

1978

Ranch Homes , Inc. v. Greater Park City Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

RANCH HOMES, INC.,	:	
Plaintiff-	:	
Respondent,	:	
vs.	:	Case No. 15467
GREATER PARK CITY	:	
CORPORATION,	:	
Defendant-	:	
Appellant.	:	

BRIEF OF APPELLANT

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

Honorable James S. Sawaya, Judge

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FILED

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Clerk, Supreme Court, Utah

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Defendant-	:	
Appellant.	:	

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff, Ranch Homes, brought this action for damages for breach of an option agreement.

DISPOSITION IN LOWER COURT

The first trial was by jury, which found against the defendant, Greater Park City Company. Greater Park City Company thereupon promptly made a Motion for Judgment Notwithstanding the Verdict and, alternatively, for a New Trial. The Honorable Peter F. Leary granted Greater Park City Company's Motion for a New Trial. The new trial was had, without a jury, before the Honorable James S. Sawaya. At the conclusion of the second trial, the Court entered judgment against Greater

Park City Company in the sum of \$42,587.00, together with prejudgment interest in the amount of \$6,196.12 and costs in the amount of \$655.30.

RELIEF SOUGHT ON APPEAL

Greater Park City Company seeks reversal of the judgment or, alternatively, a new trial.

STATEMENT OF FACTS

Ranch Homes is a corporation formed in the summer of 1974. (Transcript of First Trial, Volume 1, page 21, hereinafter 1st Tr., 1 at 21; Transcript of Second Trial, page 24, hereinafter 2d Tr. at 24). James Fahs is plaintiff's president and Grant Kesler and Michael Tuckett are vice-presidents. (1st Tr., 1 at 21 & 43).

On September 3, 1974, Ranch Homes entered into an Option Agreement with Greater Park City Company to purchase approximately 30 acres of undeveloped property in Park City, Utah. (Plaintiff's Exhibit 2 -- unless otherwise noted, all exhibits referred to will be those introduced in the second trial and found at Record on Appeal, page 192, hereinafter R.192). The consideration paid by Ranch Homes for the option was \$10,000. (See paragraph 1 of plaintiff's Exhibit 2). Paragraph 2 of the Option Agreement provided that the option period was to expire at 5:00 p.m. on April 1, 1975. If Ranch Homes elected to exercise the option, it was to give written notice of such election to Greater Park City Company on or

before April 1, 1975. (Paragraph 3).

The Option Agreement contained two purchase prices: \$480,000 if paid in cash on or before the closing date; or, at Ranch Homes' election, \$510,000 payable in installments of \$50,000 on or before the closing date and \$150,000 plus interest on April 1st of 1976, 1977, and 1978. (Paragraph 5).

Ranch Homes elected the installment payment method (plaintiff's Exhibit 1), but did not appear on the closing date to tender the first \$50,000 payment. (1st Tr., 1 at 70; 2d Tr. at 202). The property subsequently passed into the hands of defendant's principal creditor, a third party. (1st Tr., 2 at 107; 2d Tr. at 202).

Throughout most of both trials, Ranch Homes expressed its intent to use the property for an FHA-insured, single-family housing development. (1st Tr., 1 at 33-35; 2d Tr. at 25). The first phase of the proposed development would have entailed the construction of 32 homes, with a sales price in the range of \$54,000 to \$55,000. (1st Tr., 1 at 50; 2d Tr. at 265). The houses would be constructed in a "cluster" around cul-de-sacs. (1st Tr., 1 at 37 & 39; 2d Tr. at 29).

At the conclusion of the first trial, the jury answered a Special Verdict, in which it found that Greater Park City Company had repudiated or breached the Option Agreement, and that Ranch Homes was thereby excused from tendering \$50,000 on the closing date. (R.91). Judge Sawaya made similar findings and conclusions. (R.163). Greater Park City

Company does not contest these findings on appeal. Rather, what Greater Park City Company does dispute is the amount of damages awarded to Ranch Homes and the methods by which the damages were computed.

Judge Sawaya found (Finding No. 13, R.166) that between September 3, 1974, and April 30, 1975, Ranch Homes, in reasonable reliance upon the Option Agreement, expended the sum of \$27,587.00, and through its officers performed services of a value of \$15,000.00, in preparation for performance of the contract, in part performance of the contract, and in planning for the development of the optioned property. These expenditures and services, the Judge found, were of the type contemplated by the contract and were foreseeable by the parties at the time the contract was executed. Id. Interest and costs were added to these reliance damages in the judgment. (See R.168).

ARGUMENT

POINT 1

PLAINTIFF'S EXPENDITURES WERE NOT REASONABLY MADE IN PERFORMANCE OF THE OPTION AGREEMENT OR NECESSARY PREPARATION THEREOF, AND GREATER PARK CITY COMPANY DID NOT HAVE REASON TO FORESEE THEM AS A PROBABLE RESULT OF ANY BREACH WHEN THE OPTION AGREEMENT WAS MADE.

