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Lloyd B. Gurney, Betty Gurney, Paul Gurney,
Donna S. Gurney, Lee A. Jeppson, LaRae G.
Jeppson, and LaRee Smith v. Randy G. Young,
Blake Jumper, Stone River Development, LLC,
RCP Land Investment, LLC, and R.G. Young, Inc. :
Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LLOYD B. GURNEY, BETTY GURNEY, :
PAUL GURNEY, DONNA S. GURNEY, :
LEE A. JEPPSON, LaRAE G. JEPPSON :
and LaREE SMITH, :

Plaintiffs and Appellees, :

vs. :

RANDY G. YOUNG, BLAKE JUMPER, :
STONE RIVER DEVELOPMENT, LLC, :
RCP LAND INVESTMENT, LLC, and :
R.G. YOUNG, INC., :

Defendants and Appellants. :

RANDY G. YOUNG, STONE RIVER :
DEVELOPMENT, INC., and R.G. :
YOUNG, INC., :

Counterclaim Plaintiffs and :
Appellants, :

vs. :

LLOYD B. GURNEY, BETTY GURNEY, :
PAUL GURNEY, DONNA S. GURNEY, :
LEE A. JEPPSON, LaRAE G. JEPPSON :
and LaREE SMITH :

Counterclaim Defendants and :
Appellees. :

Appellate Court No. 20070554-CA

REPLY BRIEF OF APPELLANTS

FILED
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JUN 10 2008

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REPLY BRIEF OF APPELLANTS

Appeal from the Recitation of Undisputed Facts and Conclusions of Law and the
Final Judgment entered in the Fourth Judicial District Court of Utah County,
State of Utah, The Honorable Stephen L. Hansen, District Judge

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INTRODUCTION

The trial court erred in determining that the parties' Real Estate Purchase Contract ("REPC") failed due to lack of consideration. Addendum No. 1 required the payment of \$10,000.00 on or before July 30, 2004, to extend the REPC's Settlement Deadline from August 1, 2004 to October 1, 2004. These Settlement Deadline extension provisions never became operative. Prior to July 30, 2004, the parties entered into the Second Addendum to the REPC - Addendum No. III. Addendum No. III, which was timely signed by all of the parties and was consummated before July 30, 2004, extended the REPC's settlement deadline to February 1, 2005 without requiring any payments from the Young Entities.¹ Addendum No. III provides that where its terms conflict with the terms of the REPC or any other Addenda, its terms shall govern. Addendum No. III's extension terms manifestly conflict with and modify the previously existing extension terms of Addendum No. 1. Accordingly, no \$10,000.00 extension payment was due and the lack of such payment cannot invalidate the parties' contract: Addendum No. 1 never became effective.

As evidenced by the Gurneys' lack of any substantive argument to the contrary, the trial court also erred in concluding that the REPC was *void ab initio*, or "lapsed," due to its date of execution. The parties executed the REPC and Addendum No. 1 at the exact same time – December 1, 2003 8:30 p.m. Accordingly, the Young Entities' offer to the Gurneys came into being at that moment and the Gurneys immediately accepted it.

¹ All of the Appellants will collectively be referred to as the "Young Entities" and all of the Appellees will collectively be referred to as the "Gurneys".

Under those facts, the offer acceptance deadline of November 28, 2003 is meaningless and does not invalidate the contract. Even if the offer acceptance deadline was somehow effective despite the fact that the offer embodied in the REPC did not come into being until after the deadline's expiration, the Young Entities, as offeror, either waived the deadline or the Gurneys' acceptance of the REPC represented a counteroffer that was, in turn, accepted by the Young Entities. Under either analysis, the parties formed a binding contract.

Finally, the Gurneys breached their obligations under paragraph 2 of the third Addendum to the REPC – Addendum No. 3. Per Addendum No. 3, the Gurneys are required to “give full cooperation while working with the city & state entities through the entitlement process & water share assignments.” The Gurneys failed to “give full cooperation” in regard to “water share assignments” by failing and refusing to transfer certain well-water rights to the Lehi Metropolitan Water District, preventing completion of the “entitlement process” - (they prevented Lehi City from approving the Gurney Estates Subdivision). The Gurneys' failures to meet their obligations under Addendum No. 3, activated Addendum No. 3's day-to-day extension of the REPC's Settlement Deadline. No party argued or presented evidence to support the notion that the day-to-day extension of the REPC, per Addendum No. 3, has extended beyond a reasonable period of time.

Accordingly, the parties entered into and still have a binding contract. The trial court's entry of summary judgment in favor of the Gurneys should be reversed.

