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J. R. Stone Company, Inc v. Raymond S. Keate : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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J. R. STONE COMPANY, INC., :
 :
Plaintiff and Appellant, :
 :
-vs- :
 :
RAYMOND S. KEATE, :
 :
Defendant and Respondent. :

Supreme Court No. 1442

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BRIEF OF APPELLANT

An Appeal from the Judgment of the Third Judicial
District Court in and for Salt Lake County, Utah

Honorable J. E. Banks, Judge

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Respondent

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Plaintiff and Appellant,	:	
	:	Supreme Court No. 14834
-vs-	:	
	:	
RAYMOND S. KEATE,	:	
	:	
Defendant and Respondent.	:	

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an action wherein the plaintiff-appellant seeks remedies and adjudications with respect to an option to purchase real property which was given by plaintiff-appellant to defendant-respondent.

DISPOSITION IN THE LOWER COURT

The lower court entered a declaratory judgment construing certain provisions of the Option but the lower court declined to grant a judgment declaring the Option void and further declined to enter a decree of specific performance.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks an adjudication by this Court that under the facts and circumstances of the case the option

to purchase real property granted by plaintiff-appellant to defendant-respondent is of no further force and effect. In the alternative, if the Option is still capable of exercise, plaintiff-appellant seeks a reversal of certain aspects of the declaratory judgment which purport to construe the Option.

STATEMENT OF FACTS

In January, 1971, defendant-respondent, Raymond S. Keate, (hereinafter referred to as "Keate") contacted Gerald R. Turner, a Salt Lake attorney, for the purposes of assisting Keate in obtaining financing for his air filter manufacturing business, Fiber Glass Products, Inc. (Tr. Vol. II, pp. 44,40). Fiber Glass Products was in need of funds in excess of \$400,000.00 for working capital, equipment and construction of a new plant (Tr. Vol. II, p. 40). Attorney Turner experienced difficulty in obtaining this financing because the amounts were large and the available collateral was insufficient (Tr. Vol. II, pp. 44, 49).

After several contacts with various lenders (Tr. Vol. IV pp. 14-15), Attorney Turner focused on the lease guarantee provisions of the Small Business Administration regulations (Tr. Vol. IV, pp. 15-16). Under these regulations, a landlord could purchase the building, lease it to Fiber Glass Products

and the SBA would guarantee the landlord the lease payments. Turner informed Keate that this arrangement maximized the value of available collateral by using both the building and the lease as collateral and obtaining the funds through two different borrowers (Tr. Vol. IV, pp. 15-16).

Inasmuch as the SBA lease guarantee provisions appeared to be the only arrangement with any probability of success (Tr. Vol. IV, p. 16), Keate requested Turner to proceed with that application (Tr. Vol. IV, p. 16). However, one aspect of the transaction was unsatisfactory to Keate inasmuch as he felt the business could be sold in a year at a handsome profit. In order to meet this problem, Keate was given the option to purchase the building. The reasons for giving the option to Keate rather than to Fiber Glass were that it would help Keate in attempting to sell the business (Tr. Vol. II, p. 64); and would permit Keate to make a profit if the business went broke (Tr. Vol. II, p. 64; Vol. IV, p. 94; Vol. III, pp. 12-13).

One vital prerequisite to obtaining the lease guarantee financing was locating a person willing to purchase the building and lease it to Fiber Glass Products under this arrangement.

Attorney Turner was aware that his brother-in-law, John R. Stone, was involved in the construction business and

may be willing to participate in the transaction as the owner and lessor (Tr. Vol. II, p. 49; Vol IV, p. 18). Mr. Stone consented to this participation so long as it was through a corporation. Thus, the plaintiff-appellant, J. R. Stone Company (hereinafter referred to as "Stone Company") was organized.

