

1988

# Gateway Development Inc., a Utah corporation v. Nixon and Nixon Inc., a Utah corporation, and Ezra J. Nixon, aka E.J. Nixon, Jr. : Brief of Respondents

Utah Court of Appeals

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L. Brent Hoggan; Olson and Hoggan; Attorney for Respondents.

Lowell V. Summerhays; Law Offices of Lowell V. Summerhays; Attorney for Appellant.

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UTAH COURT OF APPEALS

BRIEF

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DOCKET NO.

880037-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, UTAH

GATEWAY DEVELOPMENT CORPORATION, )  
INC., a Utah Corporation, )

Plaintiff and Appellant, )

vs. )

NIXON & NIXON, INC., a Utah  
Corporation, and EZRA J.  
NIXON aka E. J. NIXON, JR., )

Defendants and Respondents. )

BRIEF OF RESPONDENTS

No. 880037-CA

Priority Classification  
No. 14b

On Appeal from the Third Judicial District Court  
For Salt Lake County, State of Utah  
The Honorable Frank G. Noel

LOWELL V. SUMMERHAYS  
Utah State Bar #3154  
LAW OFFICES OF LOWELL V.  
SUMMERHAYS  
Attorney for Appellant  
4609 South State Street  
Murray, Utah 84107  
P. O. Box 1355  
Sandy, Utah 84091-1355  
Telephone: (801) 942-8008

L. BRENT HOGGAN  
Utah State Bar #1512  
OLSON & HOGGAN  
Attorneys for Respondents  
56 West Center  
P. O. Box 525  
Logan, Utah 84321  
Telephone: (801) 752-1551

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COURT OF APPEALS

L. Brent Hoggan  
Utah State Bar #1512  
OLSON & HOGGAN  
Attorneys for Respondents  
56 West Center  
P. O. Box 525  
Logan, Utah 84321  
Telephone: (801) 752-1551

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, UTAH

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GATEWAY DEVELOPMENT CORPORATION, )  
INC., a Utah Corporation, )

Plaintiff and Appellant, )

vs. )

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Corporation, and EZRA J. )  
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On Appeal from the Third Judicial District Court  
For Salt Lake County, State of Utah  
The Honorable Frank G. Noel

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PARTIES TO THE ACTION

Plaintiff and Appellant:

Gateway Development Corporation, Inc., a Utah Corporation

Defendants and Respondents:

Nixon & Nixon, Inc., a Utah Corporation, and Ezra J.  
Nixon aka E. J. Nixon, Jr.

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### PRELIMINARY STATEMENT

In this Brief, the Plaintiff and Appellant will be referred to as Gateway, The Defendant Nixon & Nixon, Inc. will be referred to as Nixon, and the Defendant E. J. Nixon, Jr. will be referred to as E.J. A principal party to the chain of events leading to this case is John New & Associates, Inc., hereinafter referred to as New. References to the record on appeal will be designated "R". References to the Transcript of the trial will be designated "T". References to the transcript of the Gateway Motion to Re-open will be designated "MTR". All emphasis is added.

### JURISDICTION OF THE COURT

Original jurisdiction is conferred upon the Supreme Court of the State of Utah pursuant to Section 78-2-2(3)(i), Utah Code Annotated 1953, as supplemented and amended. The Supreme Court exercised its discretion to transfer the appeal to the Utah Court of Appeals in accordance with Rule 4A of the Rules of the Utah Supreme Court and pursuant to Section 78-2-2(4), Utah Code Annotated 1953, as supplemented and amended.

### NATURE OF THE PROCEEDINGS BELOW

The suit below was on a promissory note. The case was tried to a jury. At the close of Gateway's case and after Gateway had rested, Nixon and E.J. moved for dismissal of

Gateway's Complaint for failure of Gateway to prove that it was the owner and holder of the note sued upon. This motion was granted. This holding was affirmed on Gateway's motion to re-open and for re-hearing.

#### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Two (2) issues are presented to this Court for review. They are:

1. Did Gateway prove at the trial by a preponderance of the evidence that it was the owner and holder of the Promissory Note sued upon.

2. If Gateway proved at the trial by a preponderance of the evidence that it was the owner and holder of the Promissory Note sued upon, did Gateway prove by a preponderance of the evidence that said Promissory Note was due and payable.

#### APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

There are no constitutional provisions, statutes, ordinances, rules or regulations whose provisions are determinative of this case.

#### STATEMENT OF THE CASE

This case was tried to a jury in the District Court of Salt Lake County on February 4, 1987, the Honorable Frank G. Noel presiding. The suit by Gateway is to enforce payment



of a promissory note. When Gateway rested its case, Nixon and E.J. moved to dismiss Gateway's Complaint on the ground that Gateway had not proven that it was the owner and holder of the Note, and the motion was granted. (T. 20, lines 21 and 22) The Court reduced its Order of Dismissal to writing on February 18, 1987. (R. 104) On February 27, 1987, Gateway moved to alter or amend the Order of Dismissal. (R. 106) This motion was heard and denied on October 9, 1987. (MTR. 32, lines 21-25 and R. 133) This appeal followed Judge Noel's denial of Gateway's Motion to Alter or Amend Order of Dismissal.