ARGUMENT

POINT I

THE CONTRACT DID NOT FAIL DUE TO LACK OF CONSIDERATION BECAUSE, BEFORE ANY PAYMENT WAS DUE UNDER ADDENDUM NO. 1, ADDENDUM NO. III EXTENDED THE SETTLEMENT DEADLINE TO FEBRUARY 1, 2005

The Gurneys focus the argument in their Brief of Appellees on the erroneous conclusion that the REPC failed due to lack of consideration based upon a “missing” \$10,000.00 closing-extension payment. By so arguing, it is the Gurneys, and not the Young Entities, who seek to divert attention from the actual terms within the four corners of the parties’ contract. Following Addendum No. 1, the parties entered into two additional Addenda (Addendum No. III and Addendum No. 3), both of which superseded the closing-extension payment requirement of Addendum No. 1.

The parties executed the REPC and Addendum No. 1 jointly on December 1, 2003 at 8:30 p.m. (R. 193-206). In reliance upon that execution, the Young Entities tendered the \$10,000.00 earnest money to the Gurneys. (R. 193-206 and 225 ¶ 17). The Gurneys accepted and never returned this \$10,000.00: they still have it today. (R. 225 ¶ 18). The parties then proceeded to partially perform the contract for more than two years.

The Settlement Deadline (often referred to as the “closing”) in the REPC was August 1, 2004. (R. 202 ¶ 23(f)) Addendum No. 1 modified the August 1, 2004 closing date – actually accelerating it in the event of final plat approval from the Lehi City Council – and allowed for a two-month extension of the August 1, 2004 closing date upon the Young Entities payment of \$10,000 to the title company:

In the event the Buyer has not received final plat approval with 2.5 units/acre from Lehi by the closing date then the Buyer shall be granted one (1) extension to be paid as follows:

a) ***Buyer to pay an additional ten thousand (\$10,000.00) dollars non-refundable deposit to Integrated Title Service no later than July 30, 2004 to extend the closing date to October 1, 2004.*** Deposit shall be applied to purchase price at initial closing

(R. 199-200) (emphasis added).

The source of the suggestion that the Young Entities were under an obligation to pay a \$10,000.00 extension payment comes from the emphasized language. According to Addendum No. 1, "to extend the closing date to October 1, 2004" the Young Entities needed to make a \$10,000.00 payment before July 30, 2004. Prior to July 30, 2004, however, the parties entered into the second addendum to the REPC – Addendum No. III – which superseded Addendum No. 1's closing extension terms.

Addendum No. III simply provides: "Buyer and Seller each agree to extend said closing an additional 6 months from the Initial closing, not to exceed Feb. 1st 2005." (R. 191). Addendum No. III does not premise the extension of the closing date upon any payment, and it extends Settlement Deadline, a/k/a the closing date, for the REPC beyond the extension that was available under Addendum No. 1. In other words, before any payment was due under Addendum No. 1, Addendum No. III extended the Settlement Deadline to February 1, 2005. Accordingly, Addendum No. III's extension of the closing date through February 1, 2005 without requiring

payment, conflicts with and supercedes Addendum No. 1's requirement that the Young Entities pay \$10,000.00 "to extend the closing date through October 1, 2004."

The Gurneys argue that since Addendum No. III is silent as to any payment related to the closing extension through February 1, 2005, Addendum No. 1's payment requirement survived and applied. This position is untenable because the \$10,000.00 payment requirement does not universally apply to any extension. Rather, it is inextricably linked with Addendum No. 1's optional extension of the closing through October 1, 2005. This is evident from Addendum No. 1's plain language: "Buyer to pay an additional ten thousand \$10,000.00 dollars . . . no later than July 30, 2004 to extend the closing date to October 1, 2004." (R. 198-99). The payment requirement cannot be parsed out of the entire provision and given meaning on its own.

The Gurneys cite the recent Utah Supreme Court case of *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326,² but misapply the holding in *Tangren* to the instant case. The holding of *Tangren* is that "in the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration." *Id.* at ¶ 17. Accordingly, the Court in *Tangren* overruled its early holding in *Ringwood v. Foreign Auto Works, Inc.*, 671 P.2d 182 (Utah 1983), which allowed parol or extrinsic evidence to determine whether a second agreement with a clear integration clause superseded a prior written agreement. See *Tangren*, 2008 UT 20 at ¶ 16 n.20. An examination of *Tangren* and *Ringwood* is entirely unnecessary and inappropriate in this case because the Addendum No. III, and

² Brief of Appellees at 12.

Addendum No. 3, clearly specify that “To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda . . . , these terms shall control. All other terms of the REPC, including all prior addenda . . . , not modified by this ADDENDUM shall remain the same. . . .” (R. 191). This is not a case in which it is necessary to consider whether an agreement that is silent as to its impact upon the REPC may be found to modify the REPC through the consideration of parol evidence.