Although problems were encountered including a change of the construction site, the arrangement was finally carried out. On October 4, 1971, Stone Company borrowed the money for the purchase of the real property and the construction of the building (Ex. 7). The loan was secured by a trust deed describing the building (Ex. 8). By a lease dated September 30, 1972, Stone leased the building to Fiber Glass Products Company. However, Fiber Glass Products did not occupy the building until February, 1972, (Tr. Vol. I, p. 27). A copy of the lease is before the court as Exhibit 4. On September 30, 1971, Fiber Glass Company got the working capital loan from Valley Bank & Trust Company (Ex. 39). This note was also secured by another trust deed on the building (Ex.39). Neither John R. Stone nor Stone Company received the benefit of the proceeds of this loan. It was used exclusively in the Fiber Glass Company business. On September 30, 1971, the Option

to Purchase, the document in dispute in this case, was prepared by Gerald Turner, and executed by Stone Company. A copy of the Option is before the Court as Exhibit 3. It is important to note that although all of the transactions involved Fiber Glass Products, the Option ran in favor of Raymond Keate personally. There was never any written authorization from Fiber Glass Products authorizing Keate to personally receive this benefit (Tr. Vol. III, pp. 12-13).

Fiber Glass moved into the building in February, 1972, and began its operation (Tr. Vol. I, p. 27). On July 10, 1974, Fiber Glass discontinued business and vacated the building. At the time the building was vacated, neither Raymond Keate nor any employee or representative of Fiber Glass Company made any attempt to notify John R. Stone or Stone Company that the building was being vacated (Tr. Vol. I, p. 46).

Fiber Glass Products, under the complete supervision of Keate (Tr. Vol. I, pp. 41-42), occupied the building in total disregard of its obligations under the Lease. Despite the obligations of paragraph 10 of the Lease (ex. 4), Fiber Glass Company left the property in totally untenable condition (Tr. Vol. II, p. 28; Vol. II, p. 7). There was a large accumulation of debris and garbage strewn about the building

(Tr. Vol. II, p. 73; Exs. 42(a), (b), (c), (e), (g), (i), (l), (m), (n), (q), (s), (u), (v), (w), (y), (cc) and (dd)). There was large accumulations of garbage and debris shown over the grounds (Exs. 42(x), 44(2), (3), (4), (5), (9), (14), (15), and (16)). Employees had used the insulation on the walls as dart boards, the glass rods being substituted for darts (Tr. Vol. I, p. 51; Vol. I, pp. 44-45; Exs. 42(h), (v)). The metal skin of the building was damaged in many places by heavy objects being thrust against it (Exs. 42(f), (k), (o), (w), (aa), and 48(8)). Insulation had been torn from the walls over most of the building (Exs. 42(e), (g), (h), (p), (r), (t)). The asphalt pavement surrounding the building was covered with chemicals and was broken up and separated (Exs. 42(o), (x), 44(10), (11), (12)). Many of the plumbing fixtures had been clogged and broken (Exs. 42(y), (z), (d)). Keate's office was piled high with debris (Exs. 42(m), 42(ee)). The company had permitted large accumulations of fiber glass resin on the floor of the building (Tr. Vol. II, pp. 3-4; Exs. 42(l), (n), (p), (bb)). A piece of this resin which was pulled from the floor is before the court as Exhibit 45. Keate admitted that accumulations of the type demonstrated by Exhibit 45 were over 30% of the floor area (Tr. Vol. I, p. 60) and accumulations

of a lesser depth covered another 20% of the building (Tr. Vol. I, p. 61). This fiber glass resin grows harder with the passage of time and becomes more difficult to remove (Tr. Vol. II, p. 101). Inasmuch as the Stone Company was not notified that Fiber Glass Products had vacated the building (Tr. Vol. I, p. 46, 85), the resin sat for three months. When notice was finally received that the building was vacant, it required jackhammers (Tr. Vol. II, p. 3), and bulldozers (Tr. Vol. IV, p. 29), to remove the material from the floors.

The accumulation of debris, resin and damage to the building made the premises untenable (Tr. Vol. II, pp. 6-7), 28). Since tenantability was a condition of the lease guarantee insurance (Tr. Vol. II, pp. 12-13, Ex. 14), Stone Company was unable to receive any benefits under the lease guarantee insurance until the building was cleaned and repaired (Ex. 14).

