

1997

Joseph R. and Florence Brunetti v. Gilbert R.  
Turner, Kenneth T. Holman and Overland  
Development Corp., : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH R. and FLORENCE BRUNETTI,

Plaintiffs/Appellees,

v.

GILBERT R. TURNER, KENNETH T.  
HOLMAN and OVERLAND  
DEVELOPMENT CORP.,

Defendants/Appellant.

Case No. 970014-CA

97-0339-CA

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE SANDRA N. PEULER, DISTRICT JUDGE

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Argument priority classification 15

**UTAH COURT OF APPEALS  
BRIEF**

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**COURT OF APPEALS**

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### **STATEMENT OF JURISDICTION**

This appeal arises from a civil action brought by Plaintiffs for the recovery of earnest money related to the attempted joint venture and sale of certain real property located in Salt Lake County, Utah.

Jurisdiction of the Third Judicial District Court, Salt Lake County, Utah from which this appeal arises, is based on UTAH CODE ANN. § 78-3-4(1) (1953, as amended).

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to Article VIII, Section 5 of the Constitution of the State of Utah, UTAH CODE ANN. § 78-2-2(3)(j) (1995 Supp.) and Rule 3(a) of the Utah Rules of Appellate Procedure. This case was poured over to the Court of Appeals by the Supreme Court on May 15, 1997.

Partial summary judgment, from which Overland Development Corp. ("Overland") appeals was entered by the trial court on June 23, 1995 and the Order Denying Defendants' Motion to Reconsider the Order Granting Partial Summary Judgment was entered on October 17, 1996. A final judgment was entered on December 17, 1996, Appellant's Notice of Appeal was filed with the Third Judicial District Court, Salt Lake County, on January 2, 1997 and an Amended Notice of Appeal was filed on January 13, 1997.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Was it error for the trial court to rule that Overland was obligated to pay the second \$15,000, even though it had never requested that the contract be extended and had in fact given notice to the Brunettis that it no longer wished to pursue the development of the Property under the terms of the contract?



2. Was it error for the trial court to rule that the first \$15,000 was due and payable in light of express language in the contract that such funds were only payable upon closing of a construction loan or if additional time was needed, when Overland never requested additional time and the construction loan related to the Property did not close, and when Plaintiffs refused to enter into the joint venture with Overland?

3. Was it error for the trial court to rule that the Brunettis did not breach the contract by refusing to enter into a joint venture with Overland?

4. Was it error for the trial court to rule that the contract is unambiguous?

5. Was it error for the trial court to rule that there was a meeting of the minds, and that there were no material issues of fact concerning the joint venture?

These issues have been preserved in the trial court record in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment (**Record (hereinafter "R.") 137-170**); Defendant's Memorandum of Points and Authorities in Support of Motion to Reconsider Entry of Partial Summary Judgment (**R. 562-599**); the April 11, 1995 and April 21, 1995 hearings on the Plaintiffs' Motion for Partial Summary Judgment (**R. 843-886**) and (**R. 887-927**); and the July 1, 1996 hearing on Defendants' Motion for Reconsideration (**R. 948-978**).

**Standard of Review:** The trial court granted partial summary judgment for the Plaintiffs on their breach of contract claim. Because entitlement to summary judgment, or not, is a question of law, the Utah Court Appeals accords no deference to the trial court's resolution of the legal issues presented. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). This Court determines "only whether the trial court erred in applying the governing law and whether the trial court correctly

held that there were not disputed issues of material fact." State v. Ferre, 784 P.2d 149, 151 (Utah 1989). With regard to the issues involving interpretation of the contract, this court reviews the trial court's decision under a correctness standard giving the trial court's interpretation no particular weight. Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE AND COURSE OF PROCEEDINGS**

This lawsuit centered around the sale and joint venture of a piece of property located at approximately North Temple and Redwood Road in Salt Lake City, Utah owned by the Plaintiffs (the "Property"). The letter agreement between the parties was not on a commonly used form and referred to a somewhat unique arrangement between the parties under which the parties were to enter into a joint venture in order to save the developer cash, the seller was to be paid for the Property at the time the joint venture obtained a construction loan and no provision was made for an earnest money deposit becoming non-refundable unless or until there was a request to extend the period beyond the original period of the agreement. There are factual disputes as to the parties' intent with respect to whether there was a joint venture (with the sellers expressly stating that they never intended to enter into a joint venture), as to whether the parties agreed upon terms concerning the earnest money deposit, and as to what the essence of the transaction was. Despite numerous factual issues with respect to these matters, summary judgment was granted in favor of the Plaintiffs.

In 1989 or 1990, Plaintiffs listed the Property for sale with their agent, Gilbert Turner ("Turner"). Overland was interested in the Property and, on April 6, 1990, made an offer concerning the Property. Overland's offer included an agreement that the parties would joint venture

the development of the property. On April 26, 1990, Plaintiffs made a counteroffer to which Overland responded with its counteroffer on May 7, 1990. Also, on May 7, 1990, Overland delivered an earnest money check to Plaintiffs' agent, Turner, with written instructions that the check was not to be deposited pending written notification by Overland. Overland's counteroffer was accepted on May 9, 1990, completing the agreement between the parties (the "Agreement").