In any event, the Court in *Tangren*, however, would have reached exactly the same conclusion as the Court did in *Ringwood* (without of course considering extrinsic evidence): the second agreement superseded the first. See *Tangren*, 2008 UT 20 at ¶ 16 n.20 (“We therefore would have concluded, as did the trial court [in *Ringwood*], that the second agreement superseded the first.”)

An examination of the facts in the *Ringwood* case reveals why the conclusion that second agreement superseded the first is correct. In *Ringwood*, the defendants agreed to purchase stock for \$100,000 and gave the Ringwoods a promissory note in that amount in October of 1978. In November of 1978, the parties entered into a more comprehensive agreement for the purchase and sale of the stock with terms similar to those in the promissory note and with an integration clause. The trial court found that the November 1978 agreement superseded the October 1978 promissory note. The Utah Supreme Court in the *Ringwood* case affirmed, concluding that “[t]he November agreement contains many of the same or similar provisions found in the promissory note. . . .” *Ringwood*, 671 P.2d at 183.

In the instant case, Addendum No. III superseded Addendum No. 1. Both Addenda cover exactly the same term: the REPC's Settlement Deadline. Addendum No. 1 extended the Settlement Deadline to October 1, 2004 upon the payment of \$10,000, but before that payment became due and that extension became effective, the parties signed Addendum No. III. Addendum No. III was signed on time by everyone before the payment was due under Addendum No. 1 to extend the Settlement Deadline. Addendum No. III extended the Settlement Deadline to February 1, 2005, without requiring any payment in any amount. Addendum No. 1's Settlement Deadline extension provisions never became effective.

The other distinct difference between *Tangren, Ringwood* and the instant case, is that in the instant case the integration clause is in the REPC – the first signed contract – not in the subsequent addenda. In determining whether the terms of Addendum No. 1 conflict with Addendum No. III, the integration clause in the REPC is not relevant. As previously mentioned, the very language of Addendum No. III itself resolves this dispute: “To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda . . . , these terms shall control. All other terms of the REPC, including all prior addenda . . . , not modified by this ADDENDUM shall remain the same. . . .” (R. 191.) The issue simply is whether a conflict between the terms of the Addenda exists, and an integration clause in the pre-existing REPC does nothing to further that analysis. If a conflict exists, the terms of Addendum No. III control. At a minimum, the Settlement Deadlines in the Addenda conflict. To obtain the extended Settlement Deadline of October 1, 2004, under Addendum No. 1 requires a payment of \$10,000; to obtain

the extended Settlement Deadline of February 1, 2005, under Addendum No. III requires no payment. A closer examination of Addendum No. 1 reveals additional conflicts not relevant to this case.

Even if the Court were to regard as tenable the Gurneys' position that Addendum No. III's silence as to an extension payment preserved Addendum No. 1's extension-payment requirement, such a position is no more tenable than the Young Entities' position that Addendum No. III's silence as to an extension payment-requirement eliminated such a requirement. This is particularly true considering this is a review of a summary judgment. See *Tretheway v. Miracle Mortgage, Inc.*, 2000 UT 12, ¶ 2, 995 P.2d 599 ("In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.")

Moreover, when parties espouse opposing tenable interpretations of contractual provisions, such provisions are ambiguous. See *Plateau Mining Co. v. Utah Div. of State Lands & Forestry et al.*, 802 P.2d 720, 725 (Utah 1990) (stating to demonstrate ambiguity the contrary positions of the parties must be tenable). Accordingly, the Court "may consider the parties' actions and performance as evidence of the parties' true intention." *Id.* Determination of intent by extrinsic evidence presents a question of fact – making summary judgment inappropriate. See *Schmidt v. Downs*, 775 P.2d 427, 430 (Utah Ct. App. 1989) (determination of intent by extrinsic evidence is a question of fact).

The facts show that Addendum No. III was entered into following Lehi City's refusal to approve the Gurney Estates Subdivision at a density of 2.5 units per acre,

as anticipated and incorporated into the REPC and Addendum No. 1. (R. 224 ¶ 19). As a result of Lehi City's actions, Randy Young proposed a reduction in the purchase price. (R. 224 ¶ 20). In lieu of agreeing to a reduction in the purchase price, the Gurneys agreed to the extension provided in Addendum No. III. (R. 224 ¶ 21). The Gurneys have not provided any evidence to rebut the fact that the intention of the parties was to extend the closing date as a result of Lehi City's changed density requirements and in lieu of a reduced purchase price. At the very least, a determination of the parties' intent in entering into Addendum No. III presented a disputed question of fact that the trial court should not have resolved.

