

1996

# Wesley Clock and Clock v. John F. Green and Larue Green : Brief of Appellant

Utah Court of Appeals

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Bryan Canon; Attorney for Respondents.

David L. Grindstaff.

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**IN THE UTAH COURT OF APPEALS**

WESLEY CLOCK AND  
CLOCK,

Plaintiffs and Appellees

v.

JOHN F. GREEN AND LARUE  
GREEN,

Defendants and Appellants.

)

)

)

)

)

)

Case No. 960797-CA

Priority No. 15

**BRIEF OF APPELLANT**

**AN APPEAL FROM THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY STATE OF UTAH  
THE HONORABLE HOMER WILKENS, PRESIDING**

David L. Grindstaff  
457 East 300 South  
Salt Lake City, Utah 84111

Bryan Canon, Esq.  
Attorney for Respondents  
40 East South  
Salt Lake City, Utah 84111

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IN THE UTAH COURT OF APPEALS

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WESLEY CLOCK AND	)	
CLOCK,	)	
Plaintiffs and Appellees	)	Case No. 960797-CA
v.	)	Priority No. 15
JOHN F. GREEN AND LARUE	)	
GREEN,	)	
Defendants and Appellants.	)	

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BRIEF OF APPELLANT

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AN APPEAL FROM THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY STATE OF UTAH  
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David L. Grindstaff  
457 East 300 South  
Salt Lake City, Utah 84111

Bryan Canon, Esq.  
Attorney for Respondents  
40 East South  
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**IN THE UTAH COURT OF APPEALS**

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WESLEY CLOCK AND	)	
CLOCK,	)	
	)	
Plaintiffs and Appellees	)	Case No. 960797-CA
v.	)	Priority No. 15
	)	
JOHN F. GREEN AND LARUE	)	
GREEN,	)	
	)	
Defendants and Appellants.	)	

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**BRIEF OF APPELLANT**

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**JURISDICTION OF THE COURT AND  
NATURE OF THE PROCEEDINGS**

This is an appeal from an Order and Judgment of the Third District Court granting Plaintiff's Motion for Summary Judgment and denying Defendant's Counter-Motion for Summary Judgment. Appellant's appeal was originally filed in the Utah Supreme Court, however, it was subsequently assigned to the Utah Court of Appeals and assigned appellant's new case number of 960797-CA. This court has jurisdiction to consider the appellant's appeal pursuant to Utah Code Annot. § 78-2-2(3)(j) and Utah App. Proc. R. 3. This court has jurisdiction to review a final decision entered by a district court of the State of Utah.

### **ISSUES PRESENTED FOR REVIEW**

The issue presented for review is whether a material issue of fact exists as to when the option could be exercised on a written agreement which was silent as to when the option could be granted and contrary affidavits were presented.

### **STANDARD OF REVIEW**

The standard of review to be applied in this case is contained in Rule 56(c), Utah R. Civ. P. The standard is whether the pleading, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Since a summary judgment addresses only questions of law, the decision of the trial court is reviewed for correctness and accorded no deference. Hebertson v. Willowcreek Plaza, 895 P.2d 839, 840 (Utah Ct. App. 1995).

A timely notice of appeal was filed in this case on October 4, 1996.

### **CONSTITUTIONAL PROVISIONS, STATUTES AND APPLICABLE RULES**

This case is governed by Rule 56(c), Utah R. Civ. P.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This is an appeal from a final order of the Third district Court granting Summary Judgment's to Plaintiff's and Denying Defendant's Motion for Summary Judgment.

B. Statement of the Facts

1. The parties to this lawsuit's all signed a handwritten document which forms the basis of this case which states as follows:

" I Wesley Clock and Ann Clock agree to pay \$675 per month plus sewer and water. There is a \$350 deposit plus \$1,000 for a lease option to buy. Starting July 29, 1991 pro-rated to Aug. 4, 1991, the selling price to be \$81,500 at 10 ½ per cent interest. When option is picked up, the \$350 plus the \$1,000 will be applied to the down payment of \$5,000 or more. The seller will re-roof and make the carport into a double garage, replace the back door. Other than the things above, the Clocks will take care of any repairs during the option period. There will be a balloon payment due in the balance of the loan August 5, 1996. The rent to be pro-rated from July 29, 1991 to August 4, 1991. Rent to begin on August 5, 1991. August 2 is \$500.00; August 5 on \$700; balance by August 20, 1991. If the Clocks do not buy they will be renters and money will not be refunded.

