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FLYNN, J., dissenting. I respectfully dissent from the majority opinion holding that the defendant lessee Shop-Rite's exercise of its lease option to renew for an additional term was effective upon the attempted delivery of notice to the lessor, Scoville, even though actual notice was not received within the time provided by the lease for its exercise.

At issue before us in this case is the character of the act by which the lease required Shop-Rite to exercise the option to renew. Was the acceptance of the offer to renew contained in the lease effective upon attempted delivery or only upon actual receipt by Scoville? That is the issue.

The court, *O'Keefe, J.*, rendered a judgment of dismissal on behalf of Shop-Rite in Scoville's summary process action, and found that ''[t]he 'last day of the extended term' was July 31, 1998, the last day for exercise of the extension [of the lease] was January 31, 1998.'' The court also found that Shop-Rite mailed notice of the exercise of its option to the plaintiff by certified letter on January 29, 1998.

The court also found that ''[t]he certified letter to Naples [Florida] arrived on Saturday, January 31, 1998. As the plaintiff was not at home, the mail carrier left him a notice which would allow him to obtain the letter [at the post office]. When the plaintiff found the notice in the mid-afternoon of the 31st, the post office was closed. He retrieved the letter on Monday, February 2, 1998.''

Despite Judge Cohn's prior interlocutory order[1] holding, in part, that Scoville had to be in receipt of the actual notice in which Shop-Rite exercised its option to renew before the exercise could become effective, the court, *O'Keefe, J.*, held to the contrary that under the lease agreement, receipt of actual notice after exercise of the option was not required. It concluded that by Shop-Rite's timely sending its renewal by certified mail, it did everything required by the lease to exercise the option.

The court also found that the plaintiff notified Shop-Rite in writing that the extension was rejected because the notice had arrived late.

The court further found that ''possession of a certified mail slip or any other type of token by the offeror which entitles that individual to exclusive possession of the notice and confers a right of possession of the notice superior to that of all other parties is the equivalent of actual receipt of the notice.'' I disagree.

I first observe that had there been evidence in the record that Scoville had attempted to delay or dodge

receipt of the notice of acceptance, I would agree with the majority. There is, however, no such evidence. In fact, the only evidence is that Scoville did *not* attempt to avoid receipt of the notice.

Since no material facts are in dispute, and the principal issue on appeal is the legal effect of Shop-Rite's notice, our review of this question of law is plenary.

An option contract is a promise that meets the requirements for the formation of a contract and limits the promisor's, in this case, Scoville's, power to revoke the offer to renew. See 1 Restatement (Second), Contracts § 25, p. 73 (1981). We have before us an option contract in which Scoville made what has sometimes been called an ''irrevocable'' offer creating a power of acceptance. See 3 A. Corbin, Contracts (Rev. Ed. 1996) § 11.1, p. 456; see also *Parkway Trailer Sales, Inc.* v. *Wooldridge Bros., Inc.*, 148 Conn. 21, 27, 166 A.2d 710 (1960) (new contract came into being as soon as defendants received notice that option was being exercised). Because an option contract creates an irrevocable offer binding the lessor to accept a properly exercised option to renew, ''[the] requirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly. It is reasoned that any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.'' 1 Restatement (Second), supra, § 25, comment (d), p. 75. Accordingly, ''[u]nless the offer provides otherwise . . . an acceptance under an option contract is not operative until received by the offeror.'' Id., § 63, p. 151.

As illustrated in the Restatement for example: ''A, for consideration, gives B an option to buy property, written notice to be given on or before a specified date. Notice dispatched before but not received until after that date is not effective to exercise the option.'' Id., § 63, comment (f), illustration 12, p. 155. This is so because ''[o]ption contracts are commonly subject to a definite time limit, and the usual understanding is that the notification that the option has been exercised must be received by the offeror before that time.'' Id., § 63, comment (f), p. 155. Nevertheless, I do recognize that ''[i]n cases in which notices had been sent before the deadline but not received until after deadline, the holding by some courts that the notices where timely . . . and by others that they were untimely . . . depended on such variant factors as the language of the leases, fault of the parties, and general policy considerations.'' (Citations omitted.) Annot., 29 A.L.R.4th 956, 960–61 (1984). Significantly, however, this annotation explains that ''[i]t has been stated that a notice required to be 'given' by a certain date is insufficient and ineffectual if not received within the specified time.'' Id., 962, citing *Sy Jack Realty Co.* v. *Pergament Syosset Corp.*, 27 N.Y.2d 449, 452, 267 N.E.2d 462, 318 N.Y.S.2d 720 (1971).

Section 5 (c) of the lease provides in relevant part that the lessee, Shop-Rite, may exercise an option to extend the lease term for another five years ''by *giving* notice to the Landlord six (6) months or more before the last day of the extended term . . . to and including the 31st day of July, 2003 . . . .'' (Emphasis added.)

