

1977

Michio Tomino v. Greater Park City Company, A Utah Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MICHIO TOMINO,

Plaintiff-
Respondent,

vs.

GREATER PARK CITY
COMPANY, a Utah
corporation,

Defendant-
Appellant.

Case No. 1482

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Honorable Stewart M. Hanson, Judge

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FILE

APR

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE.	1
DISPOSITION IN LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
PROCEDURAL HANDLING OF THE MATTER BELOW	6
<u>POINT I.</u> JUDGE CROFT DID NOT ERR IN ISSUING THE PARTIAL SUMMARY JUDGMENT	14
<u>POINT II.</u> THE TRIAL COURT'S HOLDING REGARDING THE UNCONSCIONABILITY OF DEFENDANT'S CLAIMED FORFEITURE WAS PROPER AND IS DISPOSITIVE	30
<u>POINT III.</u> DEFENDANT WAS GIVEN AMPLE OPPORTUNITIES TO PRESENT ITS CASE AND WAS ACCORDED COMPLETE DUE PROCESS.	36
CONCLUSION.	39

AUTHORITIES CITED

CASES

	<u>Page</u>
<u>Bradbury v. Fillingame</u> , 84 Utah 178, 35 P.2d 772 (1934).	23
<u>Dupler v. Yates</u> , 10 Utah 2d 251, 351 P.2d 624 (1960).	17
<u>Engstrom v. Bushnell</u> , 20 Utah 2d 250, 436 P.2d 806 (1968).	30
<u>Ephriam Theatre v. Hawk</u> , 7 Utah 2d 163, 166, 321 P.2d 221 (1958).	28
<u>In the Matter of the Estate of Akker</u> , 19 Utah 2d 414, 432 P.2d 45 (1967).	14
<u>Lyon v. Giannoni</u> , 168 Cal. App. 2d 336, 335 P.2d 690 (1959).	22
<u>Mastic Tile Division of Rubberoid Co. v. Acme Distributing Co.</u> , 15 Utah 2d 136, 389 P.2d 56 (1964).	17
<u>Meyer v. DeLuke</u> , 23 Utah 2d 74, 457 P.2d 966 (1969).	14
<u>Pearson v. Williams</u> , 24 Wend. (N.Y.) 244 (1840).	26
<u>Percoff v. Solomon</u> , 259 Ala. 482, 67 So. 2d 21 (1953).	29
<u>Perkins v. Spencer</u> , 121 Utah 468, 243 P.2d 446 (1952).	33
<u>Santi v. Denver & R. G. West Rel. Co.</u> , 21 Utah 2d 157, 442 P.2d 921 (1968).	30
<u>Skousen v. Smith</u> , 27 Utah 2d 169, 493 P.2d 1003 (1972).	29
<u>Stabile v. McCarthy</u> , 336 Mass. Repts. 339, 145 N.E.2d 821 (1957).	21
<u>Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.</u> , 560 P.2d 700 (Utah, 1977).	29

IN THE SUPREME COURT OF THE
STATE OF UTAH

MICHIO TOMINO,
Plaintiff-
Respondent,

v.

GREATER PARK CITY
COMPANY, a Utah
corporation,

Defendant-
Appellant.

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Case No. 14835

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff, assignee of Development Services,
Incorporated (hereinafter "Development Services" or hereinafter referred to as "Purchaser"), brought this action under a contract to recover certain funds previously paid to Defendant.

DISPOSITION IN LOWER COURT

During the course of the proceeding partial summary judgments were granted on certain issues and a non-jury trial was conducted on September 8, 1976 before the

Honorable Stewart M. Hanson, Sr. resulting in a Memorandum Decision (R. 198-99), Findings of Fact and Conclusions of Law (R. 202-07), and a Judgment (R. 208) in favor of Plaintiff and against Defendant with judgment in the sum of \$103,975.00 together with accrued interest. F/N

RELIEF SOUGHT ON APPEAL

Defendant states that it seeks reversal of the judgment and a new trial.

STATEMENT OF FACTS

The operative facts relative to the transaction in question are not particularly in dispute. The parties stipulated (see R. 233 through 238) with respect to most of the operative facts and the admission of most of the operative documents. The pertinent facts, which are herein set forth in essentially the same order as they are found in the Findings of Fact and Conclusions of Law (R. 202, et seq.) are as follows:

On the 7th day of February, 1974, Development Services, Inc., a Nebraska corporation (hereinafter called

F/N In its discussion of "Disposition in Lower Court" at p. 2 of its Brief, Defendant claims that its presentation of evidence at trial "was limited by the prior summary judgments". To the contrary, Defendant, for reasons unclear, offered evidence on subjects which Plaintiff were precluded by the prior summary judgments, Plaintiff objected accordingly, but the trial court allowed the evidence in. (R. 244).

"Development"), and defendant executed a Purchase Agreement regarding certain real property located in Park City, Utah. (See Exhibit 1-P, and R. 234).^{F/N} The contract provided in paragraph 26 as follows:

"It is the intention of the parties that the Inn and all other facilities constructed by Purchaser upon the Subject Property will be operated pursuant to a franchise granted by Sheraton Inns, Inc., which shall identify the same as a Sheraton Inn or by a similar name and shall provide for reservation, supervisory and other services customary with Sheraton Inns, Inc. franchisees. Purchaser agrees that it will not commence construction upon the Subject Property unless and until such franchise or a comparable franchise is obtained and a copy of the franchise agreement is delivered to GPCC. The provisions of this Paragraph 26 shall not in any manner constitute a basis for delay by Purchaser in making any payments or taking any action on or before the dates herein provided. In the event that such franchise or a comparable franchise is not obtained prior to June 1, 1974, Purchaser shall have the right, upon written notice to GPCC given not later than June 15, 1974, to reconvey the Subject Property to GPCC, in which event GPCC shall be obligated, promptly following such termination, to refund to Purchaser all sums theretofore paid by Purchaser to GPCC as purchase price for the Subject Property pursuant to Paragraph 2 hereof, less a sum equal to interest on said purchase price from the date hereof to the date of such termination at the prime commercial rate established by Chase Manhattan Bank, N.A., from time to time during such period."

