

1994

Living Scriptures INC v. Michael John Kudlik : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO. 940200 CA

IN THE UTAH COURT OF APPEALS

LIVING SCRIPTURES, INC., a
Utah corporation,

Plaintiff/Appellee,

vs.

MICHAEL JOHN KUDLIK,
individually and doing
business as CALIFORNIA
SUDS,

Defendant/Appellant.

BRIEF OF APPELLANT

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

APR 25 1994

IN THE UTAH COURT OF APPEALS

LIVING SCRIPTURES, INC., a)	
Utah corporation,)	BRIEF OF APPELLANT
)	
Plaintiff/Appellee,)	
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vs.)	
)	Case No. 940200-CA
MICHAEL JOHN KUDLIK,)	(Priority No. 15)
individually and doing)	
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IN THE UTAH COURT OF APPEALS

LIVING SCRIPTURES, INC., a)	
Utah corporation,)	BRIEF OF APPELLANT
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	Case No. 940200-CA
MICHAEL JOHN KUDLIK,)	(Priority No. 16)
individually and doing)	
business as CALIFORNIA)	
SUDS,)	
)	
Defendant/Appellant.)	

I.

JURISDICTIONAL STATEMENT

This appeal is from an Order of Restitution and Final Judgment (a copy of which is attached hereto as Appendix A), entered by the Honorable W. Brent West of the Second Judicial District Court of Weber County, Utah. The Utah Supreme Court had jurisdiction over this appeal pursuant to Utah Code Ann. §78-2-2(3)(j). The Supreme Court, acting pursuant to Rule 42, Utah Rules of Appellate

Procedure, transferred this appeal to this Court by order dated April 4, 1994.

II.

ISSUE PRESENTED FOR REVIEW
AND STANDARD OF APPELLATE REVIEW

The issue presented for review is as follows:

1. Did the trial court err in concluding that a lessor's repeated acceptance without objection of its lessee's chronically late rent payments did not constitute a waiver or estoppel of the lessor's right to insist on strict compliance with the payment terms of the parties' commercial lease agreement?

Because this case was adjudicated on the basis of proffers of stipulated fact, the issue presented on appeal is a question of law on which this court will not defer to the trial court, but will review the trial court's determination for correctness. Pratt By and Through Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1171 (Utah 1991); Avila v. Winn, 794 P.2d 20, 22 (Utah 1990).

III.

DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances or rules whose interpretation is believed to be determinative of the issue on appeal.

IV.

STATEMENT OF THE CASE

A. Nature of the Case.

Appellee Living Scriptures, Inc. ("Lessor") instituted this action to recover unpaid rent, treble damages and attorney's fees for unlawful detainer, and to terminate the interest of its lessee, appellant Michael John Kudlik ("Lessee") in a Lease Agreement dated June 26, 1985 ("Lease Agreement") and an accompanying Memorandum of Understanding dated January 25, 1993 ("Memorandum"). (R. 1-26.)¹ The Lessee acknowledged that he was delinquent in the payment of rent, but asserted as an affirmative defense that the Lessor had waived or was estopped from asserting strict performance of the rent payment schedule set forth in the Lease Agreement and the Memorandum. (R. 46.)

B. Course of Proceedings and Disposition in Trial Court.

At an evidentiary hearing at which the parties' counsel presented proffered stipulations of fact, the Lessee asserted that the Lessor had routinely and periodically accepted without objection the Lessee's historically delinquent rent payments and that the Lessor either had failed to provide, or failed to abide by, an unequivocal advance notice of its intent to insist upon

¹ An accurate copy of the Lease Agreement and the Memorandum is attached hereto as Appendix B and Appendix C, respectively.

strict compliance with the rent payment schedule specified by the Lease Agreement and the Memorandum. (Tr. of September 20, 1993 Hearing at 13-22, 29-31.) The trial court, however, held that even though the Lessor had tolerated ". . . a pattern of payments that were not being made" (Tr. at 32), the Lessor did not waive its right to require strict performance in the payment of rent. (Tr. at 33.)²

The court accordingly entered judgment against the Lessee for unpaid and trebled rent in the amount of \$6,283.20 and attorney's fees and costs in the amount of \$6,083.60. (R. 98.) The court further evicted the Lessee from, and restored the Lessor to possession of, the property ("Property") covered by the Lease Agreement and terminated the Lessee's interest in the Lease Agreement. This relief was embodied in the court's Order of Restitution dated September 20, 1993 and Final Judgment dated September 21, 1993. (R. 81-82, 97-99.) The Lessee filed its Notice of Appeal on September 28, 1993.