Overland spent a great deal of time and money attempting to get the proper zoning change necessary to develop the Property. However, due to the fact that Overland could not acquire proper zoning, Overland elected not to proceed with the development of the Property under the original terms of the Agreement. Therefore, on August 25, 1990, Overland proposed a different arrangement. This arrangement was not agreed to by Plaintiffs and, since the parties could not arrive at a subsequent agreement, the original Agreement terminated. Overland then requested return of the undeposited earnest money check, and Plaintiffs' agent, Turner, returned the earnest money to Overland.

Plaintiffs brought suit claiming that they were entitled to the earnest money based upon Defendants' alleged breach of Agreement. In the suit, Plaintiffs alleged causes of action against Overland and Holman, Overland's principal stockholder, for fraud, breach of contract, breach of the implied covenant of good faith, equitable estoppel and unjust enrichment. Prior to trial, Plaintiffs and Defendants Holman and Overland brought Motions for Summary Judgment. Based upon these Motions, and the oral argument addressing these Motions, on June 23, 1995, the Court entered partial summary judgment against Overland for breach of contract. In particular, the trial court found that the Agreement between the Plaintiffs and Overland, embodied in the April 6, 1990

Overland letter, as modified by the May 7, 1990 counteroffer, was clear and unambiguous, and required Overland to deliver to Plaintiffs the first \$15,000 earnest money on September 7, 1990, and the second \$15,000 on November 7, 1990. Further, the trial court found, on the basis of summary judgment motions, that Overland's letter of August 25, 1992 constituted a request for additional time to close on the purchase of the Property stimulating the payment of the second \$15,000 amount. The trial court found that Overland did not pay the required earnest money payments and that the Plaintiffs were therefore entitled to a judgment against Overland for \$30,000 plus interest from November 7, 1990, due to breach of contract. This is the ruling which Overland seeks to have this Court vacate.

At the same time, the trial court granted partial summary judgment in favor of Overland and Holman, dismissing Plaintiffs' claims for equitable estoppel and unjust enrichment and dismissed all other claims against Holman with the exception of a fraud claim, which remained for trial, as did a fraud claim and a breach of the covenant of good faith and fair dealing against Overland. This case was then tried beginning on August 23, 1995 and, after being continued, ending on November 17, 1995. After full presentation of all the evidence, the trial court, granted a Motion to Dismiss by Overland, Holman and Turner finding that none of the Defendants had made a misrepresentation to Plaintiffs, defrauded Plaintiffs or breached the covenant of good faith or fair dealing. The trial court specifically found that Turner was Plaintiffs' agent and that Turner had acted in Plaintiffs' best interest.

The trial court's entry of partial summary judgment against Overland should be reversed and the case remanded for a trial on the merits. In particular, there exist significant questions of material

fact with regard to whether there was ever a meeting of the minds between the parties on whether the Agreement calls for the earnest money to be forfeited and, if so, under what circumstance and when the earnest money would be forfeited, the terms of the joint venture agreement between the parties or whether the Plaintiffs ever intended to enter into that joint venture, and how the earnest money related to the joint venture. Because of these questions of fact, there was not a meeting of the minds between the parties sufficient to establish a binding contract giving rise to forfeiture of the earnest money. Also, it is evident based upon the documents and testimony that Overland never requested an extension to the contract period. Thus, with respect to the second \$15,000, there can be no dispute that it never became due and payable. Overland therefore requests that this Court reverse the trial courts entry of Plaintiffs' Motion for Partial Summary Judgment and remand this matter for a short trial on whether there was ever an enforceable contract between the parties. Overland further requests that in remanding this matter this Court instruct the trial court enter partial summary judgment in Overland's favor, finding that Plaintiffs never became entitled to the second \$15,000.

#### **DISPOSITION OF TRIAL COURT**

The trial court granted Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion"), finding that Plaintiffs were entitled to both the original \$15,000 and the second \$15,000 based upon Plaintiffs' theory of breach of contract. It is from this ruling that Overland appeals.<sup>1</sup>

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<sup>1</sup> Prior to the entry of the final judgment, Overland filed a Motion for Reconsideration of trial court's grant of Summary Judgment. This motion was denied, and a final judgment for Defendants on Plaintiffs' remaining claims was entered on December 17, 1996 after a trial on the merits.

### **STATEMENT OF FACTS**

1. Plaintiffs were the owners of a parcel of land at approximately North Temple and Redwood Road, consisting of approximately 5.33 acres (the "Property"). **R. 117.**

2. In late 1989 or early 1990, Plaintiffs entered into an agreement with Turner whereby Turner agreed to act as Plaintiffs' real estate agent to find a buyer for the Property. **R. 117 and 759.**

3. On April 6, 1990, Overland made an offer in writing regarding the Property. **R. 117;**  
**a true and correct copy of Overland's April 6, 1990 offer is set forth in the Addendum as Exhibit "A."**

4. Of particular importance are the terms of this offer, terms which were never deleted in the subsequent counteroffers. They are:

- a. A \$15,000 earnest money would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance paid from the proceeds of the construction loan.
- b. Overland would then enter into a joint venture with the landowner, within two weeks, to develop the property.