On November 20, 1978, New as Seller and Nixon as Buyer entered into a written Agreement for the sale and purchase of real property in Weber County, Utah. (MTR. 5) A copy of this Agreement is appended to this Brief and will be referred to hereinafter as the New-Nixon Agreement.

New refused to perform the New-Nixon Agreement, and as a result Nixon filed suit against New in the District Court of Weber County for specific performance. Judge Calvin Gould presided over this trial and ruled in favor of New. The decision of Judge Gould was appealed to the Utah Supreme Court and there was reversed. (Nixon & Nixon, Inc. vs. John New & Associates, Inc., 641 P.2d 144) A copy of the Utah Supreme Court's Decision in the Nixon-New case is appended to this Brief.

The New-Nixon Agreement requires Nixon to execute a Note to New. (Paragraph 9) On remand from the Supreme Court, the District Court of Weber County decreed specific performance of the New-Nixon Agreement. Pursuant to this decree, the Promissory Note sued upon by Gateway was given by Nixon to New on December 30, 1983. (See Ex. 21-P and particularly the last paragraph on page 2 which states: "This note is given pursuant to the terms of a Judgment and Decree of the Honorable Calvin Gould entered December 26, 1983 in Civil Case #72745 in the District Court of Weber County, Utah, to which Judgment and Decree reference is made for the terms, provisions and conditions thereof.") The Nixon to New Note was admitted as Exhibit 21-P in the trial. A copy of the Nixon to New Note is appended to this Brief and will be referred to hereinafter as "the Note".

In March 1986, Plaintiff filed suit against Nixon and E.J. in the District Court of Salt Lake County, alleging the execution of the Note and that:

"5. All conditions and conditions precedent have been performed or have occurred, or the performance or occurrence thereof has been waived and defendants are estopped from demanding or requiring their performance or occurrence;"

"6. On January 22, 1984, said agreement was duly assigned to the plaintiff and plaintiff is the present owner and holder thereof." (R. 2 and 3)

Nixon and E.J. denied the allegations in paragraph 5 and 6 of Gateway's Complaint. (R. 11) Thereafter, Gateway amended

its Complaint to change the specific date of the purported assignment to it of the Note to April 21, 1980. (R. 56, paragraph 6) The amended allegation was likewise denied by Nixon and E.J. (R. 62, paragraph 6)

#### SUMMARY OF ARGUMENTS

1. Nixon and E.J. contend that the Note is non-negotiable and that Gateway failed to prove at the trial that the Note had been transferred or assigned to Gateway, and that failing in such proof, Gateway was not the owner and holder of the Note and was not, therefore, entitled to sue on the Note.

2. The Note by its terms is payable "... six months after the maker (Nixon) files a final subdivision plat ..." against the property subject of the New-Nixon Agreement. If not paid then, the Note begins to accrue interest at eight percent (8%) and the principal and interest on the Note are due four years after the filing of said subdivision plat. (See Ex. 21-P, paragraphs 1, 2 and 3) Plaintiff failed to prove at the trial that the subdivision plat has ever been filed or waived by Nixon, and without such proof, there is no evidence the Note was due when sued upon or at all.

#### ARGUMENT

1. DID GATEWAY PROVE AT THE TRIAL BY A PREPONDERANCE OF THE EVIDENCE THAT IT WAS THE OWNER AND HOLDER OF THE PROMISSORY NOTE SUED UPON.

The Note is non-negotiable. The elements required to make an instrument negotiable are set forth in 70A-3-104, Utah Code Annotated, 1953 as amended, as follows:

- "(1) Any writing to be a negotiable instrument within this chapter must
  - (a) be signed by the maker or drawer; and
  - (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
  - (c) be payable on demand or at a definite time; and
  - (d) be payable to order or to bearer."

The Note fails the test of 70A-3-104, Utah Code Annotated, 1953, in the following particulars:

(a) The Note does not "contain an unconditional promise to pay a sum certain." The Note is for \$53,071.27 and provides that from this sum the maker (Nixon) can offset (1) amounts necessary to remove liens from the property described in the Note, (2) the costs of clearing title to the said property, and (3) the cost to Nixon of performing covenants to be performed by New under the terms of the New-Nixon Agreement. (Ex. 21-P, paragraphs A, B and C) The amount due on the Note cannot therefore be certain until the amounts of the offsets are determined. In addition, there is a condition to the payment of the Note, to-wit: the filing of a subdivision plat.

The Note is not, therefore, an "unconditional order or promise to pay."

(b) The Note is not payable "to order or bearer." The Note is payable "to John New & Associates, Inc., a Utah Corporation." (Ex. 21-P, paragraph 1)

In its Amended Complaint, Gateway alleged that, "On April 21, 1980 said agreement (the Note) was duly assigned to the Plaintiff ..." (R. 57) This allegation was denied by Nixon and E.J. in their Answer. (R. 63, paragraph 6) This denial put the burden on Gateway to prove the assignment.

Gateway undertook to prove the assignment to it of the Note by introducing three (3) exhibits. The first was Ex. 20-P, which on its face is an assignment of certain real property as therein described from New to Gateway. No mention is made in the assignment of the Note. A copy of this Assignment is appended to this Brief.

