IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SAM KAZERY **APPELLANT**

V. **CAUSE NO. 2009-CA-01391**

GEORGE WILKINSON **APPELLEE**

BRIEF OF APPELLANT

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DATED: February 22, 2010

ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SAM KAZERY — APPELLANT

V. — CAUSE NO. 2009-CA-01391

GEORGE WILKINSON — APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Justice of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sam Kazery, 5236 Robinson Road Extension, Jackson, Mississippi 39204.
2. Arnold Kazery, 1992 Dry Creek Road, Magee, Mississippi 39141.
3. Thomas M. Bryson, Esq., Attorney for Appellant, Keyes, Bryson & Piazza, 5448 I-55 North, Suite E, Jackson, Mississippi 39211.
4. George Wilkinson, 104 Seville Way, Madison, Mississippi 39110.
5. Vernon H. Chadwick, Esq., Attorney for Appellee, 1640 Lelia Drive, Suite 210, Jackson, Mississippi 39216.

Respectfully Submitted,
SAM KAZERY

By: THOMAS M. BRYSON

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STATEMENT OF THE ISSUES

The Appellant, Sam Kazery, having designated the entire record as being necessary for appeal, state that the issues Appellant intends to present on appeal are these:

1. The Trial Court erred in concluding that the Plaintiff, Sam Kazery, waived his rights to receive written notification of the Defendant's exercise of his option to renew the subject lease in 1997 and in 2007.

2. The Trial Court erred in concluding that the Defendant properly exercised his option to renew the subject lease through July 31, 2027.

3. The Trial Court erred in concluding that after the Plaintiff received notice on July 23, 2007, that Kazery must have acted to enforce his right or be deemed to have waived his right to receive notice of renewal prior to March 31, 2007.

4. The Trial Court erred in concluding that Kazery, in his letter on April 20, 2007, intended to allow the Defendant to improperly renew his lease.

5. The Trial Court erred in concluding that after Wilkinson's July 23, 2007 letter, specifically putting Kazery on notice that Wilkinson had notified Arnold Kazery of his intention to renew his fourth and fifth options, that Kazery did not object.

6. The Trial Court erred in finding that a renewal clause of a lease need not be strictly complied with, despite no showing that it resulted not from lessee's own ignorance or negligence but from accident, fraud, surprise and mistake.

7. The Trial Court erred in finding that a renewal clause of the lease need not be strictly complied with, despite a failure to find it will do little or no harm to the lessor.

8. The Trial Court erred in not admitting into evidence Exhibits number 7 and 8 initially but requiring authentication of a disk at the conclusion of the trial.

STATEMENT OF THE CASE

On February 12, 2008, Sam Kazery, Plaintiff herein, filed his complaint *pro se* seeking among other things declaratory judgment from the Chancery Court of Hinds County, Mississippi, First Judicial District. The Complaint sought to void Defendant's claim or rights under a lease pertaining to property owned in the City of Jackson by the Plaintiff. The basis of the Plaintiff's claim is that the lease was not properly renewed and that the Defendant failed to meet certain other terms and conditions contained in the lease, including but not limited to providing proof of insurance and payment of taxes.

STATEMENT OF FACTS

The record shows that on or about August 1, 1966, Mary Kazery Eyd ("Eyd") was the owner of the subject real estate located in the City of Jackson, Hinds County, Mississippi. The record further reflects that on or about August 1, 1966, Eyd entered into a lease with Courtesy Inns, Inc. ("Courtesy"), (Exhibit "1") which was properly executed and bound the successors of lessee and lessor. The Appellant, Sam Kazery ("Kazery"), is the successor-in-interest to the property subject to this lawsuit and was the successor to Eyd's position as lessor under the aforementioned lease. Kazery's claim arises by virtue of an agreed judgment (Exhibit "6") and warranty deeds (Exhibits "20" and "21"). The Defendant, Wilkinson's, interest as lessee arises from an assignment of lease dated August 23, 1985 (Exhibit "2"). There is no dispute that at all times pertinent Sam Kazery held good and merchantable title to the property and is successor to Eyd's interest in the subject lease. Mary Kazery Eyd was the grandmother of Plaintiff, Sam Kazery and the mother of Counter-Defendant, Arnold Kazery, in the present action.