By reason of the extensive damage and accumulations of debris and resin, the cost of repair and clean-up was more than John R. Stone or Stone Company could expend. Accordingly, John R. Stone and Stone Company applied for a loan with the Lockhart Company secured by the building (Ex. 1). All proceeds of the loan including some of Stone's personal funds were used for the clean-up and repair of the building (Exs. 49, 50;

Tr. Vol. III, pp. 16-38). The funds were insufficient to pay for the entire operation, and so a portion was financed by promissory notes from John R. Stone and Stone Company to Mr. Stone's father (Tr. Vol. I, p. 8). John R. Stone personally spent a lot of time in assisting in the repair and clean-up of the premises. The value of his services were \$5,156.20 (Ex. 50, 69; Tr. Vol. III, p. 30). The clean-up operations were completed in May, 1975 (Tr. Vol. III, p. 49). The total cost, of the repair and clean-up was \$19,606.50 (Ex. 50). Loan proceeds of \$15,000.00 from Lockhart Company were used to pay these expenses. The garbage and debris was so extensive that it required forty loads in dump trucks with 15 yard beds to haul it away (Tr. Vol. IV, p. 30).

Keate waited until after the clean-up and repair was completed and then served a notice (Ex. 5) upon John R. Stone that Keate intended to exercise the Option. Notice was received by the Stone Company on September 8, 1975 (Ex. 5). The Notice sent by Keate stated terms which were different from the terms set forth in the Option. Keate admitted during the course of the trial that he knew that the terms stated in his Notice of Exercise were not in accordance with what he knew to be the actual terms of the Option his attorney previously drafted (Tr. Vol. IV, p. 102). The Option agreement had originally been prepared by Gerald Turner who acted as Keate's

attorney (Tr. Vol. IV, p. 98). When the Option was drafted, Turner explained to Keate that the purchase price under the Option included 10% of \$125,000.00 (Tr. Vol. IV, pp. 33, 77). Yet in his Notice of Exercise Keate claimed the figure was 10% of \$117,000.00 (Ex. 5).

Upon receipt of the Notice of Exercise, Stone responded through counsel that the Notice proposed terms different than those stated in the Option (Ex. 6). However, since the original Option Agreement was attached to the Notice and the Notice stated that the attached Option was exercised, Stone was unsure as to whether it constituted an exercise on the basis of the original terms or a counter-offer. Thus, with the hope of clarifying the matter, Stone noted in his response that he would regard it as a valid exercise of the Option according to its original terms and confirmed the closing date for September 18, 1975 (Ex. 6; Tr. Vol. I, p. 30).

Stone appeared at the closing with a warranty deed ready for delivery to Keate describing the real property (Tr. Vol. I, pp. 80-81; Vol. IV, p. 54; Ex. 15). Keate failed to appear at the closing and refused to perform any of the obligations of the Option contract (Tr. Vol. I, pp. 30-31). Keate has never tendered any type of performance either on the

closing date or at any date thereafter up to and including the date of the commencement of this action (Tr. Vol. I, pp. 30-31).

Since Keate insisted that the varied terms were the only acceptable terms, Stone Company commenced this action to clear up the problem since it left the title to the land in an uncertain position. Stone Company's Amended Complaint sought two alternative remedies: (a) a declaration that the Option be declared null and void and of no further force and effect; (b) a decree of specific performance be entered on the basis of the actual terms of the Option.

The lower court entered a declaratory judgment construing various terms and provisions of the Option Agreement, but did not decree specific performance and did not declare the Option as null and void.

Plaintiff-appellant asserts that under the facts and circumstances of the case the lower court should have declared the Option null and void. In the event the Option is not declared null and void, plaintiff-appellant seeks reversal of some of the constructions of the lower court with respect to the Option. Neither party has appealed the Court's failure to grant specific performance.

ARGUMENT
POINT I.

THE COURT ERRED IN NOT DECLARING THE OPTION VOID.

