1986

First Security Financial v. Okland LTD : Brief of Appellant

Utah Supreme Court

Kyle W. Jones; Attorney for Respondent.
John Michael Coombs, Leonard W. Burningham; Attorneys for Appellant.

IN THE SUPREME COURT OF THE

DOCKET NO. 860314-CA STATE OF UTAH

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff-Respondent, v. OKLAND LTD., INC., and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT CO., a Utah corporation, Defendant-Appellant.	APPELLANT'S BRIEF 860314-CA
OKLAND LTD., INC., Third-Party Plaintiff, v. DOUG BRADSHAW, ROBERT M. SIMONSEN, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership, and JOHN DOES 1 - 5, Third-Party Defendants.	Case No. 21032 Priority #136.

Appeal from a Summary Judgment in the Third Judicial District Court in and for Salt Lake County, State of Utah the Honorable Judith M. Billings, Judge Presiding (District Court No. C84-2941)

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TABLE OF CONTENTS

LIST OF AUTORITIES

CASES CITED

STATUTES

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether there are sufficient disputed material facts to warrant reversal of the Summary Judgment entered against

Defendant-Appellant Okland Ltd., Inc. (hereinafter "Okland" or "Appellant") and in favor of Plaintiff-Respondent, First Security Financial (hereinafter "First Security" or "Respondent"), including but not limited to the following:

(a) no proof of damages;

(b) no reasonable relationship between the alleged default of Okland and the damages awarded; and

(c) no proof that Respondent has any interest in the matters complained of in its Complaint.

2. Whether the Summary Judgment is supported by the written Equipment Lease Agreement as a matter of law (hereinafter "Lease" [R. 3-6; A. 3-6]), and if so, whether the Lease should be declared void as a penalty.

STATEMENT OF CASE

This appeal is taken from the final Summary Judgment entered by the Honorable Judith M. Billings in the Third Judicial District Court against Okland and in favor of Respondent (Summary Judgment, R. 257-58; A. 30-33).

The action involved the alleged breach or default of an Equipment Lease Agreement ("Lease" [R. 3-6; A. 3-6]) covering certain furniture and equipment purchased by Murray First Thrift

Leasing (hereinafter "MFT" [Respondent's alleged predecessor]) and a "leaseback" to co-Defendants Okland and Bradshaw-Ferrin Development Company (the latter, hereinafter "Defendant Bradshaw"), on September 30, 1981, for the exclusive use in the pre-offer and sale of condominium units at the then-to-be-built Wilshire Project ("Wilshire Condominiums") located at 10th East and 4th South Streets in Salt Lake City, Utah. Summary Judgment was entered against Defendant Bradshaw for his default on the Lease on June 4, 1985, at which time Respondent calculated the accelerated balance on the Lease at $26,423.95 (R. 123-25).

On October 15, 1985, Summary Judgment against Okland was formally entered by the lower court from which this appeal is taken. Such appeal involves Okland and Respondent exclusively, and as a result, third parties not affected by this Summary Judgment have stipulated to its finality for purposes of appeal.

After considering arguments by the respective counsel for Respondent and Okland, and based on a review of the pleadings and record, the lower court found as a matter of law, that (1) there were no factual issues concerning the nature of the subject contract and the damages awarded; (2) the Respondent had properly pursued its remedies; and (3) there was no evidence to support Okland's allegation that the Respondent failed

to mitigate its damages (Judge's Ruling, R. 370-73; A. 35-39). Based on these findings and other findings of the Honorable Judith M. Billings contained in the Judge's Ruling, the lower court entered Summary Judgment against Okland for $24,030.89, or the total alleged unpaid balance remaining on the Lease; $363.52 for 1984 property taxes; $384.80 for 1985 property taxes; $1,201.25 for future monthly "late charges" prospectively assessed on the alleged accelerated balance; $6,055.77 in interest at the rate of eighteen percent (18%) per annum on the amount so accelerated under the Lease since May 1984; and $1,900.00 in attorney's fees, for a total judgment of $33,893.23. The Summary Judgment also granted interest on the total amount awarded at the rate of eighteen percent (18%) per annum from the date of entry until paid, including accruing costs, attorney's fees and future expenses of location, repossession, and sale of the equipment which was the subject of the Lease; and the court further granted Respondent all necessary writs and orders of any nature to recover the equipment, if, when, and apparently wherever located, such costs and expenses to be prospectively accessed Okland (R. 257-58; A. 30-33).

The Honorable Judith M. Billings also found the total

amount "promised" under the Lease was the proper "remedy since there has been no repossession of equipment because the equipment has disappeared.", at R. 372; A. 38. The lower court also stated in answer to questions posed by Appellant's counsel concerning a trial on the issue of damages, ". . . No. I think the [supporting] affidavit is sufficient evidence of damages and there are no contravening affidavits to indicate those damages are not correct.", at R. 373; A. 39.

STATEMENT OF FACTS

Respondent, as the alleged successor in interest to MFT, brought an action in the lower court against Okland and Defendant Bradshaw for breach of the Lease. The Lease was for a term of 60 months, with payments of $775.19 per month, commencing September 30, 1981, and ending September 29, 1986 (Complaint and Exhibit "A", [R. 2-6; A. 1-6]). The Lease reflects that the first and last payments were paid on execution of the Lease (R. 3; A. 3) leaving 58 remaining payments upon execution.

Okland, in answering the Complaint made it clear to the Court and Respondent that it was in no position to verify any of Respondent's claims, while readily admitting liability under the Lease to MFT (Original Answer, Amended Answer, Cross-Claim and

Third-Party Complaint [specifically, ¶¶ 1-5 inclusive, of the Cross-Claim], R. 13-14, 191-93; A. 7-14).

Okland affirmatively asserted that Respondent's Complaint failed to state a claim against it; that Okland had acted in good faith; and that Respondent had failed in any respect to attempt to mitigate the damages of which it complained (R. 189-96; A. 7-14).

Okland also made clear that it executed the Lease in contemplation of constructing the Wilshire Condominiums, and the equipment covered by the Lease was purchased by Defendant Bradshaw, sold to MFT, and "leased back" for this purpose. Okland further alleged that approximately 60 days after execution of the Lease, it withdrew from negotiations to construct the Wilshire Condominiums and failed to apply to MFT for written permission to be removed as a guarantor in reliance on representations of Defendant Bradshaw that written permission would not be necessary (R. 189-96; A. 7-14). Additionally, Okland stated that it believed Defendant Bradshaw and other named and unnamed successors-in-interest, including other third-party defendants, may have been released by Respondent or MFT, and that at all times, Defendant Bradshaw and third-party defendants had had the exclusive use, benefit and enjoyment of all equip-

ment covered by the Lease (R. 189-96; A. 7-14). This same factual information was given to Respondent in the initial Answer, Cross-Claim and Third-Party Complaint filed by Okland (R. 13-14). The Amended Answer, Cross-Claim and Third-Party Complaint included additional affirmative defenses to the effect that there was a failure of consideration and that MFT was a "secured party" only with respect to the equipment covered by the Lease (R. 189-96; A. 7-14).

On April 4, 1985, without having conducted any [emphasis added] discovery in nearly a year since filing of the action, Respondent filed a Motion for Summary Judgment against Okland and Defendant Bradshaw, asking the lower court for judgment against each, jointly and severally in the sum of $26,423.95, together with interest at the rate of eighteen percent (18%) per annum, costs of court, expenses of repossession and sale and attorney's fees (R. 40-41). The Motion was supported by an affidavit of Respondent's counsel covering his attorney's fees (R. 36-37), and an affidavit of C. S. Cummings (R. 34-35; A. 15-16). The affidavit of Mr. Cummings stated that he was an officer of First Security Financial and authorized to give the affidavit; that the matters set forth in the affidavit were of his own knowledge; that he had reviewed the Respondent's

Complaint and knew the contents thereof to be true; that he had reviewed the original Lease and believed the Lease attached to Respondent's Complaint to be identical in every respect; and as of the date of his affidavit, Okland and Defendant Bradshaw were indebted [emphasis added] to Respondent in the amount of $26,423.95, as calculated on the Lease, together with interest, plus expenses and attorney's fees, etc. (R. 34-35; A. 15-16).

At the same time Okland's counsel filed an affidavit in opposition to the Motion for Summary Judgment of Respondent indicating that he had had conversations with Respondent's counsel, Kyle W. Jones, who had indicated to him that the Lease was a "sale-leaseback" and not a "true" lease; and that prior to being required to formally respond to Okland's First Set of Interrogatories, Request for Production of Documents and Request for Admissions, Mr. Jones had indicated to him that no documentation or other information existed or was available regarding the Lease, whether or not it was a "sale-leaseback", including, but not limited to the absence of documentation as to the disposition of the equipment upon termination of the Lease; the residual at the expiration of the Lease; the payout; the actual damages of the Respondent; the beneficiary of any investment tax credit; depreciation; the useful life of the equipment;

or any other factual matter relevant to the Lease Agreement between the parties and the liabilities for its breach. (R. 70-72; A. 20-22). Not one [emphasis added] of these facts has ever been controverted by Respondent, its counsel, or anyone else.

Okland, through James G. Okland, at the same time also filed an affidavit in opposition to Respondent's Motion for Summary Judgment (R. 47-50) in which he also disputed the bare unsupported allegations of damages, and again made it clear to Respondent that Okland was not in a position to obtain information to verify the truth or accuracy of the matters outlined in affidavits in support of the Respondent's Motion; and also, that he believed the equipment which was the subject of the Lease was of substantial value and could be so disposed of to limit Okland's liability (R. 47-50).

At such April hearing, the lower court granted Summary Judgment in favor of the Respondent as against Defendant Bradshaw (R. 123-25) and continued Respondent's Motion for Summary Judgment against Okland without date.

From April through September 1985, Okland vigorously and diligently pursued Third-Party Defendants, Doug Bradshaw, Bob Simonson, City Gate Condominium Partnership, and Cross-Claimant Defendant Bradshaw, in an effort to locate the equipment and

mitigate its damages (R. 262-64, 53-54, 130-31, 271-72, 357-58, 364-65, 138-39, 172-73, 197-99). Okland also submitted Interrogatories and Request fo. Production of Documents to Respondent and also took the deposition of one former employee of MFT (R. 42-43, 13-114, 138-139), the only individual really competent to testify on MFT (or Respondent's behalf), namely the leasing agent or broker who negotiated the Lease on September 30, 1981 (R. 369; 211-214).