On or about December 26, 1984, a conservatorship was established for Mary Kazery Eyd in

the Chancery Court of Hinds County, Mississippi and the Honorable Robert G. Nichols, Jr. was appointed as conservator. Subsequent to Mr. Nichols appointment, Howard G. Ross, Jr., Esquire was appointed as substitute conservator for Mrs. Eyd. On November 6, 1986, Howard Ross, the conservator of the Estate of Mary Kazery Eyd, joined and consented to an Agreed Judgment in the matter of *Eyd v. Kazery, et al.*, cause number 124188. In that Agreed Judgment, Howard Ross, the conservator, was authorized and directed to issue warranty deeds to Arnold Joseph Kazery Eyd or his designee (emphasis added) conveying the subject property (Exhibit "6"). Ross executed a warranty deed (on November 10, 1966) to George Kazery and Sam Kazery, Arnold Kazery's sons and designees (Exhibit "20"). This conveyance contained the following language: "This conveyance is subject to that certain lease to Courtesy Inns, Inc.".

George Kazery (Sam Kazery's brother) executed a warranty deed to Sam Kazery, conveying his interest in the property and the lease on April 15, 1987 (Exhibit "21"), both of these deeds were filed of record on September 27, 1990. Therefore, there is no dispute that Sam Kazery is vested with record title to the subject property and is successor to lessor's interest in the lease.

The lease was for an initial term of one year and contains five options to renew as follows.

a. The first twenty year option was to be exercised on or before July 31, 1967 to extend the lease through July 31, 1987.

b. The second option was a ten year option that required the exercise on or before March 31, 1987 to extend the term through July 31, 1997.

c. The third option was a ten year option which required written notice to be received from the lessee on or before March 31, 1997 to extend the term to July 31, 2007.

d. The fourth option was likewise to be exercised by written notice on or before March

31, 2007 to extend the term through July 31, 2017.

e. The fifth option was required to be exercised by written notice upon the lessor on or before March 31, 2017, to extend the term through July 31, 2027.

There was no written evidence presented indicating a notice to exercise the second renewal option on or before March 31, 1987, however, Kazery allowed Wilkinson to remain in possession and directed that Wilkinson make the rental payments to his father, Arnold Kazery, in accordance with his grandmother's wishes. The third option was required to be exercised on or before March 31, 1997. Wilkinson produced a letter (Exhibit "14"), which he alleges renewed his lease through 2007. This letter was sent to Sam Kazery and the letter indicates that Wilkinson had attempted to place Sam Kazery on notice via certified mail but that those letters were refused. Sam Kazery elected to allow Wilkinson to remain in possession through July 31, 2007.

As early as December 4, 1986, Sam Kazery began corresponding with Wilkinson (Exhibits "7, 8, 9, 11, 12") and likewise Wilkinson began responding to Kazery (Exhibits "10 and 14"). Under the terms of the lease Wilkinson was required to pay the advalorem property taxes on the property and has done so in accordance with the lease. The property tax receipts indicate that from the date of recording of the warranty deeds to Sam Kazery (Exhibits "20 and 21") the tax receipts had indicated that the property was vested in Sam Kazery (Exhibit "19"). George Wilkinson provided no written notice, as required under the lease, to Kazery prior to March 31, 2007 to renew the lease through July 31, 2017, nor has he provided written notification of a further exercise of his fifth option through July 31, 2027. Wilkinson only notified Kazery of his intention to exercise the forth and fifth option through a letter from his attorney dated July 23, 2007 (Exhibit "26"), which is after the deadline contained in the lease of March 31, 2007. Wilkinson contends that he provided

notification to Arnold Kazery in 2004 and 2006. It is undisputed that Sam Kazery received neither of these notifications.