POINT II

**THE REPC and THE THREE ADDENDA MAY NOT BE
INVALIDATED DUE TO THEIR DATES OF EXECUTION:
IN ANY EVENT, ALL OF THE PARTIES SIGNED THE
SECOND ADDENDUM TO THE REPC, ADDENDUM NO.
III, IN A TIMELY MANNER**

The Trial Court erred in concluding that the REPC and Addendum No. 1 "lapsed" because they were not executed prior to their November 28, 2003 offer acceptance deadline. It similarly would be an error to determine that the third addendum to the REPC, Addendum No. 3, is negatively affected by the fact that some of the Gurneys executed it after its offer acceptance deadline. The offer embodied in the REPC and Addendum No. 1 was created and accepted at the exact same time – it could not lapse before it was even created. Further, the Young Entities either waived the Gurneys' late acceptance of the REPC and Addendum No. 1, and their partial late acceptance of Addendum No. 3, or they represented counteroffers the Young Entities accepted.

A. The Trial Court Improperly Resolved Disputes of Material Fact Regarding Dates of Contract Execution

As a preliminary matter, it is worth repeating that the trial court improperly resolved disputes of material fact regarding the dates of execution of the contract documents. Specifically, the trial court found that it was an undisputed fact that neither the REPC nor any of the Addenda were “signed timely by any of the parties.” (R. 551 ¶ 5). The evidence in the record does not support this finding. At best, the trial court improperly resolved disputes of material fact.

All of the parties timely signed the second addendum to the REPC, Addendum No. III, with the last party signing on June 8, 2004 – six days before the offer acceptance deadline.³ (R. 191). Addendum No. III, including its date of creation is material, in part because it modified and superseded the closing extension terms of Addendum No. 1, including the elimination of Addendum No. 1's \$10,000.00 extension payment requirement. See Point I, *supra*.

The Gurneys direct this Court's attention to a meaningless document. Instead of explaining how Addendum No. III can possibly be interpreted as having been untimely signed, and seeking to avoid the implications of Addendum No. III's terms, the Gurneys direct the Court's attention to “Addendum No. II.” See Brief of Appellees at 21. There is no document in the record called “Addendum No. II.”

³ As noted in the Young Entities' opening Brief, the Gurneys' counsel suggested to the trial court that the date next to LaRae Jeppson's signature should be read “6/15/04” instead of “6/5/04”. The only evidence in the record concerning the dates of execution of Addendum No. III is the Addendum itself. Careful examination of Addendum No. III shows that LaRae executed the Addendum at the same time as her husband Lee, “6/5/04 6:15 p.m.” (R. 191, 100 and 36). At the very least, there is a dispute of material fact concerning the date of LaRae's execution – a dispute that should not have been resolved by the trial court.

The parties did consider a document called “Addendum No. 2”, but that document was never consummated. (R. 104). Addendum No. 2 is a meaningless red herring. All of the parties signed the second addendum to the REPC, Addendum No. III, before its offer acceptance deadline. The Trial Court’s error on this point alone is enough to reverse its entry of summary judgment.⁴ “[O]nly one material fact in dispute is required to reverse a summary judgment.” *Yoho Auto., Inc. v. Shillington*, 784 P.2d 1253, 1255 (Utah Ct. App. 1989) (citation omitted).

B. The REPC and Addendum No. 1 Were Valid and Binding Despite Their Date of Execution

All of the parties simultaneously executed both the REPC and Addendum No. 1 on December 1, 2003 at 8:30 p.m. (R. 193-206). Accordingly, those documents’ offer acceptance deadlines of November 28, 2003 cannot invalidate the contract. The offer embodied in the REPC and Addendum No. 1 was not even created until after the acceptance deadline, and the offer was immediately accepted upon its creation. Under these circumstances, the offer acceptance deadline of November 28, 2003 is of no consequence.

Even if the offer acceptance deadline is considered to have significance, the “late acceptance” of the offer does not invalidate the contract. In examining the validity of the acceptance of offers rendered in violation of specific offer acceptance conditions, such as time of acceptance limitations, courts take two approaches.

⁴ The trial court’s finding that none of the parties signed any of the contract documents in a timely fashion also is in error in another material respect. Specifically, both the Young Entities and at least three of the Gurneys executed Addendum No. 3 before its offer acceptance deadline. (R. 189).

Under one approach, the offeror is free to waive the offer acceptance conditions because the offer acceptance conditions are contractual provisions running to his or her benefit. “It is well-settled a contracting party may waive conditions placed in a contract solely for that party's benefit. The provision in an offer specifying the means of acceptance is such a condition and may be waived by the offeror.” *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Cal. Ct. App. 1984) (citations omitted); See also *Nichols v. Nicholas*, 141 A.2d 746, 748 (Md. Ct. App. 1958) and *Beirne v. Alaska State Hous. Auth.* 454 P.2d 262, 264-65 (Alaska 1969). The other approach is to consider the late acceptance to be a counteroffer that, in turn, the original offeror may accept. See Restatement (First) Contracts § 73 (1932).

