstrating Estoppel.

Like waiver, estoppel is an affirmative defense. See Utah R. Civ. P. 8(c). As such, Kudlik bears the entire burden of demonstrating the existence of each of its elements. Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417, 420 (1973). Kudlik has failed to meet his burden as to this affirmative defense.

Whereas waiver is the intentional relinquishment of a known right, estoppel is a doctrine that precludes parties from asserting

Intermountain Theatres, Inc., 560 P.2d 700, 701-02 (Utah 1977), all hold merely that a party may not both declare a forfeiture of a lease and, at the same time, continue to accept rental payments during the period following the declaration of forfeiture. This is so despite the landlord's attempt to alter the rule by a unilateral declaration that the acceptance of rent does not constitute a waiver. See Girard, 660 P.2d at 248-49; Woodland Theatres, Inc., 560 P.2d at 701.

their rights where their actions or conduct would render it inequitable for them to do so. Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983). Estoppel requires proof of the following three elements:

(i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

CECO v. Concrete Specialists, Inc., 772 P.2d 967, 969-70 (Utah 1989). Kudlik has failed to prove any of these elements.

First, Kudlik has failed to show a statement, admission, act, or failure to act on the part of LSI that is inconsistent with LSI's insistence on compliance with the payment terms of the Lease and the Memorandum. Kudlik has made no allegation and offered no evidence that LSI expressly stated that it would not insist on compliance with those terms or that LSI made any admission contrary to such insistence. Rather, Kudlik argues that LSI's mere acceptance of four late rental payments is inconsistent with its present assertion of the right to terminate the Lease based on Kudlik's continued failure to timely make subsequent payments. LSI's actions are completely consistent with such an assertion.

As discussed above, during the time period in question, LSI attempted time and again to get Kudlik to make timely rental payments. As each attempt failed, LSI escalated its actions, finally bringing this lawsuit. LSI in no way misled Kudlik into

believing that LSI would not act to terminate the Lease in the event Kudlik continued to ignore his payment obligations. To the contrary, LSI insisted, at every juncture, that Kudlik comply with those provisions.

Second, Kudlik has failed to offer any evidence whatsoever that he actually relied on any actions of LSI. Kudlik failed to even proffer evidence that he could have made the rental payments on time, but chose not to based on LSI's acceptance of four late payments. Moreover, even assuming for the sake of argument that Kudlik did in fact rely on LSI's acceptance of those four late payments, Kudlik has failed to demonstrate that such claimed reliance was reasonable in light of the no-waiver provision in the Memorandum and LSI's continual "bird-dogging" efforts. As noted above, Kudlik expressly agreed in the Memorandum that a waiver by LSI of any past breach would not constitute a waiver of any future breach. Kudlik makes no allegation that the parties waived that provision, either expressly or by any conduct other than that which the parties expressly agreed would not constitute a waiver. Kudlik's claimed reliance on LSI's temporary forbearance, therefore, was not reasonable, even if actual.

Finally, Kudlik has failed to demonstrate that his claimed injury resulted from his purported reliance on LSI's waiver of past overdue payments. Specifically, as noted above, Kudlik failed to proffer any evidence to the trial court that he could have made the rent payments on time in the absence of any such reliance. In

light of such failure, and of Kudlik's failure to establish the existence of the other elements of estoppel, Kudlik's claim of estoppel must fail. Judge West's ruling must therefore be affirmed.

C. Even if LSI Temporarily Waived its Right to Timely Payment Under the Lease and the Memorandum, Which LSI Did Not, LSI Gave Kudlik Reasonable Notice of its Intent to Require Compliance with Those Terms in the Future.