C. Statement of Facts.

In 1990, the Lessee purchased a car wash facility ("Facility") located on the Property at 3685 Harrison Boulevard in Ogden, Utah. (Tr. of September 8, 1993 Hearing at 4.) At the time he purchased

² An accurate copy of the court's Findings of Fact and Conclusions of Law reflecting this and other issues in the case is attached hereto as Appendix D.

the Facility, the Lessee assumed the obligations owing under the Lease Agreement, made a down payment of \$75,000 to purchase the Facility and expended approximately \$100,000 to improve the Property. Id. The Lease Agreement required the Lessee to pay rent of \$1,428 per month by the first day of each month. (Lease Agreement, ¶13.)

After the Lessee became delinquent in the payment of property taxes for the years 1991 and 1992 and the payment of rent for January 1993, the parties entered into the Memorandum, under which the Lessee agreed to pay the January 1993 rent no later than February 1, 1993, and the February 1993 rent no later than February 10, 1993. (Memorandum, ¶12.) The Lessee timely made these payments. The Lessor's rent payment ledger, see Trial Exh. 6, a copy of which is attached hereto as Appendix E, indicates that the Lessee subsequently paid and the Lessor accepted the next four months' rent as follows:

<u>Month of Required Rent</u>	<u>Date Due Under Lease</u>	<u>Date Actually Paid</u>	<u>No. Days Delinquent</u>
March 1993	March 1, 1993	March 23, 1993	23
April 1993	April 1, 1993	May 26, 1993	56
May 1993	May 1, 1993	June 29, 1993	60
June 1993	June 1, 1993	August 19, 1993	80

Thus, for the four-month period ending August 31, 1993, the Lessee was an average of 55 days late in the payment of required rent.

There is no evidence that the Lessor ever objected to this erratic four-month payment pattern at any time before August 2, 1993.

On August 2, 1993, the Lessor's lawyer called the Lessee to demand payment of the then-delinquent June and July rent and \$200 in attorney's fees. (Tr. of September 20, 1993 Hearing at 5, 6.) The Lessor's lawyer repeated that demand the following day. Id. at 6. In doing so, the Lessor's lawyer demanded that the Lessee ". . . bring things current immediately." Id.³ The Lessee, however, did not pay "immediately." Rather, 16 days later, on August 19, 1993, the Lessee made only the delinquent June rent payment, rather than the two months of delinquent rent demanded on August 2 and August 3, 1993. (Trial Exh. 6, Appendix E hereto.) The Lessor accepted the partial payment, even though it was not enough to bring the Lease Agreement "current" and even though it was not paid "immediately." Id.

The day after it accepted the partial payment, the Lessor prepared and caused to be served a three-day notice to quit ("Three-Day Notice"). When the Lessee failed to comply with the

³ The court's factual finding on this issue is embodied in paragraph 6 of its Findings of Fact. (See Appendix D at 3.) The Lessee does not challenge this Finding. The Lessee does, however, challenge paragraph 16 in which the court purports to make a factual "finding" that this notice was "reasonable" advance notice of the Lessor's insistence on strict performance. Although denominated a "finding of fact," this "finding" actually is a legal conclusion.

Three-Day Notice, the Lessor filed its complaint in this case. Two weeks later, on September 7, 1993, the Lessee tendered, and the Lessor accepted, a check for \$2,856.00 for the two months (July and August) of delinquent rent claimed in the Complaint. (Tr. of September 8, 1993 Hearing at 5, 6.)⁴

Despite the Lessee's assertion that Utah law did not permit the Lessor to insist upon strict compliance with the payment schedule in the Lease Agreement without providing and honoring an unequivocal notice that tardy performance would not be tolerated, the trial court entered judgment against the Lessee for unpaid rent, treble damages, attorney's fees, and forfeiture of the Lease Agreement. (R. 97-99.)

V.