Damages for breach of contract are awarded only when:

"[T]he defendant had reason to foresee [those injuries] as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the

defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury." (Emphasis added).
Restatement of Contracts § 330.

Cf. Pacific Coast Title Ins. Co. v. Hartford Accident & Indemnity Co., 7 Utah 2d 377, 325 P.2d 906 (1958). Also, before reliance damages may be awarded, the amount of plaintiff's expenditures must be found to have been "reasonably made." Restatement of Contracts § 333. If the plaintiff's expenditures are unreasonable and unnecessary for the purpose of carrying out the contract, then they must not be allowed. See United States v. Behan, 110 U.S. 338 (1883).

To sustain the trial court's finding, this Court must concur that the following expenditures, among others, were both foreseeable by defendant at the time the Option Agreement was executed and that they were reasonably made:

1. Expenditures incurred prior to the execution of the Option Agreement on September 3, 1974.
2. Expenditures incurred prior to plaintiff's exercise of the Option on April 1, 1975.
3. Expenditures incurred in designing the housing development in an extraordinary manner with "cluster" housing at the end of cul-de-sac streets, and with unusual planting islands in the middle of each cul-de-sac.
4. Expenditures incurred in the form of

services performed by plaintiff's officers in attempting to obtain loans for the development, and in pursuing FHA financing where conventional financing would allow lower down payments by potential buyers.

5. Expenditures incurred during the option period in the form of services performed by one of plaintiff's officers in drafting architectural plans for the proposed houses, rather than plaintiff's purchasing plans from a design firm for many thousands of dollars less.

6. Expenditures incurred during the option period in the form of services performed by one of plaintiff's officers in preparing completed engineering plans where a simple preliminary plot would have sufficed.

7. Expenditures incurred by plaintiff for logo and brochure design. (Plaintiff's Exhibit 5, Check No. 116).

8. Expenditures incurred in the incorporation of plaintiff and in the drafting of a prior limited partnership agreement.

9. Expenditures incurred in the drafting of final architectural and engineering plans for all phases of development notwithstanding the fact that only Phase I was to be completed

in 1975, and incurred before exercising the option, before receiving FHA approval and before a construction loan was approved.

10. Expenditures incurred for all of the above items even though, as plaintiff finally testified at the conclusion of the Second Trial, a purchaser could have bought a lot from plaintiff and built his own house upon it without using plaintiff's plans!

It is respectfully submitted that these items of damage charged to defendant were neither foreseeable nor reasonable. As the uncontroverted testimony of defendant's expert witness, Mr. Herbert Trayner, a subdivider and licensed general contractor, established, the industry standard for the steps to be taken by a reasonably prudent developer after obtaining an option but before exercising it are as follows:

First, a developer must assure himself that the property can be rezoned if it is not already zoned for the intended use. (2d Tr. at 302-303). The developer must indicate to the zoning authority who owns the property, the number of units per acre which will be constructed upon it, and whether it is going to be single-family, commercial or whatever. (2d Tr. at 303). To effect a zoning change, if it can be done, takes an average of between six to eight weeks. The developer's expenditure of time consists of "a little leg work." (2d Tr. at 306, 316).

In talking with the zoning board, it is helpful to have a preliminary plat showing the configuration of the use to which the developer intends to put the land. No other renderings, working drawings, architectural or engineering plans are needed until after the option is exercised. If a developer has a good working relationship with an engineering firm, they will do a preliminary plat without charge. Otherwise, it will cost around \$500. (2d Tr. at 303-304). Also, with a preliminary plat, a developer can get a reasonably strong commitment from a lender assuming that he can get the zoning he is looking for. There is no need for architectural drawings or completed engineering plans to talk to lenders during the option period. "That's just too much expense to get into at this point." (2d Tr. at 306-307, emphasis supplied.)

During the option period, a developer should also talk to subcontractors to get a preliminary estimate of costs. Estimates for off-site improvements can be based on the preliminary plat. (2d Tr. at 306). For the houses themselves, hiring an architect is just too expensive. Design firms sell housing plans that are current on styles, cost and desirability. Each plan includes six sets of prints, enough to get bids and to build the homes. Each plan costs from \$100 to \$400 per house. Many developers can even avoid this expense since they have their own plan files. (2d Tr. at 307-309).

If a developer decides to qualify for FHA financing, his only need is to get a verbal understanding that FHA would

be interested in underwriting the houses at a certain price range. During the option period it is premature to submit any plans to them. (2d Tr. at 315-316). The FHA will work with a developer on a very preliminary basis since they do not want him to spend any more money than is necessary. (2d Tr. at 325).

The key, therefore, is to keep expenditures to a minimum during the option period. As Mr. Trayner testified:

"With the exception of whatever charge the engineer may have to work a -- work out a preliminary plat and unless the community would require some sort of a filing fee, there shouldn't have to be any costs."
(2d Tr. at 316).

