

2007

Holladay Towne Center L.L.C., a Utah limited liability company v. Brown Family Holdings L.C., a Utah limited liability company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**HOLLADAY TOWNE
CENTER, L.L.C., a Utah limited
liability company,**

**Plaintiff/Appellant and Cross-
Appellee,**

vs.

**BROWN FAMILY HOLDINGS,
L.C., a Utah limited liability
company,**

**Defendant/Appellee and Cross-
Appellant.**

Appeal Case No. 20070496

Trial Court No. 060913167

**REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE
HOLLADAY TOWNE CENTER, L.L.C.**

Appeal from the May 1, 2007 Findings of Fact, Conclusions of Law, And Order, May 1,
2007 Judgment, and May 22, 2007 Order Re: Award of Attorney Fees and Costs of the
Third District Court, in and for Salt Lake County, State of Utah,
Honorable John Paul Kennedy

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TAH APPELLATE COURTS**

APR 25 2008

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PARTIES

1. HOLLADAY TOWN CENTER, L.L.C., PLAINTIFF/APPELLANT AND CROSS-APPELLEE.
2. BROWN FAMILY HOLDINGS, L.C., DEFENDANT/APPELLEE AND CROSS-APPELLANT.

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JURISDICTION OVER APPEAL

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUES ON APPEAL:

Issue No. 1: Did the District Court err in deciding as a matter of law that Holladay Town Center (“Holladay” or “Tenant”) has the requisite standing under the lease and by virtue of its leasehold to bring a direct action to quiet title as to fee title ownership, and then err in ruling on the validity of the easement without the issue being properly before the court or the necessary parties present? [Record (“R.”) at 928, pp. 36-61; 414-426; 628-642].

Issue No. 2: Did the District Court misinterpret the lease between the parties by: (1) allocating the responsibility of addressing and resolving an easement against the property to the Tenant; (2) failing to hold the lease contained a warranty of title provision; (3) failing to hold the existence of the easement, rather than its validity, is the determining factor under the lease requiring the Tenant to take action to remove the same; (4) finding that the lease authorizes the Tenant to contest, at its own expense, any legal requirements, defined as including any covenants, restrictions or conditions of record; (5) finding that under the lease, because it was a triple net lease, the Tenant was obligated to pay the rent without offset and without any cost to the Landlord; and (6) not

finding that Tenant was entitled to abatement of rent as a result of the existence of the easement. [R. at 928, pp. 36-61; 414-426; 628-642].

Issue No. 3: Did the trial court err by awarding attorney’s fees to Defendant Brown Family Holdings, L.C. (“BFH” or “Landlord”) based on insufficient evidence in the requesting affidavit? [R. at 792-796].

ISSUES ON CROSS APPEAL:

Did the Trial Court err in failing to find that the Holladay Towne Center’s pattern of intentionally late rental payments for the express purpose of forcing Brown Family Holdings to undertake action that was not the Landlord’s/Brown Family Holdings’ responsibility under the Ground Lease, and Holladay Towne Center’s filing of a frivolous easement action against Brown Family Holding, while there was no easement as a matter of law, constituted a material breach of the lease?

Standard of Review: “A Court appropriately grants summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Thus, we review the district court’s grant of . . . summary judgment for correctness, granting no deference to the district court.” Wasatch Oil & Gas, L.L.C. v. Reott, 2007 UT App 223, ¶17, 163 P.3d 713 (citations omitted).

“Calculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion.” Dixie State Bank V. Bracken, 764 P.2d 985, 988 (Utah 1988).

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from a dispute between Tenant Holladay and Landlord BFH regarding whether the Ground Lease required BFH to provide clear title to Holladay and who was obligated under a Ground Lease to clear an easement on the Property. [R. at 2-3]. On March 1, 2005, Holladay and BFH entered into a Ground Lease wherein BFH agreed to lease the Property to Holladay. [R. at 158]. BFH knew that Holladay intended to use the Property as part of its larger project to develop, build, and market a large shopping center in the area, and in fact the Lease contained language that permitted Holladay to demolish existing structures and make the necessary developments for Holladay's purposes. [R. at 158-159]. In order to use the property, Holladay required the Property to be free from any encumbrances that would hinder its development and/or financing. [R. at 158-159]. Holladay represented in the Lease that there were no such encumbrances on the Property, a representation that was a material and integral part of Holladay's decision to enter the Lease. [R. at 159, ¶ 14].