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- c. The benefit of a joint venture relationship of this type is that it enables the developer to use its limited resources on the development of the property instead of the purchase of the land. This also reduces some of the risk to the developer and gives assurance that the project can be consummated before the expiration of the agreement.

*See, Exhibit A.* Thus, the time at which the earnest money became payable and the need for a joint venture between Plaintiffs and Overland were integral provisions of the offer. **R. 566-67, 587-88 and 609.**

5. In fact, without the joint venture agreement between the parties, Overland would not have agreed to purchase the Property. Further, Overland believed that the earnest money was not payable unless and until the Property closed or Overland requested an extension of time under the original agreement. Had this not been the case, Overland would not have agreed to purchase the Property. **R. 174 and 609.**

6. However, the Brunettis testified that they never agreed nor intended to enter into a joint venture with Overland. **R. 648-49 and 994-95.** At trial Mr. Brunetti stated:

Q. (By Paul Van Dam) Do you remember telling Mr. Turner that you would not enter into a joint venture agreement with Mr. Holman and his corporation?

A. (By Mr. Brunetti) Yes, sir.

Q. Do you remember when that was?

A. That was right at first. . . .

**R. 944-45.** In his deposition, Mr. Brunetti stated:

Q. (By Richard Rappaport) Did you ever tell Mr. Turner that you would not enter into a joint venture agreement with Overland Development?

A. (By Mr. Brunetti) Yes.

Q. When was that?

- A. I can't remember at this time. All I wanted was my money. I was not going to be in joint venture with them.

**May 12, 1993, deposition of Joseph Brunetti, page 89 lines 6-14; a true and correct copy of the relevant pages of Mr. Brunetti's May 12, 1993, deposition are attached hereto in the Addendum as Exhibit "B".** In her deposition, Mrs. Brunetti stated:

- Q. (By Richard Rappaport) Had you ever been willing to sign a joint venture agreement with Overland?

- A. (By Mrs. Brunetti) No.

**May 3, 1994, deposition of Florence Brunetti, page 19 lines 15-17; a true and correct copy of the relevant pages of Mrs. Brunetti's May 3, 1994 deposition attached hereto in the Addendum as Exhibit "C".** Plaintiffs simply believed that they were going to sell their land. **R. 649.** However nowhere within their April 26, 1990 counteroffer do they reject this portion of Overland's offer **R. 589; a true and correct copy of the Brunettis' April 26, 1990 counteroffer is attached hereto in the Addendum as Exhibit "D".**

7. Plaintiffs also testified that they believed that the first \$15,000 earnest money was payable regardless of whether the sale of the Property closed. **R. 120.** However, Overland believed that the first \$15,000 only became payable if there was a closing on the construction loan or Overland requested an extension of time past the initial 120 day period. **R. 174.** Therefore, there was no meeting of the minds with regard to financial terms of the contract.

8. After reviewing Overland's offer, on April 26, 1990, Plaintiffs submitted a counteroffer. In this counteroffer, besides adjusting the sales price, Plaintiffs stated:



The initial contract term shall be for 90 days. Should additional time be required, the developer agrees to release the original \$15,000 earnest money to seller and replace it with another \$15,000 non-refundable earnest money for an additional 60 days."

**R. 118, 139, 172 and 589; *see also*, Exhibit D.**

9. Importantly, Plaintiffs did not reject or counter with respect to the offer to enter into a joint venture or with regard to the time when the initial earnest money became payable, nor did the Agreement state that the earnest money was to be forfeited. ***See*, Exhibit D.**

10. In response to Plaintiffs' counteroffer, on May 7, 1990, Overland changed the term of the Agreement to 120 days rather than 90 days. **R. 172, 590 and 647; a true and correct copy of Overland's counteroffer to Plaintiffs' counteroffer is attached hereto in the Addendum as Exhibit "E".** No changes were made concerning the joint venture or the time in which the original earnest money became payable. Overland's counteroffer to Plaintiffs' counteroffer was accepted by the Plaintiffs as evidenced by their initials on the requested 120-day change. **R. 172, 568 and 590; *see also*, Exhibit E.**

11. With the counteroffer, on May 7, 1990, Overland delivered to Turner, Plaintiffs' agent, a check for \$15,000 as earnest money for the purchase and development of the Property. The check was never deposited. **R. 173 and 594.**

12. Thereafter, the parties attempted to get the Property rezoned to allow commercial development. **R. 173.**

13. However, by August 25, 1990, it became apparent that Salt Lake City was not willing to rezone the Property under the proposed plan. Therefore, on that date, Overland sent a letter to Plaintiffs. **R. 173.** That letter states:

On May 9, 1990, you and your wife, Florence, accepted an offer I made to purchase five (+ or -) acres located on North Temple near Redwood Road for \$895,000. The agreement gave me 120 days to complete the sale. If I needed additional time I would be required to release the original \$15,000 Earnest Money deposit to you and pay an additional \$15,000 non-refundable Earnest Money for an additional 60-day extension. September 6, 1990 will be the 120th day since our agreement was signed on May 9th.