In contrast to the standards of the industry, plaintiff's damages included the following unforeseeable and unreasonable expenditures incurred by plaintiff during the option and, therefore, prior to the time plaintiff had committed to purchase the property. Plaintiff's vice-president and attorney, Grant Kesler, was paid a lump sum of \$2,500 for all legal services rendered. (1st Tr., 1 at 91-92; 2d Tr. at 121-122 & 127-128; plaintiff's Exhibit 5, Check No. 110). This expenditure, however, included services rendered in the organization and formation of the plaintiff, which occurred prior to the execution of the Option Agreement. (2d Tr. at 121 & 128). Ranch Homes was first organized by Mr. Kesler as a limited partnership and, after some tax advice, it was changed to a Subchapter "S" corporation. Mr. Kesler's services not only included the

drafting of the corporate Articles, By-laws, Minutes, and stock certificates, but also the negotiation and drafting of the Option Agreement itself. (2d Tr. at 72 & 121-122). It is respectfully submitted that Greater Park City Company could not foresee damages relating to the formation of plaintiff and the execution of the Option Agreement.

Plaintiff paid \$5,000 to its president, Mr. Fahs, for drafting final architectural plans. (1st Tr., 1 at 54 & 66; 2d Tr. at 33; plaintiff's Exhibit 5, Check Nos. 102, 105, 107 & 111). Plaintiff expended another \$5,000 in payment to its vice-president, Mr. Tuckett, a licensed engineer, for his "managerial" services which included meeting with the FHA and the Park City Engineer to coordinate all drawings and design work. (1st Tr., 1 at 74-75 & 86; 2d Tr. at 110; plaintiff's Exhibit 5, Check Nos. 103, 106, 109, 114 & 115). Both these expenditures were charged to defendant. In addition, plaintiff claimed to have been damaged in the amount of \$17,500 for Mr. Fahs' "quarterbacking" services. Mr. Fahs was involved in the negotiation of the Option Agreement, working with the Park City Master Plan Committee and Planning Commission to rezone the property and to get approval for their "cluster" concept of housing, and in meeting with the various lenders and with FHA. (1st Tr., 1 at 37-39 and 2 at 33; 2d Tr. at 60). Mr. Fahs testified that he spent seven months full time on the project, that if he had been working for a developer in Salt Lake, he would have been earning \$30,000 a year, and, therefore

his seven-month salary would equate to \$17,500. (1st Tr., 2 at 33-34; 2d Tr. at 60-61). Also, plaintiff claimed \$22,750 for final engineering plans drawn by Mr. Tuckett. The engineering plans, of course, conformed to the nature of the architectural plans in the platting of the property and designing the roads, sewer system, and water and drainage systems for "cluster" housing on cul-de-sac streets. (See plaintiff's Exhibits 14 and 15; 1st Tr., 1 at 76; cf. 2d Tr. at 109). The Trial Judge awarded \$15,000 for Mr. Tuckett's engineering and Mr. Fahs' "quarterbacking" services. Plaintiff's expenditures for the services performed by Mr. Fahs and Mr. Tuckett suffer from numerous defects.

Some of the work these two individuals performed was rendered before the Option Agreement was executed. (2d Tr. at 70). Plaintiff failed in its proof to distinguish between services rendered before and after execution. (See 2d Tr. at 60, 70, 73 & 86). Also, all but a very small portion of the damages awarded plaintiff were for expenditures made and services performed before plaintiff exercised its option. (See plaintiff's Exhibit 5). Can it be said that it is both foreseeable and reasonable that plaintiff would prepare final architectural and engineering plans before a construction loan was granted and before plaintiff purchased the property? Can it also be said that it is both foreseeable and reasonable that plaintiff would prepare architectural plans at all, rather than using a design firm?

Can it be said that it was both foreseeable and reasonable for plaintiff to continue in its attempt to secure an FHA commitment when the sales price on its homes was \$55,000? As the testimony of defendant's expert witness, Mr. Gordon Hashimoto, Assistant Professor of Architecture at the University of Utah, established, it was not prudent to have FHA financing for houses selling in this price range. (2d Tr. at 247-248). Since the FHA loan limit at the time was \$45,000, a \$55,000 house would require a \$10,000 down payment, or 18% of the purchase price. Conventional financing (without FHA) would have made lower down payments available for buyers. (Id.). Mr. Trayner concurred in this conclusion and added that a prudent developer should get just a verbal understanding from the FHA during the option period. (2d Tr. at 315-316). The FHA will work with a developer on a preliminary basis; there is no need to spend a lot of money or time in working with them. (2d Tr. at 325).