The record further reflects that Kazery began corresponding with the Wilkinson as early as December 4, 1986 (Exhibit "7 and 34"), regarding his interest in the lease thus beginning correspondence between Kazery and Wilkinson pertaining to the lease and the position of the parties. Wilkinson had filed his assignment of lease dated August 23, 1985 with the lease attached in the offices of the Chancery Clerk of Hinds County, Mississippi (Exhibit "3") and thereafter began making lease payments as instructed first by the conservator for Eyd (Exhibit "5") and later at the instruction of Sam Kazery (R.V. 1, pg. 93). At no time did the Wilkinson ever receive any communication either oral or written from Kazery or his predecessor indicating that Arnold Kazery had any interest in the lease. Despite the communication, both oral and written between Kazery and Wilkinson, Wilkinson insisted on trying to deal with Arnold Kazery. Both Arnold Kazery and Kazery contend that Wilkinson purposely did so as he viewed Arnold Kazery as an easier target for his attempts to purchase the property. Arnold Kazery is in advanced age and lacks the formal education (R.V. 1, pgs. 91-94). It is undisputed however, that George Wilkinson personally reviewed the tax receipts and paid the taxes as instructed by Sam Kazery, made the rent payments to either Sam Kazery or Arnold Kazery and attempted to exercise his option to renew the lease in 1997 by letter to Sam Kazery in which he enclosed a copy of a letter renewing his lease for another 10 years (Exhibit "14", R.V. 1, pg. 49). He stated in part "Enclosed is a copy of the letter I sent to you twice via certified mail and you refused" (emphasis added). Sam Kazery acknowledges receiving this letter in 1997, after the due date, and acknowledges that even though the notice to him was late, he allowed everything to continue on (R.V. 1, pg. 104). Subsequent to the letter renewing

the lease sent to Sam Kazery in 1997, George Wilkinson made no attempt to send any notice of renewal to Sam Kazery as he had done previously. The deadline for the exercise of option number four was March 31, 2007. Wilkinson alleges that he made two attempts to exercise his options through letters to Arnold Kazery in 2004 and 2006. Arnold Kazery testifies that neither of these letters was delivered to Sam Kazery, and in fact testifies that he did not receive the 2004 letter and threw away the 2006 letter (R.V. 2, pgs. 146-147).

On April 20, 2007, Sam Kazery wrote a letter to George Wilkinson (Exhibit "22") in which he invites Mr. Wilkinson to begin discussions for a future lease. Kazery again wrote Wilkinson on July 12, 2007 (Exhibit "18") reminding him that his lease would expire on July 31, 2007 and that he expected him to vacate, but again renewing his offer to discuss continued occupancy of the property by Wilkinson. On July 23, 2007, Kazery received a letter from Wilkinson's attorney (Exhibit "26") delivering to Sam Kazery for the first time the purported renewal of the lease allegedly sent to Arnold Kazery. The deadline for renewal had passed on March 31, 2007. After numerous attempts to resolve this matter Kazery filed this action.

The following is a listing of the significant dates set forth above.

1. August 1, 1966 - Execution of lease agreement between Eyd and Courtesy;
2. August 23, 1985 - Assignment of lease from Courtesy to Wilkinson;
3. November 6, 1986 - Agreed Judgment authorizing conservator of Eyd to convey property to Arnold Kazery or his designee;
4. November 10, 1986 - Warranty Deed from conservatorship of Eyd to George Kazery and Kazery;
5. March 31, 1987 - Due date for exercise of option two under the lease;

6. April 15, 1987 - Warranty Deed from George Kazery to Kazery;

7. March 31, 1997 - Due date for exercise of the third option under the lease;

8. 1996 through 1997 - Undated letter from Wilkinson to Kazery referencing his attempt to notify Kazery of his renewal of the lease;

9. March 31, 2007 - Due date for the exercise of option four;

10. April 20, 2007 - Letter from Kazery to Wilkinson;

11. July 12, 2007 - Letter from Kazery to Wilkinson containing notice to vacate;

12. July 23, 2007 - Letter from Wilkinson's attorney to Kazery referencing letters to Arnold Kazery.

SUMMARY OF THE ARGUMENT

This matter can be decided by answering the following questions.

a. Did Kazery waive his rights to receive notification as provided under the lease of the second and third options due no later than March 31, 1987 and March 31, 1997 and if he did so does that waiver constitute a waiver of his right to receive written notification no later than March 31, 2007 of the exercise of options four and five?

b. Did Sam Kazery's actions after receiving notification on July 23, 2007 constitute a waiver of the requirement that he be notified in writing no later than March 31, 2007?

c. The last question to be answered is whether the Court properly applied the test enunciated in the case of *Koch v. H & S Development Company*, 163 So.2d 710 (Miss. 1964), which would enable the Court to grant equity relief for failure to strictly comply with the requirements contained in a renewal clause in a lease?