/s/ Anne Clock, Wesley clock, John F. Green and Larue Green."

2. The contract fails to give a location as to which property was to be sold and what was the option period.

3. The plaintiffs paid a \$300 deposit and \$1,000.00 for the lease option.

4. On April 12, 1996 the Plaintiffs gave a copy of a notice of intent to exercise the option to purchase the property.

5. According to Larue Green and John Green, the parties agreed that the down payment described in the payment was required to be paid within one year from the date the agreement was signed.

6. Defendants never paid the down payment or offered to pay the down payment until approximately April 12, 1996.

7. Plaintiffs did not tender to Defendants a purchase contract at 10½ per cent interest.

#### **SUMMARY OF THE ARGUMENTS**

A material issue of fact exists which should be determined at trial and not through a motion for summary judgment.

#### **ARGUMENTS**

##### **WHETHER A MATERIAL ISSUE OF FACT EXISTS AS TO THE TERMS OF THE ALLEGED OPTION CONTRACT**

The parties to this lawsuit's handwritten document which forms the basis of this case states as follows:

" I Wesley Clock and Ann Clock agree to pay \$675 per month plus sewer and water. There is a \$350 deposit plus \$1,000 for a lease option to buy. Starting July 29, 1991 pro-rated to Aug. 4, 1991, the selling price to be \$81,500 at 10 ½ per cent interest. When option is picked up, the \$350 plus the \$1,000 will be applied to the down payment of \$5,000 or more. The seller will re-roof and make the carport into a double garage, replace the back door. Other than the things above, the Clocks will take care of any repairs during the option period.

There will be a balloon payment due in the balance of the loan August 5, 1996. The rent to be pro-rated from July 29, 1991 to August 4, 1991. Rent to begin on August 5, 1991. August 2 is \$500.00; August 5 on \$700; balance by August 20, 1991. If the Clocks do not buy they will be renters and money will not be refunded.

/s/ Anne Clock, Wesley clock, John F. Green and Larue  
Green."

The first determination is whether or not this contract is intended to be an integration. To resolve this question of fact any relevant evidence is admissible. Union Bank v. Swenson, 707 P.2d 663, (Utah 1985).

In looking only at the document, no mention is made as to an address of the residence and real property to which the option would apply. No mention is made as to the period of time for which the option would be available and whether or not the rental money's paid would be applied to the purchase price of the property if the option would be picked up. The writing refers to a down payment of \$5000.00 or more, but fails to state an exact amount and a date as to when that down payment would be required.

It is very clear from this writing that the alleged contract is very incomplete. Its terms are ambiguous and not very clear. Parole evidence is necessary to conclude what piece of property was the subject of the option and for what period of time the option

covered. Defendant's tendered affidavits stating that the parties agreed that the Plaintiff's right to accept the option were limited to a one year time frame. Record at pages 38-41. The Defendant's reject that claim through their affidavits. Record at pages 52-55. The Plaintiff's did not receive a down payment toward the purchase price of the residence of \$5000.00 or more within the claimed option period therefore they contend the option period has expired. When determining whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law, the Court is required to construe all facts liberally in favor of the party opposing the motion, and will draw all reasonable inferences from the record in favor of the non-moving party. Katzenberger v. State, 735 P.2d 405, 408 (Utah App.1987). Further, because summary judgment presents only questions of law, no deference is given to the trial court's ruling and it is reviewed for correctness. Mumgord v. ITT Commercial Fin. Corp. 848 P.2d 1041, 1043 (Utah Ct App.1993). The Green's affidavits clearly state that the option term was for only one year that the option period had expired in August of 1992. The contract is silent on that point, therefore the contract is not integrated on that issue and the Affidavit's of the Green's are relevant to establish the terms of the agreements. Defendants state specific

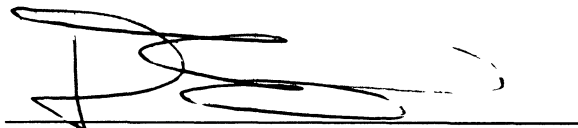
facts in support of their position and Plaintiff offer differing facts. The court is to construe Defendants are entitled to have that question resolved by a trier of fact at a trial and not through a Summary Judgment.

