

1975

Zion\'s Properties, Inc. v. Forrest C. Holt : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Zar E. Hayes; Pugsley, Hayes, Watkiss, Campbell and Cowley; Attorney for Defendant-Respondent; Arthur H. Nielsen; Nielsen, Condor, Hansen, and Henroid; Attorney for Plaintiff-Respondent. Lowell V. Summerhays; Lowell V. Summerhays, Inc.; Attorney for Plaintiff-Appellant.

Recommended Citation

Brief of Respondent, *Zion\'s Properties, Inc. v. Holt*, No. 13922.00 (Utah Supreme Court, 1975).
https://digitalcommons.law.byu.edu/byu_sc1/137

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

ZION'S PROPERTIES, INC., a Utah
corporation,

Plaintiff-Appellant,

vs.

FORREST C. HOLT, VIRGINIA W. HOLT,
GORDON C. HOLT, individually, and
GORDON C. HOLT, dba HOLT REALTY &
INVESTMENT COMPANY,

Defendants-Respondents.

TANDY LEATHER COMPANY, a Utah
corporation,

Plaintiff-Respondent,

vs.

FORREST C. HOLT and VIRGINIA W.
HOLT, his wife, and ZION'S PROPERTIES,
INC., a corporation,

Defendants.

Case No.
13922

Case No.
13922

BRIEF OF RESPONDENTS HOLT

**Appeal from the Order and Summary Judgment of the
Third Judicial District Court of Salt Lake County, Utah
Honorable G. Gordon Hall**

ZAR E. HAYES of
Pugslev, Hayes, Watkiss,
Campbell & Cowley
315 East Second South
Salt Lake City, Utah 84111
Attorney for Defendants-
Respondents Holt

ARTHUR H. NIELSEN of
Nielsen, Condor, Hansen &
Henroid
410 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent Tandy Leather Co.

LOWELL V. SUMMERHAYS of
Lowell V. Summerhays, Inc.
1010 University Club Bldg.
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

FILED

APR 24 1975

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN THE LOWER COURT	2
STATEMENT OF FACTS	2
POINT I	
THE LOWER COURT PROPERLY GRANTED THE MOTION OF RE- SPONDENTS HOLT FOR SUMMARY JUDGMENT UNDER THE UNDIS- PUTED MATERIAL FACTS AND ADMISSIONS AS SHOWN BY THE RECORD BEFORE THE COURT	6
POINT II	
THE PURPORTED AGREEMENT AS RELATED TO A PARTIAL PAYMENT NOTED ON THE CHECK OF DECEM- BER 10, 1973 HAD NO VALID FORCE OR EFFECT, AS THE SAME, EVEN IF ESTABLISHED, WAS WITHOUT CONSIDERATION	16
SUMMARY	18
CONCLUSION	19

CASES CITED

<i>Bennion v. Amos</i> , 28 Utah 2d 216, 500 P.2d 512	15
<i>Christy v. Guild</i> , 121 P.2d 401, 101 Utah 313	15, 16
<i>Detroit Heating & Lighting Co. v. Stevens</i> , 16 Utah 177, 52 P. 379	16
<i>Freed Furniture & Carpet Co. v. Sorensen</i> , 28 Utah 419, 79 P.564, 107 Am. St. Rep. 731, 3 Ann. Cas. 634	16
<i>Hirsch v. Steele</i> , 10 Utah 18, 36 P. 49	16
<i>King v. Firm</i> , 285 P.2d 1114, 3 Utah 2d 419	14
<i>Landfield v. Cohen</i> (Calif.), 200 P.2d 149	16
<i>Lippincott v. Rich</i> , 19 Utah 140, 56 P. 806	16
<i>Russell v. Harkness</i> , 4 Utah 197, 7 P. 865	16
<i>Sieverts v. White</i> , 273 P.2d 974, 2 Utah 2d 351	15, 16
<i>Standard Steam Laundry v. Dole</i> , 22 Utah 311, 61 P. 1103	16
<i>Truitt v. Patten, Sheriff</i> (Utah), 287 P. 175	16

AUTHORITIES CITED

17 Am. Jur. 2d, Contracts §460	17
52 Am. Jur., Tender §24	15
Williston on Contracts, Vol. 3, Rev. Ed. §887F	14

IN THE SUPREME COURT OF THE STATE OF UTAH

ZION'S PROPERTIES, INC., a Utah
corporation,

Plaintiff-Appellant,

vs.