Gateway also attempted to offer two (2) Quit Claim Deeds, one as Ex. 19-P and the other as Ex. 29-P. Ex. 19-P was objected to and the objection sustained. (T. 6, lines 14 and 15) No further attempts were made to have it admitted. Ex. 29-P was objected to and its admission refused. (T. 9, lines 16-18) There was no other evidence presented by Gateway that the Note had been assigned to it as alleged in paragraph 6 of its Amended Complaint.

The only other evidence on the ownership of the Note by Gateway was this testimony of Carl Lee Gall, President of Gateway:

"Q. (By Mr. Hunt) Did you receive that Promissory Note from John New & Associates when it was delivered to them?

"A. Yes. (T. 7, lines 17-19)

"Q. (By Mr. Hunt) You did receive that from John New & Associates?

...

"A. Yes. (T. 8, lines 1-7)

Gateway did not argue at the trial that it was the owner of the Note by any means other than the assignment (Ex. 20-P) or the proffered and refused Quit Claim Deeds (Exs. 19-P and 29-P). In its Brief, Gateway argues that the mere fact Gateway had possession of the Note vested legal title to the Note in Gateway. (Appellant's Brief, page 5)

It is admitted that there is dicta in Utah cases to the effect that a non-negotiable note may be assigned by parol. However, even under such dicta, there must be some parol evidence to show the assignment. In this case, there was none. Gateway's sole evidence of ownership of the Note was its possession of the same. It offered no evidence as to how it obtained such possession. Gateway alleged a specific assignment, giving the exact date thereof, to-wit: April 21,

1980. (R. 56, paragraph 6) Nixon and E.J. denied this allegation, thereby putting Gateway on its proof of the allegation. Gateway offered no proof of the alleged assignment.

The rule of law on parol assignments is stated thusly in 10 C.J.S. on Bills and Notes §227:

"A valid assignment may be made by words or acts which fairly indicate an intention to make the assignee the owner. Such assignment may be in writing, and formal or informal, but it must show, in some manner, a making over of the right or interest therein as distinguished from a mere delivery of possession."

and in 11 Am. Jur. 2nd on Bills and Notes §275, it is stated, "But there is more to delivery than merely parting with possession; there must also be the intention to give effect to the instrument."

In Leverett v. Awnings Inc., (GA) 104 SE 2nd 686, the Court held there must be intention to pass title.

The Oregon Supreme Court in Schumann v. Bank of California, N.A., 233 P. 860, held that assignment of a non-negotiable chose in action may be affected by assent of the assignor and assignee, accompanied by delivery of the chose in action.

Midstate Homes, Inc. v. Hockenberger, (Kan) 389 P.2d 760, and Glenn v. Lukenbill, (Kan) 389 P.2d 792, cited by Gateway at page 5 of its Brief, are inappropriate as both cases dealt with negotiable instruments, whereas the Note in this case is non-negotiable. Clearly a negotiable note is transferable by

delivery without endorsement. (70A-3-202(1), Utah Code Annotated, 1953 as amended and supplemented) In both the Hockenberger and Lukenbill (supra.), the assignment was in fact in writing and the statements therein that an assignment could be by parol are dicta. Moreover, even if the dicta is accepted as the law of the case, the ruling does not obviate the requirement of proving the oral assignment.

The cases of Thatcher et al. v. Merriam et al., (Ut) 240 P.2d 266, Johnson v. Beickey, (Ut) 43 P. 189, and O'Conner v. Slatter, (Ut) 93 Pac. 1078, cited by Gateway at pages 6 and 7 of its Brief, are not dispositive of this case. These three (3) cases recite as dicta that a note may be assigned by parol. However, in all three (3) cases, there was, in fact, a written assignment of the notes in question. The statement is repeated in Am. Jur. 2nd on Bills, Notes, in the Utah case of Thatcher (ibid.) and in various other cases that a non-negotiable note may be transferred by parol. But counsel has been unable to find a single case where a court has actually considered a non-negotiable note assigned without a written endorsement or assignment in support of the proposition that a non-negotiable note can be assigned by parol. In short, the dicta that a non-negotiable note can be transferred by parol does not appear to be supported by any case law where there was in fact no written endorsement or assignment. On the other hand, in the case of Ball v. Hill, (Tex) 38 Tex. 237, the



Texas Supreme Court held that "possession of a non-negotiable note, without a written assignment, is no evidence of ownership." Assuming arguendo that the dicta in Thatcher, Johnson and O'Conner (supra.) in fact stands for the proposition that a non-negotiable note can be transferred by parol, there is still the requirement that the assignment by parol be proven. The point in this case is not just whether a non-negotiable note can be transferred by parol and without written endorsement or assignment, but whether there was any parol evidence (or any evidence of any kind for that matter) that there was an assignment of the Note from New to Gateway.