The Utah Supreme Court has recognized that a party is free to waive contractual provisions and conditions precedent running to its benefit:

[A] party to a contract, who is entitled to demand performance of a condition precedent, may waive the same, either expressly or by acts evidencing such intention; and performance of a condition precedent to taking effect of the contract may be waived by the acts of the parties in treating the agreement as in effect.

Ahrendt v. Bobbitt, 229 P.2d 296, 297 (Utah 1951) (quoting 17 C.J.S. *Contracts* § 491). The Court also has applied the counteroffer approach. See *Frandsen v. Gertsner*, 487 P.2d 697, 700 (Utah 1971) (holding late or defective acceptance is counteroffer which the original offeror must in turn accept in order to create contract).

“Regardless of the legal analytical vehicle, *i.e.*, a counter offer and acceptance or an express retroactive waiver of the time limitation for the acceptance, the end

result is the same.” *Cain v. Noel*, 235 S.E.2d 292, 293 (S.C. 1977). The Young Entities waived any right flowing from the offer acceptance deadline clauses in the REPC and Addendum No. 1. (R. 226 ¶ 13). Their tender of the earnest money signaled their waiver, a waiver reaffirmed by entering into two additional Addenda, by performing the contract for more than two years, and ultimately by suing for specific enforcement of the contract.

If the Gurneys’ acceptance of the REPC and Addendum No. 1 is considered a counter-offer, then the end result is the same: the Young Entities accepted the counteroffer and a binding contract was formed. The Young Entities’ execution of the contract documents at the exact same time as the Gurneys, the Young Entities’ tender of earnest money, their execution of two additional Addenda, and their lengthy performance of the contract evidence the Young Entities’ acceptance of the counteroffer.⁵

⁵ The counteroffer approach to validating late acceptance of an offer has been questioned as possibly implicating the statute of frauds. See *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Cal. Ct. App. 1984) (questioning whether the buyer’s signature on the original offer would satisfy the statute of frauds).

In Utah, a third signature by the Young Entities is not required to satisfy the statute of frauds. “One or more writings, not all of which are signed by the party to be charged, may be considered together as a memorandum for purposes of the statute of frauds if there is a nexus between them.” *Machan Hampshire Prop., Inc. v. Western Real Estate & Dev. Co.*, 779 P.2d 230, 234 (Utah Ct. App. 1989). The REPC and the three Addenda, all of which are signed by all of the parties together “contain all the essential terms and provisions of the contract to which the parties have agreed.” *Id.*

C. Addendum No. 3 is Valid and Binding Despite its Dates of Execution

Applying either the waiver or counteroffer theories, the late-acceptance of Addendum No. 3 by some of the Gurneys also does not invalidate the contract. The Young entities waived any right flowing from the offer acceptance deadline in Addendum No. 3. (R. 222 ¶ 33). Alternatively, they accepted the counteroffer created through the Gurneys' late acceptance of Addendum No. 3. The Young Entities' continued performance of the contract and the significant time and resources they expended to bring the contract to closing evidences their acceptance of the counteroffer. (R. 222 ¶ 34).

D. The Time Is of the Essence Clause Does Not Operate to Invalidate the REPC, Addendum No. 1 or Addendum No. 3

Both the trial court and the Gurneys place particular emphasis on the REPC's "time is of the essence" clause in finding that the REPC and Addendum No. 1 "lapsed" due to their date of execution. "Time is of the essence" means that "performance by one party at time or within period specified in contract is essential to enable him to require performance of the other party." *Black's Law Dictionary* 1483 (6th ed. 1990). Thus, "time is of the essence" is a concept of contract performance, not contract formation. After all, the REPC's "time is of the essence" clause has no effect if the contract or even the offer, as the Gurneys suggest in this case, never existed in the first place. The trial court's reliance upon the "time is of the essence" clause to invalidate the REPC and Addendum No. 1 based upon their offer acceptance deadlines was misplaced. Whether an offer containing a condition precedent, such as time of acceptance, has been validly accepted should be

determined through the application of the waiver or counteroffer analyses examined above.