FORREST C. HOLT, VIRGINIA W. HOLT,
GORDON C. HOLT, individually, and
GORDON C. HOLT, dba HOLT REALTY &
INVESTMENT COMPANY,

Defendants-Respondents.

Case No.
13922

TANDY LEATHER COMPANY, a Utah
corporation,

Plaintiff-Respondent,

vs.

FORREST C. HOLT and VIRGINIA W.
HOLT, his wife, and ZION'S PROPERTIES,
INC., a corporation,

Defendants.

Case No.
13922

BRIEF OF RESPONDENTS HOLT

STATEMENT OF THE KIND OF CASE

This matter involves two actions relating to certain property situated in Salt Lake County, Utah, both of which under the ultimate pleadings resolve themselves into a determination as to whether or not a certain Uniform Real Estate Contract relating to said property had been legally and properly terminated so that title to the property should be quieted in the Respondents Forrest C. Holt and Virginia W. Holt, or whether the Appellant Zion's Properties, Inc. still retains an interest in the said property under and by virtue of said Uniform Real Estate Contract. In

effect, under all the pleadings, cross-claims and counter-claims in both actions, which were consolidated in the Court below, the matter resolved itself into a quiet title action, both the Appellant Zion's Properties, Inc. and Forrest C. Holt and Virginia W. Holt asking that title be quieted in them respectively. Tandy Leather Company, a Respondent herein, was interested only in determining to whom it properly should pay rentals on part of the property occupied by it.

DISPOSITION IN THE LOWER COURT

The lower Court granted the Motion of Respondents Forrest C. Holt and Virginia W. Holt quieting title in them to the said property, holding that the Uniform Real Estate Contract had been fully and completely terminated, cancelled and forfeited in accordance with the terms thereof, and that the Holts were entitled to all rentals on the property from and after February 10, 1974, including monies deposited by Tandy Leather Company in Civil Case No. 218576 (R. 64-67). From that judgment, Appellant Zion's Properties, Inc. appeals.

STATEMENT OF FACTS

Appellant's Statement of Facts is not in truth a statement of "facts" but is a statement of the contentions and interpretations of Appellant. Appellant's Brief does not cite any page or reference to the record to support it and accordingly does not comply with

Rule 75(p) (2) (d) of the Utah Rules of Civil Procedure. Respondents Holt accordingly set forth the following Statement of Facts.

For brevity herein, the Appellant will be referred to herein as "Zion's"; Respondents Forrest C. Holt and Virginia W. Holt will be referred to as "Holts"; and Respondent Tandy Leather Company will be referred to as "Tandy".

The original record sent up from the lower Court was the file in Civil No. 218576 (the Tandy case) and reference to matters therein will be designated as "R.". Since such did not contain all files and pleadings of the consolidated cases the record was supplemented by transmitting the file in Civil No. 218922 (the Zion's case) and references to matters therein will be designated as "Sup. R.".

On January 31, 1973, Forrest C. Holt and Virginia W. Holt, his wife, as seller and the Great Southern, Inc. as buyer, entered into a certain Uniform Real Estate Contract covering the property which is the basis of these actions. A copy of said Contract is in the file (Sup. R. 6-7). Zion's succeeded to the rights of Great Southern's interest under said Contract by an assignment dated July 18, 1973. Each and both of the consolidated actions were precipitated by a notice given by Gordon C. Holt as agent of the Holts dated February 4, 1974, addressed to Zion's declaring the Con-

tract to be in default and requiring performance within five days as required by the Contract. (R. 39 and Sup. R. 15).

The Uniform Real Estate Contract involved provided for a down payment of \$5,000.00 and the balance of \$40,000.00 to be paid, \$7,000.00 on or before August 1, 1973 plus interest, and the balance of \$33,000.00 to be paid, \$7,750.00 plus interest on or before February 1, 1974 with annual payments thereafter of \$7,750.00 plus interest on the 1st day of each February until paid. (Sup. R. 6). The \$5,000.00 down payment was made but none of the other payments on the Contract were ever made as and when the same fell due, the only payments made thereafter being \$1,000.00 on or about August 1, 1973, \$5,000.00 on or about September 12, 1973, \$500.00 on or about December 7, 1973, and \$1,000.00 on or about December 16, 1973, making a total of all payments of \$12,500.00, and a total of only \$7,500.00 after the initial down payment. See Answers to Request for Admissions (R. 48) and Answers to Interrogatories (R. 34). Under the terms of the Contract there should have been paid on or before August 1, 1973, after the down payment, the sum of \$7,000.00 representing the first installment plus accrued interest of \$1,600.00, or a total of \$8,600.00, which demonstrates that never at any time was Zion's current in its required payments. In addition thereto it was required to pay the property taxes for 1973 in the amount of \$623.27, which it failed to pay and which Holts were

therefore required to and did pay. (R. 36, 43, 44, 45).