Gateway alleged assignment to it of the Note on a specific date, to-wit: April 21, 1980. The assignment was denied by Nixon and E.J. in their Answer. This denial put Gateway on its proof of the allegation by a preponderance of the evidence. Gateway failed to prove that by parol or otherwise on the date of the alleged assignment, to-wit: April 21, 1980, or at all, New assigned the Note to Gateway. It is significant that the assignment, which is Ex. 20-P, is dated April 21, 1980, the date Gateway alleges the Note was assigned to it, and it is apparent that Gateway relies on this assignment to establish its ownership of the Note. If not, why did Gateway not simply put on parol or other evidence of the assignment to it of the Note? One can only conclude it was because there was not other evidence of such an assignment. And the assignment which is

Ex. 20-P is clearly not an assignment of the Note. It is an assignment of real property and makes no reference whatever to the Note or any other chose in action.

Nixon and E.J. submit there was no evidence of the assignment of the Note to Gateway, written or parol; that Gateway therefore failed in its burden of showing ownership of the Note, and failing to show ownership of the Note, Gateway had no right to sue thereon.

**2. IF GATEWAY PROVED AT THE TRIAL BY A PREPONDERANCE OF THE EVIDENCE THAT IT WAS THE OWNER AND HOLDER OF THE PROMISSORY NOTE SUED UPON, DID GATEWAY PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SAID PROMISSORY NOTE WAS DUE AND PAYABLE.**

The Note states on its face as follows:

"1. The principal amount of this Note shall be paid six months after the Maker hereof files a final subdivision plat for the following described property in Weber County, Utah:

(here follows legal description)

"2. In the event this Note is not paid within six (6) months after filing of the aforesaid subdivision plat, the amount remaining unpaid on the date six (6) months after filing said subdivision plat shall bear interest from and after the date six (6) months after filing said subdivision plat at the rate of Eight percent (8%) per annum until paid.

"3. Any amounts of principal and interest not sooner paid on this Note within four (4) years after filing the aforesaid subdivision plat shall be due on a date four (4) years after filing said subdivision plat and if not then said Payee may proceed according to law." (Ex. 21-P)

In its Amended Complaint, Gateway alleged that:

"5. All conditions and conditions precedent which would render said agreement due and payable have been performed or have occurred, or the performance or occurrence thereof has been waived and defendants are estopped from demanding or requiring their performance or occurrence;" (R. 57)

This allegation was denied by Nixon and E.J. (R. 63, paragraph 6) This denial put Gateway on its proof by a preponderance of the evidence that (1) all conditions precedent have been performed or occurred, or (2) that performance of such conditions have been waived, or (3) that Nixon is estopped from demanding or requiring this performance.

Gateway did not put on any evidence that a subdivision plat had ever been filed on the property described in the Note. Gateway did not put on any evidence that the filing of the subdivision plat had been waived by Nixon and E.J. Gateway did not put on any evidence that would show Nixon is estopped from requiring performance of the conditions precedent, to-wit: the filing of the subdivision plat. Gateway had the burden of proving the Note was due. It is axiomatic that there is no cause of action on a note until it is due. 70A-3-122(1), Utah Code Annotated, 1953 as amended, provides that "A cause of action against a maker ... accrues (a) in the case of a time instrument on the day after maturity." Gateway failed in its burden of proving the Note even matured and had no cause of action on the Note until "... the day after it matured." (70A-3-122(1), Utah Code Annotated, 1953 as amended)

It should be noted that this point was not raised in argument to the Trial Court. The reason for such failure was that the Trial Court dismissed Gateway's Complaint on Nixon and E.J.'s first argument, making it moot to raise the second argument. However, if this Court for any reason finds Gateway's action should not have been dismissed for the reasons argued in point 1 of this Brief, this Court can and should find that Gateway, after presenting all of its evidence and resting, did not prove the condition precedent to the Note being due and Gateway did not therefore prove its cause of action.

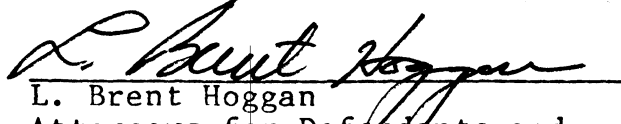
#### CONCLUSION

Gateway put on no evidence of the Note being assigned to it. Had there been such evidence, it surely would have been offered by Gateway. The assignment, Ex. 20-P, was not evidence the Note had been assigned by New to Gateway and is the only evidence offered by Gateway that the Note was assigned to it. And in any event, even if the Note was assigned to it as alleged, Gateway failed to prove the condition precedent to the Note being due, to-wit: the recording of the subdivision plat or the waiver by Nixon of this condition, by a preponderance of the evidence, or at all. The dismissal of Gateway's case was proper and should be affirmed by this Court.

DATED this 7th day of July, 1988.

Respectfully submitted,

OLSON & HOGGAN

  
L. Brent Hoggan  
Attorneys for Defendants and  
Respondents

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct  
copies of the foregoing Brief of Respondents to:

Lowell V. Summerhays  
Law Offices of Lowell V. Summerhays  
4609 South State Street  
Murray, Utah 84107

postage prepaid in Logan, Utah, this 7th day of July, 1988.