Moreover, the trial court erred in concluding that “Time of performance was an essential element of the documents and could not be waived.” (R. 551). A “time is of the essence” provision may be waived: “Even where time is of the essence, a breach of the contract in that respect by one of the parties may be waived by the other party subsequently treating the contract as still in force, through words or Conduct indicating that the provision is no longer of importance, or by conduct that contributes to the delay.” 17A Am. Jur. 2d *Contracts* § 609; see also *Provo City Corp. v. Nielson Scott Co.*, 603 P.2d 803, 806 (Utah 1979) (“It is true that parties to a written contract may modify, waive, or make new contractual terms, even if the contract itself contains a provision to the contrary.”) As previously discussed, the parties in this case clearly waived an rights arising from the “time is of the essence” clause by treating the contract as binding.

POINT III

THE DOCTRINES OF RATIFICATION, WAIVER and ESTOPPEL PREVENT THE INVALIDATION OF THE PARTIES’ CONTRACT DUE TO THE DATES OF EXECUTION or THE LACK OF AN EXTENSION PAYMENT

Even if the Gurneys, at some point, did have the right to escape from the parties’ contract, it was and is inequitable to allow them to exercise such right given the facts of this case. “Estoppel is an equitable doctrine which precludes parties from asserting their rights where their actions render it inequitable to allow them to assert those rights.” *Brixen & Christopher Architects v. Elton*, 777 P.2d 1039, 1043

(Utah Ct. App. 1989). This case presents the Court with “very compelling circumstances where the interests of justice, morality, and common fairness clearly dictate that [the doctrine of equitable estoppel should be applied].” *Phillips v. Borough of Keyport*, 107 F.3d 164, 182 (3rd Cir. 1997).

The Gurneys present no substantive argument in support of the notion that the parties’ contract was void *ab initio* (or “lapsed”), virtually conceding that the trial court erred on that point. It is very obviously inequitable to declare the REPC void *ab initio* due to its date of execution when the Gurneys signed the document then accepted and never returned the earnest money. After all, the provision of the REPC declaring the earnest money non-refundable has no force or effect when the contract never existed in the first place. The inequity inherent in declaring the REPC void *ab initio* becomes even more apparent when one considers that the Gurneys partially performed the contract for more than two years, executed two additional addenda, and never complained about the REPC’s date of execution, allowing without complaint and even positively assisting the Young Entities to expend considerable time and resources in reliance upon the contract.

The Young Entities had no obligation under the clear terms of Addenda Nos. III and 3 to make any extension payment. See Point I, *supra*. Even if they did have such an obligation, the facts again demand the application of estoppel. The parties continued to perform the contract for more than 18 months after alleged Addendum No. 1 July 30, 2004 extension payment due date. Every action by the Gurneys following that alleged deadline and up to the date their lawyers filed this lawsuit indicated that the parties continued to have a binding contract: The Gurneys entered

into a third Addendum, they worked in concert with the Young Entities to secure development approvals from Lehi City including an annexation agreement and preliminary plat approval and they entered into the collateral Water Transfer Agreement. At the same time the Gurneys' inaction also indicated that the contract continued to be binding – they never once complained about the missing extension payment or suggested it negatively affected the contract.⁶

In reliance upon the Gurneys' actions and conspicuous inaction, the Young Entities continued, at great expense, to perform the contract. The Gurneys suggest that estoppel is inapplicable because the development approvals secured through the partial performance of the parties' contract are solely for the benefit of the Young Entities. Even if that is true,⁷ the loss of benefits to the Young Entities is the operable element of estoppel:

Estoppel requires proof of three elements: (1) a statement, admission, act, or failure to act by one party inconsistent with a later-asserted claim; (2) the other party's reasonable action or inaction based upon the first party's

⁶ The Gurneys seek to escape the ramifications of their silence by suggesting that “The Gurneys did not discover until May 2006 that the second earnest money amount had not been deposited.” Opposition Brief at 18. Such a statement is not supported by the record. Paul Gurney testified that he did not discover the “missing” extension payment until May 2006. (R. 366). His testimony says nothing about the other Gurneys' knowledge. If indeed such an extension payment was due, as the Gurneys contend, they all knew of the requirement and cannot plead ignorance. “Each party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense.” *Western Properties v. Southern Utah Aviation Co.*, 776 P.2d 656, 658 (Utah Ct. App. 1989) (citations omitted).

⁷ If this trial court's decision is reversed, it will be interesting to listen to the Gurneys explain why, within days of the trial court's decision, they were knocking on the door of the Lehi City Engineer's office requesting copies of the Young Entities' engineering plans for the Gurney Estates Subdivision.

statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate its statement, admission, act, or failure to act.

Burrow v. Vrontikis, 788 P.2d 1046, 1048 (Utah Ct. App. 1990) (emphasis added).

