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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, and Stone River Development, LLC, RCP  
Land Investments, LLC, and R. G. Young, Inc. :  
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

Plaintiffs/Appellees,

v.

RANDY G. YOUNG, BLAKE JUMPER  
and STONE RIVER DEVELOPMENT,  
L.L.C., RCP LAND INVESTMENTS,  
L.L.C. and R. G. YOUNG, INC.

Defendants/Appellants.

Appellate Court No. 20070554-CA

RANDY G. YOUNG, STONE RIVER  
DEVELOPMENT, L.L.C., and R.G.  
YOUNG, INC.,

Counterclaim Plaintiffs/Appellants,

v.

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

Counterclaim Defendants/Appellees.

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**BRIEF OF APPELLEES**

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FILED  
UTAH APPELLATE COURTS  
APR 11 2008

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## **RESPONSE TO ISSUES ON APPEAL**

Appellees respectfully submit that the Statement of Issues, as presented by the Appellants, is improperly argumentative and unduly complicated, and they overlook a significant preliminary issue. Appellees (hereinafter also referred to as “the Gurneys”) respectfully submit that there are three simple issues before this Court:

Issue No. 1: Should the Trial Court have expressly granted the Gurney’s Motion to Strike Portions of the Affidavits of Paul Timothy and Randy G. Young, and in relation thereto, should any of this evidence be considered in this appeal?

Issue No. 2: Did the court properly grant the Motion for Summary Judgment based upon the finding that the Real Estate Purchase Contract (“REPC”) and/or several of the Addenda lapsed by virtue of their failure to be executed, or to be executed in a timely fashion?

Issue No. 3: Alternatively, even if the various documents had been signed timely, did the REPC cease to exist due to failure of consideration because the Appellants did not pay a second \$10,000 earnest money which was required by Addendum No. I and never removed?

## **DETERMINATIVE RULES**

The Appellees agree that the determinative rule respecting this case is Rule 56, Utah R. Civ. P.; a copy of Rule 56 is attached as Exhibit “A” to the Addendum of the Appellants’ Brief.

## **RESPONSE TO STATEMENT OF THE CASE**

This is an appeal from a Summary Judgment granted by the Trial Court. The Appellants' Brief includes significant facts and information which the Gurneys consider to be irrelevant, inadmissible, and confusing. In light thereof, in response to the Appellants' Statement of Facts, the Gurneys submit the following history related to the matters before the Trial Court:

The Gurneys began the case by filing a Complaint in Fourth District Court on February 23, 2006. (R.24-30.) They sought as their first cause of action a declaratory judgment from the Court to determine that Young<sup>1</sup> breached a Real Estate Purchase Contract ("REPC") and Addenda, relieving the Gurneys of any obligations. (R.026.) Alternatively, the Gurneys requested that the Court determine that the parties never had a meeting of the minds, as is required for the valid formation of a contract—in this case, the REPC and the Addenda. The Young Entities counterclaimed, seeking specific performance of the REPC and a declaratory judgment. (R.54-55.)

Without seeing the necessity for costly and time-consuming discovery, the Gurneys filed a Motion for Partial Summary Judgment with the Trial Court. (R.84.) The Young Entities opposed the motion, and submitted several affidavits in connection with their opposition. (R.187-228.) The Gurneys opposed those affidavits with a Motion to Strike Portions of the Affidavits of Paul Timothy and Randy G. Young. (R.298-301, 308-61.)

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<sup>1</sup> In accord with Utah R. App. 24(d), and in light of the confusion as to the parties to the REPC (see Appellants' Brief at p.10), the Appellants will sometimes herein be referred to collectively as the "Young Entities," as Appellant did.

After hearing oral argument, the Trial Court issued its Memorandum Decision, granting the Gurneys' Motion, on September 27, 2006. (R.399-404.) The Court's ruling did not expressly resolve the Gurneys' Motion to Strike, but the Court did rule that "affidavits setting forth the Plaintiffs' actions and the Defendants' reliance on the contract do not alter the terms of the contracts in dispute. The contract and its terms were available to both parties and the contract itself, not the Plaintiffs' actions, are the indisputable facts Defendants should have relied upon." (R.402.)