In or about November 2005, Holladay discovered that an easement existed in the public record, encumbering the property in favor of the adjacent property (the "Easement"). [R. at 159-160]. The existence of the Easement prevented Holladay from developing the Property as intended and precluded Holladay's title company from issuing a lender's policy of title insurance free of the Easement. [R. at 160]. Pursuant to the Lease, Holladay provided BFH with written notice of the existence of the Easement, and

BFH's resultant default under the Lease. [R. at 197-198]. BFH denied that it was in default of the Lease, refused to take any steps to remove the Easement, and asserted that the easement was invalid. [R. at 160]. As a result of BFH's refusal to take any steps to remove the Easement, Holladay delayed payment of the monthly rent for as long as allowed under the terms of the Lease. [R. at 161].

B. Course of Proceedings

Holladay filed this action against BFH on August 9, 2006, asserting claims for declaratory judgment, breach of contract, and specific performance. [R. at 1-40]. On September 18, 2006, BFH filed its Motion to Dismiss Holladay's Complaint for failure to state a claim. [R. at 44-46]. Following the completed briefing on BFH's Motion to Dismiss, on or about November 15, 2006, BFH filed its Counterclaim, wherein BFH asserts claims for breach of contract, breach of duty of good faith and fair dealing, waste of premises, and unjust enrichment. [R. at 393-399]. On or around December 8, 2006, Holladay filed its Motion to Dismiss BFH's Counterclaim for failure to state a claim. [R. at 405-407]. Also on December 8, 2006, Holladay filed its Motion for Summary Judgment on its claims for declaratory judgment and specific performance. [R. at 411-413]. On or around January 19, 2007, BFH filed its own Motion for Summary Judgment seeking, among other things, summary judgment on its claims for breach of contract and the removal of Holladay from the Property. [R. at 497-499]. BFH did not file any opposition to Holladay's Motion to Dismiss.

C. Disposition by Trial Court

On March 12, 2007, the parties' cross-motions to dismiss and cross-motions for summary judgment, as well as related motions to strike¹, came before the Trial Court for oral hearing. [R. at 928]. At that hearing the Trial Court dismissed Holladay's "lawsuit" and BFH's Counterclaim, except for BFH's claim for attorney fees. [R. at 928, p. 63, a copy of the Trial Court's Ruling is attached as Addendum "B"]. The Trial Court further held that as to Holladay and BFH there was no valid easement, that the easement is void, and that Holladay had standing to bring a quiet title action against the owner of the adjacent lot with the recorded easement. [R. at 928, pp. 62-63]. The Trial Court also held that Holladay did not violate the Lease by failing to make timely lease payments and by bringing this lawsuit against BFH. [R. at 928, p. 63].

On May 1, 2007 the Trial Court entered its "Findings of Fact, Conclusions of Law, and Order", which held that (1) there was no easement on Lot 27, (2) because there was no valid easement, there was no basis for Holladay's claims against BFH, (3) that, if the easements interfere with Holladay's use of the leasehold, it is Holladay's right to resolve easement issue by quiet title action or otherwise, without cost to BFH, and (4) that Holladay did not materially breach the Lease by its late payments. [R. at 825-829, attached as Addendum Ex. "C"]. Also on May 1, 2007 the Trial Court signed a Judgment, which held that (1) Holladay's Complaint is dismissed, (2) BFH's counterclaim for Unlawful Detainer is dismissed without prejudice, and (3) Holladay

¹ The Trial Court did not rule on any of the motions to strike

shall pay BFH's costs and attorneys' fees incurred in connection with this action and in connection with BFH's collection of rents. [R. at 831-833, attached as Addendum "D"]. Finally, on May 22, 2007, without an oral hearing, the Trial Court entered its Order Re: Award of Attorney Fees and Costs, which ordered Holladay to pay BFH's attorney fees in the amount of \$39,675.50 and costs in the amount of \$5,818.06. [R. at 861-863, attached as Addendum "E"].