Stone Company has no dispute with the factual determinations made by the trial court. The issue presented on this appeal is that the trial court erred and abused its discretion by not granting appropriate relief. Under the facts and circumstances of the case, the Option should have been declared void. There are only three views of the transaction and each view, under the established law, compels the conclusion that the Option is void or no longer capable of exercise. The three alternatives are as follows: (a) the Option was duly exercised by Keate, and the resulting contract was breached by Keate; (b) the Option was rejected by Keate by reason of his counter-offer incorporating different terms and conditions; (c) the Option was never exercised by Keate and was revoked by Stone inasmuch as it was not supported by any consideration. Each of these alternatives will be separately discussed.

ALTERNATIVE (a): Option exercised, resulting contract breached.

Paragraph 3 of the Option to Purchase (Ex. 3) states that the Option may be exercised by written notice, signed by the Optionee, and sent registered mail to the Optionor.

On September 8, 1975, a Notice of Exercise of Option (Ex. 5) was served on John R. Stone, President of J. R. Stone

Company. Attached to the Notice was a xeroxed copy of the original Option to Purchase. The first paragraph of the Notice clearly and unequivocally stated that Keate intended to exercise the attached Option. However, the remainder of the Notice purported to impose a construction of the Option which Keate knew was incorrect (Tr. Vol. IV, p. 77; Vol. II, p. 34; Vol. IV, p. 102). Stone Company was faced with a dilemma: should it rely on the first paragraph which unequivocally exercised the Option by incorporating the original terms which all parties understood, or should it rely on the extraneous wording which all parties knew was incorrect? Stone elected to treat the Option as an exercise according to the actual terms and forwarded a Notice to this effect to Keate (Ex. 6).

Where, as here, there was a subjective meeting of the minds, Keate's attempt to try for a better deal should be treated as mere surplusage. See Hawaiian Equipment Co. v. Eimco Corp., 115 Utah 590, 207 P.2d 794 (1949); Chournos v. Evona Inv. Co., 97 Utah 351, 93 P.2d 450 (1939). Any other holding would permit Keate to benefit by creating an ambiguity for the purpose of permitting him to purchase or decline to purchase, depending on later developments.

Inasmuch as an Option is considered a continuing offer, Williams v. Morgan, 11 Utah 2d 317, 358 P.2d 903 (1961), the receipt of the Notice of Exercise constituted an acceptance of that offer and the existence of a contract to purchase. Stone Company's reply confirmed a closing date of September 18, 1975, which was within the time stated in Keate's Notice of Exercise.

Stone Company prepared a warranty deed and had the same ready for delivery on September 18, 1975, at the offices of Stone Company's attorney (Tr. Vol. I, pp. 80-81; Vol. IV, p. 54; Ex. 15). Keate did not appear at the closing and never tendered the purchase price and has never attempted to perform his obligations (Tr. Vol. I, pp. 30-31).

The Option or the offer became part of a contract which was formed by acceptance, and was clearly and unequivocally breached by Keate. By reason thereof, the Option constituted a component of the breached contract and is no longer existing.

ALTERNATIVE (b): The Option to Purchase was refused and rejected by Keate's Counter-Offer.

Under this alternative, the wording of the Notice which was inconsistent with the provisions of the Option itself,

rather than considered as surplusage, is treated as a counter-offer. As stated in Hawaiian Equipment Company v. Eimco Corporation, 115 Utah 590, 207 P.2d 794 (1949):

"An acceptance which imposes terms or conditions not present in the offer has no validity and. . . its only recognition is as a counter-offer."

Paragraph 4 of the Option to Purchase clearly states:

"If this Option is exercised, the total purchase price shall be the amount of the first mortgage that Optionor has executed with the Mortgagee, Valley Bank & Trust Company, \$125,000.00 plus ten percent (10%) of the amount of said mortgage. The Optionee in addition to the purchase price will pay all costs of closing."