Respondent's Motion for Summary Judgment as to Okland was finally heard approximately six months later on September 23, 1985. In support of the renewed Motion for Summary Judgment, Respondent filed an additional affidavit of one D. R. Russell which states: That he had access to the files of First Security Financial and was authorized by it to make his affidavit; that the matters set forth were true of his own knowledge; that he had reviewed the allegations of the Complaint of Respondent and knew the contents to be true; that he had reviewed the corporate resolution of Okland, a check of MFT written to defendants and the related Bill of Sale concerning the equipment covered by the Lease and that all such documents were identical in every respect to the originals; that the equipment listed on the Schedules to the Lease was delivered to the defendants, and that. . .

"it [equipment] has not been repossessed by the Plaintiff; . . .

"6. That as of the date of this affidavit, defendant Okland is indebted [emphasis added] to the plaintiff pursuant to the Equipment Lease Agreement as follows:

a.	31 payments at $775.19 (last payment 2/29/84)	$24,030.89
b.	property taxes for 1984	363.52
c.	property taxes for 1985	341.80
d.	Late charges (31 months) (.05 x 775.19 = $38.75)	1,201.25
e.	Interest (18% per annum from May 1, 1984)	6,055.77
		$31,993.23

together with attorney's fees as provided by the Equipment Lease Agreement and the expenses of location, repossession and sale of the leased equipment" (R. 232-41, specifically 233; A. 17-19, specifically 18).

The September 1985 amended affidavit of James G. Okland filed on behalf of Okland in opposition to Respondent's Motion for Summary Judgment states that Mr. Okland is the Secretary of Okland Ltd., Inc. and authorized to make the statement on behalf of the Appellant; that the statements made are based on personal knowledge; that he signed the Lease on behalf of Defendant Okland with MFT; that the Lease does not reflect the actual agreement and intent of Okland, Defendant Bradshaw and MFT in

that Okland and Defendant Bradshaw would own all of the equipment covered by the Lease at the end of the Lease and that title would pass to them; that he believed the equipment could be released, sold, or otherwise disposed of at substantial value and return; that MFT had agreed that Defendant Bradshaw would own the equipment at the end of the Lease and the Agreement was styled in lease form so that MFT could receive the investment tax credit; that Okland had never received an accounting of the application of payment made and believes that the amount claimed in the Respondent's Complaint of $26,423.95 as of May 1, 1984, was erroneous; that the demand letters received from Respondent in April and May, 1984, were for differing amounts (also, from different entities, [R. 207-08]) than that set forth in Respondent's Complaint; that no accounting had been made concerning the first and last payments made on the execution of the Lease as reflected therein; that to the knowledge of Mr. Okland, the Respondent had not attempted to sell or otherwise dispose of the equipment to decrease the damages which Respondent allegedly stated had been incurred as a result of alleged delinquent payments; and further, that Respondent had never made any attempt to retrieve or even locate the furniture (R. 202-08; A. 28-29). He further stated that there had been a discussion of

"residual" value or contract to purchase when the Lease was made which would further reduce damages when credited (R. 202-08; A. 28-29).

Based on the foregoing, the Honorable Judith M. Billings entered Summary Judgment in favor of Respondent for each of the amounts set forth in the affidavit of D. R. Russell (R. 233; A. 18), awarding further costs, expenses, and attorneys fees in locating and repossessing the equipment, including any future writs and orders in pursuit thereof (R. 257-58; A. 35-39).

SUMMARY OF ARGUMENT

The only undisputed relevant and material facts in this action are those either admitted by Okland or claimed by Okland in its Answer, Cross-Claim and Third-Party Complaint (initial and amended) and supporting affidavits of James G. Okland and its counsel in Opposition to Respondent's Motion for Summary Judgment. Okland admitted it executed the Lease with MFT; that MFT had not released it from any liability; that it believed co-defendant Bradshaw or other successors-in-interest may have been released from any liability under the Lease by MFT; that Defendant Bradshaw or others had had the exclusive use, benefit, and enjoyment of all of the equipment covered by the

Lease; that it had no information as to what had been paid or what was due under the Lease; that it believed the equipment which was the subject of the Lease was valuable and could be sold or leased; and that it had no information as to the whereabouts of the leased equipment [emphasis added]. Not one of these allegations has been denied or even remotely met by Respondent.

Respondent's unverified Complaint and affidavits in support of its Motion for Summary Judgment are replete with conclusions of law, unsupported by any relevant facts, disputed or otherwise. Respondent has further failed to show it has any right to bring this action as there is no evidence to prove it is the successor-in-interest to MFT. In this respect, Respondent relies on the affidavits of two persons, one claiming to be an officer of First Security Financial and the other claiming to have had "access" to the files of First Security Financial, neither obviously, having an inkling as to the nature and intent of the Lease Agreement in issue as it involved MFT. Further, the carefully couched affidavit of the person with mere "access" to the nebulous files of First Security Financial, not MFT, epitomizes Respondent's total defiance of the facts and absence of proof of its case with the statement that "it (the

leased equipment) has not been repossessed" (R. 234; A. 18). This allegation alone leaves every other possibility open, including prior sale or other disposition for value, receipt of insurance proceeds for loss of the leased equipment, including the fact that Respondent knew where the equipment was all along knowing Okland did not.

Respondent would have one believe the denial by Okland of each and every allegation of Respondent's Complaint on the basis that Okland did not possess sufficient information to otherwise respond to the allegations was in bad faith. In the Memorandum of Respondent in Support of its Motion for Summary Judgment (R. 154-158, specificially p. 156), counsel for Respondent twists Okland's good faith denial of lack of information to its advantage by claiming its affidavits in support of its Motion for Summary Judgment clearly show Respondent to be the successor-in-interest to MFT, and further that they evidence the exact undeniable amount due and owing by Okland to Respondent. Counsel for Respondent further states that none of the discovery conducted by Okland or other parties has brought "in anything to change the above stated facts." With empty, self-serving responses like these to Okland's First Set of Interrogatories to Plaintiff-Respondent, one need not wonder why the discovery con-

ducted by Okland was fruitless as Respondent therein admits to-wit:

> "3. Please state what measures you have undertaken to date to mitigate any damages for the alleged default on the lease.
>
> "ANSWER: At present, plaintiff is attempting to locate the equipment, it has filed a lawsuit seeking damages from the lessees and has completely complied with the duties and obligations set forth under the Lease Agreement, and have given notices to the lessees that a default has occurred and that they expect payment to be made.
>
> "4. Please state which party or parties specifically made lease payments on each occasion from the period of the commencement of the lease until the date of its alleged default.
>
> "ANSWER: Plaintiff has no records of which party or parties specifically made the lease payments on the aforementioned Lease Agreement. All billings were sent directly to the lessee and any payments received were applied directly to the lease per any written instructions received. . . .
>
> "12. Please indicate and itemize your out-of-pocket, actual, hard cash damages, exclusive of attorney's fees and other costs.
>
> "ANSWER: Under the terms of the Lease Agreement defendants were to pay sixty (60) payments at $775.19. There still remains due and owing thirty-one (31) payments under the aforementioned lease document leaving a balance due and owing of $24,202.63, there is also property taxes for 1984 that were paid by plaintiff in the amount of $363.52 plus possible 1985 estimated property taxes of $363.52. There is also included late fees on this lease in the amount of $2,170.92 together with the value of the equipment at the end of the lease, plus possible sales tax if it was to be sold, plus court costs and legal fees and interest." (Plaintiff's Answers to Okland's First Set of Interrogatories.)

Okland's good faith admission of liability under the Lease with MFT was for naught. Eighteen months elapsed between the filing of the Complaint and the hearing on Respondent's Motion for Summary Judgment, and there is still no evidence of Respondent's legitimate interest in the Lease or damages it has allegedly suffered, if any, as a direct result of the alleged default on the Lease. Respondent, if it is the successor-in-interest to MFT, is and was always in a position to provide this information, and has had a duty to do so by virtue of Okland's responsive pleadings on file, particularly when Respondent knew or should have known who made payments to it all those months and thus knew or should have known the location of the furniture upon default. Respondent should not be permitted to profit by this unequivocal display of bad faith.

The Summary Judgment granted against Okland defies all basic logic and legal premises. The total amount of the Summary Judgment coupled with the payments claimed by Respondent to have been made under the Lease total $57,924.12, an amount substantially exceeding the total value of the five year Lease (sixty payments at $775.19 or $46,511.40) in which 2½ years remained upon alleged default.

Paragraph 14 of the Lease provides the lessor with an option for remedies in the event the leased equipment is lost or

destroyed, and the remedies granted Respondent by the lower court do not comport with the provisions of the Lease in this regard, assuming the equipment was indeed lost or destroyed. Further, the Lease also provides for repossession and sale of the leased equipment in the event lease payments are accelerated, with resulting credit of the proceeds of any such sale, after the deduction of related costs and expenses to lessee. The award of the lower court is conspicuously deficient and far afield from the Lease's terms in this respect. The lower court seems to view the remedies contained in the Lease as cumulative, and this fact alone brings to mind simple but true axioms of law such as penalties being void, that an aggrieved party is entitled only to the benefit of its bargain; that an aggrieved party is entitled to be placed in the position it would have been in had the default not occured, and that he who seeks equity must to equity. Quite clearly, an acceleration of lease payments with interest and with "late charges" added to each payment accelerated (as they are not at such time "past due"), together with prospective interest at the rate of eighteen percent (18%) per annum on such accelerated amount (including sales and use taxes on allegedly lost equipment) is absurd.

This matter should be reversed and remanded with instruc-

tions to the lower court to find as a matter of law that if Respondent can show it is the successor-in-interest to MFT that it further show that it acted in a "commercially reasonably manner" in failing to take any action whatsoever to dispose of the equipment. In this regard, it is the responsibilitly of this Court to set such guidelines as to whether Respondent is foreclosed from a deficiency judgment or otherwise should be "no-caused"--a responsibility for and finding of which in this case this Court should not shrink from.

ARGUMENTS

POINT 1.

THE SUMMARY JUDGMENT IS NOT SUPPORTED BY THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE AS THEY DO NOT SHOW AS A MATTER OF LAW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT RESPONDENT IS ENTITLED TO JUDGMENT AS AWARDED.

Blatant and uncontroverted disputes of genuine material fact exist and therefore upholding the Summary Judgment would deprive Appellant of its day in court and the right to make its case thereby substantially altering the Summary Judgment.

Alleged "Rental" Payment Balance -- 31 Payments or What?