On June 18, 2007 Holladay filed its Notice of Appeal, wherein Holladay appeals the Findings of Fact, Conclusions of Law, and Order; Judgment; and Order Re: Award of Attorney Fees and Costs. [R. at 878-880]. BFH filed its Notice of Appeal on June 27, 2007. [R. at 895].

RESPONSE TO BFH'S STATEMENT OF FACTS

In an effort to avoid repetition Holladay will not endeavor to respond fact by fact to what BFH refers to as undisputed facts, but will address the relevant facts within the body of Holladay's argument section.

HOLLADAY'S STATEMENT OF ADDITIONAL FACTS RELEVANT TO BFH'S CROSS-APPEAL

Holladay sets forth the following additional facts relevant to Holladay's opposition to BFH's Cross-Appeal:

1. With regard to rent payment, the Lease provides that Holladay is obligated to pay BFH annual rent of \$58,200.00, "payable in advance in equal monthly installments of \$4,850.00 beginning on the first day of the calendar month after the Commencement

Date and thereafter on the first day of each calendar month” [R. at 14 – Lease Art. 3.1(a)].

2. The Lease further provides for certain “Events of Default”, which includes non-payment of rent “within fifteen (15) days of when due and such failure shall not have been cured within ten (10) days after receipt of written notice from Landlord respecting such overdue Rent payment.” [R. at 27 – Lease Art. 12.1(a)]

3. Since the commencement of the Lease, Holladay has made all rent payments within either the 15 day grace period, or within the 10 day grace period as required by Lease. [R. at 161, ¶ 26].

4. For the months of November 2005 through April of 2005, Holladay always paid the rent on or before the 13th day of each month, typically in the first few days of each month. [R. at 161, ¶ 27].

5. For the months of May, 2006, through August, 2006, Holladay, as a means of expressing its frustration with BFH’s refusal to resolve the easement issue, paid its rent later in the month, but still within the cure period under the Lease. [R. at 161, ¶ 28].

6. From August, 2006, to the present Holladay has made its rent payments within the first week of each month, all of which have been accepted by BFH. [R. at 161, ¶ 29; R. at 928 at pp. 34-35].

SUMMARY OF ARGUMENTS

The primary issue before this Court is straightforward – whose obligation is it to take care of an easement discovered after the commencement of a lease, which is

preventing Holladay, the Tenant, from developing the property as provided for in the Lease. It is Holladay's assertion that the Trial Court erred in determining that it was Holladay's obligation and that Holladay had standing to pursue a quiet title action to clear the title. The Trial Court's holding is contrary to the terms and intent of the Lease, and contrary to the law. The Lease expressly provides that it was BFH's obligation to provide clear title at the commencement of the Lease subject to any exceptions identified and accepted by Holladay. Based on that requirement and the express purpose of the Lease, it is also BFH's obligation to resolve any title issues that are discovered and not excepted by the Lease. The Easement was one such issue. However, BFH has refused to take care of the Easement and Holladay has been forced to bring this lawsuit to enforce the Lease.

The Trial Court's determination that removal of the Easement is Holladay's problem and that Holladay has standing to bring a quiet title action against the Easement owner is not only contrary to the terms and intent of the Lease, but it is also contrary to the law. As a tenant, Holladay lacks standing to bring a quiet title action against the owner of the Easement because, under Utah law, standing to bring a quiet title action is "limited to parties who could acquire an interest in the property created by the court's judgment." Elder v. Nephi City, 2007 UT 46 ¶20, 164 P.3d 1238. Accordingly, the Trial Court's judgment should be reversed and BFH should be compelled to resolve the title issue.

The Trial Court further erred in ruling on the validity of the Easement despite the fact that it was not an issue presented by either party's pleadings, not to mention the fact that the Easement owner was not before the Court. It can hardly be disputed that the holder of the beneficial interest in an easement must be a party to any determination of the validity of the Easement. Additionally, the validity of the easement is irrelevant to the question of whether it is an encumbrance, which needs to be resolved. Utah law is clear that the validity of an encumbrance does not change the fact that it is an encumbrance.