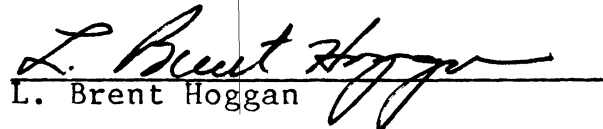
  
L. Brent Hoggan

EXHIBIT A

A G R E E M E N T

Agreement made this 20 day of November, 1978, between JOHN NEW and ASSOCIATES, INC., a Utah corporation, hereinafter referred to as Seller and NIXON and NIXON INC., a Utah corporation, hereinafter referred to as Buyer.

RECITALS

1. Seller has right title and interest to certain real property described more particularly in Exhibit "A", made a part hereof by this reference.

2. Buyer desires to purchase the same for the purpose of building a subdivision.

Now therefore it is agreed and covenanted between the parties as follows:

1. Buyers will pay the redemption price necessary to redeem the property and interest of John New and Associates in the approximate sum of Seventy Six Thousand Nine Hundred Twenty Eight Dollars and Seventy-Three Cents (\$76,928.73).

2. Buyer shall convey to Seller title to the describe property, free and clear of all liens and shall provide for Buyer a policy of title insurance, insuring the title of Buyer.

3. Buyer shall use best efforts to prepare a subdivision plat and proceed with engineering and development of the property at a commercially reasonable speed.

4. Six months from the filing of the final plat, Buyer shall pay to Seller the difference between the redemption price paid initially and One Hundred and Thirty Thousand Dollar (\$130,000.00).

5. In the event, it becomes necessary to fence or realign the millstream creek, in order to meet F.H.A. standards and approval for funding, such realignment or fencing will be

EXHIBIT "A"

done by Seller at Seller's expense or if Seller is unable to do the necessary work within Thirty days from written notice, Buyer may do work and deduct the expense from the purchase price.

6. In the event, any assessments, liens or encumbrances that exist or are subsequently disclosed to exist at the time of this agreement that necessitate extra payments from Buyer to develop the subdivision, such sums shall be deducted from the balance of the purchase price owed Seller by Buyer.

7. Buyer shall make all normal improvements and meet all normal improvement costs, associated with development of the property.

8. In the event, Buyer does not pay Seller the amount of money due and payable six months from the filing of the final subdivision plat, the amount of money then due and owing shall bear interest at the rate of Eight percent (8%).

9. Buyer shall execute a note in favor of Seller consistant with the terms of this agreement. In the event, Buyer has not paid the Seller the amounts due and payable hereunder within four years from the filing of final plat, the note shall be in default and Seller may proceed according to law.

10. The Buyer has the option to require Seller to purchase the 2.45 acres described in Exhibit "A" as parcel two, at the sum of Fifteen Thousand Five Hundred Eighty Nine Dollars and Eight Two Cents (\$15,589.82). This sum represents the repurchase price of the 2.45 acres. It is the intent of the parties that the option to require Seller to rebuy shall bear the identical price per acre that Buyer pays to Seller. In the event, there are adjustments in the purchase price due to expenses incurred with realignment or fencing of the millstream creek, or in the event, there are unknown liens or assessments, these adjustments are to be reflected in the price required of Seller for repurchasing the 2.45 acres. Buyer must exercise this right within six months after filing of the final plat.

11. In the event, Buyer sells the property, the note to Seller will become due and payable.

12. It is the intent of the parties to meet F.H.A. requirements for financing. If there are any extraordinary F.H.A. requirements beyond Ogden City requirements, Seller may be required to pay these additional costs up to Seven Thousand Five Hundred Dollars (\$7,500.00). In the event, Buyer determines the development is untenable, Buyer may require Seller to rebuy the property for One Hundred Thousand Dollars (\$100,000.00).

13. Time is of the essence to this agreement.

DATED this 20 day of November, 1978.

NIXON and NIXON INC.,

By: E. J. Nixon

E. J. Nixon

JOHN NEW and ASSOCIATES

By: John New

John New, President

STATE OF UTAH           )  
                              :SS  
COUNTY OF WEBER       )

On the 20 day of November, 1978, personally appeared before me John New, who being duly sworn did say that he is the President of John New and Associates and that said instrument was signed in behalf of said John New and Associates, by authority of its bylaws and said John New acknowledged to me that said John New and Associates executed the same.

[Signature]  
NOTARY PUBLIC  
Residing at: [Address]  
My Commission Expires: 5/11/81



STATE OF UTAH                    )  
                                      :ss  
COUNTY OF WILKINSON            )

On the \_\_\_\_ day of November, 1978, personally appeared  
before me E. J. Nixon, who being duly sworn did  
say that he is an officer of Nixon and Nixon Inc., and that  
said instrument was signed in behalf of said Nixon and Nixon  
Inc., by authority of its bylaws and said E. J. Nixon,  
acknowledged to me that said Nixon and Nixon Inc., executed  
the same.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing at: / , /  
My Commission Expires: 6/11/81

## EXHIBIT A

### PARCEL 1:

Part of the Southwest Quarter of Section 17, and the Southeast Quarter of Section 18, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point on Ogden City Coordinates North 209+99.49, East 45+90.45 on the East right-of-way line of the Oregon Short Line Railroad, said point given as 13.30 chains West and 79.2 feet North of the Southeast corner of said Section 18; and running thence North 1°30' East 620.00 feet and North 0°29'30" East 446.43 feet along said railroad right-of-way to Ogden City Coordinates North 220+65.85, East 45+92.52 (being the centerline of 7th Street extended), thence South 89°09'45" East 809.38 feet to the East line of Section 18 (Ogden City Coordinates North 220+67.68, East 54+01.97), thence South 0°50'15" West 33 feet; thence South 89°09'45" East 198.0 feet; thence South 0°58'30" West 822.73 feet to a fence corner; thence North 64°00' West 718.19 feet; thence South 25°09'15" West 282.80 feet along fence; thence South 3°35'09" West 258.05 feet; thence North 89°17'49" West 231.0 feet to the point of beginning.