With the contract being thus in default as to payments required to be made prior to February 1, 1974, and the February 1, 1974 payment not having been made on the date due, the notice of February 4, 1974 (R. 39) was given requiring immediate performance or forfeiture. No payment was ever made thereafter, and as shown by Replies to Request for Admissions. No proper and unconditional tender of any monies was ever made thereafter. (R. 47-52).

The Contract was then treated by the Holts as forfeited and terminated and the Holts advised all tenants that rental payments should thereafter be made to them. (R. 40, 41, 42).

Respondents Holt answered Interrogatories submitted by Zion's (R. 33-38). Respondents Holt then submitted Requests for Admissions to Zion's on August 7, 1974. (R. 28). No replies thereto were made or served or filed within the time required by Rule 36 Utah Rules of Civil Procedure and had not been so served when Holts filed their Motion for Summary Judgment on September 24, 1974, (R. 22, 23, 24) and hence were deemed admitted and such was one of the bases for the Motion for Summary Judgment. Replies to such Request for Admissions were eventually filed on October 1, 1974, almost one month delinquent but were in the files when the Motion for Summary Judgment

ment was argued. (R. 47-53). Such replies and the admissions therein, even as qualified therein, establish that the Contract was always in default and that no valid tender or tenders were ever made prior to the termination of the Contract nor at all. (R. 47-53).

POINT I

THE LOWER COURT PROPERLY GRANTED THE MOTION OF RESPONDENTS HOLT FOR SUMMARY JUDGMENT UNDER THE UNDISPUTED MATERIAL FACTS AND ADMISSIONS AS SHOWN BY THE RECORD BEFORE THE COURT.

Respondents will consider under this heading their arguments and answer to the arguments of the Appellant under its Points I and III, inasmuch as such matters are so inter-related that they cannot be separately discussed without undue overlapping and duplication.

It was admitted that Holts did use a portion of the property involved for storage of some of Holts' personal property from the date of the contract, with the prior approval of the original purchaser, and that said property was left in said premises until the termination of the contract. (R. 37). This, however, was not and could not under the law be a justification for the failure and refusal of the Appellant Zion's to make

the payments required to be made under the terms of the contract.

As is reflected by the files and records referred to in the Statement of Facts hereinabove set forth, from the moment the first payment, subsequent to the down payment, became due under the contract, the buyers were in default. The first payment of \$7,000.00 plus interest at 8% per annum amounting to \$1,600.00 became due under the contract on August 1, 1973. That payment was not made, but only \$1,000.00 was paid on that date. It would appear that the balance of the August 1, 1973 payment was extended to September 1, 1973, but that balance was not paid. (R. 46). The only payments made subsequent to the initial down payment were \$1,000.00 paid on August 1, 1973, \$5,000.00 on or about September 12, 1973, \$500.00 on or about December 7, 1973, and \$1,000.00 on or about December 16, 1973.

Under the Contract after the down payment there was a balance of \$40,000.00 due and payable as set forth therein. If the payment had been made as required by the Contract on August 1, 1973, both as to principal and interest, there should have been then remaining \$33,000.00 on principal. In fact, however, after applying payments made to that date there remained unpaid as of August 1, 1973, \$40,600.00, and after the payment of \$5,000.00 on September 12, 1973,