Finally, the Trial Court erred in awarding \$45,493.56 in attorneys' fees and costs to BFH based on wholly insufficient evidence to determine the reasonable of such fees and costs. BFH's fee affidavits fail to meet the necessary evidentiary requirements in virtually every respect. For example, BFH's fee affidavits fail to provide a detailed explanation of the work performed but, instead, offer merely a synopsis paragraph of the general categories of work performed. Lacking is any description of the actual work performed, time incurred in performing such work, and fee charged for such work. BFH doesn't even provide the total number of hours it spent on this matter. BFH also fails to provide sufficient information to determine what fees and costs were incurred in relation to its dismissed Counterclaim. Accordingly, the Trial Court's May 21, 2007 Order Re: Award of Attorney Fees and Costs should be reversed.

With regard to BFH's counterclaims, the Trial Court correctly found that Holladay had complied with the terms of the Lease regarding timing of payment, that Holladay's

refusal to dismiss its lawsuit was not a material breach of the Lease, and that neither the late payment or lawsuit violated the implied covenant of good faith and fair dealing.

ARGUMENT

I. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF BFH SHOULD BE REVERSED.

A. Holladay Does Not Assert That BFH Was Aware Of The Easement At The Time The Parties Entered The Lease.

First of all, it must be clarified that, contrary to BFH's insinuation, Holladay has not at any time "attempt[ed] to persuade this Court that Brown had some ill intent" with regard to its knowledge of the existence of the Easement prior to entry of the Lease. Holladay has absolutely no reason to believe that BFH knew about the Easement. Furthermore, Holladay does not dispute that it received a commitment for title insurance in prior to signing the Lease and that the commitment did not identify the Easement at issue in this case. However, as set forth below, that does not change the fact that once the encumbrance was discovered, regardless of its validity or legal enforceability, it could not simply be ignored inasmuch as it affected Holladay's ability to develop Lot 27 as intended when it entered the Lease by preventing Holladay from obtaining the necessary development financing. [R. at 158-160; R. at 626-627].

B. Whether The Easement Is Valid Or Enforceable Is Irrelevant To The Questions Of Whose Obligation It Was Under The Lease To Quiet Title.

BFH goes to great lengths to attempt to show that the Easement is unenforceable and invalid and Holladay certainly hopes that is true. However, the validity or

enforceability of the Easement does not excuse BFH's failure to take whatever steps are necessary to clear the title. Contrary to BFH's argument, this Court's decision in Howe v. Professional Manivest, Inc. is directly applicable and highlights the central issue of this case—responsibility under the Lease to remove any encumbrances. 829 P.2d 160, 162 (Utah Ct. App. 1992). The applicable holding of Howe is that a “legal impossibility is [not] a defense to breach of a lease covenant against encumbrances.” Id. at 162. In Howe the question of the validity of the encumbrance, which “purported to limit [the landlord's] rights,” was secondary to the tenant's obligation under the Lease to no encumber the subject property. Id. at 163. In other words, the tenant breached his obligation under the Lease regardless of the validity of the actual encumbrance.

Likewise, both the Trial Court in its “Findings of Fact, Conclusions of Law, and Order”, and now BFH, have it backwards. The Trial Court first determined that there was no easement, and thus, there was no basis for Holladay's claim, and then held that if the non-existent easement was hindering Holladay's ability to develop Lot 27, Holladay had standing to quiet title or otherwise resolve the issue. Applying Howe, and accepting the undisputed fact that Holladay had been unable to obtain title insurance necessary to proceed with development,² the proper approach should first be a determination of the

² Although BFH's asserts that, according to its so-called expert, “the purported easement on lot 27 will not impede acquisition of financing,” the only evidence in the Record with regard to actual efforts to obtain title insurance necessary to obtain financing is that the title company would not issue an insurance policy absent an exception for the Easement. [R. at 98-104; 157-161; 625-627; 928 at p.47].

parties' obligations under the Lease, which is exactly what Holladay asked the Trial Court to do.

With regard to Holladay's argument that the owner of the servient property, Lot 26, was an indispensable party, Holladay raised the issue below at the hearing once the Trial Court held that, as to Holladay and BFH, the Easement was invalid. [R. at 928, pp. 43-45].