SUMMARY OF ARGUMENT

Where 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 a reasonable notice that it will insist upon strict performance. If the

⁴ After being informed by the Lessee's legal counsel that the Lessor's acceptance of these two delinquent payments constituted a waiver of its right to terminate the Lease Agreement (Tr. of September 8, 1993 Hearing at 16), the Lessor returned the rent check to the Lessee and instructed its lease payment agent to delete from its records any indication that the lease payments had been accepted. (Trial Exh. 6, Appendix E hereto.)

landlord fails to provide and conform to such notice, the landlord waives or is estopped from asserting its right to insist upon strict performance of the lease agreement.

In this case, the Lessor's repeated four-month acceptance without objection of the Lessee's delinquent rent payments, the Lessor's acceptance of a partial, delinquent rent payment after notifying the Lessee that full payment was required "immediately," and the Lessor's initial acceptance of rent after it filed its Complaint to evict the Lessee from the Property, constitutes a waiver of the Lessor's right to hold the Lessee to strict performance of the Lease Agreement. Under these circumstances, the trial court erred in entering judgment against the Lessee for unpaid rent, treble damages, attorney's fees, and forfeiture of the Lease Agreement.

VI.

ARGUMENT

- A. THE LESSOR'S REPEATED ACCEPTANCE OF DELINQUENT RENT, WITHOUT PROTEST, CONSTITUTES A WAIVER OR ESTOPPEL OF ITS CONTRACTUAL RIGHT TO DECLARE AN IMMEDIATE DEFAULT BASED ON THE LESSEE'S FAILURE TO CONFORM TO THE RENT PAYMENT SCHEDULE IN THE LEASE AGREEMENT.

It is settled law 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 that specified in the lease is acceptable." Restatement of Property

(Second), §12.1, comment c (1977). Accord, 2 Powell on Real Property, §228[3](i) (1990) ("A landlord may waive his right to insist upon prompt payment of rent, usually by accepting late payments, without protest, over one or more payment periods."); 49 AmJur 2d, Landlord & Tenant, §1065 (1990) ("Thus if a lessor by his continuous course of conduct has led the lessee to believe that prompt payment will not be insisted upon, he will not be permitted without notice of his intention to do so to enforce a forfeiture for failure to make prompt payment, for the lessor should not be permitted to entrap the tenant.")

The Utah Supreme Court has long recognized that a creditor who has induced its debtor to believe that strict performance will not be required, must provide the debtor with reasonable, advance notice before it can insist on strict performance. In Pacific Development Co. v. Stewart, 195 P.2d 748, 750 (Utah 1948), the court stated:

There is no question that the acceptance by the seller of buyers' past due payments and its other conduct toward the buyers leading the latter to believe that strict performance would not be required by the seller, imposes upon the seller the duty of giving to the buyer a reasonable notice before it may insist on strict performance by the buyers.

In other words, a "seller who waives strict compliance with [a contract's] payment schedule . . . must give notice and a reasonable time to perform before thereafter strictly enforcing the

time requirement." Adair v. Bracken, 745 P.2d 849, 853 (Utah App. 1987) (summarizing Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980)).

The rationale for this principle is salutary:

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.

Pacific Development Co. v. Stewart, 195 P.2d at 750 (quoting Brown v. Chowchilla Land Co., 210 P. 424, 427 (Cal. 1922) (emphasis in original)).

Where the creditor has accepted late payments and has made contradictory demands this ". . . would leave some doubt in the [debtor's] minds as to what the [creditor] expected and lead the [debtor] to believe that strict compliance with the contract is not required, estop[ping] [the creditor] from effecting a forfeiture of the debtor's interest." Grow v. Marwick Development, Inc., 621 P.2d 1249, 1252 (Utah 1980). Thus, "definite notice that [the debtor] must pay up, or forfeit the payments he had made and his rights under the contract," is required as a matter of fundamental "fairness." Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981). The right of the debtor to receive a notice specifying that it has a reasonable time in which to cure its default is necessary because

"without this notice the defaulting [debtor] would not know what to do." Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah 1976).⁵

In the final analysis, "a landlord seeking enforcement of a forfeiture must take care not to do anything which may be deemed an acknowledgement of a continuation of the tenancy. Any act done by a landlord knowing of a cause for forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture." Woodland Theaters, Inc. v. ABC Intermountain Theaters, Inc., 560 P.2d 700, 702 (Utah 1977) (quoting 3A Thompson on Real Property §1328 (1989)). Thus, a lessor's post-default acceptance of rent constitutes a waiver of the lessor's right to forfeit the lease. Woodland Theaters, 560 P.2d at 702; Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983); Minshew v. Chevron Oil Co., 575 P.2d 192, 194 (Utah 1978).