there remained due and owing \$35,978.96 including interest. (Sup R. 26). Thus the Contract was at that time delinquent approximately \$3,000.00. After applying each and every payment which was made, as the same were made, as above set forth, the Contract was at all times in default to and including February 1, 1974, when the next payment of \$7,750.00 plus interest became due, which incidentally was not paid. See Affidavit with calculations attached thereto (Sup. R. 25, 26) attached to Holts' Motion for Summary Judgment, (Sup. R. 22) which Affidavit and figures were never in any respect denied or refuted, but are in fact completely admitted (a) by the failure of Zion's to timely reply to Holts' Requests for Admissions, (R. 28-30), and also even by Zion's belated and delinquent Replies to Requests for Admissions (R. 47, 48). In this state of affairs Holts called into play Section 16A of the Uniform Real Estate Contract relating to defaults (Sup. R. 7) and gave notice that unless the entire delinquency as referred to above, plus an amount of \$623.27 for 1974 taxes, which Zion's was required to pay but did not pay, were paid and the Contract brought current within 5 days of such notice of February 4, 1974, that the Contract would be terminated and that the seller would refuse to deliver title under the Contract or to recognize said Contract. (R. 39) The Contract was not so brought current within said 5 day period nor at all. (See Request for Admissions, R. 28-31, Zion's belated Replies thereto, R. 47-52, and Answers to Interrogatories, R. 33-37.)

Appellant has argued in its Brief that its default was cured by various claimed tenders of payments, and refers to such claimed tenders in its Statement of Facts and by reference occasionally in its Argument. Some of the contentions as relates to such purported tenders refer to the fact that such tenders were made to one Sterling Weber, whom Appellant refers to as "Respondents' agent". Mr. Weber was not Respondents' agent. There is nothing in any record or pleading or document which was before the Court to indicate that Weber was Respondents' agent. As a matter of fact the only thing referring to Weber's relationship to any party is the statement contained in Appellant's belated Replies to Holts' Request for Admissions wherein Appellant states "Also, Sterling Weber *on behalf of Zion's Properties, Inc.* has requested that such removal occur." (R. 48).

The record before the Court shows conclusively that never at any time was there any actual tender made of any monies to the Respondents Holt, and even if we accept at full value the contentions of Appellant as it relates them in its belated Replies to Requests for Admissions, there never was any unconditional tender of any funds or amounts whatsoever to any person, even including the said Sterling Weber, who, as indicated, if he represented anyone, represented the Appellant. Weber's only connection at all with the Respondents Holt was that he was the real estate agent who intially handled the sale of the property.

Let us then examine the four purported tenders to which Appellant refers in its Brief and we will see that if we accept its admissions to Holts' Request for Admissions at full value (although not filed timely), the most they show are promises to make a tender, or conditional tenders, and even then, not timely.

The purported "First Tender" claimed to have been made is referred to in the belated Replies to Request for Admissions (R. 51). Therein Appellant, through its officer, states "I made a verbal promise and tender to pay whatever amount it took to bring all payments current as of that date in accordance with a written contract and the verbal and written modifications; I was prepared to write a check out for the amount from my bank account but did not do so because the property was not removed." That surely was not an unconditional tender nor any tender at all, but only a "promise" to make a tender.

The purported "Second Tender" is likewise referred to in said belated Replies to Request for Admissions (R. 51). Appellant states that on or about February 4, 1974 Richard Brown, for and on behalf of Appellant, "stated that he wanted to make the payment on the property but wanted Forrest C. Holt to remove his property from the subject premises". It is then stated that Mr. Brown "offered to make payment". There is nothing therein nor anywhere else in any matter before the Court to show that money of

any kind in the form of cash, check or otherwise was offered or tendered to the Respondents Holt or anyone on their behalf.

With regard to the purported "Third Tender", this was allegedly made on or about February 19, 1974 (R. 51). Note that this was long after the Contract had in fact been fully and completely terminated, so that such purported tender can have no bearing upon the matter. Yet even so, it was not a tender. It is stated that Mr. Brown, for and on behalf of the Appellant, displayed to Mr. Weber, who as indicated did not represent Holts, "the stub of a cashier's check made out to Forrest C. Holt in the amount of \$9,765.00" and refers to Exhibit "B" attached. (R. 52). Note that said Exhibit "B" (R. 56) shows that such cashier's check was in fact not used and was cashed by the purchaser on February 22, 1974. In any event, there is no contention that such was ever tendered to Respondents Holt.

As relates to the purported "Fourth Tender", this allegedly was made on or about March 6, 1974, again long after the Uniform Real Estate Contract had been fully and completely terminated and cancelled. The Appellant Zion's contends that it met again with the said Sterling G. Weber and "had \$10,000.00 in cash to pay to Mr. Holt, I showed the money to Mr. Weber and told him that as soon as Mr. Holt had the property removed I would pay him that cash." Again as relates to this purported tender, in addition to being well after

the Contract had been terminated, it was completely conditional and was never made to the Holts or anyone on their behalf, and in fact was not even made to the said Sterling Weber, but the only contention being that cash was showed to the said Weber.