C. The Lease Required BFH To Provide Clear Title To Holladay At The Commencement Of The Lease Term, To Resolve Any Title Issues That Arise During The Term Of The Lease, And Convey Clear Title When Holladay Exercises Its Purchase Option.

The Lease required BFH to provide clear title to Holladay at the commencement of the Lease term (unless excepted), by necessary implication, to resolve any title issues that may arise during the term of the Lease, and to convey clear title when Holladay exercises its purchase option. Any other interpretation is not supported by the terms of the Lease or by common sense, and would be contrary to whole purpose of the Lease.

The Lease required BFH to provide Holladay clear title at the commencement of the Lease term so that Holladay could freely develop the property, and by necessary implication, requires that BFH resolve any title issues that arise after the commencement of the Lease. Section 1.1 of the Lease states that BFH is required to deliver possession of the Property "subject to the following matters to the extent that they affect the [Property]: (a) The Permitted Exceptions to the extent valid and subsisting and affecting the Premises as of the Effective Date..." [R. at 13 – Lease Art. 1.1]. The Lease defines the term "Permitted Exceptions" as "those matters described in Exhibit "B" attached hereto

affecting Landlord's title to the Land all of which have been approved by Tenant." [R. at 11]. The only identified exception was property taxes accruing for the current year and thereafter.

The Lease further provides that when and if Holladay exercises its option to purchase the Property, BFH will be required to deliver the Property to BFH "subject to only the matters described in Article 1.1 and other matters reasonably approved by Tenant." [R. at 31 – Lease Art. 16.5 (emphasis added)]. The Lease does not create a new obligation on BFH to clear the title at the time of Holladay exercising its option. The Lease expressly refers to the matters in Article 1.1, the same matters BFH was already supposed to clear at the time it delivered possession.

Accordingly, it is clear from the express terms of the Lease that BFH was required to convey clear title to Holladay at the commencement of the Lease term. It is further clear that the necessary implication is that if any title issues arise after the commencement of the Lease that were not identified as a "Permitted Exception" and would interfere with Holladay's ability to accomplish its stated purpose should be resolved by BFH, at BFH's expense. Any other interpretation of the Lease would be inconsistent with the intent of the parties in entering the Lease and contrary to its express purpose. It is well established that "[a] cardinal rule in construing a contract is to give effect to the intentions of the parties and, if possible, to glean those intentions 'from an examination of the text of the contract itself.'" Howe v. Professional Maninvest, Inc., 829 P.2d 160, 162 (Utah 1992) (quoting LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857,

858 (Utah 1988)). Before entering into the Lease, Holladay explained to BFH that it was going to use the Property as part of its larger commercial Development. [R. at 158-159, ¶ 10]. Holladay explained that it was going to be demolishing existing buildings on the Property, and constructing new improvements. [Id.] The Lease provides for Holladay to use the Property in this manner, and also clearly states in Section 1.1 that possession of the Property will be delivered subject to the Permitted Encumbrances. If it was not the intention of the parties to have BFH actually deliver the Property free of other encumbrances, then Section 1.1 makes no sense.

It is not altogether clear whether BFH acknowledges an obligation on its part to convey clear title at the commencement of lease period, but BFH clearly acknowledges that the Lease requires it to convey clear title when Holladay exercises its purchase option. Of course, BFH is asserting that Holladay will never be able to exercise that option, which is addressed below. BFH apparently asserts, however, that even if the easement was valid, it would still be exempted under Article 1.1(e). Article 1.1(e) does not provide such an exemption. Article 1.1(e) provides that BFH is delivering possession of Lot 27 to Holladay subject to “[p]resent violations of law, ordinances, orders or requirements that might be disclosed by an examination and inspection or search of the Premises by any federal, state, county or municipal department or authority having jurisdiction, as the same may exist on the Effective Date.” [R. at 13 – Lease Art. 1.1(e)]. Holladay fails to understand how “violations of law, ordinances, orders or requirements” could be interpreted as referring to an easement discovered during the lease term. Rather,

Article 1.1(e), like Article 6.3 addressed below, is referring to legal regulations, ordinances, or restrictions that may affect Holladay's use of the property rather than title to the property, which is a critical distinction.