⁵ This is consistent with Bentley v. Potter, 694 P.2d 617, 620 (Utah 1984):

"When a lease provides that if a party to the lease is in default and the other party may terminate the lease after giving notice of the default, the notice must plainly indicate the nature of the default or breach and give reasonable notice that failure to cure the default within the time allowed may lead to termination."

Utah courts have also recognized that because ". . . forfeiture is a harsh remedy, clarity must be required before any notice will work such a result." Dang v. Cox Corp., 655 P.2d 658, 662 (Utah 1982). Accord, Russell v. Park City Corp., 506 P.2d 1274, 1276 (Utah 1973).

In this case, the Lessee undeniably was contractually required to make rent payments "in full and on time," by the first of each month. (Memorandum, ¶2.) Rather than strictly holding the Lessee to that obligation, however, the Lessor routinely accepted without objection delinquent rent payments. Indeed, during the four-month period immediately preceding the filing of its complaint, the Lessor accepted payments that were an average of 55 days past due and which were becoming increasingly delinquent with each passing month.

In early August 1993, the Lessor demanded that the Lessee ". . . bring things current immediately." (Tr. of September 20, 1993 Hearing at 5, 6.) The Lessor repeated this demand the following day, asserting that if full payment was not made, the Lessor would "begin [the] eviction process." (Tr. of September 20, 1993 Hearing at 6.) However, rather than enforcing its demand to require immediate strict performance, the Lessor did what it had repeatedly done during the preceding months: It accepted the Lessee's June rent payment on August 19, 1993. One day after doing so, however, it filed its Complaint. Eighteen days later, on September 7, 1993, it accepted (but subsequently "unaccepted")⁶ the

⁶ Although the Lessor purported to revoke its acceptance of this payment the day after it was made, it did so only after being advised by the Lessee's lawyer that its acceptance constituted a waiver of the Lessor's claims for back rent, treble damages and restitution. (Tr. of September 8, 1993 Hearing at 16.)


Lessee's payment of the then-delinquent July and August rent installments. Therefore, because of its refusal to accept the then-delinquent July and August rent payments in the amount of \$2,856, the Lessor obtained a judgment against the Lessee for unpaid and trebled rent of \$6,283.20, attorney's fees and costs of \$6,083.60, and an order extinguishing the Lease Agreement--and with it, the Lessor's substantial invested equity in the car wash Facility that it had operated on the Property.

CONCLUSION

The trial court erred in ruling that the Lessor did not waive, or was not estopped from asserting, its right to require strict performance in the Lessee's payment of rent. The court's Order of Restitution and Final Judgment should be vacated and judgment of no cause of action should be entered on the Lessor's Complaint.

Respectfully submitted this 25 day of April, 1994.

ANDERSON & KARRENERG

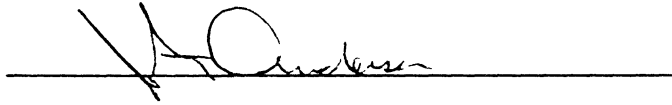


John T. Anderson
Attorneys for Appellant

CERTIFICATE OF SERVICE

On this 25 day of April, 1994, I hereby caused to be mailed via U.S. first-class mail, postage prepaid, four true and correct copies of the foregoing BRIEF OF APPELLANT to the following:

Scott F. Young, Esq.
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147

A handwritten signature, likely of Scott F. Young, is written over a horizontal line. The signature is cursive and stylized, with a large 'S' and 'Y'.