Section 30 of the lease provides in relevant part: ''All notices due the Landlord shall be *sent* by telegram or registered or certified mail addressed to the person to whom rent is payable at the address to which payments of rent may be sent . . . .'' (Emphasis added.)

As Corbin notes, when contracts are being made by correspondence, it is held in most cases that the contract is consummated at the time and place that the acceptance is mailed. But when, by the terms of an already consummated contract it is provided that one party shall have the power to produce certain legal results by giving notice, it is usually held that this means notice received in fact and not merely notice mailed. 3 A. Corbin, supra, § 11.8, p. 526; see 1 Restatement (Second), supra, § 63.

In *Smith* v. *Hevro Realty Corp.*, 199 Conn. 330,335–36, 507 A.2d 980 (1986), our Supreme Court was called on, in part, to interpret the effect of an attempt by the lessee to exercise a right of first refusal. After concluding that the right of first refusal ripened into an option, the court examined the trial court's holding that the attempted exercise of the option was untimely. Id., 337. The court explained that the parties had ''agreed that, to be effective, a reply to notice of an offer had to be made within thirty (30) days of the date of the mailing of [the notice].'' (Internal quotation marks omitted.) Id. However, when the lessor notified the lessee-option holder that another party had submitted an offer, the lessor changed the terms, stating that ''[t]he Lessee's option is exercisable pursuant to the terms of the existing lease in writing mailed . . . and postmarked no later than 12:00 midnight July 24, 1983.'' (Internal quotation marks omitted.) Id. The lessee's letter of acceptance was timely postmarked, but it was not received by the lessor until August 6 or 7, 1983. Id. The trial court had held that the late delivery of the acceptance rendered it ineffective and untimely. Because neither party had contested the timeliness of the acceptance; id., 338 n.10; our Supreme Court stated that it would ''not resolve this issue and [would] assume, arguendo, that [the lessee's] exercise of its offer was not untimely.'' Id., 338.

In *Smith,* our Supreme Court did explain that a renewal option in a lease is a continuing offer to lease for the extended lease term which offer is irrevocable until the time period fixed by the parties, which creates in the option holder the power to form a binding contract by accepting the offer in the manner agreed on by the parties. See id., 336. ''To be effective, an accep-

tance of an offer under an option contract must be unequivocal . . . in exact accord with the terms of the option.'' (Internal quotation marks omitted.) Id., 339.

Section 30 of the lease agreement provides for the manner of *sending* notices. It did not relieve the offeree, Shop-Rite, of *giving* unequivocal notice of the acceptance to the plaintiff lessor within the time specified in the contract. Certainly, if the contract were to relieve Shop-Rite of the obligation of providing actual notice to the plaintiff of its intent to extend the option, § 5 could have provided that the option may be extended by *sending* notice to the landlord. The fact that the contract differentiated between giving notice for the exercise of the option in § 5 and sending notices by mail in § 30 leads me to the conclusion that words ''giving'' and ''sent'' are distinguishable. See generally *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 609, 830 A.2d 164 (2003) (''[t]he use of . . . different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings'' [internal quotation marks omitted]). Shop-Rite did not give an unequivocal acceptance of the renewal within the time specified in the lease agreement as § 5 (c) of the lease required. When Scoville received a notice of the post office's attempt to deliver certified mail to him, he had no way of knowing the content of whatever communication had been sent to him. We do not know whether the slip left by the postal carrier even stated from whom the certified letter had been sent. Additionally, even if we assume that it stated that Shop-Rite had sent the letter, Scoville would have no way of knowing that it was an exercise of the option to renew because the parties had been in recent discussion about Scoville's possible $50,000 buy-out of Shop-Rite's option to renew, as opposed to Shop-Rite's exercise of its option to renew.

Section 63 (b) of the Restatement clearly provides that ''an acceptance under an option contract is not operative until received by the offeror.'' 1 Restatement (Second), supra, § 63 (b), p. 151. In this case, Shop-Rite had to give actual notice of its acceptance of the renewal term offered by the lease on or before January 31, 1998. Although it could have given actual notice to Scoville any time prior to the six month deadline, it waited until the eleventh hour to mail its acceptance, and it bore the risk of the notice not being timely received. As held in *Smith*: ''Unless the parties have agreed to the contrary, acceptance under an option contract is not effective until it is *actually received* by the offeror.'' (Emphasis added.) *Smith* v. *Hervo Realty Corp.*, supra, 199 Conn. 337.

Accordingly, I would reverse the judgment of the trial court and remand the case for further proceedings.

[1] See *Scoville* v. *Shop-Rite Supermarkets, Inc.*, Superior Court, judicial district of New Britain, Housing Session, Docket No. 9806-1688 (May 30,

2001) (31 Conn. L. Rptr. 55), holding that Shop-Rite's notice was untimely, but declining to rule at that juncture whether there were equitable reasons for enforcing the option. This declaratory judgment action was later withdrawn.