The plain language of the Lease, and the intention of the parties, requires BFH to deliver the Property free of encumbrances, including the Easement. The existence of the easement is a breach of the Lease, and BFH must remove it. At the very most, this Court should find that the Lease is ambiguous as to the parties' obligations related to the Easement.

D. The Lease Does Not Confer Standing On Holladay To Bring A Quiet Title Action.

BFH's argument that that Lease somehow grants Holladay standing to pursue a quiet title action or other judicial intervention should be rejected. BFH's reliance on Article 6.3 of the Lease in support of this argument is simply misplaced. Article 6.3 provides that the "[t]he tenant shall have the right, at its own expense, to contest or review by appropriate legal or administrative proceedings the validity or legality of any such Legal Requirement. . . ." [R. at 20-21 – Lease Art. 6.3]. BFH notes that the Lease defines "Legal Requirement" as "all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises" [R. at 11 – Lease Definitions]. However, a reading of the entire definition of Legal Requirements makes it clear that it is not referring to title issues, such as easements. Rather, it is referring to:

[A]ll present and future laws, statutes, requirements, ordinances, orders, judgments, regulations, administrative or judicial determinations, even if unforeseen or extraordinary, of every governmental or quasi-governmental authority, court or agency claiming jurisdiction over the Premises now or hereafter enacted or in effect (including, discrimination against, disabled individuals), and all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises, even if in compliance therewith necessitates structural changes to the Improvements or the making of Improvements, or results in interference with the use or enjoyment of all or any portion of the Premises.

[Id.]. In other words, Holladay does have the right under the Lease to challenge the legality of any laws, ordinances, codes, restrictions, etc. that affect its use of, but not the title to the property. Even if the Lease did provide Holladay the “right” to file a quiet title action, that does not automatically mean that Holladay would have standing.

BFH’s attempt to argue around the Elder v. Nephi case, which states that “[s]tanding to bring a quiet title action to perfect title is limited to parties who could acquire an interest in the property created by the court’s judgment or decree,” should be rejected. 2007 UT 46 ¶20, 164 P.3d 1238. Obviously the facts of the Elder case are not identical to the facts of this case, but that doesn’t render it inapplicable.

As an allegedly “more instructive” case, BFH refers this Court to Archer v. Board of State Lands and Forestry, 907 P.2d 1142 (Utah 1992). The Archer case actually supports Holladay’s position. In the Archer case, the Lessee was not pursuing a quiet title action or otherwise seeking to affect title to the property. Id. at 1143-44. Instead, the Plaintiff was appealing a decision by the Division of State Lands and Forestry to allow Chevron to assign Chevron’s common carrier pipeline easement to a third party.

Id. The third party was arguing that the plaintiff lacked standing to challenge the Division's decision. Id. at 1145. The court held that the plaintiff had standing to challenge the assignment because the Plaintiff had a right to use of the pipeline and the pipeline was Plaintiff's only legal means to transport phosphates to commercial markets. Id. The bottom line is that the Archer case in no way disputes or calls into question the standing requirement set forth in the Elder case regarding standing to bring a quiet title action.

The Idaho case, Tower Asset Sub Inc. v. Lawrence, cited in Holladay's Brief of Appellant further demonstrates the distinction between Elder and Archer. In Tower the lessee of the dominant estate brought an action for quiet title and injunctive relief against the owner of the subservient estate over which the easement crossed. The Tower court held that the plaintiff didn't have standing to quiet title because Tower was only a lessee, but did have standing to pursue the injunctive relief claim. 152 P.3d 581, 584 (Idaho 2007). This holding is consistent with Utah law as set forth in Elder and Archer.