Plaintiff's choice of "cluster" housing at the end of cul-de-sac streets with planting islands in the middle of each cul-de-sac, rather than conventional single-family housing, necessitated additional expenditures which were awarded against defendant. Plaintiff's own witnesses testified that the extra designed into the proposed subdivision, such as circular planters in the center of cul-de-sac streets, "made the design more difficult on this project" (1st Tr., 1 at 104), and "took a great deal more engineering." (2d Tr. at 31). Plaintiff

also "had the hardest time in the world trying to convince" the FHA and the zoning board to accept this design. (2d Tr. at 29, 31 & 76). It was something very foreign to them. (Id.). Can it be said that it is both foreseeable and reasonable that plaintiff would spend substantial sums of money in designing such unusual and difficult features into its proposed subdivision before actually purchasing the property? As Professor Hashimoto testified, cluster housing is really an alternative to urban housing, not to the type of suburban housing the plaintiff was proposing. Its design was not appropriate at plaintiff's particular site. (2d Tr. at 233-235). In any event, the question here is whether such expenditures could be reasonably anticipated as damages flowing from the breach by the defendant of the Option Agreement.

As Mr. Trayner testified, it does not take full time work for seven months to get financing, zoning and FHA approvals. (2d Tr. at 316). In light of Mr. Trayner's testimony, can it be said to be both foreseeable and reasonable that Mr. Tucket would spend \$5,000 of his time and Mr. Fahs \$17,500 of his time in dealing with these groups? Also, as Mr. Trayner testified, a developer needs only a preliminary plot, not final engineering plans, to talk to zoning boards and lenders. (2d Tr. at 303-304, 306-307 & 315-316). Can it then be said to be both foreseeable and reasonable that Mr. Tuckett would spend \$22,750 of his time in preparing such plans prior to obtaining a zoning change,

exercising the option, and purchasing the property?

The most substantial problem, however, that plaintiff has with its claimed expenditures relates to a startling admission made at the close of the second trial. Throughout the first and almost all of the second trial, plaintiff maintained that its intent was to build homes. In the first trial, Mr. Fahs, plaintiff's president, testified as follows:

"QUESTION: Now, was it Ranch Homes' intent to develop the property and sell vacant lots, building lots, or was it their intent to build homes on these properties and sell them?

ANSWER: It was Ranch Homes' intent to build homes. We didn't feel that the market in Park City--there were plenty of lots on the market. The idea was to try to sell an FHA approved \$50,000 home with \$45,000 financing at a good interest rate with a very low down payment and actually get people who were servicing the resort operation, provide them with a place to live."
(1st Tr., 3 at 13).

(Accord 2d Tr. at 77, 271-272). At the conclusion of the second trial, Mr. Fahs contradicted all of his prior testimony in the following dialogue:

"QUESTION: Did you have the idea that you would sell individual lots without building the homes on them?

ANSWER: Yes, I believe my proforma that was prepared in the Summer of 1974 reflected that fact.

* * *

QUESTION: Then Mr. Fahs on this Exhibit 9 [plaintiff's master plan prepared by Mr. Fahs] are you telling me the buyer of this lot would use your plan or wouldn't?

ANSWER: He would -- he could use my plan. If he didn't use my plan, he could use his own plan.

* * *

QUESTION: I see. So then you would have been willing to just sell thirty-two lots and not build houses?

ANSWER: Oh, I think we -- we -- we had that as -- in the back of our minds --"

(2d Tr. at 387-390).

(Accord, defendant's Exhibit 25). It is respectfully submitted that neither the architectural or engineering plans, nor any of the management services performed by either Mr. Fahs or Mr. Tuckett, were foreseeable or reasonable in light of Mr. Fahs' amazing testimony that a buyer could have purchased just a lot from plaintiff and built his own house upon it. A prospective purchaser did not have to use plaintiff's plans at all!

In similar situations, the courts have denied claims of reliance damages. In the case of Mendoyoma, Inc. v. County of Mendocino, 8 Cal. App. 3d 873, 87 Cal. Rptr. 740 (1970), the appellant sued, inter alia, for \$14,237.33 interest paid on loans which it had obtained to fund the initial development of its business venture. The trial court excluded this item of special damage. In affirming, the Court of Appeals stated:

"[G]eneral damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. Second, if

special circumstances cause some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the guilty party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." [*italics in original*]
Id. at 744.

In Sitlington v. Fulton, 281 F.2d 552 (10th Cir. 1960), the plaintiff entered into a contract with defendant for the sale of a farm. Conveyance of that farm was delayed because defendant's tenant refused to vacate the premises without a court order. In denying plaintiff's claim for cattle losses and related expenses, the Tenth Circuit stated:

"Special damages could not be recovered unless in contemplation of the parties at the time the contract was executed. The sellers could not have foreseen that the purchaser would buy cattle or incur expenses in planting crops and making improvements on the farm before obtaining complete possession."
Id. at 556.

Accord, "whatever expenditure . . . made was in full awareness of the contingencies to be met before defendants would come into ownership of the land" Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417, 421 (1973).

The courts are also clear that expenditures made before a contract is entered into may not be recovered. Cacavas v.