The Appellant would argue as to the first point that each renewal option's requirements must

be strictly complied with and a waiver of one option does not constitute a waiver of requirements contained in subsequent renewal options. The Appellant would further argue that the Court's findings of fact do not support the finding that the Appellant knowingly and intentionally waived the notice requirements after March 31, 2007. Lastly, the Appellant would also argue that the Court's own findings of fact do not support equity relief under the doctrine set forth in the *Koch v. H & S Development Company*, 163 So.2d 710 (Miss. 1964).

ARGUMENT

A careful reading of the Court's opinion and the record reflects no basis for finding that the Appellant knowingly and intentionally waived notice requirements under the lease prior to March 31, 2007. An examination of the doctrine of waiver sets forth the well established rule in Mississippi that a waiver requires that there be an intentional surrender or relinquishment of the right. This rule supposes a voluntary surrender of a right. It also requires that any waiver must evidence an intention to permanently surrender the right alleged to have been waived. *Ewing v. Adams*, 573 So.2d 1364 (Miss. 1990). The rule is further defined in a Utah case, *U.S. Realty 86 Associates vs. Security INV Ltd.*, 40 P.3d 586 (Utah 2002), in which the Court found that a stricter standard is necessary for a waiver of a lease renewal option requirement than that which is required for waiver of a bilateral contract provision. In the case at bar, it is important to distinguish the actions of Kazery prior to March 31, 2007 and subsequent thereto. It is undisputed that Kazery obtained title to the property by virtue of warranty deeds dated November 10, 1986 and April 15, 1987. Both were recorded in 1990. However, prior to 1990 Kazery began corresponding with Wilkinson (Exhibits "7, 8, 9, 10, 11, 12, and 14"). Wilkinson testifies that he did not keep records dating back that far but did acknowledge that he had received letters throughout the time from Kazery talking about the

requirements that he was looking for under the lease (R.V. 1, pg. 31). None of the evidence or testimony presented indicates that Wilkinson attempted to exercise his option to renew in 1987 through written notice upon Arnold Kazery. However, it is undisputed that Wilkinson remained in possession, paid rent as directed, and reviewed and paid tax bills as received. There is however, evidence of a written renewal attempt as required in 1997 for the term ending July 31, 2007. (Exhibit "14") Wilkinson testified that this letter, although undated, would have been sent in 1996 or 1997 (R.V. 1, pg. 51). This letter is significant in that Wilkinson references his previous attempts to notice Sam Kazery of his exercise of the option and supplying his father, Arnold Kazery, with a copy. No attempt was made prior to March 31, 2007 to notify Sam Kazery as required under the lease in like manner. We can only speculate as to why no such attempt was made in 2007, although Wilkinson hints at the reason when he testifies that he found it easier to deal with Arnold Kazery and that he did not get along well with Sam Kazery (R.V. 1, pg. 77). Therefore, it is clear that although Wilkinson placed Kazery on notice in 1996 and 1997 of his intent to exercise his option through July 31, 2007, he made no attempt to do so for the fourth and fifth options prior to March 31, 2007. Although Sam Kazery disputes the fact that this notice was received prior to March 31, 1997, he elected to continue to accept rental payments and continue the landlord-tenant relationship for the term ending July 31, 2007. The question which then must be answered is whether under the doctrine of waiver the lessor, Kazery, intentionally surrendered or relinquished his rights to receive written notification of Wilkinson's exercise of his options either in 1987, 1997 or 2007. It is significant to recognize that under the lease there are five recurring options, each separate from the other and each requiring its own notification. Assuming arguendo, that by his actions subsequent to March 31, 1987 Kazery waived the notice requirements for the ten year period ending July 31, 1997, did such a

waiver constitute a waiver of the requirements for renewal of subsequent options?