The trial court's invalidation of the REPC resulted in the Young Entities' complete loss of their \$10,000.00 earnest money payment and the extensive time and resources they expended in partial performance of the contract (not to mention the obligation to pay the Gurneys' attorney fees). "[T]he interests of justice, morality, and common fairness clearly dictate that" the Gurneys should be estopped from asserting their late-breaking, lawyer generated, complaints about the REPC's invalidity. *Phillips v. Borough of Keyport*, 107 F.3d 164, 182 (3rd Cir. 1997).

POINT IV

THE CONTRACT REMAINS UNDER EXTENSION

A. The Gurneys Breached Their Obligations Under Addendum No. 3

In their Opposition Brief the Gurneys made no response to the fact that they breached the terms Addendum No. 3 to the REPC. Instead, they disingenuously suggest that the Young Entities fail to point out which specific provisions of the REPC and Addenda the Gurneys breached. Point IV(C), starting on page 42, of the Young Entities' Brief very specifically notes that the Gurneys breached Paragraph 2 of Addendum No. 3 to the REPC. Addendum No. 3 provides:

1. Due to delays with water share agreement issues Buyer & Seller agree to extend the closing date to June 15, 2005.

2. Both parties will give full cooperation while working with the City & State entities through the entitlement process & water share assignments.

3. Since the Buyer has no control over the water issues between [Gurney] family members it is difficult, if not impossible to move the land forward until these issues are resolved, it is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.

(R. 189) (emphasis added).

The Gurneys breached Paragraph 2 of the Addendum No. 3 by failing and refusing to “give full cooperation” in working with City and State entities in regard to securing development entitlements and completing water share assignments. Specifically, the Gurneys failed and refused to transfer certain well water rights to the Lehi Metropolitan Water District. (R. 239 ¶ 6). The Gurneys’ failure to comply with that obligation and other “water share assignment” obligations set forth in the parties’ Water Transfer Agreement is direct evidence of the Gurneys’ breach of their obligation to “give full cooperation while working with the City & State entities through the entitlement process & water share assignments.” (R. 189).

The Water Transfer Agreement and the Gurneys’ failures to meet that Agreement’s obligations are admissible evidence establishing the Gurneys’ breach of Addendum No. 3 for several reasons. First, the Water Transfer Agreement is not parol evidence – it is not “contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of [Addendum No. 3].” *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985). Rather, the Gurneys’ failure to comply with their water share assignment obligations

is direct evidence of their failure to meet Addendum No. 3's clear and unaltered requirement that they “give full cooperation” in relation to “water share assignments.”

Second, the requirements of Paragraph 2 of Addendum No. 3 are ambiguous as to exactly what the parties intended by “give full cooperation” and as to exactly what was meant by “water share assignments.” Even if the Water Transfer Agreement is parol evidence in relation to Addendum No. 3, it may be considered to clarify these ambiguities in Addendum No. 3. See *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326 (“parol evidence may be admitted only if the court makes a subsequent determination that the language of the agreement is ambiguous”). The Water Transfer Agreement specifies exactly what each parties' obligations were in relation to “water share assignments.”

Third, Paragraph 14 of the REPC provides, “This contract cannot be changed except by written agreement of the parties.” (R. 203). The Water Transfer Agreement is a written agreement executed by all of the parties to the REPC. (R. 234-36). It specifically provides the mechanism by which the water share assignments contemplated by the REPC, and necessary for the entitlement approvals contemplated by the REPC, would be accomplished.⁸ Thus, the Water Transfer Agreement alternatively may be seen as a written and signed modification of the REPC's water assignment provisions.

⁸ The REPC included in the sale 53.82 shares of water or shares equal to the required amount by Lehi City for Development. (R. 206). Lehi City required compliance with the water share assignment obligations set forth in the Water Transfer Agreement prior to giving final plat approval to the Gurney Estates Subdivision. (R. 229-41).

Finally, the Water Transfer Agreement also may be seen as a binding accord and satisfaction regarding the REPC's water assignment provisions.

An accord and satisfaction arises when the parties to a contract agree that a different performance, to be made in substitution of the performance originally agreed upon, will discharge the obligation created under the original agreement.

Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985) (citations omitted). Because the Water Transfer Agreement specifies the exact manner and assigns the exact obligations, through which Lehi City's water requirements would be met, the Agreement alternatively may be viewed as an accord and satisfaction as to performance of the REPC's water transfer provisions.

B. Addendum No. 3 Extends the REPC

Addendum No. 3 provides, "[I]t is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day." (R. 189). The Gurneys' delayed progress through the City, perpetuating "water resolution issues" through their failure to "give full cooperation" relating to the "water share assignments." Accordingly, the REPC was and is extended on a day by day basis due to the Gurneys' failures.