Kudlik argues, without any foundation in fact, that "[w]here a landlord routinely, and without objection, accepts past due payments and leads the tenant to believe that strict adherence to the payment schedule will not be required, the law requires the landlord to provide the tenant with reasonable notice that it will insist on strict performance." Brief of Appellant at 7. Even assuming the validity of that statement and its applicability to the case at hand, however, Kudlik has no reason to complain in the present case because LSI did not routinely accept late payments without objection and LSI gave Kudlik reasonable notice of its intent to require strict compliance with the Lease and the Memorandum.¹⁷

¹⁷ As discussed above, LSI's acceptance of four late payments was far from a "routine" practice, and the acceptance was not "without objection." During the period of these four payments, LSI was continually "bird-dogging" Kudlik to bring his payments current and to thereafter make them in a timely manner. Furthermore, in light of the no-waiver provision agreed to by the parties, LSI's conduct could not reasonably be construed as "leading the tenant to believe" that strict compliance with the payment terms would not be required.

LSI accepted the last rental payment on August 19, 1993, leaving at least two months of rental payments past due.¹⁸ The following day, and again on August 23, 1993, LSI caused a three-day Notice to Quit to be served on Kudlik. Kudlik did not comply with either Notice, thereby forcing LSI to file this action on August 27, 1993.

On September 2 and 4, 1993, LSI served Kudlik with a Notice of Filing of Possession Bond and of Remedies Available to Defendant, which included the option of full payment within 3 days after service. Kudlik did not choose that option, but instead requested a hearing. At the September 8, 1993 hearing, however, LSI's attorney indicated LSI's continued willingness to allow Kudlik to cure his defaults, if done so within the time-frame set forth in the unlawful detainer statute. (Tr. of September 8, 1993 Hearing at 10-11.) LSI's attorney suggested payment by the end of the following day. (Id.) Kudlik's attorney, however, requested Kudlik

¹⁸ Despite Kudlik's contention that LSI "accepted" a rental payment on September 3, 1993, the evidence demonstrates otherwise. First, LSI returned Kudlik's check to Kudlik's attorney. (Tr. of September 20, 1993 Hearing at 9-10.) LSI was entitled to refuse tender of payment following Kudlik's breach of the Lease and the Memorandum. See Shoemaker v. Pioneer Invests., 14 Utah 2d 250, 381 P.2d 735, 736 (1963). Second, the check was drawn on an account that contained insufficient funds to pay it. (Tr. of September 20, 1993 Hearing at 9-10.) A bad check does not constitute "payment," and mere receipt of a bad check does not constitute "acceptance" of payment. Moreover, it is ridiculous for Kudlik to claim, for the purpose of arguing waiver or estoppel, that he relied on such an "acceptance" when the purported payment was made after the filing of the Complaint in this action and LSI's efforts to recover possession of the Premises.

be given until the following Monday, September 13, 1993. (Id. at 35.) LSI's attorney agreed to this request, giving Kudlik until noon on September 13, 1993 to cure the defaults. (Id. at 36.) Thus, Kudlik had 21 days from the August 23, 1993 Notice to Quit (24 days from the August 20, 1993 Notice to Quit) in which to cure the defaults. Kudlik did not do so. Therefore, Kudlik's argument that he was not given a reasonable time to cure the defaults must be rejected. Judge West's ruling should be affirmed.

VII. CONCLUSION

The essence of Kudlik's argument is that LSI should not have worked with him, but rather LSI should have immediately invoked its rights under the unlawful detainer statute on the first day after Kudlik was late on his next payment. Kudlik asked Judge West, and is now asking this Court, to punish LSI for having worked with Kudlik in "bird-dogging" him to bring his payments current. Kudlik shamelessly makes this argument despite the fact that he and LSI specifically agreed in the Memorandum that LSI's acceptance of late payments would not constitute a waiver and despite the fact that LSI went to extreme measures to prompt Kudlik to honor his obligations. To add insult to injury, Kudlik makes his argument without any showing whatsoever of any reliance on his part, either actual or reasonable, on any actions of LSI.

As set forth above, LSI went to extreme measures to encourage Kudlik to honor his obligations under the Lease and the Memorandum. Kudlik should not be rewarded by this Court for his ability to

manipulate LSI's kindness. Kudlik had failed to carry his burden of proof as the affirmative defenses of waiver and estoppel.