Zack, 43 Mich. App. 222, 203 N.W.2d 913 (1972) (expenses incurred before a contract is made are not in the contemplation of the parties); 17 A.L.R.2d, infra at 1314 ("For expenditures incurred before the actual making of the contract, a defendant is not liable unless he is affirmatively shown to have assumed responsibility for them. The action is based upon the contract and can include only losses sustained as a consequence of it.").

Reliance damages are not recoverable where the expenditures are made in a collateral undertaking (such as the development of plaintiff's proposed subdivision) rather than in performance of the agreement sued upon (plaintiff's option to purchase certain land). See Mendoyoma, supra; Schnierow v. Boutagy, 33 Cal. App. 336, 164 P. 1132 (1917) (not foreseeable that a purchaser of real property, in reliance upon his contract, would sell his own property at a sacrifice); Susi v. Simonds, 147 Me. 189, 85 A.2d 178 (1951) ("It must affirmatively appear that the special circumstances . . . were communicated by the plaintiff to the defendant . . . at the time of making the contract."); Scheer v. Nelson, 113 Neb. 821, 205 N.W. 250 (1925) (where the expenses of procuring a loan to secure conveyance were held too remote because such expenses arose out of a collateral transaction); Chamberlain v. Brady, 17 Jones & Spencer 484, 49 N.Y. Superior Ct. Reports 484 (1882 N.Y.), aff'd without opinion, 94 N.Y. 649 (costs of architect's

plans in preparing to build on land held not foreseeable); 17 A.L.R.2d 1300, 1308-1313, Anno: "Right to recover, in action for breach of contract, expenditures incurred in preparation for performance"; 11 Williston on Contracts § 1363A (3d ed.) (expenditures are not recoverable unless they "should properly have been anticipated as necessary for the performance of the contract and are peculiarly appropriate for that purpose, rather than for the plaintiff's general business"); cf. St. Clair v. Local Union No. 515, 422 F.2d 128 (6th Cir. 1969) (in an action against a union for unfairly representing plaintiff after his dismissal from a job, damages for humiliation and embarrassment and for loss of his home to the mortgage holder were held not foreseeable).

In the instant case, not only were plaintiff's expenditures unforeseeable, but they also related to collateral transactions -- plaintiff's incorporation and the development of its proposed subdivision. Plaintiff's recovery should be set aside since its expenditures were completely within its discretion and control, were not in performance of the Option Agreement, but rather in preparation for its collateral transactions of incorporation and developing a subdivision, were within the risks it assumed, and were made prior to the time plaintiff would come into ownership of the property. The parties' Option Agreement did not contemplate that plaintiff should prepare to build a subdivision before it

acquired the financing to purchase the optioned property and before it received a conveyance thereof. It was simply not foreseeable that the plaintiff would complete almost all of its plans for a subdivision prior to exercising the option and receiving a conveyance of the property.

Defendant submits, as is more fully discussed in the following section, that the only proper measure of damages for breach of an option is the difference between the contract price and the market value of the optioned property. However, if this Court declines to adopt the market value measure of damages, then defendant should reimburse plaintiff for the \$10,000 option price it paid, along with certain limited additional expenditures. As the uncontradicted testimony of Mr. Trayner established, a reasonably prudent subdivider, following industry standards, may have spent \$500 for a preliminary engineering plat and \$100 to \$400 for house plans purchased from a design firm, and would have spent "a little time" in meeting with the planning commission, various lenders and the FHA. Defendant concedes that the total reasonable value of these services would be \$2,000. Clearly, only these expenditures, totalling \$12,000, are the natural, probable, and reasonable result of defendant's breach.

POINT II

THE PROPER MEASURE OF DAMAGES FOR BREACH OF AN OPTION IS THE DIFFERENCE BETWEEN THE MARKET VALUE OF THE LAND AND THE OPTION PRICE TO BE PAID. NO DAMAGES MAY BE AWARDED FOR EXPENDITURES MADE.

"The measure of damages in a case of this sort [breach of an option agreement] is the difference between the value of the property at the time the purchaser was to have a conveyance of it, and the price which he was then to pay. [citations omitted] The plaintiff has the benefit of this rule. He was not entitled to show loss of estimated profits or out of pocket expenses. Exceptional cases may arise where departure from the usual rule is permitted (see, e.g. Neal v. Jefferson, 212 Mass. 517, 523, 99 N.E. 334, 41 L.R.A.N.S. 387), but this is not one of them." (Emphasis added). Capaldi v. Burlwood Realty Corp., 350 Mass. 765, 214 N.E.2d 71, 72 (Mass. Sup. Jud. Ct. 1966).

Accord, Cohen v. Lovitz, 255 F.Supp. 302 (Dist. Ct. D.C. 1966).

This is the same as the general measure of damages for failure to convey a piece of property. Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962). The Neal case referred to in the quote above involved the lease of a hotel coupled with an option to purchase it. It presented "unusual circumstances" because lost profits and reliance damages may be the natural and probable result of the breach of a lease agreement. Thus, the holding in Neal does not mean that lost profits and out-of-pocket expenses are recoverable for breach of an option agreement, but, rather, that where an agreement involves an option plus an additional promise, additional measures of damages may become relevant.