Respondent's affidavit in Support of its Motion for Summary

Judgment (R. 232-34; A. 17-19) attests that the last payment made by lessees was on February 21, 1984. Respondent does not allege that the Lease was in default prior to that time; this por-position coupled with the Lease, evidences that first and last payments were paid on September 30, 1981, amounting to 31 payments or a total payment on the Lease of $24,030.89 until the time of the alleged default. If $24,030.89 was paid on the Lease and $44,296.80 was the total due under the Lease (Discount Sheet R. 216), the balance due and owing Respondent on the date of alleged default would have been $20,265.91--an obvious difference from that awarded in the Summary Judgment. It is noteworthy that in Appellant's affidavit in Opposition to the Motion for Summary Judgment, the lower court was apprised that Respondent's calculation of damages was in issue as it had never made and could not render an accounting to Appellant (R. 202-208, specifically ¶8). (See Summary of Argument, supra, and the evasive responses of Respondent to Okland's Interrogatories therein.)

Assuming $20,265.91 was the total due under the terms of the Lease (through September 1, 1986 [emphasis added]) upon alleged default in March 1984, the Summary Judgment awarding Respondent accelerated damages in the amount of nearly

$34,000.00 at eighteen percent (18%) interest per annum until paid, plus after accruing costs, attorney's fees and expenses of location, repossession and resale of the equipment, including ownership of the leased equipment, is a far cry from the $20-some Thousand Dollars Respondent would have received at the end of 1986. Appellant is not even awarded use of the leased equipment, despite being required to pay the lease in full and more [emphasis added]. In addition, based on the fact that MFT actually bought the equipment for approximately $25,800.00 and appears to have received at least $24,000.00, on the Lease, Respondent, if a rightful assignee, is actually out-of-pocket only $1,800.00.

"Late Charges" (Paragraph 20 of the Lease)

The Summary Judgment further awards $1,201.25 in "late charges" on the alleged accelerated balance (31 payments) pursuant to the Lease (R. 258; A. 31). No authority exists for this proposition. It amounts to a windfall to Respondant and a penalty to Okland.

Interest From May 1, 1984 Until October 15, 1985 on the Alleged and Unproven Balance

The Summary Judgment further awards $6,055.77 in interest (eighteen percent [18%]) on the disputed $24,030.89 balance from the period of commencement of the suit until the Summary

Judgment was entered.

Okland admitted its liability under the Lease at the outset and asked only for proof of Respondent's rights in the Lease and an accounting of damages which it could not ascertain. The law in Utah is clear that prejudgment interest is not a matter of right, but awarded only where the party against whom it is sought caused the delay in payment. L.A. Drywall, Inc. v. Whitmore Construction Co., 608 P.2d 626, 629 (1980 Utah). Any delay in resolving this matter was caused by failure of Respondent to provide proof of its interest and an accounting and its apparent bad faith in thwarting the efforts of Okland to mitigate damages or to ascertain any damages Respondent may have suffered. (See Summary of Argument, supra.)

Use or Sales Taxes (Paragraph 16 of the Lease)

The Summary Judgment awards 1984 and 1985 sales or use taxes of approximately $1,144.00 and yet the lower court ruled as a "matter of law" that the equipment had "disappeared" or was lost (R. 370-73). Pursuant to Section 59-16-3 (U.C.A.), property must be stored, used or otherwise consumed in this State for collection of any such tax. Furthermore, there is no evidence whatsoever that Respondent or anyone had or has not paid any such tax or that it is due or payable.

Sufficiency of Affidavits

Based on the foregoing, it is clear that there are numerous issues of fact for trial on the issue of damages alone. Okland has produced evidentiary material in total contradiction to Respondent's claims, and it is otherwise apparent from the record why Okland could not directly contradict many of Respondent's allegations as it was not in a position of access to necessary information. As a result, its denial placed all of Respondent's allegations in issue. In Dupler v. Yates, 251 P.2d 624, 637, (Utah 1960), headnote 8, coupled with Justice Wade's dissent states that when considering motions under Rule 56 it [position of access] "should be kept in mind in passing on this kind of motion [Summary Judgment]. Otherwise trial courts will be deciding cases on affidavits and depositions when there should be a regular trial."

Further, the pleadings and affidavits of Respondent in support of its Motion for Summary Judgment are based on conclusions of law only, and Summary Judgment will only be granted when supported by affidavits which set forth facts admissible in evidence. Albrecht v. Uranium Services, Inc., 596 P.2d 1025, 1026 (Utah 1979); and Norton v. Blackham, 599 P.2d 857, 859 (Utah 1983).

Also Respondent has failed to act in a "commercially reasonable" manner as a matter of law pursuant to 70A-9-504 U.C.A., 1953 as amended and should be foreclosed from any award. (See Summary of Arguments, supra.)

Mitigation of Damages

Appellant need not belabor the point that under the circumstances of this case and Utah law, Respondent had a duty to mitigate its damages. Thompson v. Jacobsen, 463 P.2d 801, 23 Utah 2d 359 (1970); Diede v. Davis, (Mont. 1983) 661 P.2d 838; Double D Amusement v. Hawkins, 20 Utah 2d 395, 438 P.2d 395 (1968).

In Green, et al. v. Nelson, 120 Utah 155, 232 P.2d 776, (1951, the Utah Supreme Court stated:

> "There are authorities holding that the burden of proving matters in mitigation or reduction of the amount of plaintiff's damages rests upon a defendant. 1 Sedgwick on Damages, 9th Ed. 447 §227. However, such authority should not be relied upon as imposing the burden on a defendant to prove one of the essential facts which must be established in order to determine what plaintiff's damages are. There can be no mitigation or reduction of damages until damages are proved. [Emphasis added] Green, supra, at 783.

There is not a shred of evidence offered by Respondent showing any good faith effort to mitigate its damages and locate the leased equipment or that it otherwise should not have brought

suit earlier for adequate assurances of performance, especially after assignment from MFT and knowing, if so, that no insurance existed to protect its new interest. For this reason alone, Respondent's actions and the question of whether it acted in a "commercially reasonable manner" in disposing of the leased equipment or failing to make any disposition of it should be determined at trial. Respondent's unilateral interpretation of the Lease (to which it was not party), is that it had no duty whatsoever to attempt to even locate the leased equipment despite being in a better position than Okland to have access to information so Okland could act to mitigate its own damages. (See Summary of Argument, supra.)

In Haggis Management, Inc. v. Turtle Management, Inc., 19 Ut. Adv. Rpt. 42 (Oct. 3, 1985), the Utah Supreme Court held that plaintiff's failure to make a "commercially reasonable disposition" of the collateral contrary to the requirement of 70A-9-504(3) (U.C.A. 1953, [1980 Ed.]) barred plaintiff from recovering a deficiency judgment based on failure of the secured party to give the debtor notice. In this case Respondent's inaction is ridiculously more prejudicial to the rights of Okland than plaintiff Haggis' mere notice failures with respect to Turtle Management. Based on the logic of Haggis (including the

well reasoned dissent of Justice Stewart [Utah 1979]), it is Appellant's contention that Respondent's intentional failure to mitigate its damages in even attempting to locate the furniture and its dedication to do nothing was not commercially reasonable and Respondent's action or lack thereof should bar Respondent from recovering any judgment from Okland.

Parol Evidence Regarding Damages

The lower court quite casually excluded any evidence of an oral understanding to purchase the leased equipment or any understandings with respect to whether the Lease was an installment sale, a lease, one intended for security, or a contract of guarantee, or even what its purpose was aside from its label. In Centurian Corp. v. Cripps, (Utah 1981) 624 P.2d 706, the Utah Supreme Court held that a "lease agreement may not be what it purports to be. How these issues bear on Respondent's damages and the remedies available to it are factual considerations that the lower court has totally ignored. Okland's affidavit (R. 202-08; A.23-29) puts these considerations into issue, and are uncontroverted. Also quotations from the deposition testimony of DeMar Riley, the sales leasing agent (R. 211-214, 369) and former employee of MFT, demonstrate that he offered lessees (Okland and Defendant

Bradshaw) the opportunity to purchase the leased equipment based on the low residual of five percent (5%). Based on the reasoning of FMA Financial Corp. v. Pro Printers, 590 P.2d 803 (Utah 1979), the integration clause in the lease (which in that case did not mention such option), should be rendered ineffective to exclude parol evidence of the existence of the agreement of the parties. Furthermore, it is quite clear that the Lease is unintegrated in that it does not even reflect the true nature of the transaction, that being, that it was a "sale-leaseback"; that MFT purchased the leased equipment for slightly in excess of $25,000.00 from Defendant Bradshaw; and that Defendant to Bradshaw had purchased it for its specific uses; and had sold it MFT only to lease it back.

Support for the admission of parol evidence in this case is further confirmed by the recent Utah case of Union Bank vs. Swenson, 19 Ut. Adv. Rpt. 22 (Sept. 27, 1985) in which the Court held inter alia, ". . . a Court must first determine whether the writing was intended by the parties to be an integration. In resolving this preliminary question of fact, parol evidence, indeed any relevant evidence, is admissible. Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981)." Union Bank, supra, at 23.

In Blem v. Ringering, 488 P.2d 798, 260 Or. 46 (1971), the Supreme Court of Oregon held the parties may enter into two or more contemporaneous contracts relating to the same subject matter and they may reduce to writing only one or more of the same, the oral contracts being regarded as collateral and distinct from the written contract; in such instance the parol evidence rule does not bar proof of the oral agreement.

In Alexander v. Simmons, 518 P.2d 160, 90 Nev. 23 (1974), the Supreme Court of Nevada held that the mere existence of a written contract is insufficient to prevent a party from showing a separate contemporaneous oral agreement.

Based on the foregoing, the Summary Judgment should be reversed and remanded so that we might understand what MFT, Okland and Defendant Bradshaw intended. Respondent is the mere alleged assignee of MFT and is in no position to know what the agreement of the parties was. Finally, it is noteworthy that in the Summary Judgment rendered against Defendant Bradshaw, Respondent calculated the principal amount past due and owing under the Lease to be $26,423.95. This discrepancy on its face reveals that Respondent itself has not but a clue as to what its actual damages are, let alone what or when or by whom payments were made.

POINT 2.

THE SUMMARY JUDGMENT CANNOT BE SUPPORTED BY THE LEASE AND IF SO, THE LEASE SHOULD BE DECLARED VOID AS A PENALTY.

Lease

Paragraph 14 of the Lease (R. 3 [reverse side]; A. 3) provides certain remedies to Lessor in the event of loss or damage to the leased equipment. Specifically, in the event of loss or damage to the leased equipment, it provides that the lessee, at the option of lessor, will replace the leased equipment in good condition and repair; or replace the same with like equipment in good condition and repair with clear title in lessor; or pay to lessor the total of the following amounts: the total rent due and owing at the time of such payment [emphasis added], plus the present value [emphasis added] of all rent and other amounts payable by lessee with respect to said item from date of such payment to date of expiration of the lease; plus the value of said item which shall be equal to not less than ten percent (10%) purchase price on said item. It further provides that upon lessor's receipt of such payments, lessee and lessee's insurer shall be entitled to lessor's interest in said item, for salvage purposes, in its then condition and location, without warranty. Even if we were to assume the leased equipment is

lost (no evidence has been introduced to prove this fact), Respondent has totally failed to make any such election or provide Okland with the calculations required of it under this provision of the Lease. Further, the award of all right, title, and interest in the leased equipment to Respondent, together with expenses of location and other related costs, is totally contrary to paragraph 14 of the Lease.