### PARCEL 2:

Part of the Southeast Quarter of Section 18, Township 6 North, Range 1 West, Salt Lake Meridian, U.S. Survey: Beginning at a point North 0°58'34" East 1143.57 feet and North 89°09'45" West 455.4 feet from the Southeast corner of said Quarter Section; and running thence North 89°09'45" West 353.98 feet to the East line of Oregon Shortline Railroad right-of-way; thence North along said right-of-way line 455 feet, more or less, to the center of Mill Creek; thence South 64°53' East 88.8 feet along said center of Mill Creek; thence Southeasterly along a channel of said Mill Creek to the point of beginning.

[7, 8] Appellant argues that she was not bound to perform because the closing was not held on the September 1, 1980, date fixed in the earnest money agreement. The general rule with regard to contracts for the sale of land is that time is not of the essence unless the parties expressly indicate otherwise or the circumstances surrounding the transaction necessarily imply that the parties intended timeliness of performance to be of paramount concern. *Hing Bo Gum v. Nakamura*, 57 Hawaii 39, 549 P.2d 471 (1976); *Ficke v. Alaska Airlines, Inc.*, Alaska, 524 P.2d 271, 277-78 & n. 4 (1974); *Russell v. Ferrell*, 181 Kan. 259, 311 P.2d 347 (1957); *Dillard v. Ceaser*, 206 Okla. 304, 243 P.2d 356 (1952); *Loyd v. Southwest Underwriters*, 50 N.M. 66, 169 P.2d 238 (1946). In this case, the record contains no evidence that the parties intended time to be of the essence in the performance of the earnest money agreement. The terms of the agreement do not so state, such as by requiring a forfeiture of the deposit or an avoidance of the contract if the deadline were not met. Appellant makes no showing that she would have suffered irreparable harm if the property were not closed on the stated date. Indeed, her own delaying actions indicate otherwise.

[9] Parties to a contract are obliged to proceed in good faith and to cooperate in the performance of the contract in accordance with its expressed intent. One party cannot by willful act or omission make it impossible or difficult for the other to perform and then invoke the other's nonperformance as a defense. *Ferris v. Jennings*, Utah, 595 P.2d 857, 859 (1979); *Zion's Properties, Inc. v. Holt*, Utah, 538 P.2d 1319, 1321 (1975). The court did not err in requiring appellant to execute the documents necessary to close the sale or in later authorizing another to do so.

The orders appealed from are affirmed. Costs to respondent.

HALL, C. J., STEWART and HOWE, and RONALD O. HYDE, District Judge, concur.

NIXON AND NIXON, INC., Plaintiff  
and Appellant,

v.

JOHN NEW & ASSOCIATES, INC.,  
Defendant and Respondent.

No. 16989.

Supreme Court of Utah.

Jan. 28, 1982.

Purchaser filed an action seeking specific performance of a contract to purchase real estate. The Second District Court, Weber County, Calvin Gould, J., found that the contract was too vague for specific performance. Appeal was taken. The Supreme Court, Stewart, J., held that the failure to specify the time for performance by the vendor did not render the contract too vague to be specifically enforced in favor of the purchaser.

Reversed and remanded.

#### 1. Contracts ⇐147(1)

Contracts are to be construed in light of reasonable expectations of parties as evidenced by purpose and language of contract.

#### 2. Contracts ⇐9(1)

Contract need not provide for every collateral matter or possible contingency.

#### 3. Specific Performance ⇐28(3)

Failure to specify time for performance by vendor in contract for purchase of real estate did not preclude specific performance in favor of purchaser since, when no time is agreed upon, general rule requires completion within reasonable time under all circumstances, and, therefore, agreement was sufficiently certain in its essential terms and obligations and rights of parties were adequately defined to support specific performance.

L. Brent Hoggan of Olson, Hoggan & Sorenson, Logan, for plaintiff and appellant.

Richard Richards, Ogden, for defendant and respondent.

STEWART, Justice:

Plaintiff, Nixon and Nixon, Inc. (the "Nixons"), purchaser of real estate, sought specific performance of a contract to purchase approximately twenty acres of undeveloped real estate located in Weber County, Utah. The trial court found the contract too vague for specific performance without specifying which provision or provisions were faulty for that reason. Judgment was entered restoring the parties to their status before the agreement. Plaintiff appeals.