Since the writing upon which Plaintiffs make a claim for Summary Judgment does not specify an option period, this term is ambiguous. Clearly, the agreement outlines that a down payment was to be paid of \$5000.00 or more and the entire purchase price of \$81,500.00 was to be paid in full on or before August 5, 1996.

#### CONCLUSION

The trial court's granting of Summary Judgment for Plaintiffs, was error as a material issue of fact exists as to the option period.

DATED this 10<sup>th</sup> day of March 10, 1997.


A handwritten signature in black ink, appearing to read 'D. Grindstaff', written over a horizontal line.

David L. Grindstaff  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing  
**BRIEF OF THE APPELLANT** was **MAILED**, postage prepaid, on this 10th  
day of 1997 to

Bryan Canon, Esq.  
40 East South  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'David Grindstaff', is written over a horizontal line.

David Grindstaff

## **ADDENDUM A**

CRAIG W. MCARTHUR #6274  
EDDINGTON & MCARTHUR  
Attorneys for Defendant  
9267 So. Redwood Road, Suite a  
West Jordan, Utah 84088  
Telephone: 566-0111

FILED  
'99 JUL 1 PM 12 00  
THIRD DISTRICT COURT

BY [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

-----ooOoo-----

WESLEY CLOCK and ANN CLOCK, :

Plaintiffs, :

vs. :

JOHN F. GREEN and LARUE GREEN, :

Defendants. :

**AFFIDAVIT OF PLAINTIFF  
LARUE GREEN**

Civil No. 960902949 CV  
Judge Wilkinson

-----ooOoo-----

STATE OF UTAH )

ss

County of Salt Lake )


I, LaRue Green, being first duly sworn upon oath, depose and say:

1. I am one of the Defendants in the above captioned cause of action.
2. I make the following statements of my own personal knowledge.
3. On July 29, 1991, I signed an agreement with Mr. and Mrs Wesley Clock.
4. A true and accurate copy of the agreement is attached as exhibit "A" to the affidavit of John F. Green.
5. At the time the agreement was signed, I was present when my husband explained to Mr. and Mrs. Clock that the down payment described in the agreement was to be paid within one

year from the date the agreement was signed.

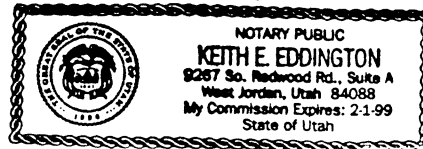
6. I also confirmed to Mr. and Mrs. Clock that the down payment was to be paid within one year from the date the agreement was signed.

DATED as of this 26 day of June, 1996.

  
LaRue Green

On the 26<sup>th</sup> day of June, 1996, personally appeared before me LaRue Green who being first duly sworn upon oath, acknowledged to me that she has read the forgoing affidavit of LaRue Green, who believes the contents thereof, and executed the same of said individual's free act-and desire.

  
NOTARY PUBLIC



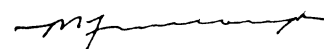
CRAIG W. MCARTHUR #6274  
EDDINGTON & MCARTHUR  
Attorneys for Defendant  
9267 So. Redwood Road, Suite a  
West Jordan, Utah 84088  
Telephone: 566-0111

FILED

1996 JUL 1 PM 12 30

THIRD JUDICIAL DISTRICT COURT

BY



IN THE THIRD JUDICIAL DISTRICT COURT CLERK

SALT LAKE COUNTY, STATE OF UTAH

-----ooOoo-----

WESLEY CLOCK and ANN CLOCK,

:

Plaintiffs,

:

**AFFIDAVIT OF PLAINTIFF  
JOHN GREEN**

vs.

:

JOHN F. GREEN and LARUE GREEN,

:

Civil No. 960902949 CV  
Judge Wilkinson

Defendants.

:

-----ooOoo-----

STATE OF UTAH )

ss

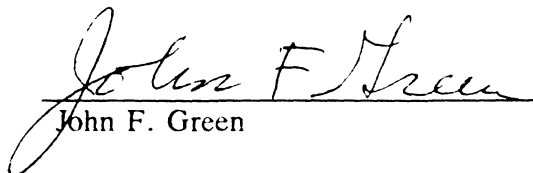
County of Salt Lake )

I, John Green, being first duly sworn upon oath, depose and say:


1. I am one of the Defendants in the above captioned cause of action.
2. I make the following statements of my own personal knowledge.
3. On July 29, 1991, I signed an agreement with Mr. and Mrs Wesley Clock.
4. A true and accurate copy of the agreement is attached hereto as exhibit "A".
5. At the time the agreement was signed, I explained to Mr. and Mrs. Clock that the down

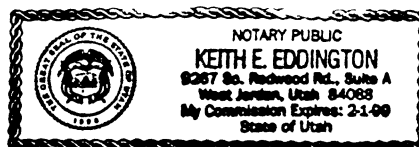
6. payment described in the agreement was to be paid within one year from the date the agreement was signed.