The letter then addressed the problems the parties were experiencing with developing the Property.

It goes on to state:

With so many issues still unanswered, I do not intend to permit Mr. Turner to release my \$15,000 check until these issues are resolved and the property is rezoned. Otherwise, I could be left with a property that is improperly zoned for my purposes.

I would therefore request that our Agreement be extended for an additional 120 days for no additional Earnest Money deposit. If this is acceptable, I will authorize Mr. Turner to hold my deposit until rezoning has been approved at which time I will then authorize in writing its release to you.

\*\*\*

In my original letter to you dated April 6, 1990, I indicated that Overland Development Company would enter into a Joint Venture Agreement with you to develop the property . . . There is no need to enter into a Joint Venture Agreement until we have rezoned the property

and are preparing to get a construction loan on the hotel and/or restaurant/s. At that time it will be necessary to prepare the Joint Venture Agreement to obtain financing and pay you for the land.

\*\*\*

If you and Mrs. Brunetti agree to provide the extension requested and permit me to continue forward with the rezoning and construction financing as has been outlined above please sign the Acceptance below.

**R. 173 and 595-97; a true and correct copy of Overland's August 25, 1990 letter is attached hereto in the Addendum as Exhibit "F".**

14. This letter therefore notified Plaintiffs that Overland did not intend to follow through with the original deal and was suggesting a new deal. The August 25 letter also made it clear that new terms would need to be agreed to by the parties but would still included a joint venture between Plaintiffs and Overland. The Brunettis never signed the acceptance contained in this letter and no new agreement was reached. **R. 608.** In fact, on September 6, 1990, the Brunettis sent a letter to Overland which states in part: "So, we do not agree to the terms of Mr. Holman's August 25, 1990 letter." **R. 598.**

15. On September 6, 1990, Overland sent a letter to Plaintiffs making a new offer to purchase the Property as well as additional property for a total of approximately 11 acres. This letter states:

I have requested Mr. Gil Turner to prepare a new Earnest Money Sales Agreement purchasing the entire 11 +/- acres to supersede my original Offer to Purchase 5 +/- acres.

The termination of the original offer and the inclusion of additional acreage will enable us to get the entire parcel rezoned. It will also eliminate the necessity of requiring you to joint venture the development with me.

**R. 599; a true and correct copy of Overland's September 6, 1990 letter is attached hereto in the Addendum as Exhibit "G".**

16. September 6, 1990 was the date on which the original offer terminated or had to be extended through the release of the original \$15,000 deposit and the deposit of an additional non-refundable \$15,000 earnest money. This letter clearly shows that Overland is not seeking to extend the original offer and, by its terms, requests a new offer which includes additional acreage and does not include a joint venture agreement. Plaintiffs did not accept this proposal. **R. 608.**

17. The parties never entered into a new agreement and Overland's attempt to purchase the Property terminated. **R. 608.** Thereafter, Turner, Plaintiffs' agent, returned Overland's original \$15,000 check to Overland. **R. 174.**

18. The trial court entered summary judgment for Plaintiffs finding that they were entitled to both the initial \$15,000 earnest money, even though Overland had not requested an extension of time in which to close the construction loan on the Property and even though the construction loan had not closed. The trial court also found that Plaintiffs were entitled to the second \$15,000, even though Overland had clearly not requested an extension of time in which to close the construction loan. In doing so the trial court refused to find that the joint venture was a condition precedent to these funds being owed to Plaintiffs. **R. 417-18.**

19. After trial, on December 17, 1996, the court entered its Findings of Fact and Conclusions of Law. **R. 758-63.** The court found that Turner was Plaintiffs' agent and acted in their best interest. **R. 759 and 761.**

### **SUMMARY OF ARGUMENT**

The trial court erred in granting Plaintiffs' Motion for Partial Summary Judgment due to numerous questions of material fact which should have been construed in Overland's favor. Therefore, Overland seeks to have this Court vacate the trial court's grant of Plaintiffs' Motion and remand this matter for trial, at least as to Plaintiffs' claim for the first \$15,000 earnest money.

The specific facts which the parties are in disagreement was whether the first \$15,000 was non-refundable and forfeitable if the deal to develop the Property failed. The Agreement does not state that the first \$15,000 is non-refundable and it states that it is only payable upon the closing of a construction loan or if Overland requested an additional period of time past the initial 120-day period to develop the Property. There are also genuine issues of material fact as to whether the parties ever had a meeting of the minds on the joint venture agreement. The Agreement specifically states the parties will enter into a joint venture agreement to develop the Property. Plaintiffs have repeatedly stated that they did not intend to enter into a joint venture agreement and Overland has maintained that it would not have entered into the Agreement without the accompanying joint venture agreement. With regard to the second \$15,000, the Agreement states that it is non-refundable only if Overland requests additional time past the initial 120-day period. Plaintiffs maintain that Overland did request additional time, but Overland maintains that it did not.