^{F/N} An amendment to the agreement was received as Exhibit 2-P together with a stipulation that it amended only the property description. (R. 237).

Prior to February 7, 1974, Development paid \$5,000 to defendant as earnest money in connection with said agreement. On February 7, 1974, Development paid \$25,000 to defendant. The amount of \$75,000 was paid by Development and accepted by defendant on March 7, 1974. (See stipulation at R. 234).

Although the contract contemplated an original closing date of April 30, 1974, the parties negotiated concerning and agreed to an extension of time in which to close said contract until approximately mid-July, 1974.⁷ An additional sum of \$20,000 was paid by Development to defendant on or about May 17, 1974 as consideration for the agreement of extension. Although no formal writing was prepared between the parties to evidence this extension, there were writings between the parties, signed by both parties to be charged which, taken together, reflect the extension agreement and the terms thereof. (See Exhibit 4-P, R. 269-272).

F/N Defendant confesses ignorance as to the trial court's findings that the extension was until "approximately mid-July". (See F/N on p. 6 of Appellant's Brief). This finding is based upon Exhibit 4-P which specifically mentions July on both the second and third pages and on the testimony of defendant's own witness, Mr. Warren King who, being questioned about Exhibit 4-P, testified:

"Obviously I saw this letter. I accepted the \$20,000. He says, 'I feel by July we should have most of our financing taken care of.' The letter says, 'Alright, you can have until July to get it done.'" (R. 27).

As of June 1, 1974, although Development had submitted substantial materials to Sheraton Inns in order to facilitate a franchise being issued (R. 245, et seq., Exhibit 10-D), Development had not received a Sheraton Inn franchise. (Stipulation at R. 235). On June 13, 1974 at 5:00 P.M., Development mailed to defendant a notice terminating the agreement pursuant to the provisions of Paragraph 26 thereof. (Exhibit 5-P and R. 235). Said notice was timely under the contract and was received by defendant. (R. 235).

On or about March 5, 1975, Development assigned its rights in and to said Purchase Agreement to plaintiff, notice of which assignment was duly given to defendant on or about March 17, 1975. (R. 236, Exhibit 6-P).

No Notice of Default was sent by defendant to Development until approximately February 15, 1975, when a Notice of Default was sent by defendant to Development and which was received by Development. On or about March 26, 1975, defendant sent and Development received a further letter indicating that the default specified in the February 15th letter had not been cured. (See Exhibit 8-P and 9-P and stipulation at R. 236).

PROCEDURAL HANDLING OF THE MATTER BELOW

Defendant complains ubiquitously in its Brief about the "piecemeal" handling of this case below and about the alleged failure of the courts below to accord it a proper opportunity to present facts and to enter upon discovery. In view of these statements, we deem it germane to spend more than the ordinary amount of time discussing the procedure below in its exact chronology:

The Complaint was filed on April 3, 1975. (R. 2). An Appearance of Counsel and Acceptance of Service was duly filed by Mr. M. Scott Woodland on behalf of Van Cott, Bagley, Cornwall & McCarthy (R. 8 and 9) and in due course an Answer, Counterclaim and Third Party Complaint was filed by Van Cott on behalf of Greater Park City Company under date of May 8, 1975. (R. 10, et seq.). It will be noted (see R. 12) that the only affirmative defense raised by Defendant was that Development had failed to act in good faith in obtaining the Sheraton Franchise and therefore was estopped from seeking refund of the payments they had made under the agreement. It will be further noted that copies of the contract were attached to the Answer of Defendant (R. 17, et seq.).

The next procedural step was that Plaintiff filed a Motion for Judgment on the Pleadings or for Partial Summary Judgment under date of June 9, 1975. (R. 47-48).

Although the Motion for Summary Judgment or Judgment on the Pleadings was originally noticed for June 12, 1975 (R. 49), it was continued several times until it was finally heard on October 9, 1975. (R. 50, R. 64, R. 77). Plaintiff filed a memorandum in support of its motion (R. 51-60), and prior to the hearing date a Memorandum was filed on behalf of the Defendant by Van Cott, Bagley, Cornwall & McCarthy. (R. 65). Although no detailed evaluation of that Memorandum will be made at this juncture, reference will be made to it throughout the argument portion of this Brief to point out that a number of the arguments being raised on this appeal relative to that Motion for Summary Judgment were not raised below by Van Cott, Bagley, Cornwall & McCarthy. When the matter was finally heard on October 9, 1975, by Minute Entry (R. 78) and Order (R. 79-80), Judge Bryant H. Croft granted Plaintiff's Motion for Partial Summary Judgment.

Promptly, there was a substitution of counsel on behalf of Defendant with Van Cott, Bagley, Cornwall & McCarthy withdrawing and Frederick S. Prince of Prince, Yeates, Ward & Geldzahler appearing. (This occurred on October 28, 1975 - R. 81). On the same date, new counsel for Defendant filed a Petition for Intermediate Appeal with this Court. (See generally this Court's Docket No. 14319 which contains the Interlocutory Appeal and matters pertaining thereto). Significantly, in the Petition for Intermediate Appeal filed by new counsel, they assert:

"The lower court's order involved defendant's substantial rights under the contract and will materially affect the final decision in that the defense struck down by such order is the sole affirmative defense asserted by defendant and is determinative of the question of liability of defendant to plaintiff, leaving only the amount of damages to be resolved by the court below."

This Court denied the Petition for Interlocutory Appeal and, taking comfort in the admission by Defendant that the sole substantive issue in the case had been resolved, Plaintiff filed a Motion for Summary Judgment. (R. 82-83). Plaintiff cited in that motion, as previously conceded by Defendant, that the sole remaining issue was the amount of damages which was capable of mathematical resolution and Plaintiff submitted affidavits to support the necessary mathematical computations. (R. 84 through 86).