The purported third tender and fourth tender are obviously those referred to in the Reply to Holts' Request for Admissions No. 2(a) wherein Zion's admits that they made no payments other than those referred to in said Request for Admissions. (R. 48). That answer states, "Admitted, except that an additional payment was tendered and refused. That payment was in the amount of \$10,000.00 and was tendered in cash in the early part of April, 1974 and later in March the tender was renewed in the form of a cashier's check" * * * "the tender was conditional upon Forrest Holt's removing his property and possessions from the warehouse on the subject property". (R. 48) Hence here again they refer to the tenders as being conditional but likewise also refer to the fact that said conditional tenders were made after the Contract had been fully and completely terminated by reason of the default of the Appellant and purchasers in making payments under the Contract as and when the same became due.

It will therefore be observed that nowhere in any record, document or pleading before the Court is there anything to show that actual money in any form was ever actually tendered to the Respondents Holt to bring

the Contract current or pay the defaulted amounts due. The most that is contended is that the Appellant "offered" or "promised" to make a tender under certain conditions. There is no dispute, and in fact Appellant emphasizes the fact that whatever purported tenders were made were conditional upon Holt removing certain personal property from the premises, but no actual money ever was tendered to anyone, conditionally or otherwise, until long after the Contract was terminated. At that time Appellant claims that in March and April, one or two months after the Contract was terminated, it displayed to one Sterling Weber in one instance a cashier's check and in another instance certain actual cash and stated that such sum would be tendered in payment of the delinquency if the property was removed. Obviously no tender made after the Contract had been terminated has any force or effect whatsoever, even if it were a good tender, and as indicated, Weber was not Holts' representative or agent.

The fact that Holt had left some of his property on the premises would not justify in any event Zion's from keeping these payments on the Contract current. Zion's had other remedies to which they could resort if they saw fit. It could either remove the property or could put Holt on notice that a specific rental would be charged to him for the space occupied. Zion's could not, however, simply elect to make no payments, without being in default and thus bring into effect the default provisions of the Contract, namely Section 16-A

thereof and it surely could not ignore the notice of default without forfeiting its rights under the contract.

This Court has established the rule that a tenant, and a fortiori a conditional buyer, cannot avoid a forfeiture wherein the tenant or the buyer is in default, by a claim of an unliquidated or disputed counterclaim. See *King v. Firm*, 285 P.2d 1114, 3 Utah 2d 419. The Court therein quoted with approval from Volume 3, Williston on Contracts, Rev. Ed., Sec. 887F as follows:

“... Where rent is due under a lease, the tenant must pay the rent even though he has been obliged to spend money on repairs which the landlord has covenanted to make. It is true that if sued for rent he would in most jurisdictions now be allowed to recoup or counterclaim the damages due from the landlord, but the landlord may not merely sue for the rent. If the lease or statute, as is usually the case, allows a landlord to eject a tenant for non-payment of his rent, the landlord may pursue this remedy, and it cannot be said that the tenant has paid or tendered the rent due if he has deducted even a valid cross-claim. *So rights may be lost under a conditional sale or a mortgage by nonpayment though the creditor owes the debtor on another account a greater amount than that due him.*”

The Utah Supreme Court then stated:

“Thus under some circumstances a tenant would be required to pay the rent or lose his rights to the property under the lease although the landlord owed him more money than the amount of the rent.”

See also *Bennion v. Amos*, 28 Utah 2d 216, 500 P.2d 512 (1972) wherein this Court held that affirmative defenses and the existence of a counter-claim, one of which was a contention that defendants were deprived of quiet enjoyment, would not preclude summary judgment or stay or prevent foreclosure of the mortgage on the property involved.

Again the rule is well established that conditional tenders are the same as no tender at all. In 52 Am. Jur., Tender, §24 it is stated:

“It is the universal rule that a tender upon conditions for which there is no foundation within the contractual relation between the parties is ineffective, or as sometimes expressed, a tender must be without condition to which the creditor can have a valid objection or which will be prejudicial to his rights.”

Also, in addition to the requirement that the tender must be actually made and must be a good tender, it must be kept good. See *Sieverts v. White*, 273 P.2d 974, 2 Utah 2d 351.

