

2008

Miller Family Real Estate, LLC, a Utah limited liability company v. Saied Hajizadeh, an individual : Appellant's Reply Brief

Utah Court of Appeals

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MILLER FAMILY REAL ESTATE,	:	
LLC, a Utah limited liability	:	
company,	:	Utah Court of Appeals No. 20080365-CA
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
SAIED HAJIZADEH, an individual,	:	
	:	Trial Court Case No. 070906776
Defendant-Appellant.	:	Trial Judge: Hon. John Paul Kennedy
	:	

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ARGUMENT

I. PLAINTIFF BUYER IS NOT ENTITLED TO "INFERENCES"

Plaintiff Buyer asserts that it is entitled to "inferences" in this court's review of the trial court's refusal to dismiss plaintiff's complaint with prejudice.¹ That principle does not apply here, however, because Plaintiff Buyer is the *appellee* here--and it does not dispute that the trial court *correctly* granted Defendant-appellant Seller's motion to dismiss.

Instead, the two issues before this court involve the logically subsequent--and purely legal--questions of (1) whether the parties' contract contained conditions precedent which were mandatory preconditions on plaintiff's ability to sue Defendant Seller² and (2) whether the trial court therefore should have dismissed plaintiff's complaint with prejudice.³

II. PLAINTIFF BUYER ADMITS IT FAILED TO PERFORM THE MANDATORY CONDITIONS PRECEDENT

Plaintiff Buyer admits that it did not perform the mandatory conditions precedent of (1) providing Defendant Seller with notice of dispute and request for mediation; (2) conducting such mediation within 30 days of such notice;⁴ and (3) concluding such

¹. Opp. Mem. p.1.

². Interwest Const. v. Palmer, 923 P.2d 1350, 1358-59 (Utah 1996)("If a contract is unambiguous, a trial court may interpret the contract as a matter of law, and we review the court's interpretation for correctness.").

³. Foster v. Montgomery, 2003 UT App 405, ¶11, 82 P.2d 191 (Whether there was failure of conditions precedent, where contract interpretation does not require resort to extrinsic evidence, is matter of law, "and on such questions we accord the trial court's interpretation no presumption of correctness.").

⁴. Plaintiff Buyer erroneously attributes to Defendant Seller the contention that such mediation was required to occur after plaintiff *became aware* of a dispute. Opp. Mem. p.5.

mediation prior to suing in court.⁵ Instead, Plaintiff Buyer admits that it did not offer to mediate the dispute until *after* it had filed suit and had been served with Defendant Seller's motion to dismiss plaintiff's complaint.⁶

Therefore, since Plaintiff Buyer admits it did not perform such conditions precedent, the only questions for this court are whether such conditions were mandatory under the parties' contract, and whether such failure deprives plaintiff of the ability to sue. For the reasons set out below, this court should answer both questions in the affirmative.

III. THE PARTIES' CONTRACT UNAMBIGUOUSLY IMPOSED MANDATORY CONDITIONS PRECEDENT WHICH PLAINTIFF BUYER DID NOT PERFORM

Plaintiff Buyer argues that the parties' Real Estate Purchase Contract (REPC) did not impose mandatory conditions precedent to suit.⁷ On the contrary, the REPC expressly and unambiguously provides that mediation was required to occur in a timely manner, and that if not, then enforcement of the contract is forever barred.⁸ Courts "will not make a better contract for the parties than they have made for themselves"⁹ and courts will not extricate

⁵. Opp. Mem. p.3, ¶ 8.

⁶. Id.

⁷. Opp. Mem. p.5

⁸. Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428 ("If the language within the four corners of [a] contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." quoting Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134.).

⁹. Bakowski v. Mountain States Steel, Inc., 2002 UT 62, ¶19, 52 P.3d 1179(company held liable to secure insurance on commencement date of lease, even though it did not yet have possession; "[Court will not] avoid the contract's plain language to achieve an

someone from circumstances which they themselves have created.¹⁰ Plaintiff Buyer is bound by the contract which it drafted and signed.¹¹ Since Plaintiff Buyer did not fulfill the conditions precedent, it is barred from enforcing the contract.

A. The REPC imposed mandatory conditions precedent to Plaintiff Buyer's right to sue

Plaintiff Buyer contends the REPC "only addresses the sequence in which a party shall exercise its remedies and the speed with which a requested mediation must take place."¹² On the contrary, the REPC imposed mandatory conditions precedent on Plaintiff's right to sue.

Paragraph 15 of the contract of sale between the parties provides in relevant part:

15. DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract ... **shall first be submitted to mediation... . . . Mediation shall take place within 30 days after notice by either party of the existence of a dispute or claim.** (emphasis added)

(a) Once Plaintiff Buyer became aware that Defendant Seller allegedly breached, Plaintiff Buyer was required to provide Defendant Seller with notice as a condition precedent to the Defendant Seller's obligation to participate in mediation; (b) such mediation was required to occur within 30 days of such notice, thus making the 30-day deadline an

'equitable' result.").