An Order was appropriately issued finding the amount of damages but, pursuant to the request of Defendant authorizing Defendant to raise additional issues in the proceeding by way of amendment to be made within ten (10) days of the Order. (See Order of Stewart M. Hanson, Sr. at R. 111-112).

Taking full advantage of this authorization, Defendant filed its Amended Answer under date of December 8, 1975 setting forth numerous affirmative defenses never raised before by previous counsel and, in some instances (see particularly the Third Affirmative Defense at R. 115)

raising issues which were quite arguably precluded by the previous summary judgment - e.g., the Sheraton Franchise matter. Under its Amended Answer however, Defendant claimed that Plaintiff had in fact obtained a Sheraton Franchise and therefore that the provisions of paragraph 26 of the contract did not apply. Accordingly, Plaintiff filed a Motion for Partial Summary Judgment on that issue seeking to strike the Third Affirmative Defense and filed therewith supporting affidavits indicating that at no time did Development Services obtain a Sheraton Franchise. (See R. 122-124). Although this was originally noticed for May 21, 1976 (R. 125) it was continued from time to time until June 30, 1976 (see R. 129 through 135) for various reasons including "to allow defendant to file counter affidavits". (R. 133). Defendant did not file any counter affidavits and accordingly the motion was granted when heard on June 30, 1976. (See R. 135 and R. 150).

Even though the Sheraton Franchise issue had therefore at that point been the subject of two definitive summary judgments - one by Judge Croft and the final by Judge Sawaya, and even though there was no remaining issue in the pleadings dealing with that issue, Defendant filed a notice to take the deposition of two employees of Sheraton Inns, Inc. - Irving Zeldman and James Wellbeloved. (R. 144). Since the issues had been completely resolved by summary judgment, Plaintiff, properly we submit, filed a Motion for

Protective Order seeking to terminate these scheduled depositions. (R. 136-137). The protective order matter was heard by Marcellus K. Snow who, after argument, entered his Order under date of July 14, 1976 to the effect that:

"The plaintiff's Motion for Protective Order should be and the same hereby is granted, it being the opinion of the court that the Sheraton Inn Franchise issue is no longer a relevant issue in this proceeding in view of the prior orders of Judge Croft and Judge Sawaya." (R. 154).

Undaunted by Judge Snow's Order, counsel for Defendant tried yet again to seek the discovery which had been prohibited by the Court's Protective Order - on August 3, 1976 it filed a Notice of Deposition upon Written Questions of James Wellbeloved of Sheraton Inns, Inc. (R. 158).

Since it seemed the matter had been adequately handled by the Court at that time, Plaintiff did file another Motion for Protective Order and Sanctions. (R. 181-183). As part of the material set forth in that motion, Plaintiff stated:

"The attempt by defendant to undertake discovery which has previously been rejected by this court constitutes an effort which is not in good faith, which violates the letter and spirit of Rule 11, and which is tantamount to contempt of Judge Snow's prior order. It is respectfully submitted that

this behavior is sufficiently grievous to warrant the imposition of sanctions against defendant in such mode as the court may deem appropriate." (Tr. 183).

The Motion for Protective Order was granted and the Court imposed sanctions in the sum of \$100 attorney's fees against Defendant "based upon Defendant's attempt to circumvent the protective order of this court as heretofore made and entered on the 14th day of July, 1976". (R. 189-190).

Lest it be assumed that Defendant's persistence in this matter became weakened by the several summary judgments, the two protective orders, and the imposition of sanctions for deliberate attempts to violate previous orders, at trial, counsel started promptly again attempting to interject the Sheraton Inn Franchise issue which had been buried, indeed cremated, by the preceding orders of Judge Croft, Judge Hanson, Sr., Judge Sawaya, and Judge Snow. (R. 244 through 255). This entire line of questioning, over repeated objections by Plaintiff's counsel, dealt with the Sheraton Inn Franchise issue or various facets of it. As noted above, the Court ultimately entered its Findings and Conclusions and Judgment in favor of Plaintiff.

Since defense counsel insisted on introducing evidence, over objection, relative to Mr. Lowe's efforts on behalf of Development to obtain the Sheraton Franchise, the Court made a finding with respect to this matter which

"The court finds in this connection that Development did exercise good faith in pursuing the Sheraton Inn Franchise and took the indicated necessary steps toward receiving the franchise including the payment of a portion of the franchise fee, the submission of extensive feasibility and market studies, and the sending of other documentation to the Sheraton Inn organization."

There is clearly evidence in the record to support this finding (R. 243, et seq.) which was introduced in evidence over Plaintiff's objection, and which defense counsel desired to place in evidence rather than relying on his hope for reversal of Judge Croft's Order through the Proffer of Proof also submitted.

The trial court made numerous findings relative to the rights of the parties. Specifically, the Court found that at the time Development exercised its right to seek refund of its monies under the contract, it was not in default of the provisions of the contract. (Tr. 205 - Finding No. 12). It further found that in all respects "Development duly and properly exercised its rights under paragraph 26 of the contract, under circumstances in which it had the right to do so, and it was therefore entitled to a refund of all sums theretofore paid by Defendant to Greater Park City Company" less interest at the Chase Manhattan rate as previously indicated. The Court specifically found that the Defendant's "fraud defense" was groundless. (See Finding No. 10 at Tr. 204 and Conclusion

No. 3 at Tr. 206).

Finally, the Court made findings to the effect that the retention by Defendant of \$125,000, as it claims, would constitute "an unconscionable forfeiture or penalty". (Tr. 206).