Paragraph 21 covers matters related to default under the lease (R. 3 [reverse side]; A. 3). It provides the lessor may recover from lessee all rents and other amounts then due and as they shall thereafter [emphasis added] become due; that the lessor may take possession of the equipment; that the lessor may recover from lessee with or without repossessing the leased equipment the accelerated and total sum of all rent and other amounts due and to become due; "provided, however, that upon repossession or surrender of equipment, lessor may sell or otherwise dispose of equipment. . . and apply the net proceeds thereof after deducting all expenses, including attorney's fees . . . as required by law or in equity." The only logical meaning these two paragraphs could have, when read together, is that so long as the lessees have the use of the leased equipment, they should be required to pay sums due thereunder. Respondent

was made aware at the outset that Okland did not have the possession or use of the leased equipment, and was not in any position to ascertain its location, especially in light of the position taken by the Respondent that it may have been lost. Under Respondent's view of the Lease, lessee under the Lease could have given a "bad check" for the first and last payments under the Lease, on its execution, and Respondent could accelerate all sixty (60) payments under the Lease ($46,511.40 [R. 3, 216; A. 34]) and still recover the leased equipment--pray tell if it was lost in the interim.

In other words, the Summary Judgment stands for the proposition that a lessor can accelerate the lease, later repossess the alleged lost equipment and re-lease it for the remainder of the original lease term for a "double-recovery".

Liquidated Damages and Penalties

In the event the Summary Judgment can be reconciled with the terms and provisions of the Lease, the Appellant believes the Lease should be declared void as a penalty.

Respondent has made no showing of proof of its actual damages so as to even determine if they are reasonably related to the accelerated damages awarded and therefore, the summary judgment should be reversed and remanded for findings as to

damages, the meaning of the contract, and whether the Lease is void as providing for unconscionable liquidated damages and a penalty.

The Summary Judgment award of $34,000.00 at eighteen percent (18%) interest per annum is not reasonably related by any stretch of the imagination to Respondent's actual damages (whatever they may be). In reviewing the Lease and Discount Sheet (R. 216), it shows Respondent, if truly the successor-in-interest of MFT, to be receiving $24,030.89 in payments prior to default, plus Summary Judgment award of $33,893.23, totalling $57,924.12 substantially more than the total Lease value over five (5) years ($46,511.40) [R. 216; A. 34]), including all right, title and interest in the leased equipment, all of this despite the fact that the lease term does not expire until September of 1986!

There are numerous cases standing for the proposition that damages awarded--regardless of Summary Judgment--are a penalty and void as a matter of law if no reasonable relationship is borne to any actual damages suffered and yet in this case, Respondent has not even bothered to prove its actual damages. Numerous cases stand for this proposition, the following of which are but a few. Young Electric Sign Co. v. Vedas, 564

P.2d 758, 760, (Utah 1979); Russell v. Ogden Union Ry & Depot Co., 122 Utah 107 247 P.2d 257 (1952); Croft B. Jensen, 86 Ut. 13, 40 P.2d 198 (1935); Double D Amusement Co. v. Hawkins, supra,; Reed v. Armstrong, 6 Utah 2d 127, 312 P.2d 777 (1957).

In Ricker v. Rombough, 261 P.2d 328, 120 CA 2d Supp. 912 (1953) the court held that a rent acceleration clause in a lease in unenforceable and void as being an agreement for liquidated damages when the damages are readily ascertainable and such is void if no reference is made to actual damages.

In In the Matter of Grodnik's, 128 F. Supp. 941 (U.S.D.C. D. Minn. 1955) the court held that contract provisions providing for liquidated damages in the event of default are prima facie valid; yet they will be declared invalid only where damage is stipulated and there is no reasonable relationship to the amount of actual injury suffered.

In Ray v. Electrical Products Consolidated, 390 P.2d 607 (Wyo. 1964) the Wyoming Supreme Court held that a provision in a contract fixing damages for breach will be construed as a penalty or forfeiture and hence unenforceable if it bears no reasonable relationship to the amount of actual damages.

In Green, et al., v. Nelson, supra, the Utah Supreme Court held that Plaintiffs were not entitled to recover the full

amount of the unpaid balance on a contract without showing their actual loss occasioned by Defendant's breach.

In Perkins v. Spencer, 243 P.2d 446, 449, 450, (Utah 1952) the Utah Supreme Court held that where parties to a contract stipulate to an amount of liquidated damages that shall be paid in the case of a breach of contract, such stipulation is generally enforceable, if the amount stipulated is not disproportionate to damages actually sustained. Further, where enforcement of a forefeiture provision in a contract would result in an unconscionable and exorbitant recovery bearing no reasonable relationship to actual damages suffered, the forfeiture provision is unenforceable.

In Morris v. Sykes, 624 P.2d 681 (Utah 1981), the Utah Supreme Court held that where a forefeiture under literal terms of a contract results in awarding to a party a sum so entirely disproportionate to any damages he may have suffered that it shocks the conscience of the Court, a court of equity will neither approve nor enforce such a penalty.

It is clear the award of the Summary Judgment is not supported by the Lease or if reconcilable with the Lease, is void on its face as a penalty.

Furthermore, the provisions in the Summary Judgment

awarding Respondent future and certain additional damages is void as it violates the premise that a judgment is final and settles all rights, claims, and obligations between the subject parties. The Summary Judgment grants future amounts which cannot presently be ascertained.

CONCLUSION

There are infinite issues of fact precluding Summary Judgment in this case. In Meuse-Rhine-Ijssel Cattle Breeders of Canada Ltd., v. Y-Tex Corp. 590 P.2d 1306, (1979) the Supreme Court of Wyoming held that if there is any doubt as to the meaning of a written instrument there arises an issue of fact to be litigated and Summary Judgment is improper. In this case the lower court made such an exclusively factual determination sua sponte.

Summary Judgment is a harsh measure and for such reasons contentions of a party opposing the motion must be considered in a light most advantageous to him and all doubts resolved in permitting him to go to trial. The motion should be granted only when, viewing the matter thusly, no right to recovery can be established. Controlled Receivables, Inc. v. Harman, 17 Ut. 2d 420, 413 P.2d 807 (Utah 1966).

The sustaining of Summary Judgment without affording a party the opportunity to present his evidence is a stringent measure which the Court should be reluctant to grant. Tangren v. Ingalls, 12 Ut. 2d 388, 367 P.2d 179, (1962). In the case at bar the lower court made evidentiary conclusions about the Lease and truth as to the numerous controverted facts, the Okland's affirmative defenses relative to the damages awarded, the nature of the Lease, and the intent of the parties--all when Respondent was not even a party to the Lease. Such is clear injustice and manifest error as in Summary Judgments evidence is not reviewed, yet the lower court ruled the leased equipment had disappeared." Burningham v. Ott, 525 P.2d 620 (Utah 1974).

In the case of Elrod v. Preferred Risk Mutual Insurance Co. of Des Moines, Iowa, 440 P.2d 544, 201 Kan. 254 (1968), the Court held that the amount of loss or damage is generally a fact issue which should not be determined by an affidavit on a motion for summary judgment. In Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238, (Utah 1977), the Utah Supreme Court held that the presence of a dispute itself as to what is a material fact disallows the granting of summary judgment. Thus the kind and nature of agreement is relevant and Appellant has been wholeheartedly deprived of an opportunity to present such relevance at a trial.

In Fredrick May & Co. v. Dunn, 13 Ut. 2d 40, 368 P.2d 266, (1962), the Utah Supreme Court held "that where there are complicated legal questions presented and it appears that if issues were tried, other evidence would be adduced, it is wise policy to deny summary judgment and determine issues of fact by trial."

In the recent Supreme Court case of Haggis Management, Inc. vs. Turtle Management, Inc., 19 Ut. Adv. Rpt. 42, 45, (October 3, 1985), the Honorable Justice Stewart in his unequivocal dissenting opinion said:

> "Where different inferences and conclusions can be drawn, summary judgment is inappropriate, even if the underlying facts are not disputed. Ultimate questions of mixed fact and law --such as the instant case -- are not to be discarded by a judge in derogation of a party's right to trial by jury. Butler v. Sports Haven International, Utah, 563 P.2d 1245, 1246 (1977).
>
> "This rule is in accord with what numerous courts have held. Even if the basic evidence is not in conflict, summary judgment is not appropriate if a jury could draw differing, but reasonable conclusions from that evidence. See, e.g., ITT Terryphone Corp. v. Modem's Plus, Inc. 1971 GA. App. 710, 320 S.E. 2nd 784, 787 (1984); Lundy v. Hazen, 90 Ida. 323, 411 P.2d 768, 770 (1966). In this case a jury trial should have been demanded and the case should have been submitted to a jury." Haggis Management, Inc., supra, at 45.

For the above reasons, Okland urges that the Court relieve itself of the burden of further inquiry into Appellant's right to a trial on the issue of damages (as it has acknowledged

liability) and that the Court forthwith reverse and remand the Summary Judgment of the Third Judicial District Court, with specific guidelines as to what Respondent must prove to show it acted reasonably in order to be entitled to any recovery, let alone its conceivable "double recovery".

Respectfully submitted this 6th day of June, 1986.

John Michael Coombs
Attorney for Appellant Okland

Leonard W. Burningham
Attorney for Appellant Okland

CERTIFICATE OF DELIVERY

I hereby certify that four (4) copies each of Appellant's Brief have been delivered to Kyle W. Jones, 1000 Continental Bank Building, Salt Lake City, Utah 84101; L. R. Gardiner, FOX, EDWARDS, GARDINER & BROWN, Attorney for Robert M. Simonsen and Simpar Associates, 57 West 200 South, Suite 400, P. O. Box 3450, Salt Lake City, Utah 84110; and four (4) copies have been

mailed to Doug Bradshaw, Bradshaw Development Company and City Gate Condominium Partnership, c/o Douglas C. Bradshaw, 4164 Cresta Avenue, Santa Barbara, California 93102, this 6th day of June, 1986.

John Michael Coombs
Leonard W. Burningham
Attorneys for Appellant

DELIVERED by _____ this _____ day of June, 1986.

