

1977

# Hanover Limited, A General Partnership v. Deanna Fields, Plaintiff, And Appellant : Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HANOVER LIMITED, a  
General Partnership,

Plaintiff and  
Appellant,

vs.

Case No. 14830

DeANNA FIELDS,

Defendant and  
Respondent.

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PETITION FOR REHEARING

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Appeal from the judgment of the Second  
District Court for Weber County  
Honorable Calvin Gould, Judge

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IN THE SUPREME COURT  
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HANOVER LIMITED, a  
General Partnership,

Plaintiff and  
Appellant,

vs.

DeANNA FIELDS,

Defendant and  
Respondent.

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PETITION FOR REHEARING

Case No. 14830

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COMES NOW the Plaintiff/Appellant and respectfully  
petitions the Court for a rehearing of the above matter after an  
adverse decision by this Court in favor of Defendant on  
September 1, 1977.

DATED this 16 day of September, 1977.



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L. Charles Evans  
Attorney for Plaintiff/Appellant

## POINTS OF ERROR

Plaintiff believes and therefore asserts that this Court erred in its September 1, 1977 decision in the following ways:

1. In concluding that there was adequate evidence to support the concept of integration of the March Contract and the July Earnest Money Agreement wherein the March Contract was replaced by the latter.

2. In not applying the doctrine of practical construction in construing the July Earnest Money Agreement.

3. In concluding that the July Earnest Money Agreement was not ambiguous.

4. In concluding that the March Contract had failed.

5. In concluding that Defendant had acted in good faith in regard to the July application for financing.

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HANOVER LIMITED, a	*	
General Partnership,	*	
	*	BRIEF IN SUPPORT OF
Plaintiff and	*	PETITION FOR REHEARING
Appellant,	*	
vs.	*	Case No. 14830
DeANNA FIELDS,	*	
	*	
Defendant and	*	
Respondent.	*	
	*	

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On September 1, 1977, this Court handed down a ruling affirming the lower court's judgment in favor of the Defendant. In doing so, the Court rejected the "ratification" and "offset" arguments of Plaintiff as being considered for the first time on appeal and found sufficient evidence to support integration of the contractual documents and to support Defendant's good faith in complying with the terms of the documents. In finding error with the Court's ruling, Plaintiff will not consider the rulings of the "integration" and "offset" arguments, for there is sufficient authority to the contrary that reasonable minds might differ. With regard to the construction of the contracts and

Defendant's good faith, however, Plaintiff finds the law and evidence strongly in support of Plaintiff's position and appeals to the Court once more to consider Plaintiff's arguments in these regards.

In its Opinion, the Court stated that a comprehensive review of the record disclosed adequate evidence to support the concept of integration as well as the finding of good faith compliance with the terms of the Agreement. In addition, the Court stated that the Earnest Money Agreement was complete on its face and contained no ambiguities. The Court went on to say that, since prior to the execution of the Earnest Money Agreement the parties had not been able to obtain the necessary financing to accomplish the sale, it appeared perfectly logical for the trial court to have found that, since the initial Contract had failed, the parties agreed upon a different contractual arrangement, which they substituted for the former. Plaintiff would like to examine the strength of each of these conclusions in light of the appropriate law and evidence.

## I

### THE MARCH UNIFORM REAL ESTATE CONTRACT WAS NOT REPLACED BY OR INTEGRATED INTO THE JULY EARNEST MONEY AGREEMENT.

To properly examine the issue of integration, one must have an adequate understanding of the purposes of the March Uniform Real Estate Contract and of the July Earnest Money Agreement. The March Contract was a simple, short-term vehicle which enabled the Defendant

to purchase her condominium immediately, while waiting to obtain long-term financing at a later date. Its purpose was to allow the Defendant to secure and move into her condominium even though her initial loan application had failed. Her down payment was used mostly to prepare the apartment so that she could move in. The rest was used to pay sales commission. (R. 107). The contract was a time framework designed to enable Defendant to work out her long-term financing. During a period of 18 months, Defendant could make as many changes in her financial status and as many loan applications as she needed in order to obtain her financing. None of the applications, nor the Earnest Money Agreements accompanying them, would have supplanted the March Contract, but would rather have operated within its boundaries. It was not because the March Contract failed that the July application for financing was made. To the contrary, the March Contract did not fail - - its purpose was to be fulfilled by such an application.

Had the anticipated July loan application been able to be processed without a new Earnest Money Agreement, such would have been done. The bank, however, indicated that a new Earnest Money Agreement would be necessary since a new application was being made. Plaintiff thereupon prepared a new Earnest Money Agreement for the sole purpose of having the loan application processed. The Defendant testified twice at trial that she understood the purpose of the Earnest Money Agreement was to enable her to get a loan. (R. 140). This was no new scheme. It was foreseen and intended by the March Contract. Defendant admitted



at trial that there was no discussion with regard to the Earnest Money Agreement replacing the March Contract. (R. 140). That was never an expressed intention of the parties. That being the case, how did the trial court come to the conclusion that the parties intended otherwise? The only evidence discernable to Plaintiff in possible support of Defendant's position is (1) Defendant's statement on page 140 of the record that she assumed that such would be the effect of the new agreement and (2) the July Earnest Money Agreement, itself.

## II

THE JULY EARNEST MONEY AGREEMENT WAS AMBIGUOUS BECAUSE OF THE INCONSISTENT ACTIONS OF THE PARTIES AFTER ITS EXECUTION, AND, WAS, THUS, SUBJECT TO THE DOCTRINE OF PRACTICAL CONSTRUCTION.