POINT I
JUDGE CROFT DID NOT ERR IN
ISSUING THE PARTIAL SUMMARY
JUDGMENT

Point I of Appellant's Brief is comprised of an amalgamation of attacks against the Summary Judgment issued by Judge Croft on October 10, 1975. (R. 79-80). A substantial number of the arguments raised in Point I are illustrative of a recurrent theme in this appeal - counsel for Defendant, not having represented Defendant at the time of Judge Croft's Summary Judgment, are seeking to raise issues for the first time on appeal in hopes of relitigating, virtually de novo, issues previously handled by other counsel who, in their own judgment, either neglected or did not feel it appropriate to raise the issues now raised. This effort at "Monday morning quarterback" runs clearly contrary to the numerous decisions of this Court which hold that an issue, to be pressed on appeal, must have been raised below. F/N

An example of Defendant's de novo approach to this appeal is the procedural argument found on p. 14 of

F/N See, e.g., Meyer v. DeLuke, 23 Utah 2d 74, 457 P.2d 966 (1969) ("A point neither raised in the pleadings nor put in issue at the trial ordinarily cannot be considered for the first time on appeal. In the Matter of the Estate of Akker, 19 Utah 2d 414, 432 P.2d 45 (1967) ("Neither of the first two points were raised in the pleadings nor put in issue at trial. Therefore, they cannot be considered for the first time on this appeal.")

its Brief, i.e., a motion for judgment on the pleadings is not proper until the pleadings are closed. At no time did counsel's predecessor raise this issue before Judge Croft. F/N

In all events, even if the issue were properly here, it is a red herring rather than an issue inasmuch as the motion was not granted as a Motion for Judgment on the Pleadings but rather was granted as a Motion for Summary Judgment. (See the Minute Entry at R. 78). It is clear that a Motion for Summary Judgment is timely filed and appropriate "at any time after the expiration of twenty (20) days from the commencement of the action". Utah Rules of Civil Procedure, Rule 56(a).

Defendant goes on, at p. 15 of its Brief, to create another straw man by taking the position that the Motion for Summary Judgment (properly a Motion for Summary Judgment since the contract was, as a matter of evidence, before the Court) must be treated as a Motion to Dismiss and proceeding, thereafter, to point out why a Motion to Dismiss should not have been granted. This argument was never raised below by counsel's predecessor in interest and, moreover, it is totally spurious.

F/N It is difficult, of course, to support a negative by reference to the record. However, the Brief filed by Van Cott, Bagley, on behalf of Defendant (R. 65-75) is a good indicator of what the real issues were at the time of the argument on summary judgment.

To set the procedural record straight on this motion, and to demonstrate that Defendant's frequent allusions to lack of due process are groundless, it should be noted that the Motion for Summary Judgment in question was filed under date of June 9, 1975. (R. 47). It was originally noticed up for June 12, 1975 (R. 49) but continued several times (R. 50, R. 76, R. 77) until it was finally heard on October 9, 1975. (R. 78). Therefore counsel for Defendant had four months in which to raise any issue they wanted to raise, in which to file affidavits, in which to submit memoranda (which they did (R. 65-75)) or to raise any questions they desired. Now being dissatisfied with the previous handling of the case and with the benefit of "20-20 hindsight", counsel seeks to raise newborn issues, de novo, on this appeal.

Much the same is true of counsel's extensive argument regarding the parole evidence rule and integration problems commencing at p. 16 of its Brief. This issue simply was not raised below. Both parties went forward on the motion full-well knowing that the only evidence before the Court was the written contract itself. Defendant did not raise the question of integration nor the question of extrinsic evidence. Nor did it attempt to place extrinsic evidence in the record, which it could have done by affidavit in the four months which it had. The parties clearly recognized that the issue presented on the motion was one which could be resolved by the contract itself

and without the need for additional evidence. A Motion for Summary Judgment under Rule 56 puts a burden on the opposing party to present evidence of issues he desires to raise. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

There is a strong corollary between the instant case and Mastic Tile Division of Rubberoid Co. v. Acme Distributing Co., 15 Utah 2d 136, 389 P.2d 56 (1964).

As noted by the Court:

"Both sides laid the matter in the lap of the court by their mutual motions, and under the facts of this particular case unequivocally invited and authorized the court to decide the case by interpreting the documents. This the court did. Having done so in a case like this, where interpretation of the writings was the only issue, we do not think the court should be required to submit to the subsequent urging of the loser that although he took his chances without reservation, he must have another go at the case, - although it is conceivable that in some other and unusual case this might be so."

Of course the instant case does not involve cross-motions for summary judgment, but it just as clearly involves a situation where the parties knowingly submitted the case with the only factual matter before the Court being the document itself. Having done so, Defendant is now precluded from seeking to inject extrinsic evidence into the interpretation or effect of the document.

After exhausting its procedural bag of tricks, Defendant finally does get to the merits of Judge Croft's Order commencing at p. 22 of its Brief. This is a question which was raised properly below and to which we will be happy to respond.

Before embarking upon an analysis of the case law, however, it is appropriate to analyze some distinctive elements of the contract in question. Paragraph 26, quoted hereinabove, contains the following language (which is emphasized for purposes of aiding in the following argument

"In the event that such franchise [a Sheraton Franchise] or a comparable franchise is not obtained prior to June 1, 1974 purchaser shall have the right, upon written notice to GPCC given not later than June 15, 1974, to reconvey the subject property to GPCC, in which event GPCC shall be obligated, promptly following such termination, to refund to purchaser all sums theretofore paid by purchaser to GPCC as purchase price for the subject property pursuant to paragraph 2 hereof, less a sum equal to interest on said purchase price from the date hereof to the date of such termination at the prime commercial rate established by Chase Manhattan Bank, N.A., from time to time during such period." (R. 32-33). (Emphasis added).