With regard to the earnest money payments, Plaintiffs were not entitled to any earnest money due to the fact that neither the sale of the Property nor a construction loan regarding the development of the Property closed. Further, an extension of the contract period was not requested nor granted and the Agreement does not state that the earnest money is to be forfeited. While Plaintiffs dispute Overland's position, this clearly creates a dispute in material fact, prohibiting the entry of summary judgment.

The Agreement does not state that the earnest money will be forfeited in the event that a construction loan on the property does not close. While forfeitures are allowed by law, they are not favored. Therefore, where a forfeiture would result, this Court strictly construes the forfeiture provision. Since the contract does not provide for forfeiture, this court should not find a forfeiture.

Plaintiffs repudiated the contract by not entering into the joint venture agreement. It is undisputed that Plaintiffs never intended to enter into a joint venture agreement. It is also undisputed that the contract called for a joint venture agreement. Since Plaintiffs never intended to enter into a joint venture agreement, there was either a failure of condition precedent to the Agreement or Plaintiffs' breached the Agreement prior to any alleged breach by Overland and are not entitled to any damages.

Because questions of fact permeate regarding whether the parties ever had a meeting of mind on critical contract terms and the Agreement is at least ambiguous, the trial court erred in granting Plaintiffs' Motion. The facts show that a question of fact exists as to whether there was meeting of minds with regard to three critical terms: the joint venture in the development of the Property; when the first \$15,000 earnest became payable; and when, if ever, the second \$15,000 became payable.

Without a mutual understanding as to these terms there could be no contract. Whether the parties had a mutual understanding upon these terms is a question of fact, with Overland claiming that there was not a mutual understanding or at least claiming that they had an understanding which was different than Plaintiffs' understanding. Therefore, the trial court should not have granted summary judgment to Plaintiffs.

Because the terms of the contract are so vague and ambiguous, the Court should vacate Plaintiffs' Summary Judgment and remand to the trial court to hear evidence regarding the parties' understanding on those terms. A contract is ambiguous if the words used to express the intention of the parties are insufficient so as the contract can be understood to encompass two or more plausible meanings. Here there are arguably two plausible meanings as to when the earnest money was to be paid; (1) Plaintiffs' proposed meaning and, (2) Defendant's position that the earnest money was only to be paid if the construction loan closed or if Overland requested an extension.

Overland believes that there exists numerous questions of fact with regard to Plaintiffs motion prohibiting summary judgment for Plaintiffs on any issue. However, based upon the facts not in dispute and the documents, Overland maintains that the court can determine as a matter of law that Plaintiffs' were not entitled to summary judgment on the second \$15,000 and that Overland was due to the fact that Overland did not request nor was it granted an extension beyond the initial 120-day period.

Overland respectfully requests this Court to vacate the Joint venture agreement's award of partial summary judgment to Plaintiffs, and remand this matter to the Joint venture agreement with

instructions to set it for trial on the breach of contract issue and limit Plaintiffs' potential damages to \$15,000.

## **ARGUMENT**

### **I. Standard of review**

The trial court granted summary judgment for Plaintiffs on the issue of breach of contract. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56(c) of the Utah Rules of Civil Procedure. Because entitlement to summary judgment is a question of law, this Court accords no deference to the trial court's resolution of the legal issues presented. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). This Court determines "only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." State v. Ferre, 784 P.2d 149, 151 (Utah 1989). With regard to the trial court's interpretation of the contract, this Court reviews the trial court's decision under a correctness standard giving the trial court's interpretation to no particular weight. Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

The purpose of a motion for summary judgment is "to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder." Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984). This gives parties a mechanism by which they can avoid unnecessary trials. Id. However, because a motion for summary judgment denies a litigant its day in court, the court must carefully scrutinize the documents submitted. Rich v. McGovern, 551 P.2d 1266 (Utah 1976). If, after such scrutiny, the "evidence presents a genuine issue of material fact



which, if resolved in favor of the non-moving party, would entitle him to judgment as a matter of law," the motion must be denied. Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982). Where reasonable minds could differ, a genuine issue of fact exists. Id. In addition, all reasonable inferences must be drawn in favor of Overland. Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah App. 1989). Rather than following this rule, the trial court drew all inferences in favor of Plaintiffs. Since reasonable minds could differ regarding the facts concerning Plaintiffs' Motion, which if resolved in Overland's favor would have entitled it to judgment as a matter of law, Plaintiffs' Motion should have been denied.