LSI therefore respectfully urges this Court to affirm Judge West's ruling. LSI also requests that this Court award LSI the costs, including reasonable attorneys fees, incurred in responding to Kudlik's appeal. See Judge West's award of attorneys fees, Findings of Fact and Conclusions of Law (R. 91-96); Final Judgment (R. 97-99); Augmented Judgment Regarding Attorneys' Fees (R. 110-111); Lease § X (R. 142-53); Memorandum ¶ 4.g. (R. 154-56); Utah Code Ann. § 78-27-56 (1992).

DATED this 24th day of May, 1994.

KIMBALL, PARR, WADDOUPS, BROWN & GEE
Scott F. Young, Esq.
Mark A. Wagner, Esq.

By: Scott F. Young
Attorneys for Living Scriptures, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 1994 a true and correct copy of the foregoing APPELLEE'S BRIEF was mailed, postage prepaid, to:

John T. Anderson, Esq.
ANDERSON & KARRENBORG
50 West Broadway, Suite 700
Salt Lake City, Utah 84101-2006

Scott S. Young

Tab A

LEASE

THIS LEASE, made this 26th day of June, 1985, by and between Myrtle M. Crouch, a single women, hereinafter referred to as Lessor and Jay Anderson and Dale Minson, severally and jointly, hereinafter referred to as Lessee.

WITNESSETH:

WHEREAS, the Lessor owns certain property located in Ogden City, Weber County, State of Utah, which property is presently leased to American Oil Company, and,

WHEREAS, American Oil Company is not utilizing the premises, and,

WHEREAS, it is contemplated by Lessor that the American Oil Company will agree to terminate their Lease with the Lessor or allow the Lessee to take possession of the premises subject to the conditions and provisions of this Lease, and,

WHEREAS, the Lessee desires to lease said property for the construction of a car wash facility;

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties agree as follows:

I. PREMISES In consideration of the faithful performance of the covenants and considerations hereinafter agreed to by Lessor and Lessee, the Lessor does hereby lease and demise to the Lessee the following described premises situated in the City of Ogden, County of Weber, State of Utah, more particularly described as follows, to-wit:

Lots 25, 26, 27 and 28 in Block 42 NELSON PARK ADDITION to Ogden City, Weber County, Utah.

II. TERM. Subject to earlier termination by the operation of any forfeiture clause or other right reserved herein, the term of this Lease shall be for a period of twenty (20) years. Said Lease term to commence at the termination of the present Lease between the Lessor and American Oil Company or at such time as American Oil Company enters into an agreement with Lessor and Lessee allowing for the commencement of this Lease.

III. PAYMENT AND CHARGES. The monthly Lease payment for the first five (5) years of this Lease shall be an amount of Twelve Hundred Dollars, (\$1,200.00) per month. The monthly lease payment for the remaining fifteen (15) years shall be adjusted each two (2) years commencing on the sixth (6th) year and continuing each two (2) years thereafter, through the balance of the Lease term. The amount of the adjusted monthly lease payment shall be made based on the increase of the Consumer Price Index for the previous period. It being the intention of the parties that the monthly lease payment for the sixth (6th) year shall be increased by the percentage increase of the Consumer Price Index for the first five (5) year period. The adjustment for the monthly lease payment for year eight (8) and nine (9) shall be based on the percentage increase of the Consumer Price Index for the previous two (2) year period, and so on through the remaining years of the Lease. Notwithstanding the above, it is agreed between the parties that the amount of increase for any two (2) year period shall not exceed 35% for the sixth and seventh year or 14% for any subsequent two year period.

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It is further agreed between the parties that at no time during the term of this Lease shall the monthly lease payment decrease, whether or not the Consumer Price Index is negative.

Monthly lease payments shall be paid in advance and shall commence upon the effective date of this Lease.

Any payment which is not paid to the Lessor within ten (10) days after the due date shall bear interest at the rate of twelve percent (12%) per annum for the due date until said sum is paid in full.

The Lessee agrees to pay all real property taxes when due and all other assessments on the property during the entire term of this Lease.

IV. PROCEDURE FOR PAYMENT. The monthly lease payment shall be paid and delivered to the Lessor to Lessor's savings account in the MountainWest Savings and Loan Association, 2406 Washington Blvd., Ogden, Utah, savings account #01-028826-14 or at such other place as the Lessor may from time to time designate in writing.