Certain things are fairly self-evident from this language. First, there is nothing in the language itself which creates any obligation on the part of the purchaser to obtain the Sheraton Franchise. Paragraph 26, should,

in this respect, be read in contradistinction to other provisions in the contract wherein various third party actions are made conditions of the contractual commitments. See for example paragraph 8 (commencing at R. 23) dealing with building permits. That provision also provides for a reconveyance in the event that the building permits are not obtained, but note the language which clearly makes it obligatory upon purchaser to do certain things in this connection:

"GPCC agrees that, in the event the prior to June 1, 1974 purchaser shall make all necessary applications and take all action necessary to obtain a building permit . . . and shall diligently pursue efforts to obtain such permits, and, in the event that any of such permits are not obtained prior to June 1, 1974, purchaser shall have a right upon written notice to GPCC given not later than June 15, 1974, to reconvey the subject property. . ." (Emphasis added).

Also interestingly enough, in the event that the building permits are not obtained following the diligent pursuit thereof by purchaser, it should be noted that GPCC is obligated to refund all of the purchase price rather than all of the purchase price less interest at the Chase Manhattan rate, as is the case under paragraph 26.

This comparison between paragraphs 26 and 8 leaves one to the obvious conclusion that, had the parties desired to include some affirmative obligation on the part of the purchaser to use diligence in obtaining a Sheraton Franchise they certainly knew the language with which to

accomplish this result - they could merely have used the same type of language - e.g., due diligence, etc. - as used in paragraph 8. That they did not do so lends very substantial credence to the interpretation of the contract urged by the Plaintiff.

A second factor which needs to be emphasized in comparing the instant case with many of those cited by Defendant is the fact that the failure to obtain the Sheraton Franchise does not result in the contract becoming a mere nullity or a "bare option". Rather, unlike paragraph 8 for example, paragraph 26 specifically provides that if the Sheraton Franchise is not obtained, and if reconveyance is sought by the purchaser, the purchaser is required to pay interest on the full purchase price for the period from the date of the contract to the date of termination. Note that the full purchase price in this case is \$630,000.00. Interest on it from the date of contract to the date of termination is not some mere trifling deposit but rather the sum of \$21,024.99. (See Tr. 84-85). So we do not have a situation where by reconveyance the purchaser converts the contract to a mere nullity or an illusory contract. Rather in the instant case we have a unique situation where the purchaser in effect has two ways in which he may perform the contract: (a) he may obtain a Sheraton Franchise and proceed with the matter, or (b) if the Sheraton Franchise is not obtained he may pay interest on the entire purchase price

for several months and relieve himself of further obligations.

Bearing these critical distinctions in mind, we turn now to an analysis of the cases cited by Defendant. Defendant relies heavily upon the case of Stabile v. McCarthy, 336 Mass. Repts. 339, 145 N.E.2d 821 (1957). (See Appellant's Brief at Tr. 23, et seq.). A close look at Stabile demonstrates immediately that it is fundamentally distinguishable from the instant case. For example, the contract language in Stabile provided:

"This agreement is subject to the right of the buyer in the event that he shall have been unable to obtain the approval of the Wilmington Planning Board of the proposed subdivision date of the . . . premises prior to the date . . . set for performance . . . at his option to cancel this agreement and claim the return of his deposit, in which event this agreement shall terminate without further obligation on the part of either party . . ." (Emphasis added).

Immediately two distinctions are evident. First, the contract speaks in obligatory language. In fact, the Court in quoting from the contract and discussing the obligation by the purchaser to obtain the permit itself stressed the word "unable" in its analysis. (See 145 N.E.2d 821 at 823). A second critical distinction, is that in Stabile, unlike the instant case, the failure to obtain the building permit constituted a complete washout of the contract with the total deposit being returned to the purchaser - this is highly distinguishable from the situation as present wherein

the purchaser is able to retain interest on the entire purchase price for the period in question. In one case, Stabile, the contract becomes a nullity, whereas in the instant case the contract merely is performed in an alternative manner. Finally, a point which in all candor should have been brought out by the Defendant itself in citing this case is that there was really no dispute in the case about the Plaintiff having an affirmative obligation to obtain the Planning Board approval. The Court itself observes this as follows:

"The plaintiff in his brief in effect concedes that he was bound to use reasonable efforts to obtain Planning Board approval." (145 N.E.2d 821 at 823).

This being the case, the only issue before the Court in Stabile is whether, in fact, he had used such reasonable efforts.

The case of Lyon v. Giannoni, 168 Cal. App. 2d 336, 335 P.2d 690 (1959) discussed at pp. 26 and 27 of Appellant's Brief is likewise quite distinguishable. In that case like Stabile, but unlike the instant case, the interpretation of the contract would have required that the total deposit be returned in the event the condition precedent was not satisfied. The Court merely held that the right to have the water tested by a reliable pump company, given to the purchaser by the contract, did not make the contract a mere option or a nullity. We completely agree with that interpretation and do not urge

otherwise in the instant case. We are not claiming that the contract should be a mere option or a nullity - those are words chosen by the Defendant in an attempt to improperly characterize the case. Our contention merely is that the purchaser in the instant contract had available alternative means of performing the contract, either of which requires valuable consideration to flow to the seller. He may pursue either of those courses without being in default of the contract.

Nor is this a case where the purchaser is seeking to avoid liability by refusing to perform a condition precedent (as argued at pp. 28 and 29 of Appellant's Brief). Appellant has conveniently ignored the entire concept of alternative performance even though that was stressed and argued extensively before Judge Croft at the time the motion was originally heard.

Some fundamental distinctions, critical to the type of contract here in question, have apparently alluded the Defendant. It is perfectly permissible for a contract to call for alternative performance - i.e., the promisor may fulfill the contract by fulfilling either of two alternatives. This was early recognized by this Court in Bradbury v. Fillingame, 84 Utah 178, 35 P.2d 772 (1934). See also Restatement of Contracts, §325; Corbin on Contracts, §1079 (1964). In the instant case, under paragraph 26 as

it is written, the purchaser may fulfill the contract in one of two ways - he may obtain the Sheraton Franchise and proceed with the contract or he may, alternatively, not obtain the Sheraton Franchise, reconvey the property, and pay interest on the total purchase price for the period from the date of the contract to the period of termination.