## **II. Summary of disputed facts.**

From the facts set forth above, there exist real and substantial differences between the parties as to the facts of this case. First, there are significant questions of fact regarding the first \$15,000 earnest money. Plaintiffs maintain that the first \$15,000 was non-refundable and was forfeited when the deal to develop the Property failed. This position is not supported by the terms of the Agreement. The Agreement does not state that the first \$15,000 is non-refundable or forfeitable. It does state that the first \$15,000 is only payable upon closing of a construction loan or if Overland requested an extension of time past the initial 120 day period to develop the Property. *See, Exhibit A.* Only under these circumstances did Overland believe it was obligated to release the first \$15,000. Clearly, neither the sale of the Property nor the construction loan regarding the Property closed and it is Overland's contention, supported by its August 25 and September 6, 1990 letters (**Exhibits F and G**), that it never requested an extension of time to develop the Property. Therefore,

there are genuine issues of material fact with regard to the first \$15,000, which should have precluded entry of summary judgment for Plaintiffs.

Second, there are genuine issues of material fact as to whether the parties ever had a meeting of the minds on the joint venture agreement. The Agreement specifically states the parties will enter into a joint venture agreement to develop the Property. Plaintiffs have repeatedly stated that from the outset they had no intention of entering into such an agreement. Overland has consistently maintained that without the joint venture agreement, it would not have entered into the Agreement. Thus, there exists real and significant questions of fact as to whether there was ever a meeting of the minds sufficient to establish a binding contract.

With regard to the second \$15,000, there also exist genuine questions of fact as to Plaintiffs' theory. The Agreement states that the second \$15,000 is non-refundable only if Overland requests additional time past the initial 120 day period. Plaintiffs maintain that Overland either did request additional time or was silent as to this issue, thus triggering the payment of the second \$15,000. Overland maintains that it did not request additional time and in fact stated that the deal was off. Overland's position is supported by its August 25 and September 6, 1990 letters, which Plaintiffs admittedly received. Again, it is not an issue of which position is correct, it is sufficient to defeat Plaintiffs' Motion that there exist a genuine dispute as to these facts.

**III. Plaintiffs were not entitled to any earnest money due to the fact that neither the sale of the Property nor a construction loan regarding the development of the Property closed, an extension of the contract period was not requested or granted and the Agreement does not state that the earnest money is to be forfeited.**

In this case, Overland gave a letter proposal to Plaintiffs dated April 6, 1990. On April 26, 1990, Plaintiffs prepared a counteroffer. In Plaintiffs' counteroffer they stated:

The initial contract term shall be for 90 days. Should additional time be required, the developer agrees to release the original \$15,000 earnest money to seller and replace it with another \$15,000 non-refundable earnest money for an additional 60 days."

Overland reviewed Plaintiffs' counteroffer and, on May 7, 1990, made a counteroffer of its own. In particular, Overland requested, and Plaintiffs agreed, that the initial contract period term be for 120 days rather than 90 days. Therefore, Overland, on May 7, 1990, delivered a \$15,000 Overland check and a letter to Turner, Plaintiffs' agent. That letter stated that the check could not be deposited until written instructions were received from Overland. In addition, under the signed Agreement the initial \$15,000 earnest money was payable only if Overland requested that the Agreement period be extended past 120 days or if a construction loan on the Property closed. Nowhere in the Agreement does it say that the earnest money will be forfeited if closing does not occur. Since Overland never requested an extension and a construction loan on the Property did not close, neither the initial \$15,000 nor the non-refundable second \$15,000 ever became payable to Plaintiffs.

**A. Because the construction loan for the development of the Property did not close nor was a contract extension requested or granted, Plaintiffs never became entitled to the first \$15,000 earnest money.**

The Agreement states and it was Overland's understanding that the first \$15,000 earnest money became payable only if a construction loan on the property closed or Overland requested an extension of the initial 120 day period. Interestingly, even Plaintiffs' Complaint agreed with Overland's understanding. The Complaint erroneously alleged that the \$15,000 earnest money was to become non-refundable 90 days from May 7, 1990. **Complaint ¶ 9 (R. 1-12)**. Plaintiffs' original theory was that because they were not told until after August 5, 1990 that the project could not go forward, they were entitled to the earnest money because there was an implied request for an extension of time. **Complaint, ¶¶ 15, 16, and 17 (R. 1-12)**. However, it is undisputed that the actual period was 120 days, and that within that time there was no request for further time. **R. 591-93**. To the contrary, Plaintiffs were notified that Overland did not want additional time under the existing deal, that Overland was not requesting additional time under the existing deal and that Overland would not authorize the deposit of the original \$15,000. **Exhibits F and G**. Therefore, not only was the \$15,000 not to be paid unless an extension of the initial contract period was requested or until the closing of the construction loan on the Property, but the initial contract term was 120 days rather than 90 days. **See, Exhibit C**. Plaintiffs' Complaint supports Overland's understanding of the Agreement, yet the trial court drew inferences in favor of the moving party and contrary to Overland's Affidavits. In making its ruling on Plaintiffs' Motion the trial court should have drawn all reasonable inferences in favor of Overland. Beehive Brick, 780 P.2d 827.