V. INSURANCE. Concurrent with the effective day of this Lease, the Lessee shall obtain from a reliable insurance company authorized to do business in the State of Utah, and shall maintain in full force and effect during the term of this Lease a policy or policies of insurance for public liability on the premises in a sum not less than One Hundred Thousand Dollars, (\$100,000.00).

VI. USE OF PREMISES. The leased premises shall be

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used for the construction and operation of a car wash. The Lessee agrees to indemnify and save harmless Lessor and Lessor's property from all claims, mechanic liens, damages, demands, actions, costs and charges arising out of or by reason of the erection and construction of the improvements herein contemplated and the operation of the business herein authorized on the premises herein demised during the term of this Lease and any extensions thereafter.

VII. LESSEE'S ASSIGNMENT OR SUBLEASE. It is agreed between the Lessor and the Lessee that the Lessee may not assign this Lease or sublet the premises without the consent of the Lessor, which consent shall not be unreasonably withheld.

VIII. HOLDOVER. In the event Lessee shall hold over beyond the expiration of the term herein provided, it is expressly understood and agreed that any such holdover tenancy shall be a month to month tenancy only, and either Lessor or Lessee may terminate such tenancy at any time by giving the other party thirty (30) days written notice of its intention to do so.

IX. BANKRUPTCY. In the event of any default in the performance of any of the covenants on the Lessee's part to be kept or in the event of abandonment by the Lessee or the lawful holder of the Lease, shall be judicially declared insolvent, or if any petition is filed in or any proceeding commenced under the bankruptcy laws of the United States by said Lessee or the Lessee holder, or if a petition for

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reorganization be filed by the Lessee, or any execution be issued against it, or any of its effects, and the same be not vacated, satisfied, bonded or discharged, as the result of which the demised premises may be taken or if a receiver or trustee be appointed of its property by a Court of competent jurisdiction and said appointment is not contested, or if contested, said appointment has become final, or if Lessee shall make an assignment for the benefit of creditors or if the interest of Lessee shall be sold at a judicial sale, then in any of such event, it shall be lawful for the Lessor, and the Lessor is hereby given the right to terminate this Lease on ten (10) days written notice to that effect and at the end of such period the term hereby granted shall immediately cease, terminate and come to an end as fully as if the entire period herein provided had expired.

X. COSTS FOR DEFAULT. In the event either the Lessor or the Lessee commences legal action against the other claiming a breach or default of this Lease, the prevailing party in such litigation shall be entitled to recover from the other reasonable attorney's fees and all costs connected with said litigation.

XI. NOTICE. It is further understood and agreed that all notices given under this Lease shall be deemed to be properly served if delivered in writing personally, or sent by certified mail to Lessor or Lessee at his then current address.

XII. SUCCESSOR IN INTEREST. The terms, conditions

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and covenants of this Lease shall be binding upon and shall inure to the benefit of each of the parties hereto, their heirs, personal representatives, successor's sublessees or assigns, and shall run with the land; and where more than one party shall be Lessee under this Lease, the word "Lessee" whenever used in this Lease shall be deemed to include all parties of lessee jointly and severally.

XIII. RIGHT OF FIRST REFUSAL TO PURCHASE. The Lessee is hereby given the right of first refusal to purchase the Leased property together with the adjacent and adjoining property presently owned by the Lessor. The right of first refusal includes the entire parcel of property owned by the Lessor and does not include any smaller parcel including only the real property subject to this Lease. After the Lessor receives an offer to purchase the entire property as set out above, written notice of said offer shall be given to the Lessee and Lessee shall have fifteen (15) days from the date of the written notice to exercise its first right of refusal to purchase the property. Notwithstanding any provision contained herein, the Lessor may transfer the property to any of her children as part of their inheritance without being subject to this provision. Any such transfer shall bind said child to the provisions of this Lease including the right of first refusal.