The Court then filed a final Judgment on June 4, 2007 which incorporated the Gurneys' undisputed facts and conclusions and granted the Gurneys' Motion for Attorneys Fees in the amount of \$28,927.48. (R.553-556.) The Trial Court found these fees and costs to have been reasonably and necessarily incurred in the pursuit of the Gurneys' case. The Court also dismissed the Young Entities' counterclaims. (*Id.*)

The Trial Court found that the relevant terms of the Agreement and the Addenda were unambiguous. Time of performance was an essential element of the documents and could not be waived. (R.550-551.) In addition, the Trial Court found that the REPC and incorporated Addendum No. I lapsed on November 28, 2003, since neither party signed the contract by that date. The Trial Court concluded that the REPC provided "[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all parties." (R.550.) Furthermore, even if the Contract and its Addenda had been signed timely by both parties, the Trial Court found that the REPC ceased to exist for failure of consideration because the Appellants had not paid the second \$10,000 in Earnest Money required by Addendum I to extend the closing date. (*Id.*) The Trial Court

found that this failure of consideration attacked the very existence of the Contract and made it unenforceable. (Id.)

Additionally, the Trial Court determined that the subsequent Addenda had not operated as waivers of the closing date of the REPC, because the deadlines in the REPC were stated clearly in each of the Addenda. (Id.) Therefore, the Trial Court found that “the time of the essence” clause was intended to give Sellers (Appellees) an immediate right to cancel the Contract if a Buyer (in this case, Appellants) were unable to timely demonstrate an ability to purchase. (Id.) Finally, the Trial Court found that the Affidavits submitted by the Appellants had not altered the terms of the Contracts in dispute, because the Appellants should have relied upon the Contract only. (R.549-552.)

### **STATEMENT OF FACTS**

1. This action involves a contract for the sale of real estate located in Utah County. (R.029,069.) The REPC contemplated the purchase of property located in Lehi, Utah County, Utah. (R.028,069.)

2. Appellees, Lloyd B. Gurney, Betty Gurney, Paul Gurney and Donna S. Gurney are individuals who are parties to a proposed Real Estate Purchase Contract (“REPC”) with an addendum signed by the Appellees and Appellant Randy G. Young on December 1, 2003. (R.030,070.)

3. LaRae G. Jeppson, Lee A. Jeppson and LaRee Smith are individuals who are also parties to the REPC. (R.029,070.)

4. Appellant Randy G. Young signed the REPC as the buyer, pursuant to the REPC. (R.109-121.)

5. Appellant Blake Jumper is an assignee who claims an interest in the REPC.  
(R.109.)

6. The REPC lapsed on November 28, 2003. (R.111.)

7. None of the parties signed the REPC prior to November 28, 2003. (R.109-121.)

8. Appellant Stone River Development, L.L.C. claims an interest in the REPC dated December 1, 2003. (R.107.) Stone River Development, L.L.C. has never been registered with the Utah Department of Commerce, although there is an entity registered as Stone River Development, Inc. (R.102.)

9. Appellant RCP Land Investments, L.L.C. is a Utah limited liability company with an interest in the REPC. (R.100.)

10. A second Addendum was prepared and presented to the Gurneys in March of 2004. That Addendum was to be accepted by the Seller on or before March 29, 2004. (R.8, 28)<sup>2</sup> (A copy of that Addendum is included in the Addendum to this brief.)<sup>3</sup>

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<sup>2</sup> The existence of this proposed Addendum was alleged in the Complaint at paragraph 11 (R.28). The Appellant's answer curiously acknowledges that "some of the parties to the REPC executed an Addendum No. 2, and affirmatively allege that such document speaks for itself." They continue that "the parties never intended for this Addendum to be a final and binding Addendum to the REPC." (R.69.)

Obviously, the Gurneys cannot speculate to the Young Entities' intent in having this Addendum presented by the parties' (allegedly) dual agent, but if the Young Entities have never disavowed the presentation of this Addendum, while admitting its presentation, they have presented themselves as having, at a minimum, "unclean hands" which should preclude their efforts to rely upon the doctrine of equitable estoppel. Hone v. Hone, 2004 UT App 241, ¶7, 95 P.3d 1221 ("Under Utah law, a plaintiff 'who has engaged in fraud or deceit in the business under consideration' will be denied equitable relief 'when fairness and good conscience so demand.'")

11. Some of the parties signed a third addendum to the REPC in or about June 2004. (R.028, 068-069.) Specifically, Addendum No. III was signed by the Appellees, and RCP Land Investments. (R.100.)

12. On or about December 6, 2004, Appellee, RG Young, Inc. proposed entering into a fourth addendum to the REPC. This Addendum was referenced as “Addendum No. 3” (R.34.) This Addendum expired if not accepted by December 13, 2004. It was signed by Randy G. Young on December 6, 2004 and by several of the Gurneys on December 13; but, it was not signed by Betty and Floyd Gurney until January 17, 2005. (R.34, 98.)

13. On or about August 29, 2005, after their last extension under the REPC had expired, Stone River Development filed a Notice of Claim of Interest with the Utah County Recorder’s Office. (R.107,027,068.)