Fortunately, the Mississippi Court of Appeals has addressed this issue in a case strikingly similar to the case at bar and answered that question in the negative. In *Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc.*, 2001-CA-00970-COA (Miss. 2002), the Court examined a lease agreement containing five consecutive options. The first two options were exercised in accordance with the terms of the lease. The third option, however was not noticed but the tenant was allowed to remain in possession for the five year renewal period and paid rent to the landlord. The landlord was not noticed for the fourth option and elected to terminate the lease. The facts mirror the case at bar. In *Taranto* the appellants argued that permitting them to remain in possession of the property for five years after expiration of an option term constituted a waiver of the necessity of giving notice as required by the lease. In *Taranto* the Court distinguished the case of *Vice v. Leigh*, 670 So.2d 6 (Miss.1995) wherein the Court found that there is a distinction between a waiver of a right to terminate of a lease and a waiver of the conditions precedent to the lessee's right of renewal. In other words, Kazery may have waived his right to terminate the lease by accepting rent but did not waive his right to receive written notice from Wilkinson as required in the lease. The Court also relied upon the reasoning in *Carsten v. Eickhoff*, 323 N.E.2d 664 (Indiana 1975), in adopting the reasoning of that Court, to wit:

> "The reasoning behind demanding exact compliance with the terms of the (renewal) option including notice provisions that the lessor is bound to grant the additional term while the lessee is free to accept or reject it."

The Court went on to discuss the requirements of waiver and found that, "Under Mississippi case law, a "waiver" presupposes a full knowledge of a right existing, and an intentional surrender

or relinquishment of that right. It contemplates something done designedly". An examination of Kazery's actions subsequent to the defective notice in 1997 consisted solely of accepting rent from Wilkinson and demanding that he continue paying the property taxes as required. In the *Taranto* case it is clear that these actions do not constitute a waiver of the conditions precedent to exercise of future options to renew the lease. Also instructive is the case of *Wahlder v. Tiger Stop, Inc.*, 391 So.2d 535 (LA 1980) in which the Louisiana Court of Appeals found that a waiver of notice requirement as to one renewal in a lease containing multiple renewal options does not constitute waiver of notice for subsequent renewals.

Since it is clear that a waiver of the right to terminate during a lease term does not constitute a waiver of notice requirements to exercise an option, it is necessary to examine whether Kazery took any action after being placed on notice on July 23, 2007 of Wilkinson's intent to exercise the fourth and fifth options constituted a waiver subsequent to that notification. The Court's opinion relies upon Kazery's letter to Wilkinson dated April 20, 2007 (prior to his notification July 24, 2007) for determination as to whether Kazery was intentionally and knowingly surrendering or relinquishing his right to receive such notification. The lease required that written notification be given to Kazery no later than March 31, 2007 in order to renew the lease under the fourth option (it is unnecessary to discuss the fifth option as it would not be available unless the fourth option was exercised). It is not disputed that Wilkinson failed to give written notice to Sam Kazery of his election to exercise the fourth option prior to March 31, 2007. Therefore, the option period had expired when Kazery wrote his letter of April 20, 2007 (Exhibit "22"). A careful reading of the letter indicates Kazery's attempt to involve Wilkinson in future lease negotiations and nothing in the language of the letter indicates any knowing and intentional waiver. Further clarification is provided by Kazery's letter

to Wilkinson dated July 12, 2007, again prior to being placed on notice by Wilkinson on July 24, 2007, that Wilkinson intended to exercise his option. (Exhibit "18") A careful reading of the two letters clearly indicates Kazery's refusal to waive the notice requirements contained in the lease. The Court speculates in its opinion as to the import of the language contained in Exhibit "22". The Court asks the question "Could it be that Kazery was once again allowing Wilkinson to improperly renew?" The answer to that question is clearly in the negative. In fact, if that were his intent it certainly would not have been necessary to invite Wilkinson to negotiate "keeping the lease" if in fact by his actions he had waived notification requirements. The pertinent paragraph contained in the April 20, 2007 letter is as follows,

> "as you well know there is an interested buyer and I am not so sure I want to sell at all. I may even fight eminent domain to keep the property. And of course as I told you before, I am concerned about my children. If you desire to keep the lease (emphasis added) would you like to join in with me and hire joint counsel?".

If Kazery had intentionally waived the notice requirements the question would arise as to the language "if you desire to keep the lease", for in that instance the lease would have been renewed and there would have been no reason for including that language other than as an invitation to negotiate a renewal of the lease. A 1992 North Carolina case set forth a rule to be applied in like circumstances. The Court found that conversations between the lessor and the lessee that did not include an express waiver of notice did not constitute such waiver, *The Wachovia Bank and Trust Co., NA v. Rubbish*, 293 S.E.2d 749 (NC 1982).