E. The Trial Court's Award Of Attorneys Fees Was Not Based On Sufficient Evidence.

The Trial Court's award of attorneys' fees and costs was based on insufficient evidence and should be reversed. Although Holladay disagrees with the Court's decision regarding its claims against BFH, Holladay does not dispute that BFH prevailed at the Trial Court level as to those claims. However, BFH did not prevail on its counterclaims and, therefore, BFH's attorney's fees should be reduced proportionately. Additionally, the Trial Court is mandated to make a determination regarding the reasonableness of

BFH's attorneys' fees and costs. The problem is that the fee affidavits submitted by BFH's attorneys fail to provide sufficient information to make such a reduction or to make a determination of reasonableness.³

As set forth in Holladay's Brief of Appellant, Utah law requires the judge making the determination of reasonableness to answer the following questions:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie State Bank, 764 P.2d at 990; see also Foote v. Clark, 962 P.2d 52 at 55 (Utah 1998). A review of BFH's fee affidavits clearly demonstrates their inadequacy. For example, under Attorney Services, Mr. Kimball provides one long paragraph setting forth in general terms the services performed by himself primarily, but also by two other attorneys. First item: "Review of documents pertaining to case. . . ." [R. at 841]. There is no indication of the number of hours spent on that particular task (could be five or fifty hours), the attorney(s) performing the task, or their respective hourly rates, thus making it impossible to answer the above questions, such as how much of the work was reasonably necessary to adequately prosecute the matter. The next few services listed include

³ As set forth in BFH's Brief of Appellee, BFH's counsel apparently removed portions of the fees incurred with regard to BFH's counterclaims, although the exact amount is unknown.

“Preparation of 10 Day Notice to Pay or Quit; Reviewing of Title and the Deeds and all other Documents regarding to this Matter; Preparation of Motion to Dismiss. . . .” [R. at 841]. Again, no specific hours, attorneys, or hourly rates. The standards are not hard to meet. Mr. Kimball could have simply attached copies of his itemized billing records, which would provide the necessary information.

Accordingly, the Trial Court award of attorney’s fees should be reversed.

II. THE COURT CORRECTLY DISMISSED BFH’S COUNTERCLAIMS.

A. Holladay’s Lawsuit And Delayed Rent Payment Does Not Constitute A Material Breach Of The Lease.

BFH assertion that Holladay has materially breached the Lease by instigating this lawsuit and by making late payments for a few months is completely groundless. First, the Lease does not prohibit the filing of a lawsuit to enforce any terms of the agreement. While BFH may disagree with Holladay’s position, Holladay’s claims are not frivolous. The Trial Court did not find that Holladay had acted in bad faith nor has BFH sought sanctions on the grounds that Holladay’s action was frivolous. As is amply set forth in the pleadings of this case, Holladay, at the very least, has legitimate arguments to support its claims. As BFH is well aware, the Lease clearly contemplates that lawsuits regarding the terms of the Lease could possibly occur by expressly providing for attorney’s fees to be awarded to the prevailing party.

Furthermore, BFH has not been deprived of the benefit of the Lease, either by the lawsuit or by Holladay’s delayed payments over a few month period. It is undisputed that Holladay has made every monthly rental payment within the time period allowed by

Lease. [See, e.g., R. at 928 at pp. 28-32]. The Trial Court correctly determined that the fact that BFH was required on a few occasions to provide notice to Holladay prior to receipt of payment, did not constitute a breach of the Lease. There is absolutely no allegation that the Lease was anything different than an arms length transaction whereby BFH agreed to certain payment terms, which expressly provide for an initial 15 day grace period, and then a 10 day period after notice of deficiency. [R. at 127 – Lease Art. 12.1(a)].

Finally, Holladay is entitled to abate rent under Utah law where, as here, “the lessee's covenant to pay rent is dependent on the lessor's performance of covenants that were a significant inducement to the consummation of the lease or to the purpose for which the lessee entered into the lease.” Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 378 (Utah 1996). In this case, Brown’s representation that the Property was free of encumbrances was a significant and material inducement for Holladay to enter the Lease. Holladay needed the Property to be free of encumbrances so that Holladay could obtain financing to develop the Property, and Brown knew that. Thus, even if this Court determines that Holladay was withholding rent in violation of the Lease, under the circumstances of this case, such abatement is permitted.

B. Holladay Did Not Breach The Implied Covenant of Good Faith and Fair Dealing by making Late Lease Payments.

The Trial Court correctly denied BFH’s claim that Holladay’s delayed payments constituted bad faith. Admittedly, the Trial Court was not pleased by the delayed payments, but expressly rejected BFH’s bad faith argument. In reaching its decision, the

Trial Court rightly found that Holladay had made all its rent payments within the time frame permitted by the Lease. [R. at 928 at pp. 28-32; 61-62].