14. On or about January 5, 2006, the Gurneys, through counsel, sent a demand for the removal of the Notice of Claim of Interest. (R.095-096.)

15. The Young Entities released the Notice of Claim of Interest after the Gurneys filed their Motion for Partial Summary Judgment. (R.256.)

16. The REPC contains a provision stating that time is of the essence. Specifically, it states, “[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all the parties. Unless otherwise

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<sup>3</sup> While the Addendum 2 was not executed by all parties, it remains relevant as to the parties’ course of dealing and to explain some of the confusion relating the numbering of the Addenda in this case. Furthermore, if the Appellants believe that improperly and untimely executed documents can simply be disregarded, then there are no documents relevant to this case.

explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 pm Mountain Time on the stated date; . . . .” (R.117.)

17. Addendum No. 1 to the REPC states that, “this addendum will extend the contract through November 28, 2003.” (R.109.)

18. Addendum No. 1 to the REPC states that “seller shall have until 5:00 p.m. Mountain Time on November 28, 2003 (date) to accept the terms of this ADDENDUM. . . Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.” (R.109.)

19. In Addendum III to the REPC, it states that the “seller shall have until \_\_\_\_\_ Mountain Time on June 14 – 04 (date) to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.” (R.100.)

20. In Addendum No. 3 to the REPC, the language states “seller shall have until 5:00 p.m. Mountain Time on December 13, 2004 (date) to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this Addendum shall lapse.” (R.098.)

21. The parties agree that the property did not close on or before August 1, 2004. (R.098, 100, 104.)

22. The parties acknowledge and accept that Addendum III was not executed by some of the parties until June 1, 2004 and others on June 5, 2004.

23. As a result, it is undisputed that six months passed after the REPC and the

incorporated Addendum I expired, and the second \$10,000 was never paid to extend the contract to October 1, 2004. (R.224,175.)

24. The Young Entities claimed that Addendum III controlled the terms of the REPC and essentially obliterated the requirement of the second \$10,000 to extend the contract to October 1, 2004. (R.269-271, R.578 pg 14-15.) Addendum No. III, however, was entirely silent as to the \$10,000 additional earnest money which had been required as a condition for a further extension, pursuant to subparagraph 2(a) of Addendum No. 1. In the absence of inadmissible parol and/or hearsay evidence, there is absolutely no evidence to support any contention that Addendum III somehow modified or changed the deposit obligation of Addendum No. 1.

25. Appellants claim, however, that the language “Seller [Appellees] shall have until 5 p.m. Mountain Time on December 13, 2004 to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC unless so accepted, the offers set forth in this ADDENDUM shall lapse,” became discretionary. (See Appellants’ Brief, p. 26-27.)

26. The Young Entities did not dispute that neither Paul Gurney, Donna Gurney, Lloyd Gurney nor Betty Gurney signed Addendum No. 3 by December 13, 2004. (R.286.)

27. Mike Kirby, from Integrated Title Services, stated in a signed Affidavit that Appellants deposited the first \$10,000 of earnest money into an escrow account

maintained by Integrated Title Services. (R.372.)<sup>4</sup>

28. Mr. Kirby also stated that Appellants never paid the additional \$10,000 required to Integrated Title Services to extend the closing date to October 1, 2004. (R.372.)

### **SUMMARY OF THE ARGUMENT**

The Trial Court did not err in making its Conclusions of Law. The Young Entities' arguments can be summarized as convoluted, futile efforts to justify their record of repeated lapses in attempting to close a real estate deal. The Young Entities express dismay over the Trial Court's decision to find essentially that the undisputed facts show that Young Entities allowed the REPC to lapse on several occasions.

Instead of acknowledging this responsibility, the Young Entities attempt to argue, largely through inadmissible testimony, to explain away their lack of diligence. In other words, by placing the blame for the contract's failure upon the Gurneys, they continue to take the contradictory position that the REPC is ambiguous enough to require parol evidence, yet sufficiently clear by itself to find in their favor.

They admit that they could have resolved an alleged water issue and forced the parties to close on the REPC but chose to "accommodate" Appellees by not doing so. (R.578, 27:18-28:6.) The Young Entities claim that facts remain in dispute, but the facts that they attempt to introduce are either inadmissible, immaterial or incorrectly challenged. (See Appellants' Brief, p. 36.)

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<sup>4</sup>Appellants filed a Motion to Strike this affidavit, at the Trial Court. The court did not strike that affidavit, however, and that issue is not on appeal.