_____

ADDENDUM

50.00
A2188

Michael J. Wilkins
WILKINS & JONES
Attorneys for Plaintiff
200 South Main, Suite 1020
Salt Lake City, Utah 84101
Telephone: 328-4760

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD. INC., and BRADSHAW FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT COMPANY, both Utah corporations, Defendants.	COMPLAINT Civil No.

As a cause of action against the defendants, plaintiff alleges as follows:

1. Plaintiff First Security Financial is a Utah corporation engaged in the thrift, loan and equipment leasing business with its principal place of business in Salt Lake City, Utah.

2. Defendants Okland Ltd. Inc., and Bradshaw Ferrin Development Company, now known as Bradshaw Development Company, are both Utah corporations with their principal places of business in Salt Lake City, Utah.

3. On or about September 30, 1981, Okland Ltd. Inc. and Bradshaw Ferrin Development Company as lessees entered into an Equipment Lease Agreement with MFT Leasing as lessor, a true and complete copy of which is attached hereto as Exhibit A and Incorporated herein by this reference.

4. First Security Financial is the successor in interest to MFT

Leasing under the Equipment Lease Agreement, entitled to all of the benefits thereunder.

5. The Equipment Lease Agreement provides for the payment of certain periodic rental payments to the lessor, not all of which have been made when due.

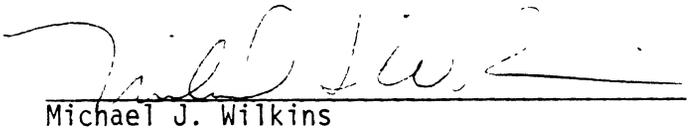
6. As a result of the failure of the lessees to make the payments as and when due, the Equipment Lease has been declared in default.

7. Pursuant to the terms of the Equipment Lease, the lessees are jointly and severally liable to plaintiff in the amount of $26,423.95, plus interest thereon at the rate of eighteen percent (18%) per annum from and after May 1, 1984 until fully paid, both before and after judgment, plus costs of court, expenses of repossession and sale of the equipment, and attorney's fees.

WHEREFORE, plaintiff prays judgment against the defendants, jointly and severally, in the amount of $26,423.95 plus interest thereon at eighteen percent (18%) per annum from and after May 1, 1984 until fully paid, both before and after judgment, plus costs of court, expenses of repossession and sale of the equipment, attorney's fees, and such other and further relief as the court deems just or the right to which may be established at trial.

DATED this 16th day of May, 1984.

WILKINS & JONES



Michael J. Wilkins
Attorneys for Plaintiff

Plaintiff's address:

135 South Main Street
Salt Lake City, Utah

MFT LEASING

135 South Main Street
Salt Lake City, Utah

ASSIGNED TO MFT LEASING
COMMERCIAL SECURITY BANK
BY _____
VICE PRESIDENT

COMMERCIAL LEASE

LEASE NO 10-0031743-6
(ALWAYS REFER TO ABOVE NO.)

LEASE AGREEMENT made and entered into this 30 day of 9 1981 by and between MFT LEASING a Utah corporation with offices at 135 South Main Street, Salt Lake City Utah 84111, ("Lessor") and ("Lessee")

OKLAND LTD INC. and
BRADSHAW FERRIN DEVELOPMENT COMPANY
As Co-Lessees
699 East South Temple
Suite 310
Salt Lake City, UT 84102 Lessee

Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor the following described personal property (the "Equipment") upon the following terms and conditions:

QTY	SERIAL NO	EQUIPMENT DESCRIPTION	SUPPLIER NAME AND ADDRESS
		SEE ATTACHED EXHIBIT A WHICH BECOMES A PART HEREOF	

XX If this Block is checked, see Exhibit A consisting of 3 pages attached hereto and a part hereof for Quantity, Serial Numbers, Description Supplier and other Equipment information

The Equipment will at all times during the term of this lease be located at the address of Lessee shown above or at _____

TERMS AND CONDITIONS OF LEASE

1 **LEASE TERM AND PAYMENT** Lessee shall pay Lessor at its offices in Salt Lake City Utah or at such other place as Lessor may designate in writing the periodical rental payments for the term indicated

If other than monthly rental payments the terms are as follows _____

Commencement Date: 9-30-81
Lease Term: Sixty (60) -- Months
Monthly Rental Payment $ 738.28
Monthly Use Tax: $ 36.91
_____ (Other): $ _____
Total Monthly Rental Payment: $ 775.19

In addition, advance payments equal to the first and last 1 months rental payments in the total amount of $1,550.38 is due and payable upon acceptance of this lease by Lessor

2 **NO WARRANTIES BY LESSOR** LESSEE HAS SELECTED BOTH (a) EQUIPMENT AND (b) SUPPLIER FROM WHOM LESSOR IS TO PURCHASE IT. LESSOR MAKES NO WARRANTIES EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER INCLUDING THE CONDITION OF EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE AND AS TO LESSOR, LESSEE LEASES EQUIPMENT AS IS

3 **CLAIMS AGAINST SUPPLIER.** If Equipment is not properly installed, does not operate as represented or warranted by Supplier or is unsatisfactory for any reason Lessee shall make any claim on account thereof solely against Supplier and shall nevertheless pay Lessor all rent payable under this lease. Lessor will include as a condition of its purchase order that Supplier agree that all warranties, agreements and representations, if any, which may be made by Supplier to Lessor may be enforced by Lessee in its own name. Lessor hereby agrees to assign to Lessee and does hereby assign, solely for the purpose of making and prosecuting any said claim, all of the rights which Lessor has against Supplier for breach of warranty or other representation respecting Equipment.

4 **SUPPLIER NOT AN AGENT** Lessee understands and agrees that neither Supplier nor any salesman or other agent of Supplier is an agent of Lessor, and that Lessor is not an agent of Supplier. No salesman or agent of Supplier is authorized to waive or alter any term or condition of this lease, and no representation as to Equipment or any other matter by Supplier shall in any way affect Lessee's duty to pay the rent and perform its other obligations as set forth in this lease.

5 **ORDERING EQUIPMENT.** Lessee hereby requests Lessor to purchase the Equipment from the above named Supplier(s). Lessor agrees to purchase the Equipment as selected by Lessee and Lessee agrees to arrange for delivery of the Equipment so that it can be accepted on or before the commencement date of this lease as set forth in paragraph 1 above. Lessee hereby authorizes Lessor to insert in this lease the commencement date, identification numbers and other descriptive data for the Equipment.

6 **AGREEMENT INCLUDES REVERSE SIDE HEREOF** This lease including the reverse side hereof correctly sets forth the entire lease agreement between Lessor and Lessee and no agreement or understanding claimed by either party hereto shall be binding unless specifically set forth herein. The term "Lessee" as used herein shall mean and include any and all Lessees who sign hereunder, each of whom shall be jointly and severally bound hereby.

7 **DECLARATION OF BUSINESS PURPOSE** Lessee hereby warrants and represents that the Equipment will be used for business purposes and not for personal, family, household or agricultural purposes. Lessee acknowledges that Lessor has relied upon this representation in entering into this lease.

THIS LEASE ALSO INCLUDES ALL TERMS AND PROVISIONS ON THE REVERSE SIDE HEREOF.
THIS LEASE CANNOT BE CANCELLED BY LESSEE.

LESSOR

MFT LEASING
By _____
Its Vice President
9-30-81
Date Accepted

EXHIBIT A

***LESSEE (Authorized Signature & Title)**

X _____ SEC/TRES OKLAND LTD INC
Douglas C. Bradshaw VP BFDC
Date Executed by Lessee X 9/30/81

Lessee's Social Security Number or
Employer's I.D. Number X 87-0350018
87-0354064

(If Corporation, President, Vice President or Treasurer should sign and give official title. If Proprietor or Partner, state which)

CCOCO

A. 3

M F T LEASING

EXHIBIT A

SUPPLIER OF EQUIPMENT	NAME OF LESSEE
	Okland LTD. Inc. and Bradshaw Ferrin Development Company 699 East South Temple Suite 310 Salt Lake City, Utah 84102

QUANTITY	SERIAL NO.	EQUIPMENT (MANUFACTURER, MAKE, MODEL #, DESCRIPTION)
1		Floral Brass Arrangement
1		Exterior Rendering of Wilshire Condo.
7		10" Palms
3		8" Ferns
5		10" Baskets
2		10" Baskets
3		8" Trays
1		Sofa Orlanda Garden
1		Circular Hunt Desk
2		Green High Back Arm Chairs
1		Leather Arm Chair
1		Lamp Table Lattice
1		Lattice Couch Table
5		Oak Frame & Glass for Renderings
1		Oak Frame for Large City Scape Photo
2		Builder/Developer Panel
2		Frames
1		Availability Board 2-Color Sil Screened
		Frame and Glass
		Prints and Mounting
1		Sign for Hallway 20 x 20 2-Color 1 Side Installed

LESSEE MUST DATE AND SIGN THIS PAGE.

NAME AND ADDRESS MUST ALSO

BE SHOWN ABOVE.

DATE: 9/30/81

LEASE NO.: 10-0031743-6

BY: [signature] SEC
SIGNATURE TITLE

BY: [signature] V.P.
SIGNATURE TITLE

A. 4

M F T LEASING

EXHIBIT A

SUPPLIER OF EQUIPMENT	NAME OF LESSEE
	Okland LTD. Inc, and Bradshaw Ferrin Development Company 699 East South Temple Suite 310 Salt Lake Ciy, Utah 84102

QUANTITY	SERIAL NO.	EQUIPMENT (MANUFACTURER, MAKE, MODEL #, DESCRIPTION)
1		Sign for Exterior - 30 x 30 2-Color 2 Sides Installed
1		Rug 6 x 9 Flora Green
1		36 x 72 Oak Windsor Desk
1		No. 2395 Lamp Brass
1		Peach Sofa
2		No. 103 Camel Chairs, Armed
1		811 SW Camel Chair Exec.
1		Windsor Left Oak Steno Desk
2		720 Beige Chairs
1		750S Green Chair Exec.
1 roll		9/16" Ecco Bond Pad (33.33 yds)
1		Rug(Oriental in entry)
1		No. 8292 Landscape Picture
1		No. 8273 Dear in Forest Picture
1		Scale Model of the Wilshire Condominium
4		Interior Renderings of Wilshire
5		Silk Screened Floor Plans 2-Color w/Backlighting
2		Floor Plan Display Tables
1		Large Table Housing 3 Floor Plans
1		Large Table for Scale Model Display
6		Ink Floor Plans & Photostats

LESSEE MUST DATE AND SIGN THIS PAGE.

NAME AND ADDRESS MUST ALSO

BE SHOWN ABOVE.