Prior to the expiration of the original 120 day period, Overland determined that Salt Lake City would not permit the development which had been anticipated and that therefore, the contemplated transaction would not move forward. On August 25, 1990, Overland wrote to the Brunettis and informed them of City requirements. Overland informed the Brunettis that until the city rezoned the Property, it would not authorize the depositing of the \$15,000.00. The August 25th letter is clear that Overland is asking for a new arrangement and it is not going to go forward with the Property purchase. Further, in the September 6, 1990 letter, Overland clearly states that it is preparing a new agreement to "supersede" the original Agreement. This is the date, based on the 120 day contract period, on which Overland had to request an extension and deposit the additional \$15,000 sum, if it wanted the Agreement to remain binding. Overland clearly stated that it was only willing to move forward with the Property under new terms which included an additional 6 acres of land. The Brunettis responded on the same day stating that they were not interested in selling the Property under the new terms. Therefore, under the facts as alleged by Overland, no later than September 6, 1990, the deal was off and Plaintiffs were not entitled to the first \$15,000.

Also, apparently, Plaintiffs' agent, Turner, believed that the deal was off. He returned the original \$15,000 earnest money to Overland. The trial court held that Turner, as Plaintiffs' agent, had represented their best interest. Since Turner was Plaintiffs' agent representing their best interests and he returned the original \$15,000 earnest money to Overland, signifying that the deal was off, it is difficult to see how Plaintiffs can now maintain that they were entitled to any earnest money. Therefore, Plaintiffs were not entitled to summary judgment regarding the first \$15,000 and, arguably, Overland was.

While arguably that Overland was entitled to summary judgment finding that the first \$15,000 never became due and payable, at a minimum it is clear, based upon the facts as alleged and supported by Overland, reasonable minds could differ as to whether Plaintiffs ever became entitled to the first \$15,000, thus giving rise to genuine issues of material facts. If these issues of material fact were resolved in Overland's favor, it would be entitled to judgment as a matter of law and the trial court erred in granting summary judgment to Plaintiffs on the issue of their entitlement to the first \$15,000. Jackson, 645 P.2d 615.

**B. Because Overland never requested an extension to the original 120 day period, Plaintiffs were not entitled to the second \$15,000 earnest money.**

With regard to the additional \$15,000, this amount was due only if Overland requested an extension beyond the initial 120 day contact period. **R. 174.** Plaintiffs claimed that Overland either requested additional time or was silent, thus inferring a need for additional time. **R. 120-23, 327-28 and 655-56.** On the other hand, it was Holman's testimony, supported by his August 25, 1990 (**Exhibit F**) and September 6, 1990 (**Exhibit G**) letters, that Overland did not request an extension past that period. Clearly the parties testimony is at odds and where there is a disputed material fact, summary judgment is not appropriate. Therefore, at a minimum, Plaintiffs are not entitled to partial summary judgment on the second \$15,000.

Originally, Plaintiffs agreed with Overland's interpretation regarding the second \$15,000 earnest money. In their Complaint, Plaintiffs stated that the original period was for 90 days, rather than the now established 120 days. The Complaint then states:

16. The Earnest Money Agreement provided an additional 60-day option for exclusive rights to the Property. By the terms of the Earnest Money Agreement, Holman and/or Overland would be required to release the initial \$15,000 earnest money deposit to the Brunettis, and deposit an additional \$15,000 of earnest money in Turner's trust account for Brunettis.

17. Despite expiration of the 90-day period, Overland . . . continued to operate as though [it] possessed exclusive rights to the Property, and on September 7, 1990, thirty two days after expiration of the option period, formally requested additional time to complete the sale.

18. By exercising the right for additional time under the Earnest Money Agreement, Overland . . . became obligated to deposit . . . an additional \$15,000 for the additional period. . . .

**R. 1-12 (emphasis added).** Clearly, as originally plead by Plaintiffs, they believed that the option to extend the period was based upon either Overland's acts or stated desire, not upon some showing of "need" sufficient to Plaintiffs to justify extending the period.

Since the deal was dead prior to September 6, 1996, there was no request for additional time and Overland should be granted summary judgment finding that Plaintiff never was entitled to the second \$15,000 earnest money. Alternatively, it is apparent that if the Court grants any credence to Plaintiffs' interpretation of the contract, there exist significant questions of material fact precluding summary judgment for Plaintiffs on this issue.

**C. The Agreement does not state that the earnest money will be forfeited in the event a construction loan on the Property does not close.**

Plaintiffs would have the court believe that the Agreement provides for forfeiture of the earnest money if a construction loan on the Property does not close. However, a careful review of the final Agreement dispels this myth. Nowhere within that document does it state that the earnest

money will be forfeited if a construction loan on the Property does not close. While forfeitures are allowed by law, they are not favored. Russell v. Park City Utah Corp., 548 P.2d 889 (Utah 1976), Cert. Denied, 429 U.S. 860 (1977). Therefore, where a forfeiture would result, this Court strictly construes the forfeiture provision. Id. at 891.