The question, of course, arises as to whether the contract is truly one for alternative performance or rather is one which has performance on the one hand and a provision for liquidated damages on the other - such a contract would not be one for alternative performance since failure to perform the main obligation is a default or breach of the contract which then triggers the liquidated damages provision. Each contract, of course, must be analyzed under its own terms to determine which of these two types of contracts really exist. In the instant case, the answer seems rather evident - that is it seems clear that the parties did not consider that the failure to obtain a Sheraton Franchise and the corollary payment of interest on the total purchase price was to be a default of the contract. This is quite clear from an analysis and comparison between paragraphs 25 and 26 of the contract (R. 30, et seq.). Paragraph 25 deals, in orthodox terms, with occasions of default. Note, for example, that under paragraph 25(a) after giving notice of default and the like and after failure to cure the default within thirty (30)

days the seller has a variety of options available including the right under paragraph 25(a) of retaining all funds paid as liquidated damages. Note that this paragraph is intended to cover all defaults. However, it obviously does not apply to the failure to obtain a Sheraton Franchise since that is dealt with expressly in paragraph 26 in another manner. Under paragraph 26 if the Sheraton Franchise is not obtained, purchaser is given the "right" to terminate and the vendor has the "obligation" to refund purchaser all sums theretofore paid less Chase Manhattan interest on the entire purchase price. If it was considered by the parties that the failure to obtain a Sheraton Franchise was in fact a default under the contract, rather than merely an alternative performance under the contract, there would be no reason for this language since the default provisions of paragraph 25 could have applied. Rather than allowing those provisions to apply, the parties dealt specifically with this issue and provided a method for handling the situation in which the Sheraton Franchise was not obtained. Further support for this analysis may be found in the absence of any language which refers to the Chase Manhattan interest as being liquidated damages or the like. Rather, it is in effect rental for the property during the period in question, which is uniquely intended to compensate the vendor for any inconvenience he may have suffered.

Corbin, in his work on contracts, has recognized

the fundamental distinction which we seek to make here.
In Section 1082 of his work he notes:

"It is evident that some alternative contracts giving the power of choice between the alternatives to the promisor can easily be confused with contracts that provide for the payment of liquidated damages in the case of breach, provided that one of the alternatives is the payment of a sum of money. Certain important differences between these two kinds of contracts, however, have been indicated above. There is no chance of such confusion in the case of an alternative contract where neither alternative performance is the payment of a sum of money. If, upon a proper interpretation of the contract, it is found that the parties have agreed that either one of the two alternative performances is to be given by the promisor and received by the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee, the contract is a true alternative contract. This is true even though one of the alternative performances is the payment of a liquidated sum of money; that fact does not make the contract one for rendering of a single performance with the provision for liquidated damages in case of breach."

Corbin quotes extensively from the case of Pearson v. Williams, 24 Wend. (N.Y.) 244 (1840). We quote Corbin's footnote as follows:

"In Pearson v. Williams, 24 Wend. (N.Y.) 244 (1840), the plaintiff conveyed land to the defendant, receiving in part payment \$21,000 in cash, the defendant covenanting further that he would erect two brick houses on the land by a certain date or, in default of erecting

the houses by that date, he would pay to the plaintiff the sum of \$4,000 or more. The defendant failed to erect the houses, and the plaintiff recovered judgment for \$4,000. The court said: 'This does not belong to the class of cases in which the question of liquidated damages has usually arisen . . . Here there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not; and there would have been no sufficient breach if the plaintiffs had stopped with alleging that the houses were not built. This is not a covenant to build, with a liquidation of the damages in case of nonperformance; but it is a covenant to build within a specified time or afterwards to pay a sum of money. The money is not to be paid by way of damages for not building the houses; but it is to be paid if the houses are not built as part of the contract price for the lots conveyed by the intestate. Again, this is not simply an alternative covenant to build or to pay a sum of money within a specified period. If it were so, the question of damages would perhaps be open; but it is an agreement to build by a certain day or afterwards pay a sum of money. When the day for building had gone by, it was then merely a covenant to pay money. It was necessary in declaring, to allege that the houses were not built--not, however, because that part of the contract was any longer in force--but by way of showing that the event had happened upon which the defendant agreed to pay the money. It had now become a simple covenant to pay money; and like other cases where there is an agreement to pay a gross sum of money; that sum, with interest from the time it became payable, forms the measure of damages."

In conclusion, the contract which is the subject of the instant action was one which obviously was negotiated between the parties in some detail. To sustain the

Defendant's contention with respect to that contract requires the Court to rewrite it in a way not originally done by the parties themselves and to add terms which they did not themselves feel appropriate to paragraph 26. (Even though, as noted above, they knew how to accomplish that result had they so desired - see for example paragraph 8 of the contract). This Court has frequently held that it is its duty to enforce contracts as written not as rewritten judicially. In Ephriam Theatre v. Hawk, 7 Utah 2d 163, 166, 321 P.2d 221 (1958) this Court noted:

"In considering the controversy here it is well to keep in mind the fundamental concepts in regard to contracts: that their purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. The intent so expressed is to be found, if possible, within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used. Unless there is ambiguity or uncertainty in the language so that the meaning is confused, or is susceptible of more than one meaning, there is no justification for interpretation or explanation from extraneous sources. . . . Generally speaking, neither of the parties nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship"

See also numerous other decisions to the same general effect. Holley v. Federal-American Partners, 29 Utah 2d 212, 507 P.2d 381 (1973); Wingets, Inc. v. Bitters, 28

Utah 2d 231, 500 P.2d 1007 (1972); Skousen v. Smith, 27 Utah 2d 169, 493 P.2d 1003 (1972).