In any event, the letter of July 12, 2007 (Exhibit "18") makes it abundantly clear. The July 12, 2007 letter again invites Wilkinson to continue his occupancy on a month to month basis

provided that the parties can reach a satisfactory arrangement. Neither of these letters pre-dated the deadline of March 31, 2007 for renewal and both were sent prior to notification by Wilkinson's attorney that Wilkinson intended to exercise the fourth and fifth option. The Trial Court notes Kazery's invitation to Wilkinson to share in the expense of an attorney set forth in the April 20, 2007 letter and relied upon that invitation as evidence of waiver, however it is important to recognize that this invitation occurred some three months prior to Wilkinson's July 23, 2007 letter putting Kazery on notice that Wilkinson intended to renew his fourth and fifth options. The Court further relied upon a finding that Kazery made no further attempt to have Wilkinson removed from the property. The rule to be applied in these circumstances equally clear and is that the failure of a lessor to seek termination of a lease for breach by the lessee does not constitute wavier of the obligation of the lessee to be free of default of any covenant as a prerequisite to the effective exercise of the option to renew, *Homestead Enterprises v. Johnson Products, Inc.*, 540 A.2d 471 (ME 1988). In fact, Kazery did so, Exhibit "18" on July 12, 2007 demands that Wilkinson vacate the property. It is important to note, as the Trial Court did, that Kazery has not negotiated any checks tendered by Wilkinson from July 31, 2007 to date. Furthermore, the majority rule provides that silence by the landlord after recieving defective notice is implied rejection of such notice, *Dyer v. Ryder Student Transp. Services, Inc.*, 765 A.2d 858 (Rhode Island 2001), see also *Geisdorf v. Doughty,* 972 P.2d 67 (Utah 1998). There is no evidence of any invitation to mediate or participate in purchase discussions other than the letters of April 20, 2007 and July 12, 2007. Therefore, under the reasoning of *Taranto*, Kazery did not waive his right to receive notification under the lease.

The last question to be answered is whether equity is appropriate to provide a remedy for Wilkinson's failure to properly notify Kazery of his exercise of the fourth and fifth option. The

Court relies upon the test set out in *Koch v. H. & S. Development Co*, 249 Miss. 590 (Miss. 1964), setting forth the two exceptions to strict compliance of a renewal clause of a lease. Although apparently the Court reaches the correct conclusion that equity is not appropriate based upon Section II of the *Koch* test, it is necessary to examine the Court's conclusion that Wilkinson is even entitled to equitable consideration. Under *Koch*, the Court may find under compelling circumstances that the failure to give notice results not from the lessee's own ignorance or negligence but from accident, fraud, surprise or mistake. The Court correctly found that Wilkinson knew or should have known that from 1992 on that Sam Kazery was the true owner of the property. The Court relied upon the tax statements inspected by Wilkinson from 1991 forward. However, the record reflects overwhelming evidence that Wilkinson chose to ignore all indications and notice that Sam Kazery was the true owner of the property. For example, he began receiving letters from Sam Kazery as early as December of 1986 through the time of the filing of the lawsuit (Exhibit "6, 7, 8, 9, 10, 11, and 12"). Wilkinson corresponded directly with Sam Kazery (Exhibit "10 and 14"). Wilkinson acknowledges in his testimony that he began dealing with Sam Kazery as early as 1987 and felt the necessity of placing Sam Kazery on notice of his 1987 renewal by letter to Sam Kazery (Exhibit "14"). Wilkinson was also careful to seek guidance first from the conservator and later from Kazery as to where to send the rent checks. For a time Wilkinson sent the rent checks made out directly to Sam Kazery but at Kazery's instruction later made them out to Arnold Kazery (R.V. 1,pg. 82-83).