¹⁰. Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited, 2001 UT 100, ¶ 12, 40 P.3d 581 ("equitable relief should not be used to 'assist one in extricating himself from circumstances which he has created'" (quoting *Battistone v. Am. Land & Dev. Co.*, 607 P.2d 837, 839 (Utah 1980))).

¹¹. Wilburn v. Interstate Elec., 748 P.2d 582, 585-86 (Utah Ct. App. 1988)(a contract is construed against the drafter).

¹². Opp. Mem. p.6.

additional condition precedent on the Defendant Seller's obligation to submit the dispute to mediation; and (c) mediation was required to occur, and that was a further condition precedent on the Plaintiff Buyer's right to sue. Instead, Plaintiff Buyer immediately sued.

Paragraph 16 of the contract provides:

"Where a Section of this Contract provides a specific remedy, the parties intend that the remedy **shall be exclusive regardless of rights which might otherwise be available under common law.**" (emphasis added)

Since Plaintiff Buyer failed to perform the conditions precedent to its right to sue under Paragraph 15, the express, unambiguous terms of Paragraph 16 provide that Plaintiff Buyer therefore has no right to sue.¹³

B. That the REPC forever prohibits Plaintiff Buyer from filing a lawsuit asserting any claim relating to the REPC is consistent with the *intent* of the parties

Numerous provisions in the contract confirm that the REPC forever prohibits Plaintiff Buyer from filing a lawsuit asserting any claim relating to the REPC. (1) The phrase "The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit and the breach or termination of this Contract" at the beginning of Paragraph 15 is broad and all-encompassing of all claims Plaintiff Buyer

¹³. "Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists. *See* 3A Arthur L. Corbin, *Corbin on Contracts* § 628, at 16 (1960). Failure of a material condition precedent relieves the obligor of any duty to perform. *See id.* § 630, at 20-21." *Harper v. Great Salt Lake Council, Inc.*, 1999 UT 34, ¶ 14, 976 P.2d 1213; see also *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153.

might assert. (2) The word "shall" is mandatory and appears in several places in Paragraph 15.¹⁴

(3) The clause, "If mediation fails, the procedures applicable and remedies available under this **Contract** shall apply" presupposes that mediation must occur *before* any other "procedures" or "remedies" under the contract can be invoked. (4) The phrase "Nothing in this Section shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court," appears *after* the mandatory provisions for mediation, and hence anticipate that mediation must occur *before* such remedy is available to the buyer.

(5) The proviso, "provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation" anticipates that mediation is ongoing *before* any buyer action for specific performance might be brought. (6) The provision that "Also the parties may agree in writing to waive mediation" appearing at the end of Paragraph 15 shows that the only way in which the mandatory obligation to invoke mediation may be avoided is if the parties expressly agree to do so in writing.

(7) The phrase in Paragraph 16 that "Where a Section of this Contract provides a specific remedy, the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law" is general and all-encompassing,

¹⁴. See e.g., Diener v. Diener, 2004 UT App 314, ¶ 12, 98 P.3d 1178: Ordinarily, the use of the word "shall" in a statute creates a mandatory condition, eliminating any discretion on the part of the courts. See, e.g., Office of the Guardian Ad Litem v. Anderson, 1999 UT App 251, ¶ 10, 987 P.2d 611; Keith v. Rizzuto, 212 F.3d 1190, 1193 n. 3 (10th Cir.2000) ("It is a basic canon of statutory construction that the use of the word 'shall' indicates a mandatory intent." (quoting United States v. Myers, 106 F.3d 936, 941 (10th Cir.1997))).

thus precluding all claims Plaintiff Buyer might now seek to assert.

IV. THE SHORT STATUTE OF LIMITATIONS IS PERFECTLY ENFORCEABLE AND REASONABLE; PLAINTIFF BUYER'S CASES ARE DISTINGUISHABLE

Plaintiff Buyer contends that enforceability of the short statute of limitations, (which Plaintiff Buyer itself inserted into the parties' contract), is not supported by applicable law.¹⁵ However, the short statute of limitations is perfectly enforceable and reasonable, and all of the cases cited by Plaintiff Buyer ostensibly to the contrary are distinguishable.

A. The short contractual statute of limitations is perfectly enforceable and reasonable

Plaintiff Buyer argues the parties could not properly contract for a short statute of limitations.¹⁶ In Clark v. Lund, 55 Utah 284, 184 P. 821, 822 (1919), the Utah Supreme Court held: "[It is a] well-established proposition [that] parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations... ." That proposition is prevalent throughout the country and in the United States Supreme Court.¹⁷ Thus, the 30-day statute of limitations the parties imposed on themselves on their right to sue is simply a function of their freedom to contract.