The wording of this paragraph clearly establishes the purchase price as \$125,000.00 plus ten percent of that amount. There is nothing in the paragraph that suggests that the 10% rate would be applied to the reduced balance of the mortgage at the time of the Exercise. The trial court confirmed the meaning of said paragraph, that it meant 10% of \$125,000.00 rather than 10% of the reduced balance of the mortgage (R. 145).

Nevertheless, the terms of the Notice of Exercise of the Option which was served on Stone Company by Keate stated:

"It is my understanding that said mortgage is in the approximate amount of \$117,000.00 at the present time, and that 10% added to that amount equals \$128,700.00."

In asserting that the 10% rate should be applied to the reduced balance of the mortgage, Keate was fully aware that his position was a departure from the intended meaning of the Option Agreement (Tr. Vol. IV, p. 102). During the course of the trial he admitted that Turner had explained to him, and that he had understood, that the purchase price would be 10% of the original loan balance and not the reduced balance at the time of Exercise (Tr. Vol. IV, p. 77; Vol. IV, p. 102).

In the Notice of Exercise of Option Keate also asserted construction of the Option which were obviously not in accordance with the terms. He asserted that the purchase price provisions set a ceiling on the purchase price of \$128,700.00 and used this to argue that he was not obligated to assume all liens and encumbrances despite the wording of the Option:

"It is also my understanding that under paragraph 5 that there are at present two liens against the property, one to Valley Bank & Trust Company in the amount of \$117,000.00 as stated above, plus a lien obligation to the Lockhart Company in the amount of approximately \$15,000.00 for a total of \$132,000.00, which is \$3,300.00 more than the purchase price under the Option. Because the purchase price cannot exceed \$128,700.00, the net difference which you are obligated to refund to me is \$3,300.00, plus delivering to me a good and sufficient warranty deed."

This total departure from the wording of the Option

constituted a counter-offer which has the effect of constituting a rejection and termination of the original offer. In Chournos v. Evona Inv. Co., 97 Utah 335, 93 P.2d 450 (1939), this Court stated the applicable rule as follows:

"To constitute a valid exercise of an option and impose a duty on the vendor to convey, the terms and conditions of the option must be complied with by the purchaser. If he attaches to his acceptance conditions, not warranted by the terms of the option, or notice of his election to buy this itself amounts to a rejection . . . we can see no reason for reinstating Chournos under the terms of the option - terms that he practically repudiated by his counter-offer." (Emphasis Added).

The instant case is very similar to the facts in the Chournos case. There is here an intentional departure from the terms of the offer in an attempt to obtain advantages which the offeree knows are not within the terms of the offer. Such action is clearly a rejection of the offer.

In Beaumont v. Prieto, 249 U.S. 554 (1919), the optionee served a notice of exercise of an option to purchase land that departed substantially from the terms of the option. The Supreme Court of the United States noted a long established rule of law:

"Plaintiff made an offer of his own and he thereby rejected the offer previously made by defendant. It was not afterwards competent for him to revive the proposal of defendant, by tendering an acceptance of it."

In Trautwein v. Leavey, 472 P.2d 776 (Wyo. 1970), the Court stated the rule as follows:

"If an offer is rejected, either by an absolute refusal or by an acceptance conditionally or not identical with the terms of the offer, or by a counter-proposal, the party making the original offer is relieved from liability on that offer; and the party who has rejected the offer cannot afterward, at his own option, convert the same offer into an agreement by subsequent acceptance. . . . The power of acceptance created by an ordinary offer is terminated by a communicated rejection. This is true even though a definite time was given by the offeror for considering his offer and the rejection is before that time has expired. When the offeror receives a notice of rejection, he is very likely to change his position in reliance thereon. . . . This has led to the rule that a definite rejection terminates the offeree's power to accept."

By reason of the intentional rejection of the offer, the refusal to comply with the terms of the Option, this Court should declare the Option null and void in accordance with the acts of the Optionee, Raymond Keate.

ALTERNATIVE (c): Option not exercised and later revoked.

The law is clear that an option constitutes nothing more than an offer. An offer not supported by consideration can be withdrawn at any time prior to acceptance.