DATE: 9/31/81

LEASE NO.: 10-0031743-6

BY: James O'Neal SEC.
SIGNATURE TITLE

BY: Donald C. Bradshaw V.P.
SIGNATURE TITLE

0003

M F T LEASING

EXHIBIT A

SUPPLIER OF EQUIPMENT	NAME OF LESSEE
	Okland LTD Inc. and Bradshaw Ferrin Development Company 699 East South Temple Suite 310 Salt Lake City, Utah 84102

QUANTITY	SERIAL NO.	EQUIPMENT (MANUFACTURER, MAKE, MODEL #, DESCRIPTION
2		30 x 36 Sample Board Panels for Interior Design
1		30 x 52 Sample Board Panel for Interior Desing

LESSEE MUST DATE AND SIGN THIS PAGE.

NAME AND ADDRESS MUST ALSO

BE SHOWN ABOVE.

DATE: 9/30/81

LEASE NO.: 10-0031743-6

BY: James Okland SEC
SIGNATURE TITLE

BY: Douglas C Bradshaw VP
SIGNATURE TITLE

000306

JOHN MICHAEL COOMBS - #3639
72 East 400 South, Suite 220
Salt Lake City, Utah 84111
Telephone: (801) 359-0833

Attorney for Defendant, Third-Party Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD. INC., and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT CO., a Utah corporation, Defendants.	AMENDED ANSWER, CROSS-CLAIM AND THIRD-PARTY COMPLAINT
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, ROBERT M. SIMONSEN, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership, and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Judge Billings

---oooOooo---

Defendant Okland Ltd., Inc., by and through its attorney of record, John Michael Coombs, hereby amends its response to the

specific allegations of Plaintiff's Complaint and affirmatively defends as follows as permitted by leave of court given this Defendant on September 6, 1985.

1. Defendant Okland Ltd., Inc. has insufficient knowledge or information with which to either admit or deny the first allegation of Plaintiff's Complaint, and therefore denies Plaintiff's first allegation in its Complaint.

2. Defendant Okland Ltd., Inc., has insufficient knowledge or information to either admit or deny the second allegation of Plaintiff's Complaint, and therefore denies Plaintiff's second allegation in its Complaint.

3. Defendant Okland Ltd., Inc., denies paragraph three of Plaintiff's Complaint in that Plaintiff's Exhibit "A" does not set forth the entire agreement between the parties.

4. Defendant Okland Ltd., Inc., has insufficient knowledge or information with which to either admit or deny paragraph four of Plaintiff's Complaint and therefore, denies the same.

5. Defendant Okland Ltd., Inc., has insufficient knowledge or information with which to either admit or deny paragraph five of Plaintiff's Complaint and therefore, denies the same.

6. Defendant Okland Ltd., Inc., has insufficient knowledge or information as to whether Defendant lessee and other successors in interest have failed to make payment as and when due, and as a result thereof, said Equipment Lease has been

declared in default, and therefore, denies paragraph six of Plaintiff's Complaint.

7. Defendant Okland Ltd., Inc., denies the allegations in paragraph seven of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

8. Plaintiff's several allegations fail to state a claim upon which relief may be granted.

9. Defendant Okland Ltd., Inc., has acted in good faith with respect to Plaintiff's several allegations contained herein.

10. Plaintiff has failed to mitigate its damages of which it complains herein.

11. Plaintiff's claims are barred by failure of consideration.

12. Plaintiff's claims are barred by the fact that the agreement between the parties involves a security interest governed by Article 9 of the Uniform Commercial Code.

CROSS-CLAIM

Defendant Okland Ltd., Inc., cross-claims against co-Defendant lessee Bradshaw Development Company as follows:

1. On September 30, 1981, James G. Okland, on behalf of Defendant Okland Ltd., Inc., signed the subject Equipment Lease attached to Plaintiff's Complaint s Exhibit "A", a true and correct copy of which is attached as Plaintiff's Exhibit "A" and cosigned by Bradshaw-Ferrin Development Company now known as

Defendant Bradshaw Development Company, a Utah corporation, in which Third-Party Defendant Doug Bradshaw is a principal shareholder.

2. Approximately 60 days subsequent to said cosigning by Defendant Okland Ltd., Inc., of said Equipment Lease, Defendant Okland Ltd., Inc., withdrew from The Wilshire Project which concerned said lease, leaving co-Defendant Bradshaw Development Company and others, including all known and unknown Third-Party Defendants in full responsiblity and liability therefor.

3. Defendant Okland failed to apply to Plaintif lessor for written permission to be removed as guarantor of the subject Equipment Lease as per the terms of said Equpment Lease based on the oral representations of Defendant Bradshaw Development Company that such would not be necessary.

4. Defendant Bradshaw Development Company, along with other named and unnamed successors in interest, Third-Party Defendants herein, made payment of certain periodic rental payments to Plaintiff/Lessor up until the time of the alleged default, and Defendant Bradshaw Development Company has at all times material herein, had the exclusive use, benefit and enjoyment of all equipment under the subject Equipment Lease all of which has caused Defendant Okland damage.

5. Defendant Bradshaw Development Company, by and through its officer and director, Doug Bradshaw, has represented to

Defendant Okland Ltd., Inc., that it wold pay, assume and hold Defendant Okland Ltd., Inc., harmless from all payments and liability under said Equipment Lease, the default of which has caused Defendant Okland Ltd., Inc. damage.

WHEREFORE, Co-Defendant Okland prays for judgment against Defendant Bradshaw Development Company for any and all amount which is liable to Plaintiff pursuant to Plaintiff's Complaint on file herein, for interest thereon, costs of court, out-of-pocket or other expenses, attorney's fees, and any and all other relief the Court deems just or equitable in the preimises.

THIRD-PARTY COMPLAINT

Defendant and Third-Party Plaintiff Okland hereby complains of named Third-Party Defendant and unknown Third-Party Defendants pursuant to Rule 9(a)(2) as follows:

1. Third-Party Defendant Doug Bradshaw is a resident of the State of Utah and is director, officer and principal shareholder in Bradshaw Development Company, defendant herein.

2. Third-Party Defendant Robert M. Simonsen is a Utah resident and successor in interest to Okland Ltd., Inc., under the subject Equipment Lease, damages for the default of which Plaintiff complains of in its Complaint on file herein.

3. Third-Party Defendant City Gate Condominium Partnership is a Utah limited partnership and successor in interest to Okland Ltd., Inc., with respect to the subject Equipment Lease.

4. John Does 1-5 are heretofore unknown Third-Party Defendants, successors in interest to Defendant Okland Ltd., who have caused damage to Defendant Okland by virtue of Plaintiff's Complaint and have had the use, benefit, and enjoyment of the equipment subject hereto, and at such time as their names are discovered Third-Party Plaintiff Okland shall amend its Complaint herein accordingly.

COUNT I

BREACH OF CONTRACT

5. Third-Party Defendant Doug Bradshaw orally represented to Third-Party Plaintiff that he, in conjunction with each and all other Third-Party Defendants would be responsible for the subject Equipment Lease and any default thereof.

6. Third-Party Defendant Doug Bradshaw in conjunction with each and all other Third-Party Defendants has breached his agreement to be responsible and liable for the subject Equipment Lease for which Third-Party Plaintiff may be liable to Plaintiff.

7. Third-Party Defendant Doug Bradshaw has failed to so indemnify or so assure Third-Party Plaintiff and otherwise secure a written consent from Plaintiff on Okland's behalf as to relinquishing Third-Party Plaintiff's liability under the subject Equipment Lease.

8. Third-Party Defendant Doug Bradshaw's breach of his

oral agreement on behalf and in conjunction with each and all Third-Party Defendants has caused Third-Party Plaintiff Okland damage.

COUNT II

UNJUST ENRICHMENT

9. Third-Party Plaintiff incorporates allegations 1 through 8 in its Third-Party Complaint as if they were set forth more fully hereafter verbatim.

10. Third-Party Defendants Simonsen, Bradshaw, and City Gate Condominium Partnership and/or other unknown Third-Party Defendants have each and all had the use, benefit, and enjoyment of the equipment subject to the Equipment Lease herein and are thereby liable to Third-Party Plaintiff for being unjustly enriched at Third-Party Plaintiff's expense.

COUNT III

PROMISSORY ESTOPPEL

11. Third-Party Plaintiff Okland Ltd., Inc., incorporates allegations 1 through 10 in its Third-Party Complaint as if they were set forth more fully hereafter verbatim.

12. Third-Party Plaintiff has relied to its detriment on the representations of Third-Party Defendants that they, jointly and severally as successors in interest to Defendant Okland on The Wilshire Project would be liable under the subject Equipment Lease.

WHEREFORE, Third-Party Plaintiff prays for jugment against each and all Third-Party Defendants, jointly and severally, and each and all unknown Third-Party Defendants on all three counts in the amount that Third-Party Plaintiff may be liable to Plaintiff, for interest thereon, costs of court, out-of-pocket or other expenses, attorney's fees, and any and all other relief as the Court deems just and equitable in the premises.

DATED this 9th day of September, 1985.

John Michael Coombs
Attorney for Okland Ltd., Inc.

MAILING CERTIFICATE

I hereby certify that on this 10th day of September, 1985, I mailed a copy of the foregoing Amended Answer to Steven D. Crawley, Attorney for Bradshaw Development Co., Doug Bradshaw, and City Gate Condominium Partnership, Suite 107, 2225 East Murray-Holladay Road, Salt Lake City, Utah 84117; Kyle W. Jones, Attorney for Plaintiff, 200 South Main, Suite 1000, Salt Lake City, Utah 84101; and R. L. Gardiner, FOX, EDWARDS, GARDINER & BROWN, 57 West 200 South, Suite 400, P. O. Box 3450, Salt Lake City, Utah 84110.

Kyle W. Jones - 1744
Attorney for Plaintiff
200 South Main, Suite 1000
Salt Lake City, Utah 84101
Telephone: 359-7771

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD., INC. and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT COMPANY, a Utah corporation, Defendants.	AFFIDAVIT IN SUPPORT OF JUDGMENT.
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, BOB SIMONSEN, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Assigned: Judge Billing

STATE OF UTAH)
) ss.
County of Salt Lake)

C. S. Cummings, upon oath, deposes and says:

1. That he is an officer of First Security Financial and authorized to make this statement on its behalf.

2. That the matters set forth in this Affidavit are true of affiant's own knowledge.

3. That affiant has reviewed the allegations contained in the Complaint on file in this matter and knows the contents thereof to be true.

4. That affiant has reviewed the original of the Equipment Lease Agreement, a copy of which is attached to the Complaint as Exhibit A, and does verify the Exhibit attached to the Complaint is identical in every respect to the original document.