In a very recent decision, Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc., 560 P.2d 700 (Utah, 1977), this Court has dealt expressly with a similar problem wherein one of the parties sought to impose implied conditions in a lease contract. This Court quoted with approval from Percoff v. Solomon, 259 Ala. 482, 67 So. 2d 21 (1953) as follows:

"An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so; or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole."

The interpretation urged by Defendant is improper and the partial summary judgment granted by Judge Croft should be sustained.

POINT II

THE TRIAL COURT'S HOLDING REGARDING THE UNCONSCIONABILITY OF DEFENDANT'S CLAIMED FORFEITURE WAS PROPER AND IS DISPOSITIVE.

In Point II of its Brief, Appellant complains of the trial court's ruling regarding the unconscionability of the forfeiture here sought to be retained by Defendant.

Naturally, it only becomes necessary to involve oneself in this analysis if one finds that the Plaintiff has breached the contract - a finding not made by the trial court below and not, we submit, otherwise appropriate. Assuming arguendo such a breach is found or assuming this Court determines there was error in the construction of the contract relative to the breach or non-breach thereof, we nonetheless submit that Judge Hanson's finding regarding the unconscionable penalty is dispositive of this case and was entirely appropriate.

Defendant's first complaint is that the finding was unnecessary and therefore should simply be disregarded. We completely disagree. It is entirely appropriate for any Court in issuing its decision to give alternative reasons justifying its decision. This is commonly practiced in both trial and appellate courts and cannot be condemned - indeed, to do so would result in a massively awkward method of handling judicial disputes. F/N

F/N

See, e.g., Santi v. Denver & R. G. West Rel. Co., 21 Utah 2d 157, 442 P.2d 921 (1968) (after finding no valid offer and acceptance, this court went on further to discuss the Statute of Frauds). See also Engstrom v. Bushnell, 20 Utah 2d 250, 436 P.2d 806 (1968), wherein this Court made finding that retention of payments would constitute a penalty even though not necessary to the main decision.

Defendant further makes broad assertions that there are no facts in the record from which this determination could have been made, and yet the facts are present, glaring, and totally persuasive. The known facts, which are comparable to the facts which have been available to this Court in numerous decisions regarding forfeitures, are as follows:

- (1) The contractually specified purchase price was \$630,000.00.
- (2) The contract was entered into under date of February 7, 1974 and was terminated on June 13, 1974 - an elapsed time of something over four months.
- (3) Interest on the purchase price for four months at Chase's rate of interest is the sum of \$21,024.99. (See Tr. 84-85).
- (4) The amount of the forfeiture being claimed by Defendant to be appropriate is the sum of \$125,000.00, which is the total of the sums paid preceding, at the time of, and subsequent to the actual execution of the contract. In addition, Defendant had the use of this money interest-free for three to four months.
- (5) Plaintiff was never given possession of the property.
- (6) Plaintiff was never given a deed to the property.
- (7) Plaintiff in no way entered upon the property or depreciated it in any sense.

So what we have in this case is a situation where the total inconvenience to the Defendant has been the fact that for a period of about four months its property was "tied up" by a potential purchaser who neither occupied nor built upon the ground. The actual amount being paid by Plaintiff exceeds the Chase interest of \$21,000.00 - it also includes interest on the funds paid during the period that they were retained by Defendant, interest-free.

The damages sought of \$125,000.00 are grossly disproportionate to any conceivable harm that could have befallen or could have been predicted to befall the Defendant during the very short period from February 7th to June 1st of 1974.

Even if Plaintiff had possessed the property to the exclusion of Defendant during the period in question, the most logical determination of actual damages to the Defendant would be rental value which is, at least roughly, equivalent to the very interest which it has received. The Court below needed no further facts to make the finding and, indeed, this Court by reviewing the same facts can just as clearly recognize that to allow Defendant to retain \$125,000.00 for, in effect, having its property "tied up" for a four month period as against a total purchase price of \$630,000.00 is unconscionable. \$125,000.00 is fully 20% of the total purchase price of \$630,000.00. If one annualizes the return that Defendant would thereby receive, it will be

noted that at this rate of return Defendant receives a 79% annual return on his purchase price - clearly a figure which shocks the conscience.

The Supreme Court of Utah was among the first in this country to recognize the harshness of forfeiture provisions such as those contained in paragraph 25 of the instant contract. F/N

Probably because of the common use of the Uniform Real Estate Contract in Utah, there are literally dozens of decisions of this Court dealing with the subject. In more modern times, perhaps Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952) is the controlling precedent. The pertinent facts in Perkins v. Spencer are not far off from those presented in the instant case - the purchase price involved was \$10,500.00 of which the purchaser had paid a total of \$2,725.00 when he defaulted. This Court concluded that this was an unenforceable penalty and sent the matter back down for determination of actual damages. The relative relationships of the figures and the time in question are comparable to the instant case, although in the instant case there was not in fact occupancy of the premises - a quite significant distinction. Another case with some factual similarities is Engstrom v. Bushnell, 20 Utah 2d 250, 436 P.2d 806 (1968), wherein the

F/N For an excellent historical discussion with particular emphasis on the Utah contribution to the case law in this area, arising from the seminal decision of Malmberg v. Baugh, 62 Utah 331, 218 Pac. 975 (1923) see "Forfeitures Under Real Estate Installment Contracts in Utah", Vol. Utah Law Review 30 (19).

Court noted that the retention of \$16,000.00 against a total purchase price of \$58,000.00 would in effect be an unconscionable penalty.