Furthermore, contrary to BFH's assertion, Holladay did not "intentionally withh[o]ld [rent] as retribution." [Brief of Appellee at p. 43]. Rather, Holladay delayed rent in an attempt to focus BFH's attention on the easement issue that Holladay needed resolved as quickly as possible so that Holladay could move forward with its development project, which was the entire purpose of Holladay leasing the property. BFH still received the rent payments pursuant to the terms of the Lease and, therefore, was not deprived of the benefit of its bargain. [R. at 928 at pp. 28-32].

Additionally, BFH overstates the number of months Holladay made its rent payments outside the 15 day grace period. BFH's own counsel admitted that it was only four or five months. [R. at 928 at pp. 28-32]. The only evidence in the record is Mr. Hulbert's testimony that it only occurred for four months, May through August, 2006. Unfortunately the actual dates on which BFH received payments is not in the Record.

C. Holladay's Refusal To Dismiss Its Lawsuit Within 30 Days Does Not Constitute An Unlawful Detainer.

Holladay's refusal to dismiss its lawsuit against BFH within 30 days of BFH's September 18, 2006 letter does not constitute an unlawful detainer. Unlawful detainer is found "when [a tenant] continues in possession, in person or by subtenant, after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held . . . after notice in writing requiring in the alternative the performance of the conditions or covenant" Utah Code Ann. § 78-36-3(1) (2008). The only

possible grounds for BFH's unlawful detainer claim is that Holladay's refusal to dismiss its lawsuit violated a condition or covenant of the Lease. Since that, as set forth above, is not the case, BFH's unlawful detainer claim fails as a matter of law.

III. THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ITS REASONABLE ATTORNEYS' FEES AND COSTS.

As quoted by BFH, the Lease provides that the in any proceeding or controversy associated with or arising out of the Lease "the prevailing party shall be entitled to recover from the other party as a part of the prevailing party's costs, such party's actual and reasonable attorneys' fees and court costs." [R. at 33]. Accordingly, whichever party prevails in relation to BFH's counterclaims is entitled, upon a proper showing, to an award of its reasonable attorneys' fees. Therefore, Holladay requests that in the event that this Court affirms the Trial Court's decision with regard to BFH's counterclaims, Holladay be awarded its reasonable attorneys' fees and costs, incurred at both the Trial Court and Appellate level.

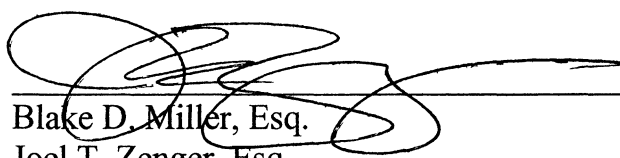
Additionally, in the event that this Court reverses the Trial Court's decision with regard to Holladay's claims, Holladay requests any award of its reasonable attorneys' fees and costs incurred in seeking the same.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Holladay's Brief of Appellant, this Court should reverse the Trial Court's granting of Defendant's Motion for Summary Judgment and denial of Plaintiff's Motion for Summary Judgment, reverse the Trial Court's award of Attorneys' Fees and Costs, Affirm The Trial Court Summary

Judgment against BFH's Counterclaims, and award Holladay its reasonable attorneys' fees and costs.

MILLER GUYMON, P.C.



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Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MILLER GUYMON, P.C.,
165 Regent Street, Salt Lake City, Utah 84111, and that pursuant to Rule 26(a), Utah
Rules of Appellate Procedure, a true and correct copy of the foregoing **REPLY BRIEF
OF APPELLANT AND CROSS-APPELLEE HOLLADAY TOWNE CENTER,
L.L.C.** was delivered to the following this 25th day of April, 2008, by:

☐ Hand Delivery

☐ Facsimile

☒ Depositing the same in the U.S. Mail, postage prepaid

☐ Federal Express

☐ Certified Mail, Receipt No. _____, return receipt requested

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A handwritten signature in black ink, appearing to be "Blake S. Atkin", is written over a horizontal line.