It has long been held by this Court that parties to a conditional sales contract are bound by the terms thereof and that full effect will be given to the terms thereof, including forfeitures, and particularly where the contract provides that time is of the essence. Among the cases so holding are the following: *Sieverts v. White*, *supra*.; *Christy v. Guild*, 121 P.2d 401, 101

Utah 313; *Russell v. Harkness*, 4 Utah 197, 7 P.865, affirmed by the Supreme Court of the United States in 118 U.S. 663, 7 S. Ct. 51, 30 L.Ed. 285; *Hirsch v. Steele*, 10 Utah 18, 36 P.49; *Detroit Heating & Lighting Co. v. Stevens*, 16 Utah 177, 52 P.379; *Lippincott v. Rich*, 19 Utah 140, 56 P. 806; *Standard Steam Laundry v. Dole*, 22 Utah 311, 61 P. 1103; *Freed Furniture & Carpet Co. v. Sorensen*, 28 Utah 419, 79 P.564, 107 Am .St. Rep. 731, 3 Ann. Cas. 634; *Truitt v. Patten, Sheriff (Utah)* 287 P. 175.

Where, as here, time is of the essence, not even equity can relieve the vendee of his default. See *Landfield v. Cohen (Calif.)* 200 P.2d 149; also *Sieverts v. White and Christy v. Guild, supra*.

POINT II

THE PURPORTED AGREEMENT AS RELATED TO A PARTIAL PAYMENT NOTED ON THE CHECK OF DECEMBER 10, 1973 HAD NO VALID FORCE OR EFFECT, AS THE SAME, EVEN IF ESTABLISHED, WAS WITHOUT CONSIDERATION.

Appellant's Argument No. II centers around a purported part performance based upon a purported agreement or notation referred to on a check dated December 10, 1973. It is stated that Appellant and Respondents orally agreed to payments of a lesser amount than that required by the Contract on December 8,

1973, and that in conformance with such purported agreement the Appellant drew its check on December 10, 1973 in the amount of \$500.00. It is stated that such check bears the notation "As per agreement 12-8-73". This is one of the payments admittedly made on the Contract, but made when the Contract was badly in default and did not in any regard bring it current.

Even if we should assume that on the date mentioned, it was agreed that if Zion's made a payment of \$500.00 that further time would be given in which to make the additional delinquent payments, such agreement was in no way binding because obviously there was not any consideration therefor. Zion's was obligated to make all the payments which were due under the Contract prior to and at that time. By making the \$500.00 payment, Zion's did not agree to and did not do anything which they were not already bound by the Uniform Real Estate Contract to do. As a matter of fact, all they did or agreed to do was less than they were already required under the Contract to do, and no additional benefit of any kind was received by Holts by virtue thereof. Again, it is a uniform rule that there must be a valid and good consideration for any secondary or substituted agreement. The rule is well stated in 17 Am. Jur. 2d, Contracts, §460 as follows:

"§460. Consideration for secondary or substituted agreement—necessity.

In the absence of a statute to the contrary, a new agreement by the parties to an older one,

altering, canceling, supplementing, or supplanting their former compact, in order to be valid, requires some consideration. *Where a written contract is, by a later contract, altered or modified in some of its terms, the later contract must generally be founded on some valid consideration.* Also, a consideration is generally necessary for an agreement to discharge a debt or claim for damages for breach of contract. An agreement by one person to discharge another from the obligations of a written contract as a matter purely *ex gratia* and in the nature of a donation would be of no binding validity as a mere executory agreement."

SUMMARY

To briefly summarize, the Appellant Zion's was, from the moment the first payment became due under the Contract, delinquent in its payments both of principal, interest, and taxes. No valid tender was ever made of money in any form to bring the Contract current prior to the notice of default and the taking effect of such notice, thereby terminating the Contract; furthermore, no valid tender even subsequent to the termination of the Contract was ever made or presented to the Respondents Holt. The Contract thereby being in default and having thereupon been properly terminated and cancelled after proper notice in accordance with the terms of said Contract, the Motion of Respondents Holt for Summary Judgment was properly granted by the Court below.

CONCLUSION

We respectfully submit that there was no basis for any ruling of the Court other than that which was made, namely for judgment in favor of the Respondents Holt and that the said Summary Judgment entered by the Court below was proper and should in all respects be affirmed.

Respectfully submitted,

ZAR E. HAYES

Attorney for Defendants-
Respondents Holt

315 East Second South
Salt Lake City, Utah 84111