It is difficult to determine some exact scientific ratio by which the Courts determine whether a particular sum in a particular case constitutes a valid provision for liquidated damages or an unconscionable penalty. The cases are replete with references to "equity" and "the conscience of the court". We conclude from this that the decision is essentially an equitable one in which the Court should consider the various relevant circumstances and come to what may well be a visceral and yet equitable reaction on an ad hoc basis. Certainly, any attempt to set down a precise formula would run afoul of the next more complicated factual situation. In the present case, however, we respectfully submit that the facts are so extremely clear and the damages so completely unconscionable that reasonable minds could not seriously differ on the result and that, in all events, normal deference should be given to the trial court's holding. Indeed, the instant case is substantially more appealing than many of those in which this Court has found forfeitures. The conduct of Development Services cannot be castigated as being wanton or malicious in any respect - indeed they spent very substantial funds in an attempt to comply with the provisions of the contracts, including not only the funds paid directly to Greater

park City Company but also those funds expended for feasibility studies, etc. At no time did they take possession of the property or depreciate it in any sense. The time period was extremely short - slightly over four months.

Under Plaintiff's interpretation of this case, the provisions of paragraph 26 which call for Chase brass interest on the total purchase price (\$21,000.00) is certainly a sufficient and reasonable award to Defendant for any damages it could conceivably suffer. For Defendant to now demand complete forfeiture of the entire \$125,000.00, in fact, supports Plaintiff's contentions made in Point I of this Brief that there has in fact been no default. This is so because Defendant is urging an interpretation of the contract which is wholly inequitable. This Court has previously noted that "it is further pertinent to observe here that where there is a choice, an interpretation which will bring about an equitable result will be preferred over a harsh or inequitable one." F/N

F/N Wingets, Inc. v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972).

POINT III

DEFENDANT WAS GIVEN AMPLE OPPORTUNITIES TO PRESENT ITS CASE AND WAS ACCORDED COMPLETE DUE PROCESS

Point III of Appellant's Brief seeks again to criticize the lower courts for failing to accord Defendant a full opportunity to present facts. We have already dealt with this issue extensively in the factual portion of this Brief (see particularly pp. 6 through 12, supra), and therefore we shall not respond at great length again.

Counsel currently representing Defendant perhaps do not have the same total perspective of this case as Plaintiff's counsel do, inasmuch as Defendant's current counsel were brought in anew after the critical decision of Judge Croft. Looking at the case as a whole, however, and not merely at the portion of the case in which current counsel has been involved, it is quite apparent that the Defendant has been given its full day in Court not once but indeed several times. The Motion for Summary Judgment originally filed specifically dealt with the Sheraton Franchise issue. (See R. 47-48). Counsel for Defendant had fully four months in which to take depositions, file affidavits, or submit any evidence desired to be considered by the Court in making its decision. That evidence, indeed, could have included the types of things proffered as evidence by Defendant's new counsel at the trial of this proceeding. Defendant did not present such affidavits nor did it seek to continue the motion.

claiming that affidavits were unavailable as they could have done under Rule 56(f), Utah Rules of Civil Procedure. Rather they knowingly and willingly participated in arguments on the Motion for Summary Judgment when the only matter in the file evidentiarily was the contract itself. They should not be allowed the opportunity, now, of relitigating issues that should properly have been submitted at that juncture.

Much the same thing is true of the subsequent summary judgment entered by Judge Sawaya. It too was continued for several weeks before finally being heard, and among the stated reasons for those continuances was to allow Defendant to obtain affidavits, which they did not do.

It seems to us that Defendant has been given every opportunity to properly present its case but has failed to do so. Indeed they were given a unique opportunity, following the initial decision of Judge Croft, to amend their Answer and raise additional defenses.

Perhaps the most astounding development in this whole sequence of events was at the trial itself. Defendant, having been told repeatedly that the Sheraton Franchise issue was totally resolved, proceeded to interject evidence at the trial regarding that issue, rather than relying exclusively on their Proffer of Proof. On behalf of Plaintiff, objections were made not once but several times to the effect that such evidence was precluded by the prior summary judgments. Nonetheless the trial court allowed the evidence in. (R. 244 through 255). How then, having forced this material into the

record over objections of Plaintiff's counsel, can Defendant logically complain when the trial courts make a finding on the subject.

Finally, even the Proffer of Proof itself is unavailing and somewhat diseased from an evidentiary point of view. With respect to the testimony proffered from Messrs. Zeldman and Wellbeloved (commencing at p. 2 of the Proffer), many of the materials are speculative and would be inadmissible as a matter of evidence. See for example, paragraph 6 at p. 4 of the Proffer wherein it is stated:

"Mr. Wellbeloved cannot recall specifically requesting Mr. Lowe to submit such proof, but assumes that Mr. Lowe knew that such proof was required."

Quite obviously, such testimony would not be admissible. Nor does the Proffer contain any evidence with respect to Sheraton's attitude about issuing a franchise to a company which did not have the financial ability to buy the property in question. One could quite logically assume that if Sheraton does indeed require evidence of control of the property, as indicated in the Proffer (paragraph 3), that they would not issue a franchise to a company which had not a deed or contract to purchase the property and the financial ability to do so - a condition precedent which Development Services did not meet.

The remainder of the Proffer purports to introduce parole evidence which, if introduced at all, should have been introduced at the time of Judge Croft's summary judgment, not almost a year later.

CONCLUSION

When all is said and done, the case boils down to a relatively simple contract case. The contract expressly provides that if a Sheraton Franchise is not obtained on or before June 1, 1974, that the purchaser has "the right" to a refund of all sums paid less interest on the total purchase price for the period in question. A Sheraton Franchise was not obtained on the due date, a fact not disputed, and Plaintiff properly seeks recovery of its funds paid less interest amounting to some \$21,000.00. The case, in one form or another, has received the scrutiny of several District Court Judges all of whom have consistently held that Plaintiff did not violate the contract, that it was not in default of the contract, and that it properly sought to enforce its express rights under the contract.

The trial court should be affirmed.

PARSONS, BEHLE & LATIMER

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Respondent was mailed to F. S. Prince, Jr., Esq., 455 South Third East, Third Floor, Salt Lake City, Utah 84111, this 18th day of April, 1977.