Because the day-by-day extension of the REPC contains no specified expiration, the extension lasts for a reasonable period of time. See *Cooper v. Deseret Fed. Sav. & Loan Ass'n*, 757 P.2d 483, 485 (Utah Ct. App. 1988) ("When a contract fails to specify the time by which a certain act must be performed, the law implies the act be performed within a reasonable time.") The Gurneys themselves recognized and admitted, through their attorney, that the REPC remained valid and

binding as late as January 5, 2006. (R. 215-16). Moreover, the Gurneys did not object to the Young Entities' claims for specific enforcement of the REPC and Water Transfer Agreement on the ground that the reasonable period of time for the Gurneys to meet their own water assignment obligations per Addendum No. 3 had expired.

POINT V

THE AFFIDAVIT TESTIMONY and OTHER EVIDENCE SUBMITTED BY THE YOUNG ENTITIES IS ADMISSIBLE

The Gurneys devote a significant portion of their Opposition Brief to arguing that the Young Entities are improperly relying upon parol evidence, specifically affidavit testimony, to modify the provisions of the REPC and Addenda. For all of their argument, however, the Gurneys fail to cite the Court to even one specific piece of “parol evidence” relied upon by the Young Entities to supposedly modify the provisions of the REPC and Addenda. The Gurneys silence is telling – there is no inadmissible parol evidence in the record.

Parol evidence consists of “contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an *integrated contract*.” *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985). None of the Affidavit testimony submitted by the Young Entities is submitted for the purposes of varying the provisions of the REPC and Addenda. The Affidavits provide the only verified full and complete copies of the REPC, the Addenda, the Water Transfer Agreement and other important documents. They also provide details concerning the circumstances under which the parties executed the contract

documents, the purposes for which certain contract documents were executed and the parties' actions in executing and performing (or not performing) their obligations per the terms of the REPC and Addenda. Such testimony is not parol evidence.

Finally, to the extent the Court considers certain provisions of the REPC and Addenda to be ambiguous, such as Addendum No. 3's requirements, the Affidavit testimony concerning the circumstances surrounding and purposes of the contract documents, as well as the evidence of their actions taken in regard to performance of the contract, may clarify such provisions and is admissible for that purpose. "[P]arol evidence is admissible to clarify facial ambiguity." *Id.* at 665 n.1.

Even if none of the REPC and Addenda provisions are considered to be ambiguous, the plain language of the REPC and Addenda establish that they cannot be invalidated for the reasons specified by the trial court, or for any other reasons.

CONCLUSION

The parties simultaneously executed both the REPC and Addendum No. 1. The Settlement Deadline in the REPC was August 1, 2004. Addendum No. 1 modified the August 1, 2004 closing date – actually accelerating it under certain circumstances – and allowed for a two-month extension of the August 1, 2004 closing date upon the Young Entities payment of \$10,000 to the title company. Before that \$10,000 payment was necessary, the parties timely negotiated and executed Addendum No. III, extending the Settlement Deadline to February 1, 2005, this time without the necessity of any further payment.

Before the February 1, 2005 Settlement Deadline, the parties negotiated and then executed Addendum No. 3, in which they once again agreed to delay the


closing: “it is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.” The Gurneys, however, never performed their obligations to deliver the requisite water under the terms of paragraph 1.3 of the REPC, delaying the resolution of the water issues and preventing the closing. Now the Gurneys admit they failed to perform, but imply that the Young Entities should have performed the Gurneys’ obligations under the REPC for them. Brief of Appellees at 9.

The Gurney now attempt to excuse their lack of performance, claiming that they did not execute either the REPC or any of its Addenda in a timely manner. The “time is of the essence” clause applies to a party’s performance – such as the Gurneys’ requirement to provide water under paragraph 1.3 of the REPC – not to the execution of the contract. The Gurneys’ failure to sign the REPC on time is something the Young Entities waived, or if not waived, a counteroffer the Young entities accepted. It should not provide the Gurneys either a legal or equitable means of escaping from an otherwise valid REPC.

The trial court’s granting of summary judgment should be reversed, and this case should be remanded for further proceedings consistent with this Court’s ruling.

Dated: June 10, 2008.

LARSEN CHRISTENSEN & RICO

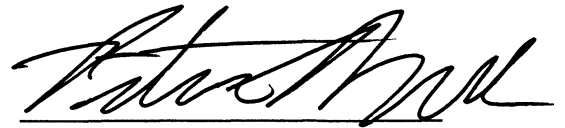


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CERTIFICATE OF SERVICE

I certify that on June 10, 2008, two copies of the foregoing Reply Brief of Appellants was served upon the following parties of record via U.S. mail, first-class and postage pre-paid:

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A handwritten signature in black ink, appearing to read "Robert A. Olson", is written over a horizontal line.