Moreover, it was perfectly *reasonable* for the parties to impose the 30-day statute of limitations for mandatory submittal of the dispute to mediation as a condition precedent to

¹⁵. Opp. Mem. pp.6-9.

¹⁶. Opp. Mem. pp.5-6.

¹⁷. See Nuhome Investments, LLC v. Weller, 2003 WY 171, ¶¶ 8-16, 81 P.3d 940 (citing Clark v. Lund from Utah; reviewing cases throughout the country and in the United States Supreme Court).

the parties' right to sue. "The overall purpose of...mediation...is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases."¹⁸ In Utah, mediation as a dispute resolution mechanism is highly favored as a matter of public policy.¹⁹ Indeed, Utah statutes provide for **mandatory** mediation in many and varied settings, including: (1) takings and eminent domain,²⁰ (2) divorce,²¹ (3) medical malpractice,²² (4) cases in the trial courts, where a Utah judge or commissioner may refer "to mediation any case for which...[there is an] established program,"²³ and (5) cases on appeal.²⁴

Mandatory mediation as a condition precedent to the right to sue is thus perfectly reasonable. And the parties contracted that such mediation was required to occur within the 30-day statute of limitation set by the parties. Plaintiff Buyer failed to meet that deadline and

¹⁸. Dessart v. Burak, 252 Mich. App. 490, 498, 652 N.W.2d 669, 674 (2002).

¹⁹. See generally UTAH CODE §§ 78B-10-101--114(Utah Uniform Mediation Act).

²⁰. UTAH CODE § 13-43-204 (2)("In takings or eminent domain settings, if]...mediation is requested by a private property owner ...the government entity or condemning entity **shall** participate in the mediation...as if the matter were ordered to mediation...by a court.")(emphasis added).

²¹. UTAH CODE § 30-3-39(1)("There is established a **mandatory** domestic mediation program to help reduce the time and tensions associated with obtaining a divorce.")(emphasis added).

²². Utah Code § 78B-3-421(b)(i)("When a medical malpractice action is arbitrated, the action **shall**...include any one or more of the following hen requested by the patient before an arbitration hearing is commenced:...**mandatory mediation**... .")(emphasis added).

²³. UTAH CODE § 78B-6-207(1).

²⁴. UTAH R. APP. P. 28A(d)(participation in appellate-court ordered mediation is **mandatory**).

is now precluded from suing. Similarly, in Lange v. Schilling,²⁵ the California Court of Appeal recently prohibited recovery of attorney fees for failure to timely mediate a dispute prior to the filing of suit. As that court had explained in a prior case:

"[The] public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees. ... **[Had] the parties resorted to mediation, their dispute may have been resolved in a much less expensive and time-consuming manner.**"²⁶

Thus, Plaintiff Buyer did not timely initiate mediation, and is now precluded from suing.

B. Plaintiff Buyer's cases are distinguishable

Plaintiff Buyer cites ²⁷ State v. Ison, in which the court stated that it was "aware of no contract law authority, and the State has provided us with none, to support the proposition that a party's failure to pursue and agreed-upon alternative dispute resolution method would excuse the breach that created the dispute."²⁸ As set out above, there is ample authority, which the State of Utah in Ison apparently did not bring to the court's attention. Moreover, in Ison, the court simply mentioned that the agreement "merely required mediation as a condition to litigation,"²⁹ but the court did not set out the specific contractual provisions involved. In contrast, Paragraphs 15 and 16 here **specifically** provide that (1) notice, (2)

²⁵. Lange v. Schilling, 163 Cal.App.4th 1412, 78 Cal.Rptr.3d 356 (May 28, 2008).

²⁶. Leamon v. Krajewicz, 107 Cal.App.4th 424, 433, 132 Cal.Rptr.2d 362, 368 (2003)(emphasis added).

²⁷. Opp. Mem. p.7.

²⁸. State v. Ison, 2006 UT 26, ¶ 50, 135 P.3d 864.

²⁹. State v. Ison, 2006 UT 26, ¶ 50, 135 P.3d 864.

mediation within 30 days of such notice, and (3) the conclusion of mediation, are all **express** conditions precedent on Plaintiff's right to sue. Since Plaintiff Buyer failed to perform such conditions, its right to sue can never arise.

The other cases cited by Plaintiff Buyer, most of which are *unreported decisions*, are also off-point. In Quick Print of New Orleans, Inc. v. Danka Office Imaging Co.,³⁰ the parties' contract did not contain provisions similar to Paragraphs 15 and 16 of the contract here. Thus, the Quick Print case did not address questions of express, specific, conditions precedent to the right to sue, as this case involves. In Haertl Wolff Parker, Inc. v. Howard S. Wright Const. Co.,³¹ the parties' contract also had no provisions similar to Paragraphs 15 and 16.