DATED as of this 26 day of June, 1996.

  
John F. Green

On the 26<sup>th</sup> day of June, 1996, personally appeared before me John F. Green who being first duly sworn upon oath, acknowledged to me that he has read the forgoing affidavit of John F. Green, who believes the contents thereof, and executed the same of said individual's free act and desire.

  
NOTARY PUBLIC



7-29-17 11

I Wesley Clark and Anne Clark.  
agree to pay \$675.00 per month Plus Sewer  
and water. There is a \$350.00 deposit plus  
an \$1000.00 for a lease option to buy.  
starting July 29, 1991 Pro-rated To Aug 4, 1991  
The selling price to be \$81500.00 at  
10 1/2% interest. When option is picked  
up the \$350.00 plus the \$1000.00 will be  
applied to the down payment of \$5000.00  
or more. The seller will remove and  
make the carpet into a double garage  
replace the black door. At the time of  
the things above the clarks will take  
care of any repairs during this option  
period. There will be a balloon payment  
due on the balance of the loan Aug. 5, 1991  
The rent to be pro-rated from July 29, 1991 to  
Aug 4, 1991. Rent to begin on Aug 5, 1991  
Aug 2, \$500.00 Aug 5, \$700.00 Balance by  
Aug 20, 1991. If the clarks do not buy then  
will be refunded. Money will not be refunded.

Anne Clark  
Wesley Clark

John F. Green  
John F. Green

000041

## **ADDENDUM B**

THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

SEP 5 1996

SALT LAKE COUNTY  
*[Signature]*

BRYAN W. CANNON, #0561  
Attorney for Plaintiff  
40 East South Temple #300  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3500

**IN THE THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

---

WESLEY CLOCK AND ANN CLOCK,	)	
	)	<b>ORDER &amp; JUDGMENT</b>
Plaintiffs,	)	
	)	Civil No. 960902949cv
vs.	)	
	)	JUDGE WILKINSON
JOHN F. GREEN AND LARUE	)	
GREEN,	)	
	)	
Defendants.	)	

---

This matter came on regularly before the above-entitled court pursuant to plaintiff's Motion for Summary Judgment and defendant's Counter-Motion for Summary Judgment. Bryan W. Cannon appeared for the plaintiff at a hearing on the matter held Friday, August 16, 1996 at 10:00 a.m. The defendants were represented by Craig W. McArthur. Based upon the arguments of counsel, the memoranda submitted by the parties and the court being otherwise fully advised in the premises, the Court hereby finds that the Agreement is fully integrated with regard to the purchase price and the deadline date for exercise of the option. The plaintiffs attempted to exercise the option for the option price prior to the deadline date. Based upon the Court's finding, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Summary Judgment is granted and defendants Counter-Motion for Summary Judgment is denied.

2. The plaintiffs, Wesley Clock and Anne Clock, are entitled to purchase the property at 1324 East 5485 South, Salt Lake City, Utah from defendants, John F. Green and Larue Green.

3. The defendants shall upon receipt of \$81,500.00 convey the said real property to the plaintiffs, Wesley Clock and Anne Clock.

4. Against the purchase price the defendants have received \$1,300.00 toward the down payment thereon. The sum of \$3,650.00 as additional down payment, now held by the court, shall be paid to defendants, John F. Green and Larue Green, and applied toward the purchase price, leaving a balance due thereon of \$76,500.00.

5. Any payments made by the plaintiffs to the defendants after August 4, 1996 shall also be applied to the purchase price.

6. Closing of the purchase shall occur within a reasonable time after the entry of this order. Plaintiffs shall be obligated to set up and arrange at closing for the purchase and defendants shall be obligated to appear at the closing, upon reasonable notice to execute documents to transfer title.

DATED this 5 <sup>Sept</sup> day of ~~August~~, 1996.

  
JUDGE WILKINSON