George Wilkinson actively managed first the corporate business of Courtesy Inns and later upon dissolution recorded a lease assignment in his favor of the Courtesy Inns lease (Exhibit "2"). George Wilkinson fully understood real estate transactions and leases. Wilkinson's testimony is that he presumed that Arnold Kazery owned the lease, although Wilkinson gave conflicting testimony

as to whether he believed Arnold Kazery owned the property or owned the lease. Wilkinson testified that he had supplied business records indicating that as manager of Courtesy Inns he had complied with instructions relating to the payment of rent to Arnold Kazery (R.V. 1, pg. 21 and Exhibit "5"), even though he says that he believed Arnold Kazery owned it (R.V. 1, pg. 27). Wilkinson further testified that he had received letters from Sam Kazery which"talk about requirements that he was looking under the lease", but did not receive "any letters like this from Arnold Kazery". Wilkinson further testified that he received "usual mid-January letters from Kazery" and that he probably did receive Exhibit "9", a letter of January 15, 1987, after which he got all of the taxes coming to him (R.V. 1, pg. 33-34). He also testified that he did not contend that the taxes were ever in the name of Arnold Kazery. Again he testifies "I don't believe we had much correspondence at all from Arnold, ours was a verbal communication", (R.V. 1, pg. 40). Although Wilkinson testified he did not remember receiving Exhibit "12", a November 23, 1992 letter from Kazery containing the phrase "on property which you lease from me on East Pascagoula Street", that he probably really would not have taken much pause with that statement (R.V. 1, pg. 45, 46). He further testifies that Kazery's name has appeared continuously on the tax receipts which he reviewed from 1991 to present (R.V. 1, pg. 66). Wilkinson's testimony was that his curiosity was not aroused as to why Arnold's name was not appearing on any of the tax forms. He testified that he was told that he (Arnold) had the lease and he was to pay the rent to him (R.V. 1, pg. 69). This is in conflict with the previous testimony where he answered "well it did and that's where I presumed ownership may have been different from the lease and that's the lease". Wilkinson again says when asked about the language in Exhibit "12" from Kazery referencing which states in part "attached herewith is a past due statement of taxes owed real estate parcel number 1911391 and 1911291 on the property which you

lease from me on East Pascagoula Street" that he probably would have discounted that language (R.V. 1, pg. 71). At his deposition, however Wilkinson agreed that he probably did receive the letter (R.V. 1, pg. 72), he also explained that he had presumed that maybe Kazery owned the real estate and that all Arnold had was the lease (R.V. 1, pg. 76). This was despite the fact that he engaged Arnold Kazery in conversations regarding his attempts to purchase the property (R.V. 1, pg. 76). Therefore, Wilkinson's failure to notify Kazery of his exercise of his option to renew in 2007 can only be characterized as a result of his intentional ignoring of all indications which evidenced otherwise. Absolutely no credible evidence supports any other conclusion. Therefore, there is no basis for equity relief under *Koch*, as Wilkinson's failure resulted from his own ignorance or negligence and not from accident, fraud, surprise or mistake.

Therefore, there is no other conclusion to be reached from the evidence presented than at best Wilkinson was negligent. In any event, the Court correctly found that because both parties will suffer hardship in the event the lease if forfeited. Clearly then, exception 2 in the *Koch* case is not appropriate for equitable relief in the present action.

CONCLUSION

It is undisputed that Kazery was entitled to receive written notice under the terms and conditions of the lease no later than March 31, 2007. It is also undisputed that written notification was not given by Wilkinson to Kazery as required. In order for the Court to find that Wilkinson is entitled to the relief requested it must find that Kazery knowingly and intentionally waived his right to receive such notification. The Trial Court's reliance upon Kazery's April 20, 2007 does not support a finding that Kazery intentionally waived his right of notification. Furthermore, Kazery's actions subsequent to July 23, 2007 do not support a finding that he subsequently waived his right

of notification after being placed on notice after the fact by letter from Wilkinson's attorney. This is especially true considering Kazery's letter of July 12, 2007 containing notice to vacate.

Furthermore, nothing in the record supports equity relief under the test enunciated in *Koch/*

WHEREFORE PREMISES CONSIDERED, Appellant urges that the Judgment of the Trial Court below be reversed and that the subject lease be deemed non renewed.

Respectfully Submitted,

Sam Kazery

By: _____
Thomas M. Bryson
Attorney for Appellant

CERTIFICATE OF SERVICE

I, THOMAS M. BRYSON, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants to the following counsel:

Attorney for George Wilkinson: Vernon H. Chadwick, Esq.
1640 Lelia Drive, Suite 210
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THIS 22nd day of February, 2010.

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