John New, seller, had previously mortgaged the property to Commercial Security Bank. After his default on the mortgage, the bank foreclosed the mortgage on the property. On November 20, 1978, the last day of the six-month redemption period, Nixon & Nixon, Inc., a real estate development corporation, agreed to buy the property for \$130,000. Jack Nixon and his father, Ezra J. Nixon, Sr., were the principal stockholders of the plaintiff, Nixon & Nixon, Inc.

Pursuant to an agreement between the Nixons and John New, the Nixons initially paid the bank \$76,928.73, the amount necessary to redeem defendant's foreclosed property. Also, Nixon contracted to prepare a subdivision plat and to proceed with engineering and development of the property at a commercially reasonable speed, to pay the difference between the purchase price and the redemption price six months from the final plat filing, and to make all normal improvements and pay all normal improvement costs associated with the property development. If Nixon did not pay New & Associates the amount due and payable six months from the filing of final subdivision plat, the money then due and owing was to bear interest at the rate of 8%. The contract further provided that if Nixon did not pay New & Associates the contract price within four years from filing of the final

plat, "the note shall be in default and New & Associates may proceed according to law."

New & Associates' duties were to convey title to the described property clear of all liens; to provide the Nixons a policy of title insurance insuring the buyer's title; to be responsible for the realignment or fencing of the Millstream Creek if it proved necessary, or if the work were not done within the specified time, to permit the Nixons to do the work and deduct the expenses from the purchase price. Nixons were to be responsible for any extraordinary FHA requirements beyond Ogden City requirements of up to \$7,500. The contract allowed the Nixons to require John New to repurchase the property for \$100,000 in the event the Nixons determined that development was practical.

Jack Nixon contacted surveyors and engineers and had initial sketches drawn as preliminary steps. As of May 1979, however, he had made no improvements on the property. At trial he explained why development had not commenced. According to him, the death of Ezra Nixon caused an initial setback in the project and the onset of the winter months created conditions not conducive to the development and improvement of raw ground. More importantly, the evidence established that it would be commercially unfeasible for a buyer to subdivide and improve a raw piece of property before clear title was tendered. As of May 1979, despite a contract term making time of the essence, New had not tendered a deed of clear title. That same month, Jack Nixon discovered that New, on his own, had begun to subdivide the property.

Jack Nixon testified he was ready, willing, and able to execute a note in accordance with the terms of the contract but that he had not received a deed or a title insurance policy from defendant as required by the contract. Mr. Hughes, New's attorney, also testified that property development and the expenditure of large sums of money could not reasonably be expected until clear title was tendered.

In holding for New & Associates on the ground that the contract was too vague to be enforceable, the court did not delineate any specific ambiguity. The sole finding on ambiguity is in the following language:

[t]he contract is so ambiguous that the rights of the defendant cannot be ascertained or enforced except at the whim or caprice of the plaintiff, and to enforce the contract as the plaintiff now requests would be to deprive the defendant of any equity he may have had in the property.

[1-3] Contracts are to be construed in light of the reasonable expectations of the parties as evidenced by the purpose and language of the contract. A contract need not provide for every collateral matter or possible contingency. *Reed v. Alvey*, Utah, 610 P.2d 1374 (1980); *Pitts v. Marsh*, 222 Kan. 586, 567 P.2d 843 (1977). In the instant case, there is no claim the contract is uncertain as to parties, subject matter, or consideration. Failure to specify time for performance will not preclude specific enforcement since when no time is agreed upon, the general rule requires completion within a reasonable time under all circumstances. *Ferris v. Jennings*, Utah, 595 P.2d 857 (1979). In light of John New's failure to tender a document of title to Jack Nixon, there is no merit in the argument that Nixon did not proceed in good faith in performing the contract. Under established principles of law, the agreement was sufficiently certain in its essential terms and the obligations and rights of the parties were adequately defined to support specific performance. *Reed v. Alvey*, *supra*.

Because the only issue argued was the vagueness of the contract, we decline to comment on any other aspects of the controversy between the parties, and leave all other matters to the trial court. Reversed and remanded for further proceedings. Costs to appellant.

HALL, C. J., and HOWE and OAKS, JJ., concur.

MAUGHAN, J., heard arguments but died before the opinion was filed.

STATE of Utah, Plaintiff and  
Respondent,

v.

Serhio H. GONZALES, Defendant  
and Appellant.

No. 17657.

Supreme Court of Utah.

Jan. 29, 1982.

Defendant was convicted in the Second District Court, Davis County, Douglas L. Cornaby, J., of attempted rape on an eight-year-old minor, and he appealed. The Supreme Court held that: (1) defendant's appointed counsel was not incompetent, and (2) other claims did not rise to degree of prejudiciality that would warrant reversal.

Affirmed.

Howe, J., concurred in result and filed opinion.

#### 1. Criminal Law ⇐641.13(5)

Hindsight indicated that had defendant taken his appointed counsel's advice to plead guilty to a lesser charge involving a lesser penalty, he would have fared better than he did by going to trial, and record did not otherwise show that appointed counsel, who was fired after he had represented defendant for about four months at preliminary and pretrial hearings, was incompetent.