It is important to note that all of the transactions

involved in this matter, except for the Option, were between J. R. Stone Company and Fiber Glass Products Company. Raymond Keate was not a party to any of these other transactions. Stone purchased the building for use by Fiber Glass Products (Tr. Vol. II, p. 49). When the lease of the premises was executed, it was between Stone Company and Fiber Glass Products (Ex. 4). The working capital loan was a loan for and on behalf of Fiber Glass Products and all proceeds were used by Fiber Glass Products (Tr. Vol. I, pp. 36-38; Vol. IV, p. 89). However, the Option to Purchase, was granted in favor of Raymond Keate personally. Keate acknowledged that there was no written resolution of the Board of Directors authorizing him to personally receive this benefit from negotiations which involved the company only (Tr. Vol. III, P. 14).

Keate acknowledged that by granting the Option to him personally, no objective of the company was thereby served (Tr. Vol. III, p. 12-13). The sole purpose was to benefit him personally and enable him to maintain an asset despite any failure of the operations of the company (Tr. Vol. III, p. 12-13).

Although the Option recites the granting of a consideration, no such consideration was ever paid (Tr. Vol. I,

pp. 68-70). In such circumstances, the Option may be revoked by the optionor at any time prior to a valid exercise. The rule has been stated as follows:

"If no consideration passes, the transaction resolves itself into a mere offer which may be withdrawn by the optionor at any time before acceptance by the optionee." Whitworth v. Enitai Lumber Company, 220 P.2d 328 (Wash. 1950).

In further support of the above rule are: Small v. Paulson, 209 P.2d 779 (Ore. 1949); Prather v. Vasquez, 327 P.2d 963 (Cal. 1958); Pittsburg Equitable Meter Co. v. Paul C. Loeber & Company, 160 F.2d 721 (7th Cir. 1947).

Inasmuch as the Notice of Exercise under this Alternative did not amount to an acceptance, the offer was revoked by the filing of this lawsuit which sought a decree that the Option be declared null and void.

Keate may argue that the consideration for the Option although not coming from him, came from Fiber Glass Products by the entry into the lease arrangement. However, the lease could not be construed as consideration for the Option inasmuch as it was the unrelated obligation of a separate party. Moreover, even if the lease could be regarded as consideration for the Option, it was flagrantly breached by Fiber Glass Products and therefore fails as adequate consideration.

POINT II

THE DOCTRINE OF LACHES BARS KEATE'S EXERCISE OF OPTION.

At the trial, plaintiff moved to dismiss defendant's counterclaim on the ground that it failed to state a claim upon which relief could be granted (Tr. Vol. I, p. 9). On the basis of the Court's response to this Motion, defendant moved to amend his counterclaim to assert reformation. This Motion was granted by the Court over plaintiff's objection (Tr. Vol. I, pp. 8, 12). The basis of defendant's objection was that such a claim was unanticipated and gave rise to equitable defenses that plaintiff had no opportunity to raise (Tr. Vol. I, pp. 8, 14; Vol. II, p. 37; Vol. II, p. 109). The Court proceeded on the basis that any equitable claims or defenses were permitted (Tr. Vol. I, pp. 3-16).

With all equitable claims open by the Court, Stone Company placed into evidence facts which support the contention that Keate's right to exercise the Option is barred by the doctrine of laches.

The grounds for application of the doctrine of laches were stated in Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256 (Utah, 1975), as follows:

"To constitute laches, two elements must be established: (1) the lack of diligence on the part of plaintiff; (2) an injury to defendant owing to such lack of diligence. Although lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay."

The circumstances of the instant case compel the conclusion that there was an intentional delay made in bad faith and that by reason thereof Stone Company was severally prejudiced.

The evidence establishes that while Keate was in full control of the operations of Fiber Glass Products (Tr. Vol. I, pp. 41-42) the building and grounds were abused and damaged in total disregard of the obligations of the lease (see citations to Record on pages 5-7, supra). By reason of this damage, the building was totally unfit for occupancy at the time it was vacated by Fiber Glass Products (Tr. Vol. II, pp. 6-7, 28).