The Trial Court looked to the contract, found it unnecessary to look beyond this clearly integrated contract<sup>5</sup>, and concluded that, based upon the terms of the contract, it lapsed—several Addenda lapsed. Addendum III did not (and could not, without expressly doing so)<sup>6</sup> supersede the obligations of Addendum I; therefore, Appellants failed to pay the additional \$10,000 which was required to extend the REPC beyond October 1, 2004. The REPC lapsed for want of consideration on October 1, 2004, due to the Buyers' failure to post the deposit by that deadline.

The Young Entities failed to proffer sufficient admissible evidence to prevent the entry of summary judgment for the Gurneys. The summary judgment entered by the court below, along with the attorneys fees awarded below (which have not been appropriately challenged in this appeal) should be affirmed. Lastly, Appellees should be awarded their fees incurred in connection with this appeal. (Utah Dept. of Soc. Services v. Adams, 806 P.2d 1193 (Ut. App. 1991) (“The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal”).

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<sup>5</sup> The approved form Utah Real Estate Purchase Contract and its approved Addenda, which the parties used in this transaction, are, for obvious policy reasons, tightly integrated. (R.46-51.)¶14:

**COMPLETE CONTRACT.** This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties.

***This contract cannot be changed except by written agreement of the parties.*** (emphasis added).

<sup>6</sup> Similarly, to the REPC itself, the standard form Addenda used by the parties clearly provided, as to previous contracts and Addenda, “All other terms of the REPC, including prior addenda and counteroffers, not modified by this Addendum shall remain the same.” (R.44.)

## POINT I

### **The Motions to Strike Portions of the Affidavits of Paul Timothy and Randy G. Young, Which Were Impliedly Granted, Should be Affirmed.**

In the trial court, the Gurneys challenged the admissibility of portions of the affidavits of Paul Timothy and Randy G. Young. (R. 299-300, 308-61.) The trial court never expressly ruled upon these motions, but did disregard these affidavits in making its ruling. (R. 402.)

The trial court was correct in disregarding this evidence, based upon the arguments set forth in the Motion to Strike and based upon the parol evidence rule. The parties' agreements were intentionally integrated<sup>7</sup>, and the appellants have set forth no basis by which those integration causes should be disregarded.

The parties' REPCs, and the Addenda thereto, conspicuously and intentionally provided that modifications, if any, needed to be in writing. Faced with a litany of breaches of time deadlines, omitted signatures, and the complete absence of a required earnest money deposit, the appellants seek to introduce a vast amount of hearsay and parol evidence to salvage their contract. This Court should affirm the significance of the REPC and Addenda's integration causes and the applicable rules of evidence by disregarding this proffered evidence. If and when that inadmissible evidence is not

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<sup>7</sup> See fns. 4, 5, supra.

considered,<sup>8</sup> this case is a simple case involving a multitude of breached conditions which excused the Gurneys' obligations.

The recent case of a Tangren Fam. Trust v Tangren, 2008 UT 20, 598 Utah Adv. 43, clarified the applicability of the parol evidence rule in the case of a "clear integration" clause. The court held, "We hold today that in the face of a clear integration clause of a separate oral agreement is not admissible on the question of integration." (Id. ¶17.)

In the case before this Court, and in light of the Tangren precedent, the Court must evaluate whether or not the REPC or the challenged Addenda, (as relevant), are ambiguous. The terms of the REPC and the Addenda, with respect to deadlines and with respect to the required deposit of additional earnest money to extend the deadlines, are not even arguably ambiguous. The dates are clearly set forth in the REPC and the Addenda; the amount of deposit required for an extension is clearly set forth Addendum No. 1(R.43, ¶2(a)). That Addendum clearly requires an additional \$10,000 earnest money deposit to extend it beyond October 1, 2004, and Addendum III did not expressly eliminate that deposit obligation. In fact, Addendum III did not mention the previously required deposit. The integration clause of Addendum III, however, clearly and unambiguously integrates that Addendum, by providing that you are a "All other terms of the REPC, including all prior addenda and counter offers, not modified by this ADDENDUM shall remain the same." Once again, absent parol evidence (which is

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<sup>8</sup> This Court, like the Trial Court, need not expressly rule upon the Motion to Strike if it otherwise elects not to consider the evidence. Mountain West Surgical Center, LLC v. Hospital Corp. of Utah, 2007 UT 92, 173 P.3d 1276 ("Because we, too, conclude that the affidavit is insufficient even if considered, it is unnecessary for us to reach the question of whether the court properly declined to strike it.").

inadmissible in the face of the unambiguous contract), it is clear that the obligation to deposit \$10,000 was not extinguished through Addendum III.