XV. TIME. Time is of the essence of this Lease.

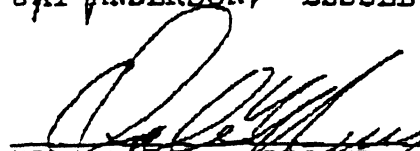
IN WITNESS WHEREOF, the parties hereto have caused this document to be duly executed, in triplicate, with all

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the formalities required by law on the respective date set forth above.


MYRTLE M. CROUCH, LESSOR


JAY ANDERSON, LESSEE


DALE MENSON, LESSEE

ASSIGNMENT OF LEASE AND CONSENT OF LESSOR

Agreement made September 18, 1989 between Jay Anderson and Dale Minson, City of Ogden, County of Weber, State of Utah, herein referred to as assignor, and Alan Shaw of City of Salt Lake, County of Salt Lake, State of Utah, herein referred to as assignee.

RECITALS

1. Assignor entered into a lease, as lessee therein, on June 26, 1985 with Myrtle Crouch, a single women, herein referred to as lessor.

2. Assignor desires to assign, and assignee desires to assume all of the right, duties, and liabilities of lessee thereunder.

In consideration of One Dollar (\$1.00), receipt of which is acknowledged by assignor, assignor assigns the lease to assignee effective September 19, 1989 for the balance of the lease term of 20 years provided in the lease. The lease commenced on June 26, 1985.

Assignee shall assume all rights and duties required of assignor under the lease including all payments required thereby and shall comply with all terms and conditions of the lease, and hold the Assignor harmless.

CONSENT OF LESSOR

Myrtle Crouch and/or her representative, lessor in the above-described lease, consents to assignment and transfer of the lease, including all terms and conditions thereof, to assignee.

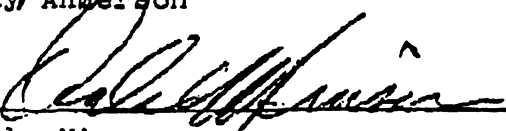
This Assignment does not release Jay Anderson or Dale Minson from the original Lease.

IN WITNESS WHEREOF, the parties have signed this Agreement this _____ day of September, 1989.

ASSIGNOR




Jay Anderson



Dale Minson

ASSIGNEE



Alan Shaw

LESSOR

Myrtle Crouch by her representative

AMENDED LEASE

The parties Myrtle M. Crouch, Lessor, and Alan Shaw, Assignee, hereby amend the June 26, 1985 lease as follows:

If Lessor decides to sell the corner lot, Alan Shaw shall have the first right to purchase said lot. The purchase price shall be the price Lessor places on the property.

The balance of the lease dated June 26, 1985, shall remain in full force and effect.

Dated this _____ day of April, 1990.


MYRTLE M. CROUCH, Lessor


ALAN SHAW, Assignee

ASSIGNMENT OF LEASE AND
CONSENT OF LESSOR

Agreement made February 15, 1991, between Alan Shaw, City of Ogden, County of Weber, State of Utah, herein referred to as assignor, and Michaeljohn Kudlik, City of Salt Lake, County of Salt Lake, State of Utah, herein referred to as assignee.

RECITALS

1. Assignor received an Assignment of Lease on September 18, 1985, of a lease dated June 26, 1985 in which Myrtle Crouch, a single woman, is the lessor (a copy of which the assignee has received).

2. Assignor desires to assign, and assignee desires to assume all of the right, duties, and liabilities of lessee thereunder. This Assignment shall not relieve the assignor of all of the right, duties, and liabilities of lessee should the assignee default in any of the terms of the lease.

In consideration of One Dollar (\$1.00), receipt of which is acknowledged by assignor, assignor assigns the lease to assignee effective February 16, 1991, for the balance of the lease term of 20 years provided in the lease. The lease commenced on June 26, 1985.

Assignee shall assume all rights and duties required of assignor under the lease including all payments required thereby and shall comply with all terms and conditions of the lease, and hold the assignor harmless.

CONSENT OF LESSOR

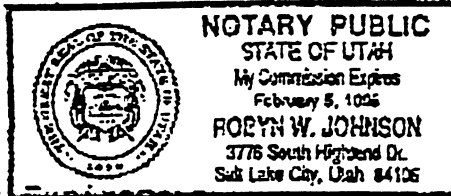
Myrtle Crouch and/or her representative, lessor in the above described lease, consents to assignment and transfer of the lease, including all terms and conditions thereof, to assignee.