While the premises were in this condition, Keate made no attempt to exercise his option. Rather, he waited until Stone Company had borrowed money and completed an extensive repair and clean-up operation. After the clean-up and repair operations were completed and the premises were again tenantable and capable of producing income Keate exercised the Option.

This failure to assert his right is ample justification for the application of the doctrine of laches. However, the delay in prejudice to Stone Company did not end with the exercise of the Option.

When Keate gave notice of his intent to exercise the Option, he added insult to injury by claiming that he should not have to assume the mortgage to the Lockhart Company which was incurred to generate funds to pay for the clean-up and repair. Despite the wording of the Option, that it was "subject to all liens and encumbrances of record" Keate claimed that Stone Company should deduct the cost of cleaning up Keate's debris (Ex. 5; R. 102). This claim, together with the claim that the purchase price was to be 10% of \$117,000.00, which Keate knew was unwarranted, caused further delay and prejudice to Stone Company.

The economic effect on Stone Company has been devastating. The clean-up and repair operations required the expenditure of funds in excess of \$19,000.00. The time and attention of the employees of Stone Company diverted them from their normal business activity, a loss that will never be recovered. Inasmuch as the damage caused by Keate and Fiber Glass Products made the premises untenable, Stone Company lost the income from the

property for a period of more than ten months, and was unable to benefit by the lease guarantee insurance which is conditional upon tenantability of the premises. Stone Company has been required to prosecute and defend a lawsuit that has been pending for more than twenty-two months at a cost of more than \$5,000.00. All of the legal action has been for the purpose of permitting Keate to find judicial sanction for a construction of the Option which he knew was not in accordance with the intent of the parties.

It would be difficult to conceive of a case more deserving of the application of equitable principals than this case before the court.

POINT III.

THE COURT ERRED IN CONSTRUING THE TERMS OF THE OPTION.

In the event the Court holds that the Option should have been declared null and void, it will be unnecessary to consider this Point on appeal inasmuch as it involves a construction of the Option in the event of later exercise.

During the course of the trial, the testimony established that in connection with the clean-up and repair operations, Stone Company engaged the services of John Stone's father who worked continuously in the building from February 1, 1975 to May 1, 1975. (Tr. Vol. I, pp. 8-11). Stone Company reimbursed

the elder Mr. Stone for this work by delivery of a promissory note in the sum of \$2,500.00 together with a mortgage on another piece of property owned by Stone Company (Tr. Vol. I, p. 8; Ex. 51).

The value of labor and other services performed by John R. Stone personally amounted to \$5,156.20 (Ex. 50; Tr. Vol. III, p. 30). Of the sum, \$2,316.60 was paid from proceeds of the Lockhart loan (Ex. 50, 69). This left a balance of \$2,839.60 (Ex. 50).

The Court refused to make Keate's Option subject to these obligations on the ground that they were not liens and encumbrances "of record" and that any lien in favor of John R. Stone would be merged into his ownership of the premises. The court limited the liens which Keate would have to pay to liens recorded pursuant to Title 38, Chapter 1, Utah Code Annotated (R. 174-175).

The Option to Purchase was prepared by Gerald Turner acting exclusively as Raymond Keate's attorney (Tr. Vol. I, p. 29). That Option provided:

"Upon receipt of the purchase price within the time allowed, the Optionor will promptly execute and deliver to the Optionee a good and sufficient warranty deed, subject to all liens and encumbrances of record. . . ."

By reason of the performance of labor and services on the building in question, John R. Stone and Royal Stone, his father, are granted a lien by the provisions of Section

38-1-3, Utah Code Annotated. That section specifically states that "all persons performing any service or furnishing any materials used in the construction, alteration or improvement of any building or improvement to any premises in any manner. . . shall have a lien upon the property. . ."