Awarding the difference between the market value and the option price would give plaintiff the benefit of its bargain and would adequately compensate plaintiff because it could then buy a comparable piece of property upon which to construct a subdivision. To hold otherwise would mean that an optionor bears the risk of all preparations made by an optionee, even though such expenditures may be completely within the discretion and contingent upon the whims of the optionee. See 17 A.L.R.2d, supra at 1309. While one optionee may make substantial discretionary expenditures before the conveyance of the optioned property, another may only want time to think about the deal, while a third might make minor expenditures. April 30, 1975, would have been the earliest possible date for a conveyance of part or all of the property by the defendant. Prior to that date, plaintiff was not entitled to a conveyance. Thus, the preparatory steps plaintiff took towards development of its proposed subdivision were risks it knowingly assumed, because the purpose of an option is to minimize the loss an optionee suffers if he decides not to purchase the property, after taking the steps he deems necessary.

Mr. Raymond Fletcher, a member of the American Institute of Real Estate Appraisers, at defendant's request, appraised the optioned property as of April 1, 1975. (1st Tr., 2 at 114 & 116; 2d Tr. at 131-132). After analyzing comparable sales and market data, Mr. Fletcher testified that

the 30 acres of optioned property would have a value of \$7,350 an acre, or \$220,500 for the entire parcel. (1st Tr., 2 at 119; 2d Tr. at 138). Using an income approach, Mr. Fletcher also testified that the property had a value of \$7,347 per acre, or \$220,420 for the entire parcel. (1st Tr., 2 at 123; 2d Tr. at 137). When this is compared with the purchase price of \$510,000, it is respectfully submitted that plaintiff suffered no damage and that the judgment below should be reversed.

POINT III

PLAINTIFF FAILED TO MITIGATE ITS DAMAGES

A plaintiff has the duty to minimize his damages. He may not sit idly by. A party injured by breach of contract should do what reasonable care and business prudence require to minimize his loss. Salt Bowl Co. v. Utah, 535 P.2d 1253 (Utah Sup. Ct. 1975); Enco, Inc. v. F.C. Russell Co., 210 Ore. 324, 311 P.2d 737 (1957). A plaintiff cannot recover damages flowing from consequences which he could reasonably have avoided. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916); Thompson v. Jacobsen, 23 Utah 2d 359, 463 P.2d 801 (1970); Jankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936).

It is submitted the evidence established, and reasonable minds cannot differ, that the plaintiff completely failed in its duty to mitigate its damages. On February 21, 1975, a meeting was held between the principals of plaintiff and

defendant. (1st Tr., 2 at 91-93; 2d Tr. at 188). At that meeting, defendant presented several alternative proposals to plaintiff in an attempt to convince plaintiff to take a parcel of property that was more accessible at that time. (1st Tr., 2 at 93; 2d Tr. at 190 & 192). This meeting was precipitated by defendant's concern over its ability to bring a road and utilities to the edge of the optioned property as required by paragraph 20 of the Option Agreement in the event that plaintiff chose to exercise the option by making installment payments. (1st Tr., 2 at 92 and 1 at 42-44; 2d Tr. at 189-190). At that time, defendant's financial position was very weak with over \$20,000,000 in debts. Defendant subsequently underwent reorganization. (See 1st Tr., 1 at 43; 2d Tr. at 202 & 211).

The optioned property consisted of 30 acres at the northerly edge of an area known as the Holliday Ranch. (See plaintiff's Exhibit 2). Defendant first proposed an alternative to sell to plaintiff a 30-acre parcel of land in the Holliday Ranch area which already had access to roads and utilities, for \$10,000 an acre or \$300,000. (1st Tr., 2 at 93-95; 2d Tr. at 192). Defendant's second alternative was to sell that 30 acres plus the next 28 acres at \$8,100 per acre for a total price of \$480,000. (1st Tr., 2 at 95-96; 2d Tr. at 192). Defendant also made a third proposal to sell 15 acres on the east side of the proposed Holliday Loop Road and 15 acres on the opposite side of that road.

(1st Tr., 2 at 96; 2d Tr. at 192). All of these alternatives were rejected by plaintiff. (1st Tr., 2 at 98-99 & 102-103).

The main reason plaintiff decided not to accept any of the alternatives is that it would have to get the new property rezoned, redesigned, reengineered and reapproved by FHA. (1st Tr., 3 at 14-16; 2d Tr. at 376-377). However, since plaintiff admitted that it would sell a prospective purchaser a lot upon which he could build his own house, it is respectfully submitted that this is no excuse for plaintiff's failure to have mitigated its damages.