5. That as of the date of this Affidavit, defendants Okland Ltd., Inc. and Bradshaw-Ferrin Development Company, now known as Bradshaw development Company are indebted to First Security Financial in the amount of $26,423.95, as calculated per the Lease, plus interest at the rate of eighteen percent (18%) per annum until paid, plus costs of court, expenses of repossession and sale of the equipment, and a reasonable attorney's fee.

DATED this ____ day of April, 1985.

C. S. Cummings

Subscribed and sworn to before me this 4th day of April, 1985.

Notary Public
Residing in Salt Lake County, UT.
My commission expires:

Kyle W. Jones - 1744
Attorney for Plaintiff
200 South Main, Suite 1000
Salt Lake City, Utah 84101
Telephone: 359-7771

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD., INC. and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT COMPANY, a Utah corporation, Defendants.	AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, BOB SIMONSEN, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Assigned: Judge Billin

STATE OF UTAH)
: ss.
County of Salt Lake)

D.R.Russell, upon oath, deposes and says:

1. That he has access to the files of First Security Financial and is authorized by it to make this statement on it's behalf.

2. That the matters set forth in this affidavit are true of affiant's own knowledge.

3. That affiant has reviewed the allegations contained in the complaint on file in this matter and knows the contents thereof to be true.

4. Affiant has reviewed the orginals of the Equipment Lease Agreement, the corportate resolution, Check no 16535 written by MFT laseing to defendants,both front and back, and the Bill of Sale to the defendants, copies of which are attached to this affidavit as exhibits A through D, and does verify the exhibits are identical in every respect to the original documents.

5. That the equipment listed on the Schedules to the Equipment Lease Agreement was delivered to the defendants and that it has not been repossessed by the plaintiff.

6. That as of the date of this affidavit, defendant Okland is indebted to the plaintiff pursuant to the Eqipment Lease agreement as follows:

a.	31 payments at $775.19 (last payment 2/29/84)	$ 24,030.89
b.	property taxes for 1984	$ 363.52
c.	property taxes for 1985	$ 341.80
d.	Late charges (31 months) (.05 x 775.19=$38.75)	$ 1,201.25
e.	Interest(18% per annum from May 1, 1984)	$ 6,055.77
	subtotal	$ 31,993.23

together with attorney's fees as provided by the Equipment Lease Agreement and the expeneses of location, repossession and sale

of the leased equipment.

DATED this 23rd day of September, 1985.

Subscribed and sworn to before me this 23rd day of September, 1985.

Notary Public
Residing in Salt Lake County, Ut.
My commission expires: 12-1-88

A. 19

JOHN MICHAEL COOMBS - #3639
72 East 400 South, Suite 325
Salt Lake City, Utah 84111
Telephone: (801) 363-7074

E. PAUL WOOD - #3537
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

Attorneys for Defendant, Third-Party Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---ooo0ooo---

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD. INC., and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT CO., a Utah corporation, Defendants.	AFFIDAVIT OF JOHN MICHAEL COOMBS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, BOB SIMONSON, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Judge Billings

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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

JOHN MICHAEL COOMBS being first duly sworn, deposes and says as follows:

1. That I am legal counsel to Defendants/Third-Party Plaintiff, Okland Ltd. Inc. in the above entitled matter.

2. That I have had conversations with Kyle Jones, Attorney for Plaintiff relative to the above.

3. That in conversations Mr. Jones indicated to me that the purported "lease" agreement was in actuality a "sale leaseback" and not a "true" lease and therefore, my understanding of the law is that the agreement would be for security.

4. That while Plaintiff has additional time within which to formally respond to Defendant/Third Party Defendant Okland Ltd., Inc.'s First Set of Interrogatories, Request for Production of Documents and Requests for Admissions, Mr. Jones orally indicated to me that no documentation or other information exists or is available as to the purported "lease" other than a notation that the lease is in fact a "sale leaseback" including but not limited to the absence of documentation as to the disposition of the title of the property upon termination of the lease, the residual on the lease, the payout, the actual damages of Plain-

tiff, the identity of the beneficiary of the investment tax credits and depreciation, the useful life of the equipment, and other factual matters relevant to the agreement between the parties and the liability for its breach.

DATED this 15th day of May, 1985.

John Michael Coombs

SUBSCRIBED AND SWORN to before me this 15th day of May, 1985.

Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

5-5-88

JOHN MICHAEL COOMBS - #3639
72 East 400 South, Suite 220
Salt Lake City, Utah 84111
Telephone: (801) 359-0833

Attorney for Defendant, Third-Party Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD. INC., and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT CO., a Utah corporation, Defendants.	SUPPLEMENTAL AND REVISED AFFIDAVIT OF JAMES G. OKLAND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, BOB SIMONSON, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Judge Billings

---oooOooo---

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

JAMES OKLAND, having been duly sworn upon oath, deposes and says that:

1. I am the Secretary of Okland Ltd., Inc., and authorized on behalf of the corporation to make this Affidavit.

2. The statements made herein are based upon personal knowledge.

3. On or about the 30th day of September, 1981, I signed the Agreement attached to Plaintiff's Complaint as Exhibit "A".

4. The Agreement does not reflect the actual agreement and intent of Okland Ltd., Inc., the co-Defendant Bradshaw-Ferrin Development Company and Murray First Thrift in that Okland Ltd., Inc., agreed to purchase the property from Murray First Thrift rather than lease the property as described in the Agreement.

5. At the end of the payment term, all of the property described in the schedules should be owned by Okland Ltd., Inc., and the co-Defendant Bradshaw-Ferrin Development Company and title should pass to us.

6. This creates a significant difference in that upon passage of title, the equipment could be leased, sold or otherwise disposed of giving Okland Ltd., Inc., subhstantial value and return.

7. Murray First Thrift orally agreed that Okland Ltd., Inc., and the co-Defendant Bradshaw Development Company at the expiration of the Lease, would be the owners of the property,

but that the Agreement should be styled in a lease form so that Murray First Thrift could receive the investment tax credit on the equipment.

8. With respect to the alleged default under the Agreement, I have never received an accounting of the application of payment made and believe that the amount requested in Plaintiff's Complaint of $26,423.95 as of May 1, 1984, is erroneous.

9. During the first part of April, 1984, I received a communication from the Plaintiff, attached hereto as Exhibit "A" and incorporated herein by reference.

10. At the time of the letter, which was April 3, 1984, the entire balance due was $25,837.91 which is substantially less than the amount prayed for in the Compl nt.

11. During the first part of May, 1984, I received the letter from Plaintiff's attorney attached hereto as Exhibit "B" and incorporated herein by reference.

12. As of the date of Exhibit "B", April 27, 1984, the alleged amounts due for delinquent payment was $2,438.15 which does not equal the delinquent balance claimed on April 3, 1984, plus an additional monthly payment of $775.15.

13. In addition, the original payment to Murray First Thrift included the last monthly payment which, to my knowledge, has not been applied to reduce the balance due and owing the

agreement.

14. To my knowledge, the Plaintiff has not attempted to sell or otherwise dispose of the equipment which is the subject of the Agreement to decrease the damages which they allegedly have incurred as a result of alleged delinquent payments. Further, the Plaintiffs have made no attempt to retrieve the furniture.

15. That the Equipment Lease does not contain the oral understandings between the parties which existed prior to and contemporaneous with the signing of the Lease including but not limited to the fact that the Equipment Lease did not even allude to the fact that the transaction was in actuality a sale lease-back, not a true lease.

16. In addition, there were oral understandings as to the "residual" on the Lease which are not contained in the Lease, namely who would own the equipment upon expiration of the lease terms and conditions and what that unstated "residual" was or would be and upon what such was based.

17. Finally, the written lease does not contain the several oral understandings as to the investment tax credits, depreciation, and other tax considerations and were purposely <u>not</u> put in the "lease", including the "residual", as it was my understanding that if these terms were written into the lease it

would not be a "lease" but another instrument more like a collateral sales agreement or security agreement which would more accurately reflect the true understanding of the parties hereto.

18. Lastly, I do not believe that Okland Ltd., Inc. received any of the consideration for the sale portion of the sale lease-back, a transaction which is not even mentioned in the "lease.

DATED this 13 day of September, 1985.

JAMES G. OKLAND

SUBSCRIBED and SWORN to before me this 18th day of September, 1985.

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
1/6/87

MAILING CERTIFICATE

I hereby certify that on this 18th day of September, 1985, I mailed a ocpy of the foregoing Supplemental and Revised Affidavit to Steven D. Crawley, Attorney for Defendant Bradshaw, 2225 East 4800 South, Suite 107, Salt Lake City, Utah 84117; Kyle W. Jones, Attorney for Plaintiff, 200 South Main Street, Suite 1000, Salt Lake City, Utah 84101; and to L. R. Gardiner, Jr., Attorney for Third-Party Defendant Simonsen, 57 West 200 South, Suite 400, P. O. Box 3450, Salt Lake City, Utah 84110.

EXHIBIT "A"

FIRST SECURITY LEASING COMPANY

P.O. BOX 30006 • SALT LAKE CITY, UTAH 84130 • TELEPHONE (801) 350-5270

April 3, 1984

Oakland Ltd Inc.
1978 South West Temple
Salt Lake City, Utah 84115

RE: Lease No. 531743

Dear Gentlemen:

In accordance with the terms of your Lease Agreement and default provisions there-in, we hereby formally declare the above referenced lease in default and make demand for payment as follows:

Payment amount due:	$ 1,598.37
Lease Balance:	$ 24,239.54

If this matter is not resolved to our satisfaction within (10) days from the date of this letter, we will proceed with all remedies that are available to us under the Lease Agreement.

Should you decide to bring this lease current rather than pay the lease off and purchase the equipment, we will not tolerate further delinquent rental payments. Your payments will be expected on the date due.

Sincerely yours:

D. R. Russell
Assistant Vice President
Assistant-Manager
Account Services

cc: Joseph W. Winterer VP

EXHIBIT "A"
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EXHIBIT "B"

WILKINS & JONES
ATTORNEYS AT LAW
200 SOUTH MAIN, SUITE 1020
SALT LAKE CITY, UTAH 84101

MICHAEL J. WILKINS
DIANE W. WILKINS
KYLE W. JONES

TELEPHONE
(801) 328-4760

April 27, 1984

Okland Limited
1978 South West Temple
Salt Lake City, Utah 84115

CERTIFIED MAIL NO. 492 388 253

Bradshaw Development Co.
c/o Steven D. Crawley
50 South Main, Suite 880
Salt Lake City, Utah 84144

CERTIFIED MAIL NO. 492 388 254

Douglas C. Bradshaw
1149 Mercedes Way
Salt Lake City, Utah 84108

CERTIFIED MAIL NO. 492 388 255

Re: Okland Limited/Bradshaw Development Lease

Gentlemen:

This firm has been retained to represent the interests of First Security Financial with respect to an unpaid equipment lease obligation originally between MFT Leasing as lessor and Okland Limited and Bradshaw Ferrin Development as lessees. First Security Financial is the successor in interest to MFT Leasing.