## **POINT II**

### **The Language within the Four Corners of the REPC and Addenda is Unambiguous; Therefore, the Parties' Intentions are Determined from the Plain Meaning of the Contractual Language, and the REPC May Be Interpreted as a Matter of Law.**

Whereas it is true that in interpreting a contract, the intentions of the party are controlling, the courts must first look to the four corners of the agreement to determine the intentions of the parties. If the language of the contract is unambiguous, those intentions are determined from the plain meaning of the contractual language, and the contract is interpreted as a matter of law. Only if the contract is ambiguous will the court look at extrinsic evidence. "An ambiguity exists where the language 'is reasonably capable of being understood in more than one sense.'" Central Florida Investments, Inc. v. Parkwest Assoc., 2002 UT 3, ¶12, 40 P.3d 599 (citations omitted). The REPC and Addendum No.1 provided that a second \$10,000 of earnest money had to be deposited into the escrow account of Integrated Title to extend the REPC beyond August 1, 2004. (R.115.) The Young Entities acknowledged that they failed to deposit this amount, asserting that Addendum No. III wiped out their obligation to fulfill this part of the contract. Appellee Paul Gurney discovered in June 2006 that the second \$10,000 had not been deposited. (R.366.) The Gurneys never made a conscious choice to waive the earnest money. Since the money was to have been deposited into the escrow account of a third party, the Gurneys were unaware that it had not been deposited. (R.366.)

The four corners of the contract show that the mandatory language of the Addenda

controls the express terms of the agreement and therefore, the intentions of the parties. The Court should reject parol evidence to enlarge the provisions of the contract. Hotel and Restaurant Employees' Alliance v. Allegheny Hotel Co., 374 F. Supp 1259, 1263 (W.D. Tenn. 1974). Whereas it is true that Addendum No. III states that “to the extent that the terms of Addendum No. III *modify or conflict with any provisions of the REPC, including all prior Addenda and counteroffers, these terms shall control*,” the trial court found that no language was added to Addendum No. III to contradict the requirement in Addendum No. 1 to the REPC that a second deposit of \$10,000 had to be made no later than July 30, 2004. (Emphasis added.) The Trial Court therefore found that the contract failed on its own terms for want of consideration. See, Bastian v. Cedar Hills Investment and Land Co., 632 P.2d 818, 821 (Utah 1981).

### **POINT III**

#### **Appellees did not Breach any Expressed Contractual Obligations Under the REPC and Addenda.**

In their argument, the Young Entities point to no specific paragraph of the REPC or Addenda that the Gurneys breached. They instead repeatedly continue to focus on a separate agreement, the water transfer agreement. Indeed, Appellants ignored the fact that the only performances required in the REPC were those necessitated by the Young Entities. They were to have obtained plat approval, paid the \$10,000 in earnest money, and paid an additional \$10,000 if plat approval was not obtained by a specific date.

Whereas it is true that the contract contained language about the sale of water, the Young Entities were aware that the REPC imposed no obligation on the Gurneys to deliver water

prior to the actual closing in this matter. (R.217.)

As stated earlier, the REPC and its Addenda were clear. In fact, during oral argument, the Young Entities' counsel agreed with the Gurneys' counsel that from the beginning, the REPC gave the Young Entities the option to buy the water shares, forward them to Lehi City and resolve the water requirements, resulting in a possible reduction in the purchase price and allowing the REPC to close. (R.578, 27:18-28:6.) The Young Entities therefore admitted that they had such an option and neglected to exercise it.

#### **POINT IV**

**Appellees are not Equitably Estopped from Denying the Validity of the REPC and Addenda. Appellees have not Ratified these Contracts nor Waived any Right to Enforce the Deadlines Imposed by the REPC and Addenda.**

The Young Entities continue to adhere strongly to an argument for equitable estoppel, despite the fact that a party cannot assert equitable estoppel against another party except when justice demands it and when refusing such equitable estoppel would be inequitable. Davidheiser v. Pierce County, 960 P.2d 998, 1001-02 (Wash. App. 1998). “Generally, equitable estoppel does not apply to representations of law.” Id. at 1022 “[T]he doctrine should be applied cautiously and only when equity clearly requires it.” Bright v. Michel, 137 So.2d 155, 159 (Miss. 1962). “Equitable estoppel should be carefully and sparingly applied.” Longley v. Knapp, 713 A.2d 939, 943 (ME 1998).

“Equitable estoppel should be applied in particular with great caution when dealing with realty.” F.B. Transit Road Corp. v. DRT Const. Co., Inc., 241 A.D.2d 930 (4<sup>th</sup> Dept. 1997). The doctrine should be applied only in “very compelling circumstances where the interests of justice, morality, and common fairness clearly dictate that course.”