As set out in the Utah cases of Bullfrog Marina, Inc. vs. Lentz, 501 P.2d 266, 28 Utah 2nd 261 (1972), Bullough vs. Sims, 400 P.2d 20, 16 Utah 2nd 304 (1965), and Zeese vs. Estate of Seigel, 534 P.2d 85 (Utah, 1965), inconsistent actions on the part of the parties creates an ambiguity which then enables the court to look at the surrounding circumstances in determining the intentions of the parties. According to the court in Bullfrog Marina, Inc. vs. Lentz, on page 271, the interpretation given by the parties themselves shown by their acts will be adopted by the court. "When parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was." The court went on to say that although the doctrine of practical construction could

only be applied when the contract was ambiguous, such ambiguity could be created by the actions of the parties.

"Where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation, the parties, by their actions, have created the ambiguity to bring the rule into operation. If this were not the rule, the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different." Bullfrog Marina v. Lentz, Ibid.

It is the strong contention of the Plaintiff that the actions of both parties were clearly consistent with the ongoing validity of the March Contract and clearly contrary to the idea that the Earnest Money Agreement replaced the March Contract. The actions which support such a conclusion are as follows:

1. No discussion was ever had between Plaintiff and Defendant to the effect that the March Contract was to be replaced by the Earnest Money Agreement.
2. No mention was made in the July Earnest Money Agreement about its replacing the March Contract.
3. Defendant continued to make payments on the March Contract through October, three months after the Earnest Money Agreement, and, in November, she promised to make further payments.
4. Defendant asked in October if Plaintiff would be willing to modify the March Contract and even sat down with Plaintiff to negotiate such modifications.
5. The idea that the March Contract was replaced by the

July agreement never saw light until February 17, 1976, when it surfaced in Defendant's Answer and Counterclaim.

6. The express purpose of the Earnest Money Agreement at the time it was signed was to enable the loan application to be processed. If the loan could have been processed without the Earnest Money Agreement, it would never have been prepared. The Defendant understood this purpose and has so testified. (R. 140). The case at hand seems to fit squarely with the rulings of the Court in the Bullfinch, Bullough, and Zeese cases. The evidence seems so clearly consistent with such a conclusion that Plaintiff finds it difficult to see how a different conclusion could be reached except under some unexpressed equitable doctrine which, if applied, should have been open to thorough examination and argument by the parties.

The Defendant claims that the \$1,000.00 loaned to the Defendant by Plaintiff and the application for a loan at the bank were made on the validity and strength of the Earnest Money Agreement. That argument, however, is not accurate. Many loans are made on the strength of Uniform Real Estate Contracts such as the one that Plaintiff and Defendant entered into in March. That Contract would have been used as the expressed basis of the loan in this case and submitted to the bank had it not been for the fact that applications for these particular federal monies had to be accompanied by an Earnest Money Agreement. The preparation of the Earnest Money Agreement, then, was merely a formality to enable the application to proceed. The real basis for the loans was the March Contract which the parties continued to look to and to

perform well after the July Earnest Money Agreement had been entered into.

### III

#### DEFENDANT DID NOT ACT IN GOOD FAITH IN REGARD TO HER JULY APPLICATION FOR FUNDING.

Both Plaintiff and Defendant testified at trial that the reason given them by the bank for the turn down by M.G.I.C. was insufficient square footage for the number of occupants in the unit. (R. 86, R. 143). The testimony of the Plaintiff is that Zion's Bank, after an error was discovered, had agreed to resubmit the application to M.G.I.C. with the correct square footage. (R. 86). It was only when the bank learned that the Defendant was getting married within ten days that they decided that they would not resubmit the application representing Defendant as a single person. (R. 87, R. 193).

The Defendant briefly testified at trial that she had made application for funding at the Bank of Utah, her own bank, after her turn down by Zion's. (R. 148). No written evidence of such application was submitted. Plaintiff queries whether such application, in whatever form it may have been, represented Defendant as a single woman or as a married woman. If as a single woman, why didn't Defendant continue with her application at Zion's Bank? They only turned her down because of her marriage plans. If she applied as a married woman, there would

be obvious cause for a turn down because of a then clearly inadequate occupant -- square footage ratio.

When Defendant entered into the March Contract, she did so as a single woman. In September, Defendant stated that she was going to remarry, although she now claims that she did not remarry. Should the Plaintiff be held responsible for a failure in financing brought about by the actions of Defendant, over which it had no control?

This Court, in its Opinion, stated that the record was devoid of any holding back or unwillingness on Defendant's part. Defendant's decision to remarry may not have constituted a holding back or unwillingness, but it certainly was the cause of the turn down by Zion's Bank and should fall within the reasoning of the court in Wineman vs. Guilmett, 60 Wash. 2d 831, 367 P.2d 534, 535 (1962), in which the court stated that the purchaser was not entitled to recover his Earnest Money deposit where his own fault prevented the sale.

## CONCLUSION

The evidence and law both support Plaintiff's contentions that the March Real Estate Contract was never integrated into or replaced by the July Earnest Money Agreement. The Judgment in favor of Defendant, therefore, should be set aside with direction that Plaintiff not be required to return Defendant's down payment. Alternately, assuming a finding that the July Earnest Money Agreement replaced the March Contract, Plaintiff should not have to return the down payment because Defendant, herself, caused the financing to fail. Finally, in the alternative, the judgment should be reversed and remanded for new trial.

WHEREFORE, Plaintiff/Appellant requests that this Court grant a rehearing of the above-entitled matter.

Respectfully submitted,

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