IN WITNESS WHEREOF, the parties have signed this Agreement this 26th day of July, 1991.

ASSIGNOR

Alan Shaw
Alan Shaw

SUBSCRIBED and sworn to before me this 26th day of July, 1991.



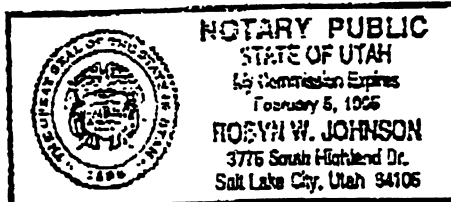
My Commission Expires:
020595

Roryn W. Johnson
NOTARY PUBLIC
Residing at Ogden, Utah

ASSIGNEE

Michael John Kudlik
Michael John Kudlik

SUBSCRIBED and sworn to before me this 26th day of July, 1991.



My Commission Expires:
020595

Roryn W. Johnson
NOTARY PUBLIC
Residing at Ogden, Utah

LESSOR

Myrtle Crouch
Myrtle Crouch by her representative

SUBSCRIBED and sworn to before me this _____ day of July, 1991.

My Commission Expires:

NOTARY PUBLIC
Residing at Ogden, Utah

Tab B

MEMORANDUM OF UNDERSTANDING

(Michaeljohn Kudlik)

THIS MEMORANDUM OF UNDERSTANDING ("Agreement") is made and entered into in Ogden, Utah, as of the 25th day of January, 1993, by and between Living Scriptures, Inc., a Utah corporation with a place of business at 4646 South 1500 West, Ogden, Utah 84405 ("LSI"); and Michaeljohn Kudlik, an individual and doing business as California Suds with a place of business at 4700 South 900 East, Suite 30-165, Salt Lake City, Utah 84117 ("Kudlik").

Background

On or about June 26, 1985, Myrtle M. Crouch, as lessor, and Jay Anderson and Dale Minson, as lessees, entered into a Lease agreement (the "Lease") with respect to certain real property located at 3685 Harrison Boulevard in Ogden, Utah (the "Property") for purposes of lessees constructing and operating a car wash facility. LSI has recently purchased the Property and is the assignee of all of lessor's rights under the Lease. Kudlik is the assignee of lessees' rights and obligations under the Lease; prior lessees have not been relieved of their obligations under the Lease. In conjunction with LSI's purchase of the Property, Kudlik and others waived the first right of refusal to purchase the Property and adjoining property. Under the terms of the Lease, Kudlik is obligated to pay all real property taxes and assessments on the Property during the term of the Lease. LSI has paid the 1991 and 1992 real property taxes, and associated penalties and interest, in the total sum of \$8,426.94, and has incurred attorneys' fees. LSI has demanded payment of such amounts from Kudlik.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and covenants herein set forth and for other good and valuable consideration, the receipt, adequacy and legal sufficiency of which are hereby acknowledged, the parties mutually agree as follows:

1. **Payment by Kudlik.** Kudlik shall pay to LSI the full amount of Eight Thousand Four Hundred Twenty-Six and 94/100 Dollars (\$8,426.94) as follows:

a. Two Thousand Eight Hundred Eight and 98/100 Dollars (\$2,808.98) on or before February 1, 1993; and

b. Two Thousand Eight Hundred Eight and 98/100 Dollars (\$2,808.98) on or before March 1, 1993; and

c. Two Thousand Eight Hundred Eight and 98/100 Dollars (\$2,808.98) on or before April 1, 1993.

All payments shall be made to LSI at the following address: P.O. Box 9576, Ogden, Utah 84409. Payments hereunder shall be deemed made by Kudlik when actually received by LSI. Any payment hereunder or under the Lease which is not received by LSI on or before its due date shall not be timely made and shall constitute a breach.