It is true that if John R. Stone or Royal Stone were commencing an action to enforce the lien, such suit would be barred by the provisions of Utah Code Annotated Section 38-1-7 since they did not record their liens within the designated time period. However, the issue before the Court is not whether John Stone and Royal Stone may maintain such an action, but whether Keate must pay the lien under the terms of the Option Agreement.

The recording provisions of Section 38-1-7, Utah Code Annotated, are for the purpose of imparting notice of the lien and to provide a plan of priorities. In this instance, Stone Company and Raymond Keate both are in possession with knowledge sufficient to put them on actual notice that an extensive clean-up and repair operation was undertaken and there is no priority question with respect to the lien.

There is no merger of the lien of John R. Stone with the title of Stone Company, inasmuch as they are separate

entities. Moreover, the lien imposed by Section 38-1-3, Utah Code Annotated, extends to the interest of the lessee. Buehner Block Company v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957).

Even if the lien was not imposed by the provisions of the contract, or is barred by the provisions of Title 38, Chapter 1, Utah Code Annotated, the trial court should have imposed said lien as an equitable lien.

Equitable liens arise by contract or by conduct by of the parties. American Investors Life Insurance Company v. Greenshield Plan, Inc., 358 P.2d 473 (Col. 1971). When equitable liens are imposed on the basis of contract, it must appear that the parties intended to create charge upon the designated property. Olson v. Kidman, 120 Utah 443, 235 P.2d 510 (1951). However, equitable liens imposed on the basis of the conduct of the parties will be imposed if in the circumstances they will do justice and equity or prevent unjust enrichment. American Investors Life Insurance Company v. Greenshield Plan, Inc., 358 P.2d 473 (Col. 1971); Mannon v. Pesula, 139 P.2d 336 (Cal. 1943); Barnes v. Eastern and Western Lumber Co., 287 P.2d 929 (Ore. 1955). Equitable liens will also be imposed to prevent injustice when a party has no adequate

remedy at law. Oregon Mutual Insurance Co. v. C. E. Cornelism,
330 P.2d 161 (Ore. 1958).

The facts and circumstances of the instant case require the intervention of equity and the imposition of an equitable lien to prevent unjust enrichment to Raymond Keate. As previously noted, at the time Fiber Glass Products vacated the building it was under the supervision and control of Raymond Keate (Tr. Vol. I, pp. 41-42). Raymond Keate knew many days prior to the termination of business of the company that they were going to vacate the building and had employees available and at his disposal (Tr. Vol. I, p. 47). Nevertheless, he chose to shift the expense of the repair and clean-up to the Stone Company because he gave no employees any instruction to clean or repair the building at the time the company vacated it (Tr. Vol. I, P. 47). This action on his part was in direct violation of the provisions of the lease (Ex. 4, ¶10).

By this flagrant breach of the lease, and by the intentional acts on the part of Raymond Keate in withholding services of his employees working in the building, the expense of this massive clean-up operation fell upon the Stone Company. Equity should intervene and not permit Raymond Keate to benefit by such action. The imposition of an equitable lien

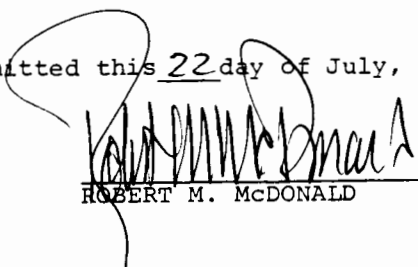
would shift the burden to the party who should have borne the expense in the first instance.

It is respectfully submitted that the trial court erred and abused its discretion in limiting the provisions of paragraph 5 of the Option only to those liens recorded pursuant to Title 38, Chapter 1, Utah Code Annotated.

CONCLUSION

Stone Company has no dispute with any of the factual determinations made by the trial court. The basis of this appeal is that those facts compel the granting of the remedy sought by the Amended Complaint in this action. It is respectfully submitted that the facts and circumstances of the case compel the conclusion that the Option to Purchase should be declared null and void thereby clearing title to the property in question.

Respectfully submitted this 22 day of July, 1977.



ROBERT M. McDONALD