Phillips v. Borough of Keyport, 107 F.3d 164, 182 (3d Cir. 1997). “[I]t will be sustained only upon clear and convincing evidence.” Kelly v. Wallace, 972 P.2d 1117, 1123 (Mont. 1998). The principle of estoppel is not intended to reward irrational expectations. U.S. v. Miranda-Ramirez, 309 F.3d 1255, 1261 (10<sup>th</sup> Cir. 2002). “A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation.” Larson v. Wycoff Co., 624 P.2d 1151, 1155 (Utah 1981). “Even if the representations are factual, the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of those facts.” Chemical Bank v. Washington Public Power Supply, 691 P.2d 524, 542 (Wash. 1984). (Later modified on different grounds).

No compelling or extraordinary circumstances exist in this case. The Young Entities had the same opportunities as the Gurneys to ascertain the facts surrounding the situation. The purpose of the Boise meeting was for the Gurneys to discuss with Mr. Timothy the Young Entities’ failure to close the real estate transaction. (R.366.) The REPC and Addenda state they are integrated documents. Paragraph 14 of the REPC states that “[t]his Contract cannot be changed except by written agreement of the parties.” (R.118.)

The Young Entities have attempted to attach the water agreement as a provision of the REPC. The Gurneys executed the water agreement to facilitate the closing of the real estate transaction. (R.366.) It is clear from a reading of the REPC and Addenda that the water agreement was not part of these documents. The Young Entities are trying to

extend the terms of the REPC and Addenda to include more than they do. Nowhere in the REPC or in the Addenda does the responsibility for satisfying all of the “water requirements” lie at the feet of the Gurneys. “Equitable estoppel is designed to prevent one party from suffering a gross wrong at the hands of another party who has brought about the condition.” Kelly, 972 P.2d at 1123. No such “gross wrong” occurred here.

The Young Entities’ argument about the substantial benefits received by the Gurneys is also misplaced. “[S]ome conditions normally have no benefit or interest to the seller...we think an offer to purchase property subject to rezoning typically exists for the sole benefit of the buyer....[the seller’s] sole interest was to sell the property.” Dergo v. Kollias, 567 N.W.2d 443, 444 (Iowa Ct. App. 1997). Similarly, the Young Entities claimed that the Gurneys had benefited through the Young Entities’ assistance with completing the application for permanent water change and annexation agreement, a water transfer agreement, a zoning approval, and a preliminary approval of the subdivision. These benefits, like zoning or other land use approvals, existed for the sole benefit of the purchaser. As for the \$10,000 in earnest money, the Young Entities entered into the contract, being aware that the REPC stated “THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.” Appellants, by their own actions, lost this \$10,000 by failing to deposit the second \$10,000 to extend the closing date to October 1, 2004, pursuant to the terms of Addendum No. I.

“It is well settled that performance must be made within the time limit of the escrow agreement.” NGA No. 2 Ltd. Liability Co. v. Rains, 946 P.2d 163, 168 (Nev. 1997). Where an escrow provision specifies a definite time for performance, the buyer

must tender performance within that time period, or else the escrow agent loses the power to deliver the deed. Id.

Even though intent was not a requirement of a waiver, the Young Entities claimed that the Gurneys intentionally waived their rights to enforce the deadlines and were equitably estopped from rescinding the contract based upon their conduct. The Young Entities hinted at subterfuge by the Gurneys. The Gurneys did not discover until May 2006 that the second earnest money amount had not been deposited. (R.366.) Their level of business sophistication did not match that of the Young Entities. They assumed that the real estate agent and the Young Entities would adhere to the terms of the contract, including those citing that “time is of the essence” and that each Addendum would expire on a date certain. The Gurneys had a clear and unwavering intent to insist on the Appellants’ strict compliance with the date of closing of escrow. R&S Investments v. Howard, 593 P.2d 53, 56 (Nev. 1979).

## **POINT V**

### **THE TRIAL COURT CONCLUDED APPROPRIATELY THAT THE REPC, INCORPORATING ADDENDUM NO. 1, CEASED TO EXIST FOR FAILURE OF CONSIDERATION.**

The parties do not dispute that the Young Entities proposed entering into the REPC for the purchase of real estate located in Utah County. The parties further agreed that Addendum I was incorporated into the REPC. The plain language of Addendum I confirmed that the terms of the contract were “extended” through November 28, 2003, or the Addendum would lapse. None of the parties signed the REPC prior to November 28, 2003. It was signed on December 1, 2003.