Plaintiff also felt that the alternative property did not have as good a view as the optioned property, that it was too close to a sewage treatment plant, and that it had drainage problems. (1st Tr., 3 at 14). The drainage problem was corrected by the subsequent purchaser for \$750 an acre. (1st Tr., 2 at 143-144; 2d Tr. at 218). The new developer had no problem in selling all of the homes he developed, despite the sewage treatment plant. (1st Tr., 3 at 5-8; 2d Tr. at 219-220). Apparently, since all of the homes were sold, the view from the alternate property did not differ appreciably from the optioned property.

Plaintiff sued defendant only for damages. (See R.185) Plaintiff, as a land developer, was not agonizing at the thought of losing real estate which would be impossible to duplicate. A substantial number of other tracts of land of

comparable size and quality had been offered to plaintiff. The remarkable thing about most of these other tracts of land was that the price at which defendant proposed to sell them to plaintiff was substantially less than the \$17,000 per acre plaintiff agreed to pay for the optioned property. Defendant had charged plaintiff a higher price under the Option Agreement because of its duty to build a road out to the edge of the optioned property. (2d Tr. at 213-214, cf. 272-274). Since plaintiff could easily have mitigated all of its alleged damages, its failure to do so bars its right to recovery, and the judgment below should be reversed.

POINT IV

PLAINTIFF'S DAMAGES ARE TOO INDETERMINABLE TO SUPPORT AN AWARD OF PREJUDGMENT INTEREST.

Plaintiff sued for \$65,500 in reliance damages. (1st Tr., 2 at 1). These damages included \$17,500 claimed for Mr. Fahs' "quarterbacking" services, and \$22,750 for Mr. Tuckett's engineering services. The first trial judge ruled as a matter of law that these expenditures were not recoverable "based upon the lack of evidence." (1st Tr., 3 at 41). The second trial judge awarded only \$15,000 in damages for these services. (Finding No. 13). As to the \$27,587 which plaintiff expended, \$5,000 of this was for Mr. Tuckett's "management" services, \$2,500 for Mr. Kesler's legal services, and another \$5,000 for Mr. Fahs' "engineering" services. The defects in all of these claimed services were

discussed in detail above. Because of these defects, defendant respectfully submits that plaintiff's damages are too indeterminable to support an award of prejudgment interest.

The law in this State on prejudgment interest has been settled since the early case of Fell v. Union Pacific Ry. Co., 32 Utah 101, 88 P. 1003 (1907). In that case, this Court stated:

"The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value." (Emphasis added). Id., 88 P. at 1007.

Accord, Restatement of Contracts § 337(a). The policy behind this test is simply that, as a matter of fairness, a person should not be liable for prejudgment interest when he does not, or cannot with reasonable certainty, know the true amount of the sum he owes.

In the instant case, plaintiff's damages are too indeterminable to support an award of prejudgment interest for the following reasons:

1. Both lower courts substantially discounted the amount claimed by plaintiff.

2. The evidence was disputed and plaintiff's proof was uncertain.

3. Concerning many of the items of damages, plaintiff failed to establish any "fixed standards of value" or market prices.

4. No prior demand for prejudgment interest was ever made by plaintiff, either in its complaint or in either trial.

Plaintiff sued for \$200,000 in damages. (R.4). In the first trial, plaintiff was awarded \$27,587 for expenditures made and \$16,000 for lost business profits. (R.92). In the second trial, defendant's motion to dismiss the claim for lost business profits was granted. (2d Tr. at 19). Plaintiff proceeded in its attempt to collect \$65,500 by way of expenditures of money, time and services. (See R.187). In awarding \$42,587, the lower court discounted plaintiff's demand by \$22,913.

Defendant submits that the very nature of the two awards given plaintiff through two different trials establishes just how indeterminable plaintiff's damages were. The law is clear that prejudgment interest is not includable where the damages cannot be ascertained until final judgment. Rausser v. LTV Electrosystems, Inc., 437 F.2d 800 (7th Cir. 1971); Western Auto Supply Co. v. Sullivan, 210 F.2d 36 (8th Cir. 1954); Portage Ind. Sch. Constr. Corp. v. Stackhouse Co., 153 Ind. App. 366, 287 N.E.2d 564 (1972); see United

Pacific Ins. Co. v. Martin & Luther General Contractors, Inc.,
455 P.2d 664 (Wyo. Sup. Ct. 1969). In Portage Ind. Sch.
Constr. Corp., supra, the Court stated:

"In this case the wide disparity between the figure contained in the so-called invoice of June 19, 1962, and the demand figure in the Appellee's complaint and the actual figure of the principal sum of the judgment would certainly lead to the conclusion that this is a case where damages could not and were not ascertained until judgment.

* * *

'The test . . . whether injury and consequent damage was complete, must be ascertained as of a particular time in accordance with fixed rules of evidence and known standards of value, which a Court or jury must follow in fixing the amount, as distinguished from using one's best judgment to assess the amount for past and future injury or elements not measurable by fixed standards of value.'"
Id., 287 N.E.2d at 569.