In Willis Corroon Corp. of Utah, Inc. v. United Capitol Ins. Co.,³² the condition precedent to a lawsuit was merely the expiration of a waiting period. In our case, the conditions precedent require affirmative action: provision of a notice and the conducting of mediation within a 30-day period after the provision of such notice. Thus, in Willis all that the agreement demanded was *inaction*, as a condition to being able to sue. But in our case, *affirmative* obligations were imposed on Plaintiff-buyer's right to sue. Also, the agreement in Willis did not contain provisions similar to Paragraphs 15 and 16 of the contract of the parties in this dispute. Thus, Willis did not address questions of express, specific, conditions

³⁰. 2004 WL 1488656 (E.D.La. 2004), Not Reported in F.Supp.2d.

³¹. 1989 WL 151765 (D.Or. 1989), Not Reported in F.Supp.

³². 1998 WL 30069 (N.D.Cal. 1998), Not Reported in F.Supp.

precedent to the right to sue, as this case involves.

Finally, in Estabrook v. Piper Jaffray Companies,³³ an employee filed a suit for specific performance, breach of contract, and declaratory judgment after being terminated. The employer moved to compel arbitration. The employee did not contest that his employment contract with the employer required arbitration, but contended that subsequent stock-compensation agreements revoked such provisions. The court disagreed and mandated arbitration. Since the employee conceded that the employment contract mandated arbitration, the court did not consider the issue. Moreover, neither the original employment contract nor the subsequent stock-compensation agreements contained provisions similar to Paragraphs 15 and 16 of the contract herein. Thus, again, the Estabrook case did not address questions of express, specific, conditions precedent to the right to sue, as this case involves.

V. DEFENDANT SELLER DID NOT "WAIVE" MEDIATION

Plaintiff Buyer argues that Defendant Seller waived mediation.³⁴ First, by that time, Plaintiff Buyer had no right to enforce the REPC...by mediation or otherwise. Second, also by that time, Defendant Seller had already filed a motion to dismiss, expressly denying that Plaintiff Buyer had any right to enforce the REPC. No "waiver" can be found.

VI. PLAINTIFF BUYER IS NOT DEPRIVED OF ITS "DAY IN COURT"

Plaintiff Buyer suggests that if it is not allowed to sue to enforce the REPC, it will be

³³. 492 F.Supp.2d 922 (N.D. Ill 2007).

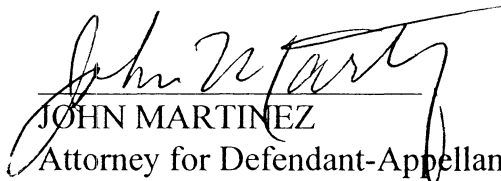
³⁴. Opp. Mem. p.9, n.3

deprived of its "day in court" under the Open Courts provision of the Utah Constitution.³⁵ A "day in court," however, means only that a court has applied the law to the facts.³⁶ By dismissing Plaintiff Buyer's complaint with prejudice, the trial court would have afforded Plaintiff Buyer all of the "day in court" to which Plaintiff Buyer is entitled.

CONCLUSION

The district court's dismissal of Plaintiff Buyer's lawsuit without prejudice should be reversed and the district court should be ordered to dismiss Plaintiff Buyer's lawsuit with prejudice. Defendant Seller should be awarded attorney fees on appeal.

DATED this 1st day of October, 2008.


JOHN MARTINEZ
Attorney for Defendant-Appellant Hajizadeh

³⁵. Opp. Mem. pp.5-6.

³⁶. Daines v. Vincent, 2008 UT 51, ¶ 47, 190 P.3d 1269 ("Daines received rulings on the elements and grounds of his claim based on the trial court's proper application of the relevant law to the facts of the case.").

CERTIFICATE OF SERVICE

Filed **eight** copies of the foregoing, *one of which contains an original signature*, **including a CD in accordance with Utah Supreme Court Standing Order No. 8, Effective May 15, 2008**, with the Clerk of the Utah Court of Appeals:

OFFICE OF THE CLERK OF THE COURT
UTAH COURT OF APPEALS
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84114-0210

and served **two** copies of the foregoing, **including a CD in accordance with Utah Supreme Court Standing Order No. 8, Effective May 15, 2008**, upon the following:

Larry G. Moore, Esq.
Gregory S. Roberts, Esq.
Ray Quinney & Nebeker
36 South State St., Suite 1400
P O Box 45385
Salt Lake City, Utah 84111

via first class mail, postage pre-paid, this 1st day of October, 2008 addressed as set forth above.