APPENDIX A

75 JUL 8 55

Scott F. Young, Esq. (A3890)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

LIVING SCRIPTURES, INC., a)	
Utah corporation,)	
)	
Plaintiff,)	ORDER OF RESTITUTION
)	
vs.)	
)	
MICHAELJOHN KUDLIK,)	
individually and doing)	
business as CALIFORNIA SUDS,)	Civil No.: 930900377EV
)	
Defendant.)	Honorable W. Brent West

THE STATE OF UTAH

To the Sheriff or Constable of Weber County, State of Utah,
greetings:

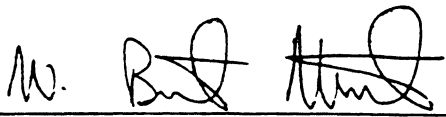
WHEREAS, on September 2 and 4, 1993, Plaintiff served upon Defendant a Notice of Filing of Possession Bond and of Remedies Available to Defendant and Defendant has not elected and complied with the remedies under Utah Code Ann. §78-36-8.5, Plaintiff is entitled to possession of the premises located at 3685 Harrison Boulevard, Ogden, Utah ("Premises").

THESE ARE, THEREFORE, to command you immediately to

evict, remove and prevent MichaelJohn Kudlik, individually and doing business as California Suds, and anyone claiming by, through or under him from the Premises, and to restore possession thereof to Plaintiff Living Scriptures, Inc. and this shall be your sufficient warrant for so doing. You are to make due return of this Writ to the above-entitled Court with your doings in the Premises hereon endorsed within two months of the date of your receipt hereof.

DATED this 26th day of September, 1993.

BY THE COURT:

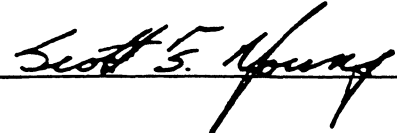


Honorable W. Brent West
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of September, 1993, I caused a true and correct copy of the foregoing ORDER OF RESTITUTION to be served by hand delivery on the following:

John T. Anderson, Esq.
Parsons, Behle & Latimer
Attorneys for Defendant
201 South Main Street
Suite 1800
Salt Lake City, Utah 84111



APPENDIX 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

EXHIBIT

B

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.

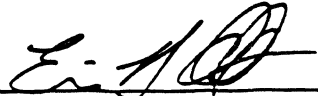
f. **Survival.** All warranties, representations, indemnities, covenants and other agreements of the parties hereto shall survive the execution, delivery and termination of this Agreement.


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


Michaeljohn Kudlik, individually
and doing business as California Suds

APPENDIX C

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.

Page 3.

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

Page 4.

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

Page 5.

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

Page 6.

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.

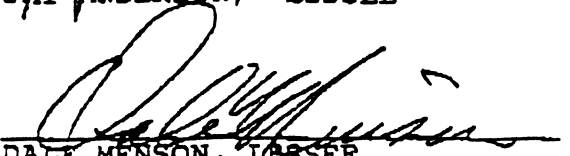
IN WITNESS WHEREOF, the parties hereto have caused this document to be duly executed, in triplicate, with all

Page 7.

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.

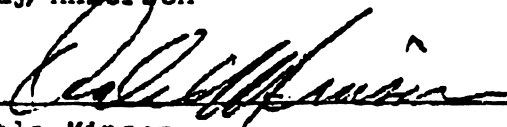
This Assignment does not release Jay Anderson or Dale Minson from the original Lease.

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

ASSIGNOR

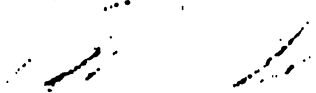


Jay Anderson



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, 1989, 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

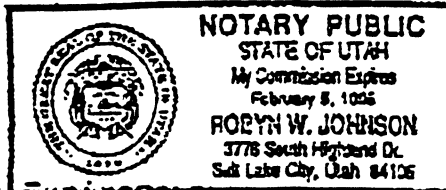
Myrtle Crouch and/or her representative, lessor in the above described lease, consents to assignment and transfer of the lease, including all terms and conditions thereof, to assignee.

IN WITNESS WHEREOF, the parties have signed this Agreement this 20th day of July, 1991.

ASSIGNOR

[Signature]
Alan Shaw

SUBSCRIBED and sworn to before me this 20th day of July, 1991.



[Signature]
NOTARY PUBLIC
Residing at Ogden, Utah

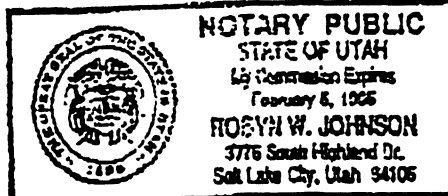
My Commission Expires:

020595

ASSIGNEE

[Signature]
Michael John Kudlik

SUBSCRIBED and sworn to before me this 20th day of July, 1991.