The Addendum states, in part:

The initial closing (hereinafter “closing”) shall occur within thirty (30) days of Buyer receiving final plat approval from Lehi City Council to construct the subdivision, but in no event later than August 1, 2004 (hereinafter “initial closing date”) at a location mutually convenient to the Buyer & Seller. Buyer shall be permitted to close on the property in two (2) stages. The first (1) stage shall be the initial closing & shall contain a minimum of eighteen & three-fourths (18.75) acres. The second (2) stage shall occur no later than eighteen (18) months from the initial closing. In the event 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) dollars non-refundable deposit to Integrated Title Services no later than July 30, 2004 to extend the closing date to October 1, 2004. Deposit shall be applied to purchase price at initial & the Escrow Agent shall promptly deliver the deposit to the Seller.

(R.114-115.)

The Young Entities had to ensure two events before the property could close on or before August 1, 2004: (1) They had to receive final plat approval from Lehi city; and, (2) They had to deposit \$10,000 as earnest money on or before July 30, 2004. The success of both conditions depended upon acts to be done solely by the Young Entities.

Although, according to Mike Kirby, Appellants deposited the \$10,000 into an escrow account maintained by Integrated Title, they did not obtain final plat approval from Lehi city and were therefore unable to close on or before August 1, 2004. This delay triggered a third condition, the Young Entities’ obligation to deposit another \$10,000 into Integrated Title’s escrow account, to extend the closing date to October 1, 2004.

The Young Entities admit that they did not pay the additional \$10,000 earnest

money to Integrated Title Service to extend the closing date. (R.224,175.) This second \$10,000 constituted additional consideration. Since the consideration was not paid, the REPC was unenforceable. “Evidence of failure of consideration does not vary or alter the terms of a contract; it attacks the *very existence* of the contract for the purpose of proving it unenforceable...In fact, it is entirely permissible for a party to rescind a contract based upon failure of consideration.” Aquagen Internat’l v. Calrae Trust, 972 P.2d 411, 414 (Utah 1998) (citations omitted.) (emphasis added.) The Young Entities deposited the first \$10,000 into the account maintained by Integrated Title at the formation of the REPC but never deposited the next required \$10,000. The REPC ceased to exist. Id.

When one party to a valid contract commits an “uncured material failure in its performance of the contract, the non-failing party is relieved of its duty to continue to perform under the contract. *Restatement (Second) of Contracts* §237(1981). This general rule is based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party...Failure of consideration [as opposed to lack of consideration] exists wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance. *If a failure of consideration occurs, the contract ceases to exist.*

Id. (citations omitted.) (emphasis added.)

The only performances required of the Young Entities by the REPC were to obtain plat approval, pay \$10,000 in earnest money, and pay an additional \$10,000 if plat approval was not obtained by a specific date. Because the Young Entities failed to perform two of the three obligations required of them, they committed “uncured material

failure” sufficient to render the REPC unenforceable for failure of consideration.

Moreover, even if the REPC were deemed enforceable, despite its failure of consideration and expiration of its own terms by November 28, 2003, the Young Entities asserted in their Answer that they never intended for Addendum No. II to the REPC to be final and binding. The document was not signed by Appellees Floyd Gurney or Betty Gurney until after its expiration. The Addendum was never signed by LaRae G. Jeppson, LaRee Smith, Randy G. Young or RC Young, Inc. In Bastian v. Cedar Hills Investment and Land Co., 632 P.2d 818 (Utah 1981), the buyer and seller entered into a real estate contract for purposes of development. Disputes arose involving, among other issues, transfers of water shares, and the prospective buyer sued for nonperformance. The court held, in part, that notwithstanding the language of the contract’s “Amendment,” the contract failed by its own terms, this time, for want of consideration. The court found that neither party performed any part of its promises, and since both parties treated the “Amendment” as if it did not exist, the Amendment failed for want of consideration. (Id. at 821.) Since the Young Entities never signed Addendum II, two Gurneys did not sign it timely, and two other Gurneys did not sign it at all, this second Addendum failed for lack of consideration.

## **POINT VI**

### **THE TRIAL COURT CONCLUDED APPROPRIATELY THAT THE REPC AND ADDENDA LAPSED ON THEIR OWN TERMS.**

The Trial Court found that the REPC, incorporated Addendum I, lapsed on November 28, 2003 on its own terms, since neither party signed the contract by that date.

Approximately six months passed before another Addendum was signed by the parties. The REPC stated that “time is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all parties.” The deadlines in the REPC were stated clearly in each of the Addenda. These facts were undisputed by the parties, and therefore, the REPC and Addenda lapsed.

## **POINT VII**

### **WAIVER OF THE ORIGINAL CLOSING DATE DID NOT OCCUR WHERE SOME APPELLEES FAILED TO SIGN THE ADDENDA TIMELY OR AT ALL.**

Addendum I was not signed timely by any of the parties. Addendum No.3 was executed in December of 2004. That Addendum also was not signed by the parties timely. Only Appellants R.G. Young, Inc., Randy G. Young, Plaintiffs LaRae Jeppson, LaRee Smith, and Lee Jeppson signed the Agreement timely. Appellees Paul Gurney, Betty Gurney, Donna Gurney and Lloyd Gurney signed the document after the date had lapsed. Since Addenda I, and 3 were not properly executed, they did not operate as waivers of the original closing date and did not vary any of the terms of the original REPC.