In the event that Kudlik fails to timely make any payment in full as due under this Agreement, LSI may make and declare, without any notice to Kudlik, the entire principal hereof and all other charges hereunder, whether or not then due, to be immediately due and payable forthwith and interest shall accrue

on the then entire outstanding principal amount hereof and all amounts due under the Lease at the rate of eighteen percent (18%) per annum from the date hereof until paid in full, both before and after judgment. Kudlik hereby expressly waives any defense, offset, recoupment, reduction and/or counterclaim and any right of defense, offset, recoupment, reduction and/or counterclaim for or on account of any reason or event whatsoever to any liability of Kudlik under this Agreement and/or the Lease.

2. Lease Payments. Kudlik is also delinquent with respect to the January 1993 Lease payment. Kudlik shall pay to LSI the full amount of the January 1993 Lease payment of One Thousand Four Hundred Twenty-Eight and No/100 Dollars (\$1,428.00) on or before February 1, 1993. Kudlik shall also pay to LSI the full amount of the February 1993 Lease payment of One Thousand Four Hundred Twenty-Eight and No/100 Dollars (\$1,428.00) on or before February 10, 1993. Kudlik shall make all other payments which are or become owed under the Lease in full and on time.

3. Event of Default. In the event that Kudlik fails to timely make any payment in full as due under this Agreement or the Lease or is otherwise in breach or default under the Lease, LSI may, without any notice to Kudlik and in addition to any other rights and remedies available to LSI under this Agreement, under the Lease, in equity or at law, immediately terminate the Lease and all of Kudlik's and his predecessors' rights thereunder. Any such termination shall be effective upon a declaration by LSI to that effect or upon LSI's sending to Kudlik a notice to that effect.

4. Miscellaneous.

a. Entire Agreement. This Agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes all negotiations, representations, prior discussions and preliminary agreements between the parties hereto relating to the subject matter of this Agreement. This Agreement shall be interpreted and construed as if drafted and prepared by all parties hereto.

b. Governing Law. This Agreement shall be deemed to have been executed in the State of Utah, and shall be interpreted, construed and enforced in accordance with and governed by the laws of the State of Utah, without giving effect to any conflict of laws provisions, and each party hereby submits to the exclusive personal jurisdiction of the courts situate in Ogden, Utah, with respect to any and all claims, demands or causes of action asserted or filed by any party against any other party relating to, or arising out of, the subject matter of this Agreement.

c. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their heirs, executors, administrators, successors, legal representatives and assigns; provided, however, that Kudlik may not assign any of his rights or obligations hereunder or under the Lease without LSI's prior written consent.

d. Waiver. Any waiver by any party hereto of any breach of any kind or character whatsoever by any other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of, or consent to, any subsequent breach of this Agreement on the part of the other party.

e. Severance Clause. The provisions of this Agreement are severable and should any

provision be void, voidable or unenforceable under any applicable law, such void, voidable or unenforceable provision shall not affect or invalidate any other provision of this Agreement, which shall continue to govern the relative rights and duties of the parties as though the void, voidable or unenforceable provision were not a part hereof. In addition, it is the intention and agreement of the parties that all of the terms and conditions hereof be enforced to the fullest extent permitted by law.

f. **Survival.** All warranties, representations, indemnities, covenants and other agreements of the parties hereto shall survive the execution, delivery and termination of this Agreement.

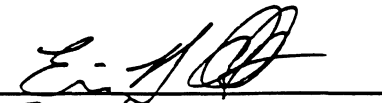
g. **Attorneys Fees.** If a legal action or other proceeding is brought for enforcement of this Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys fee (in-house or otherwise) and costs and expenses incurred, both before and after judgment, in addition to any other relief to which they may be entitled.


h. **Acknowledgement.** Kudlik specifically represents and warrants to LSI that the statements set forth in the Background above are true and correct; Kudlik has had the opportunity to consult with independent legal counsel with respect to the advisability of executing this Agreement; and, in executing this Agreement, Kudlik does not rely on any inducements, promises or representations of LSI or any agent of LSI other than the terms and conditions specifically set forth in this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first set forth above.

Living Scriptures, Inc.,
a Utah Corporation

By:
Its:


Secretary


Michael John Kudlik, individually
and doing business as California Suds