[Signature]
NOTARY PUBLIC
Residing at Ogden, Utah

My Commission Expires:

020595

LESSOR

[Signature]
Myrtle Crouch by her representative

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

NOTARY PUBLIC
Residing at Ogden, Utah

My Commission Expires:

APPENDIX D

Scott F. Young, Esq. (A3890)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

LIVING SCRIPTURES, INC., a)	
Utah corporation,)	
)	
Plaintiff,)	FINDINGS OF FACT AND CONCLUSIONS
)	OF LAW
vs.)	
)	
MICHAELJOHN KUDLIK,)	
individually and doing)	
business as CALIFORNIA SUDS,)	Civil No.: 930900377EV
)	
Defendant.)	Honorable W. Brent West

A hearing was held on Monday, September 20, 1993 before the Honorable W. Brent West, District Court Judge, in accordance with the Order Regarding Restitution entered by this Court on September 13, 1993. Plaintiff was present and represented by its counsel of record, Scott F. Young, Esq. Defendant was represented by his counsel of record, John T. Anderson, Esq.

After having reviewed the pleadings on file in this matter, having considered the testimony and the arguments of counsel for both parties, being fully advised in the premises, and good cause appearing therefor, the Court hereby enters the

following Findings of Fact:

FINDINGS OF FACT

1. On or about June 26, 1985, Myrtle M. Crouch, as landlord, and Jay Anderson and Dale Minson, as tenants, entered into a certain Lease agreement ("Lease") concerning the building and property located 3685 Harrison Boulevard, Ogden, Utah ("Premises"). A copy of the Lease is attached to Plaintiff's Complaint as Exhibit "A".

2. All right, title and interest of Myrtle M. Crouch under the Lease and in and to the Premises was transferred and assigned to Plaintiff. Plaintiff is the owner of the Premises.

3. Defendant is the assignee of the interests of Jay Anderson and Dale Minson as tenants under the Lease. Defendant is obligated to make all payments to Plaintiff that were to be made by tenant under the Lease, including all rents during the term of the Lease. Defendant is also obligated to perform all of tenant's other covenants and obligations under the Lease.

4. The current monthly rent under the Lease is \$1,428.00.

5. Plaintiff and Defendant entered into a Memorandum of Understanding dated as of January 25, 1993 ("Memorandum") pursuant to which, among other things, Defendant agreed to cure existing defaults and to make timely payments thereafter. A copy of the

Memorandum is attached as Exhibit "B" to Plaintiff's Complaint.

6. On August 2 and 3, 1993, Plaintiff informed Defendant that Plaintiff would pursue its eviction remedies if Defendant did not cure existing delinquencies immediately and if Defendant did not thereafter make payments timely.

7. As of August 20, 1993, Defendant owed to Plaintiff past due rent under the Lease in the sum of not less than \$2,856.00. Said amount is delinquent and remains unpaid at this time.

8. Pursuant to and in full compliance with Utah Code Ann. §§78-36-3 & -6, on August 20, 1993, Defendant was served with a Notice to Quit by certified mail to the addresses designated therein; and, on August 23, 1993, Defendant was served with another Notice to Quit by Hand Delivery and mail to the addresses specified therein. Copies of such Notices to Quit are attached to Plaintiff's Complaint as Exhibit "C" and "D", respectively.

9. Defendant has wholly failed, refused and neglected to pay the amounts due or to vacate and quit the Premises and is and has been since August 27, 1993, in unlawful detainer thereof.

10. Plaintiff is entitled to possession of the Premises and Defendant should be required to immediately quit said Premises.

11. On September 2, 1993, this Court entered an Order Regarding Possession Bond.

12. On September 2 and 4, 1993, Defendant was served with a Notice of Filing of Possession Bond and of Remedies Available to Defendant in accordance with Utah Code Ann. §78-36-8.5.

13. Defendant requested a hearing within three (3) days after he was served with the Notice of Filing of Possession Bond and of Remedies Available to Defendant.

14. Pursuant to Defendant's request, a hearing was held before this Court on September 8, 1993. Pursuant to that hearing, this Court entered an Order Regarding Restitution on September 13, 1993.