In Young v. Brookshire Village Properties, 655 N.E.2d 1329, 1331 (Ohio App. 1995), the seller’s agent presented the buyer, at the latter’s request, with an addendum to extend the date of closing on the contract, but the buyer failed to execute the addendum. The buyer’s failure to execute the addendum was a key component in the court’s decision to disallow the extension of the closing date. In the present case, although the parties signed the REPC, they failed to sign the Addenda either timely or at all. Nor did they

execute the REPC, including Addendum No. 1, timely; therefore, the closing date of November 28, 2003 was not extended.

### **POINT VIII**

#### **THE RECITATION THAT “TIME IS OF THE ESSENCE” WAS AN ESSENTIAL TERM OF THE AGREEMENT, AND THE CONTRACT LAPSED.**

When the time of performance is an essential element of a contract for the sale of property, such a provision is for the benefit of both parties absent a specific provision to the contrary, and neither party may unilaterally waive the time requirement. Local 112, I.B.E.W. Building Ass’n v. Tomlinson Dari-Mart, Inc., 632 P.2d 911, 913 (Wash. App. 1981). In Local 112, the purchaser offered earnest money to the seller to buy the property. The agreement provided for a closing date and stated that time was of the essence. The offer provided that the seller would obtain a good and sufficient deed from the bankruptcy court to pass title. The parties agreed to change the closing date on two occasions; however, the seller refused to extend the date a third time. The court stated that because both parties did not agree to change the termination date and because the seller made a good faith effort to obtain merchantable title, the purchaser’s unilateral waiver of the closing date was ineffective to bind the seller.

In this case, assuming, *arguendo*, that Addendum No.3 constitutes a valid extension to the REPC, its language still does not waive the specific language of the REPC wherein it states: “[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by *all* the parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract

which references a date *shall absolutely* be required by 5:00 pm Mountain Time on the stated date; . . . .” (emphasis added.) A time of the essence clause is “not a stock phrase but [is] intended to give the sellers an immediate right to cancel the contract if the buyer [is] unable to timely demonstrate an ability to purchase.” Garcia v. Alfonso, 490 So.2d 130, 131 (Fla.3d 1986).

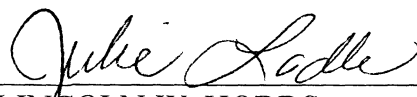
### CONCLUSION

The Trial Court properly granted Summary Judgment in favor of the Gurneys (Appellees) for two simple reasons. First, the REPC and subsequent Addenda were not executed timely and the REPC lapsed. Second, even if the documents had been signed timely, the Young Entities did not pay a second \$10,000 earnest money as required under Addendum No. 1 and the REPC ceased to exist for failure of consideration.

The Appellants arguments of waiver, superseded terms, ratification, equitable estoppel, and extension based on the water share issue are irrelevant and unduly complicate this case. The language within the four corners of the REPC and Addenda is unambiguous. Therefore, the REPC should be interpreted as a matter of law and the Trial Court’s determination that the REPC is unenforceable on its own terms should be upheld.

DATED this 11<sup>th</sup> day of April, 2008.

HOBBS & OLSON, L.C.

  
for LINCOLN W. HOBBS  
LISA M. McGARRY  
Attorneys for Appellees

## CERTIFICATE OF DELIVERY

I hereby certify that on the 11<sup>th</sup> day of April, 2008, I caused a true and correct copy of THE BRIEF OF APPELLEES to be served upon the following in the manner indicated:

- ☐ Mail
- ☐ Fax
- ☐ Fed Ex
- ☐ Hand Delivery
- ☐ Personally Served
- ☐ Email

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Attorneys for Appellants

Linda B. Ogden

# **ADDENDUM**

**ADDENDUM NO. 2  
TO  
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☐ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 10, 2003, including all prior addenda and counteroffers, between R. C. Young Inc. & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi 84043. The following terms are hereby incorporated as part of the REPC:

1. This addendum serves to extend the contract through May 1, 2004. This will allow the Buyer to work through some essential issues with the City of Lehi.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on March 29, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Randy Gurney Doreen Harney 3-27-04 9:30 am Randy Gurney Doreen Harney 3/30/04  
☐ Buyer ☒ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

**ACCEPTANCE/COUNTEROFFER/REJECTION**

CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_.

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)