Formal demand is hereby made that the unpaid payments through April, 1984, in the total amount of $2,438.15, plus attorney's fees of $150.00 for a total payment of $2,588.15, be made within ten (10) days of the date of this letter.

Your certified or cashier's check, made payable to "First Security Financial" should be mailed or delivered so as to be received by the undersigned within the time period specified.

Your failure to make the payment as required will result in immediate legal actior to protect the interests of First Security Financial.

Govern yourselves accordingly.

WILKINS & JONES

Michael J. Wilkins

MJW:js

cc: First Security Financial

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EXHIBIT "B"

Kyle W. Jones - 1744
Attorney for Plaintiff
200 South Main, Suite 1000
Salt Lake City, Utah 84101
Telephone: 359-7771

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

FIRST SECURITY FINANCIAL, a Utah corporation, Plaintiff, vs. OKLAND LTD., INC. and BRADSHAW-FERRIN DEVELOPMENT COMPANY, now known as BRADSHAW DEVELOPMENT COMPANY, a Utah corporation, Defendants.	BA. 201 NO. 832 10-16-85 — 9:26 a.m. SUMMARY JUDGMENT
OKLAND LTD., INC., Third-Party Plaintiff, vs. DOUG BRADSHAW, BOB SIMONSEN, CITY GATE CONDOMINIUM PARTNERSHIP, a limited partnership and JOHN DOES 1 - 5, Third-Party Defendants.	Civil No. C-84-2941 Assigned: Judge Billings

Plaintiff's Motion for Summary Judgment against defendant Okland Ltd., Inc., came on regularly for hearing before the Honorable

Judith Billings, District Court Judge presiding, on Monday, September 23, 1985, at the hour of 10:00 a.m. Plaintiff appeared by and through its attorney of record, Kyle W. Jones, and defendant Okland Ltd., Inc. appeared by and through its attorney of record, John Michael Coombs. No other parties appeared on behalf of any of the other parties in this matter. The court, after hearing the arguments in this matter, having reviewed the pleadings on file herein, finds that there is no factual issue with respect to whether or not the contract involved is a lease or a security agreement or a contract of guarantee and that plaintiff has properly pursued its remedies and that there is no evidence to support defendant's allegation that the plaintiff failed to mitigate its damages thereby the court enters this Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Summary Judgment against defendant Okland Ltd., Inc., be granted and that plaintiff be awarded Judgment in the following amounts:

$24,030.89	amount remaining to be paid under contract;
363.52	property taxes for 1984;
341.80	property taxes for 1985;
1,201.25	late charges pursuant to contract;
6,055.77	interest;
1,900.00	attorney's fees
$33,893.23	Total Judgment

with interest on the total Judgment at eighteen percent (18%) per annum as provided by the contract from the date of this Judgment until paid, plus after accruing costs, attorney's fees and the expenses of location, repossession and sale of the leased equipment

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff be granted all necessary writs and orders necessary to recover its leased equipment if and when it is located.

DATED this 15 day of ~~September~~ October, 1985.

BY THE COURT

Judith M. Billings

Judge Judith Billings

By _____
Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that I personally mailed a true and exact copy of the foregoing Summary Judgment this 26 day of September, 1985, postage prepaid, by U.S. mail, to:

John Michael Coombs
72 East 400 South, Suite 325
Salt Lake City, Utah 84111

Steven D. Crawley
2225 East 4800 South, Suite 107
Salt Lake City, Utah 84117

L. R. Gardiner, Jr.
57 West 200 South, Suite 400
P. O. Box 3450
Salt Lake City, Utah 84110

Kyle W. Jones

DISCOUNT SHEET

Master Lease # 10-0031743-6

SN
MD LTD Inc and Bradshaw Ferrin Development Co PHONE # 521-6454
As Co-Lessees. 699 East South Temple Suite 310 City/State SLC UT. Zip 84102

.r

sman Sale-leaseback

e #

LEASE COST: 25,838.51 FACTOR: 2.857

c Yield 26.5

er

o. Type Furniture

ent Schedule:

HLY ✓ QUARTERLY

0 PAYMENTS @

PAYMENT DUE 738.28 11-15-81

PAYMENT ~~1,175.8~~ TAX 36.91

AL PAYMENT 775.19

ANCE PAYMENTS # 2 $ 1550.38

MENTS:

Accounts Payable

Payable to:	Check #	Amt.
Bradshaw Ferrin Dev. and Oakland Ltd Inc	pd.	25,838.
CR 229-00		$25,838.

Insurance

Credit Life(Single).		
Credit Life(Dism)..		
Joint Life.....		
Joint Life/Dism.....		
A & H.....		
CR 431		$

SUB TOTAL COSTS $

COMMISSION PAYABLE:

LEASE COMM.	$
CL COMM (7½%)	$
A & H COMM (12%)	$
CR 230	$

OTHER (DESCRIBE)

CR $

TOTAL COSTS (CR) $25,838.5

OSS INCOME:

G. LEASE BAL. DR 125 $ 44,296.80

ESIDUAL DR 188-00 $ 1,291.93

OMMISSION EXPENSE DR 527 $

OTAL REC. (BAL.) $ 45,588.73

DEFERRED INCOME CR 137 $ 19,750

TOTAL CREDIT (BAL) $ 45,588.

0002

Original

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

FIRST SECURITY FINANCIAL,)

PLAINTIFF,)

-VS-) CIVIL NO. C-84-2941

OAKLAND LIMITED,) JUDGE'S RULING

DEFENDANT.)

* * *

BE IT REMEMBERED THAT ON MONDAY, THE 23RD DAY OF SEPTEMBER, 1985, COMMENCING AT THE HOUR OF 11:05 O'CLOCK A.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE HONORABLE JUDITH M. BILLINGS, JUDGE IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH.

* * *

A P P E A R A N C E S

FOR THE PLAINTIFF: KYLE W. JONES
ATTORNEY AT LAW
CONTINENTAL BANK BUILDING
SALT LAKE CITY, UTAH

FOR THE DEFENDANT: JOHN MICHAEL COOMBS
ATTORNEY AT LAW
72 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111

* * *

I N D E X

* * *

P R O C E E D I N G S

JUDGE BILLINGS: THE COURT IS PREPARED TO RULE ON THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

THE COURT WILL GRANT THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. THE COURT FEELS THAT THE ARGUMENTS RAISED BY THE DEFENDANT DO NOT MAKE SUMMARY JUDGMENT APPROPRIATE IN THIS CASE WHERE THE CONTRACT AT ISSUE IS A LEASE FOR A SECUR AGREEMENT. THE COURT FEELS THAT THE PLAINTIFF HAS PROPERLY PURSUED THEIR REMEDIES.

THE COURT IS NOT PERSUADED THAT THERE IS SUFFICIE EVIDENCE TO INDICATE THAT THE CONTRACT AT ISSUE IS NOT AN INTEGRATED CONTRACT AND THE COURT, THEREFORE, GRANTS SUMMARY JUDGMENT ON THAT CONTRACT AND FEELS IT MAKES NO DIFFERENCE WHETHER IT IS A CONTRACT OF GUARANTEE, CONTRACT OF LEASE OR CONTRACT OF SECURITY AGREEMENT, THAT THE REMEDY SOUGHT, WHIC IS PAYMENT OF THE AMOUNT PROMISED, IS THE APPROPRIATE REMEDY SINCE THERE HAS BEEN NO REPOSSESSION OF EQUIPMENT BECAUSE TH EQUIPMENT HAS DISAPPEARED.

THIS FURTHER CONCLUDES THE DEFENSE FROM BEIN A FACTUAL ISSUE AS TO THE PLAINTIFF'S FAILURE TO MITIGATE DAMAGES AS THE COURT HAS FOUND NO EVIDENCE OF THAT BEFORE TH COURT.

I AM GOING TO ASK COUNSEL FOR THE PLAINTIFF TO PREPARE THE ORDER, GIVE IT TO COUNSEL FOR THE DEFENDANT AND THEN TO THE COURT FOR SIGNATURE.

MR. COOMBS: YOUR HONOR, WHAT ABOUT THE QUESTION OF DAMAGES? SHOULD THERE BE A TRIAL ON THE ISSUE OF DAMAGES?

JUDGE BILLINGS: NO. I THINK THE AFFIDAVIT IS SUFFICIENT EVIDENCE OF DAMAGES AND THERE ARE NO CONTRAVENING AFFIDAVITS TO INDICATE THOSE DAMAGES ARE NOT CORRECT.

(WHEREUPON, A DISCUSSION BETWEEN COURT AND COUNSEL WAS HAD, AFTER WHICH, THE FOLLOWING PROCEEDINGS WERE HAD):

JUDGE BILLINGS: AS FAR AS ATTORNEY'S FEES YOU WILL HAVE TO SUBMIT AN ATTORNEY'S FEES AFFIDAVIT PURSUANT TO THE RULES. UPDATE YOUR AFFIDAVIT, SERVE IT TO COUNSEL. IF THERE IS ANY OBJECTION TO THE ATTORNEY'S FEES THE COURT WILL HEAR THAT, OTHERWISE IT WILL BE AS SUBMITTED IN THAT AFFIDAVIT.

COURT WILL BE IN RECESS.

(WHEREUPON, THE JUDGE'S RULING WAS CONCLUDED).

* * *

C E R T I F I C A T E

STATE OF UTAH)
: SS.
COUNTY OF SALT LAKE)

I, EILEEN M. AMBROSE, HEREBY CERTIFY THAT I AM A CERTIFIED SHORTHAND REPORTER OF THE STATE OF UTAH; THAT AS SUCH CERTIFIED SHORTHAND REPORTER, I ATTENDED THE HEARING OF THE ABOVE-MENTIONED MATTER AT THAT TIME AND PLACE SET OUT HEREIN; THAT THEREAT I TOOK DOWN IN SHORTHAND THE TESTIMONY GIVEN AND THE PROCEEDINGS HAD THEREIN; AND THAT THEREAFTER I TRANSCRIBED MY SAID SHORTHAND NOTES INTO TYPEWRITING, AND THAT THE FOREGOING TRANSCRIPTION IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE SAME.

Eileen M. Ambrose, C.S.R.
EILEEN M. AMBROSE, C.S.R.

MY COMMISSION EXPIRES:
JANUARY 14TH, 1988.