15. Defendant failed to comply with the conditions set forth in this Court's Order Regarding Restitution.

16. Plaintiff gave Defendant reasonable notice before insisting on strict performance by Defendant.

17. Plaintiff is entitled to a judgment forfeiting the Lease and to recover from Defendant past due rent, treble damages, attorneys' fees, and an interest charge on all amounts due and owing under the terms of the Lease at the rate of 18% per annum.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. Plaintiff has fully complied with the procedures

under Utah Code Ann. §73-36-3, -6 & -8.5 and is entitled to immediate possession of the Premises.

2. Plaintiff did not waive or relinquish any rights to pursue the eviction of Defendant.

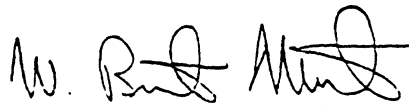
3. Defendant is and has been in unlawful detainer of the Premises since August 27, 1993 and Plaintiff is entitled to judgment forfeiting the Lease and judgment of damages for unlawful detainer in an amount equal to three times the amount of rent due for the period of time following August 27, 1993, during which the Defendant remained in possession and refused to vacate the Premises, such amount being \$3,427.20, as of September 20, 1993. Plaintiff is also entitled to judgment against Defendant for unpaid rent in the amount of \$2,856.00.

4. Plaintiff is also entitled to recover from Defendant Plaintiff's attorneys' fees incurred herein and in collecting any judgment. Such fees to be presently awarded for the period of July 28, 1993 through September 16, 1993, amount to \$5,606.00. Plaintiff is also entitled to an award of costs in the amount of \$477.60.

5. Plaintiff is also entitled to interest on all amounts due and owing under the terms of the Lease at the rate of 18% per annum.

MADE AND ENTERED this 21st day of September, 1993.

BY THE COURT:

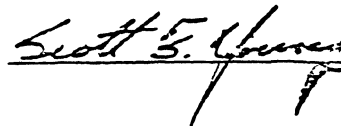


Honorable W. Brent West
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of September, 1993, I caused a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be served by hand delivery on the following:

John T. Anderson, Esq.
Parsons, Behle & Latimer
Attorneys for Defendant
201 South Main Street
Suite 1800
Salt Lake City, Utah 84111



APPENDIX F

627.2000
 BUYER California Trust SELLER 1117 Scripture ACCOUNT NO ES6852
4700 W 900 E #30-165 PO Box 9576 SET UP DATE Jan
SLC, UTAH 84117 Ogden, UTAH 84409 ANNUAL FEE 225
 SS# _____ PAID BY Seller

PAYMENT \$ 1428.00 DATE DUE 1 SPECIAL INSTRUCTIONS _____
 RESERVES _____ LATE DATE 10 days _____
 INTEREST RATE _____ LATE FEE 0 _____
 DISBURSEMENTS _____

1) Valley Bank 2) LEASE 3) _____
4079 Riverdale Rd _____
Riverdale, UT 84403 _____
 ACCOUNT NO 1346-3784 ACCOUNT NO _____ ACCOUNT NO _____
 AMOUNT \$ 1420.75 AMOUNT \$ _____ AMOUNT \$ _____
 4) Esc Spec 5) _____ 6) _____

ACCOUNT NO AF ACCOUNT NO _____ ACCOUNT NO _____
 AMOUNT \$ 225 AMOUNT \$ _____ AMOUNT \$ _____

	DATE	PAYMENT	RESERVE BALANCE		DATE	PAYMENT	RESERVE BALANCE	
3								
an	2-1-93	1428.00	✓	1450 AF pd				
b	2-10-93	1428.00	✓	pd direct				
21	3-23-93	1428.00	✓	pd direct				
ad	5-26-93	1428.00	✓				527	
up	6-29-93	1428.00	✓				629	
un	8-19-93	1428.00	✓				819	
dy	9-7-93	1428.00	✓				908	
ry	9-7-93	1428.00	✓				908	

RECEIVED JAN 1 1993
* Backed OFF both parts Seller refused parts - Took Buyers
OK to turn over to his attorney. Seller reimbursed Esc
Spec for July part Sent to Valley, Sellers OK #1135 \$1420.75

PROPERTY ADDRESS _____ YEARLY INTEREST \$ _____
 PROPERTY TAX ID # _____ \$ _____