#### 2. Criminal Law ⇐1165(1)

Despite defendant's urgings that he was denied his Fourteenth Amendment constitutional right of "due process," his Sixth Amendment right of counsel, his right to plead "alibi" defense and new trial, based on newly discovered evidence, record disclosed no error as to any alleged constitutional departures, lack of sufficient time for preparation or assertion of alibi, and cer-

ORIGINAL

PROMISSORY NOTE

For value received NIXON & NIXON, INC., a Utah Corporation agrees to pay to JOHN NEW & ASSOCIATES, INC., a Utah Corporation, at such place as Payee may in writing direct and in lawful money of the United States of America, the sum of \$53,071.27 as follows:

1. The principal amount of this Note shall be paid six months after the Maker hereof files a final subdivision plat for the following described property in Weber, County, Utah:

Part of the Southwest Quarter of Section 17, and the Southeast Quarter of Section 18, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point on Ogden City Coordinates North 209+99.49, East 45+90.45 on the East right of way line of the Oregon Short Line Railroad, said point given as 13.30 chains West and 79.2 feet North of the Southeast corner of said Section 18; and running thence North 1°30' East 620.00 feet and North 0°29'30" East 446.43 feet along said railroad right of way to Ogden City Coordinates North 220+65.85, East 45+92.52 (being the centerline of 7th Street extended), thence South 89°09'45" East 809.38 feet to the East line of Section 18 Ogden City Coordinates North 220+65.68, East 54+01.97), thence South 0°50'15" West 33 feet; thence South 89°09'45" East 198.0 feet; thence South 0°58'30" West 822.73 feet to a fence corner; thence North 64°00' West 718.19 feet; thence South 25°09'15" West 282.80 feet along fence; thence South 3°35'09" West 258.05 feet; thence North 89°17'49" West 231.0 feet to the point of beginning.

2. In the event this Note is not paid within six (6) months after filing of the aforesaid subdivision plat, the amount remaining unpaid on the date six (6) months after filing said subdivision plat shall bear interest from and after the date six (6) months after filing said subdivision plat at the rate of Eight percent (8%) per annum until paid.

3. Any amounts of principal and interest not sooner paid on this Note within four (4) years after filing the aforesaid subdivision plat shall be due on a date four (4) years after filing said subdivision plat and if not then said Payee may proceed according to law:

Payee may, at its option:

A. Pay any sums necessary to remove liens and encumbrances against the property described above, to the extent such liens



and encumbrances are placed against title to said property by the acts or neglect of Payee or those claiming by, under or through Payee or were against title to said property on November 20, 1978, and may deduct the amount so paid from the amount of this Note.

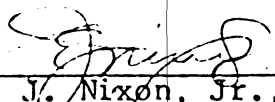
B. Take such action to clear title to the property described in paragraph 1 above of liens and encumbrances of record against said property on November 20, 1978, or placed thereon by the acts or by reason of the neglect of Payee or those claiming by, under or through Payee and deduct the expenses and costs incurred by Maker in so doing from the amount of this Note.

C. Perform any covenant to be performed by Payee by the terms of that certain Agreement dated November 20, 1978 between Payee herein as Seller and Maker herein as Buyer and deduct the cost and expense of doing so from the amount of this Note.

This Note is given pursuant to the terms of a Judgment and Decree of the Honorable Calvin Gould entered December 26, 1983 in Civil Case #72745 in the District Court of Weber County, Utah, to which Judgment and Decree reference is made for the terms, provisions and conditions thereof.

DATED this 30th day of December, 1983.

NIXON & NIXON, INC.

By   
E. J. Nixon, Jr., President



## ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned for and in consideration of the sum of  
TEN and no/100----- (\$10.00)----- Dollars,  
paid by ----- GATEWAY DEVELOPMENT COMPANY -----  
of ----- OGDEN -----, County of ----- WEBER -----, State of  
----- UTAH -----, receipt whereof is hereby acknowledged, has sold, assigned, and trans-  
ferred and by these presents do sell, assign and transfer unto the said GATEWAY  
DEVELOPMENT COMPANY -----.

Part of the Southeast Quarter of Section 18, Township  
6 North, Range 1 West, Salt Lake Meridian, U.S. Survey:  
Beginning at a point North 0°58'34" East 1143.57 feet  
and North 89°09'45" West 455.4 feet from the Southeast  
corner of said quarter section; and running thence  
North 89°09'45" West 353.98 feet to the East line  
of Oregon Shortline Railroad Right-of-way; thence  
North along said Right-of-Way line 455 feet, more  
or less, to the Center of Mill Creek; thence South  
64°53' East 88.8 feet along said Center of Mill Creek;  
thence Southeasterly along a channel of said Mill  
Creek to the point of beginning.

IN WITNESS WHEREOF, I ----- have hereunto signed my ----- name this 21 day  
of ----- April -----, 1980.

JOHN NEW AND ASSOCIATES, INC.-----

----- John New -----  
SECRETARY TREASURE

STATE OF Utah }  
COUNTY OF Salt Lake } ss.

On this 21<sup>st</sup> day of April, 1980, personally appeared before me  
----- John New -----  
the signer of the above instrument who duly acknowledged to me that ~~he~~ executed the same

----- Stanley O. -----  
Notary Public  
Residing at: Salt Lake County

My commission expires:  
February 20, 1982