The leading case of Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408 (1948), is in accord. In Lineman, the California Supreme Court stated:

"[I]nterest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree

* * *

[I]nterest is not allowable when damages cannot be computed except on conflicting evidence, such as in the present case, because of the absence of established or reasonably ascertainable market prices or values.

* * *

The trial court's computation of the damages was therefore not based on an established market price, but on a value which it was compelled to select from conflicting evidence relating to the factors of cost, carrying charges and profit

* * *

The judgment is modified by striking there-
from the allowance of interest"
Id., 195 P.2d at 412-413.

Given the indeterminable nature of plaintiff's damages, and
the difficulty in their computation, defendant submits that
it should not be charged with prejudgment interest.

POINT V

COSTS

A. No Witness Fees Are Allowable for the First Trial.

The allowance of costs is strictly statutory.

McIntosh v. Crandall, 47 Cal. App. 2d 126, 117 P.2d 380 (1941).

Costs were not recoverable at common law, and any statute
relating to costs is to be strictly construed. In the
absence of a statutory authorization, there can be no recovery
of costs. Id.

Witness fees in civil cases may be taxed only as
provided in Utah Code Anno., § 21-5-8 (1953). That statute
provides in relevant part:

"The fees of witnesses paid in civil
causes may be taxed as costs against the
losing party." (Emphasis added).

Although the jury in the first trial rendered judgment against
defendant, that judgment was set aside and a new trial was
ordered. Defendant, therefore, did not "lose" the first
trial, nor was it the "losing party." When the proceedings
of a former trial have been vacated, the case must proceed
de novo. The parties must be placed in the same position they

would have been in if no trial had been had. 58 Am.Jur.2d
"New Trial" § 228.

The lower Court awarded \$296.80 in costs for the attendance of plaintiff's witnesses at the first trial. (R.168 & 169). It is respectfully submitted that this amount must be deducted from any costs awarded plaintiff.

B. Plaintiff's Principals Are Not Entitled to Witness Fees.

Plaintiff seeks to recover witness fees paid to Messrs. Fahs, Tuckett, and Kesler for their attendance during the three days it took to conduct both the first and second trials. This is clearly inappropriate because these three individuals were not attending merely as witnesses in behalf of plaintiff, but, rather, were attending to the conduct of the suit as plaintiff's principal officers. As stated by this Court in Western Creamery Co. v. Malia, 89 Utah 422, 57 P.2d 743, 746 (1936):

"One who attends court as the agent of a party, necessarily attending to the conduct of the suit, cannot be allowed witness' fees, although he testifies"

At the first trial, these three witnesses all testified on the first day. Mr. Kesler did not take the witness stand again and Mr. Tuckett did so only briefly during the second day when recalled by plaintiff's counsel. Yet, plaintiff seeks to recover witness fees for these individuals for all three days of the first trial. This Court should rule as a matter of law that plaintiff's principals are not entitled to witness fees on the days that they did not testify and,

therefore, that the amount of costs, if any, awarded for the first trial should be reduced by \$54.90.

In the second trial, Mr. Kesler was called out of order on the second day of trial to testify and was thereafter excused because he had to go out of town. (2d Tr. at 153). Mr. Tuckett testified on only the first day of trial. Yet, plaintiff seeks to recover witness fees for these individuals for all three days of the second trial. It is respectfully submitted that the costs allowable for the second trial must also be reduced by \$54.90, said sum representing witness fees awarded to plaintiff's principals for days that they did not testify.

The total amount of costs which were thereby improperly awarded to plaintiff for the first trial, and as witness fees for its principals on days they did not testify at the second trial, is \$351.70.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that:

1. The judgment below should be reversed and a new judgment entered in defendant's favor, as a matter of law, upon the grounds that the only proper measure of damages for breach of an option agreement is the difference between the option price and the market value of the property at the time

of exercise of the option (and there is no such difference in value in this instant case); or because plaintiff failed to mitigate its damages.

2. Alternatively, the judgment below should be reversed and a new judgment entered against defendant in the amount of \$12,000, upon the ground that this amount, and only this amount, represents those expenditures which were reasonably incurred by plaintiff and which were foreseeable at the time of making the Option Agreement.

3. Alternatively, that the case be remanded for a new trial because of the insufficiency of the evidence, the excessiveness of the verdict, or because of errors in law.

4. That plaintiff is not entitled to any prejudgment interest.

5. That the total amount of any costs awardable to plaintiff is \$303.60.

Respectfully submitted this 4th day of February, 1978.

PRINCE, YEATES & GELDZAHLER
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By Donald J. Winder

CERTIFICATE OF DELIVERY

I hereby certify that on this 6th day of February, 1978, I caused to be hand-delivered a true and correct copy of the foregoing Brief of Appellant to Bryce E. Roe, Esq. and David E. Leta, Esq., attorneys for plaintiff-respondent, 340 East Fourth South, Salt Lake City, Utah.

Donald J. Winder