In this case, when Plaintiffs wanted a forfeiture to occur they knew how to provide for one. In drafting their counteroffer they stated that the second \$15,000 would be non-refundable. The same term was not applied to the first \$15,000. Also, neither Turner nor Plaintiff ever cashed or deposited the first \$15,000 check. This is hardly the action one would expect a party to take if a payment was non-refundable and immediately forfeited. It is clear in construing the language chosen by Plaintiffs, payment of the first \$15,000 is only required if a construction loan closes or Overland requests an extension, neither of which happened. Therefore, there should be no forfeiture of the first or second \$15,000.

#### **IV. Plaintiffs repudiated the contract by not entering into the joint venture agreement.**

Overland's offer clearly states that within two weeks of acceptance of the Agreement the parties will enter into a separate joint venture agreement. Plaintiffs' counter offer does not address this term of the offer and Plaintiffs indicated their acceptance of this term by signing the Agreement on May 9, 1990. R. J. Daum Const. Co. v. Child, 247 P.2d 817, 819 (Utah 1952) (where a party unconditionally accepts an offer, a binding contract is made). It is undisputed that the parties never entered into the joint venture agreement. In fact, Plaintiffs testified in their depositions that they never intended to joint venture the development of the Property and would not have entered into a



joint venture agreement with Overland. Thus, there was either a failure of a condition precedent to the Agreement<sup>2</sup> or Plaintiffs breached the Agreement prior to any alleged breach by Overland and are not entitled to any damages.

In an attempt to avoid this problem, Plaintiffs have claimed that Overland waived the joint venture requirement in its August 25, 1990 letter. But, in fact, this is further evidence that the August 25, 1990 letter is proposing a new deal. The joint venture was required of Plaintiffs and the fact that they never intended to act is a repudiation of the Agreement making it impossible for Overland to waive--since Plaintiffs had already breached the Agreement. Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992) (repudiation of a contract allows the other party to sue for breach of contract). In addition, waiver, an intentional relinquishment of a known right, is very fact specific and is usually not a proper issue for resolution by summary judgment. American Falls Canal Sec. Co. v. American S. & L. Assn., 775 P.2d 412, 415 (Utah 1989).

More importantly, by August 25, 1990, it was apparent that the development would not go forward as planned. The August 25, 1990 letter was a new offer. As with the previous offer, part of this new offer included a joint venture whereby Plaintiffs would contribute the Property in exchange for a return on their investment at closing. Plaintiffs never accepted this new offer and the original deal terminated.

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<sup>2</sup> A condition precedent is a provision within the contract which if not fulfilled excuses performance. Creer v. Thurman, 581 P.2d 149, 151 (Utah 1978). If the joint venture agreement is a condition precedent to the Agreement, then the court must inquire into the intent of the parties in light of all the circumstances when they executed the agreement. Id. This clearly makes the issue of a condition precedent a factual question not subject to summary judgment.

Because Plaintiffs repudiated the contract by not entering into the joint venture agreement, they were not entitled to partial summary judgment against Overland. If anything, Overland was entitled to summary judgment dismissing Plaintiffs' claims due to their prior breach of contract or the failure of a condition precedent. However, at a minimum there exists questions of fact regarding the joint venture agreement precluding summary judgment.

**V. Because questions of fact permeate the case regarding whether the parties ever had a meeting of the minds on critical contract terms and the Agreement is at least ambiguous, the trial court erred in granting Plaintiffs' Motion for Partial Summary Judgment.**

**A. The facts show that a question of fact exists as to whether there was a meeting of the minds with regard to critical terms of the contract.**

Overland has maintained throughout this litigation that there was never a meeting of the minds on either the joint venture or the earnest money provisions of the Agreement. For that reason, Plaintiffs' Motion should have originally been rejected. Since the date of Plaintiffs' Motion, the facts have been more fully fleshed out, further supporting Overland's position that there was never a meeting of the minds.<sup>3</sup> In order for a contract to be binding, there must be an agreement between the parties to such critical terms which are sufficiently set forth as to allow the contract to be enforced. Commercial Union Associates v. Clayton, 863 P.2d 29, 37 (Utah App. 1993). Here, it is clear that questions of fact predominate as to whether the parties ever had a meeting of the minds on three critical terms; the joint venture in the development of the Property, when the first \$15,000

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<sup>3</sup>For example, at the trial Joseph Brunetti made it clear that the Brunettis never intended to enter into a joint venture agreement with Overland (R. 944-45).

earnest money became payable; and when, if ever, the second \$15,000 became payable. Without a mutual understanding as to these terms there could be no contract.

Overland's original offer contains two important provisions with which the Plaintiffs apparently, did not agree. The first is the joint venture agreement between Plaintiffs and Overland to develop the Property. The offer states:

- a. Overland would then enter into a joint venture agreement with the land owner, within two weeks, to develop the property.
- b. The benefit of a joint venture relationship of this type is that it enables the developer to use its limited resources on the development of the property instead of the purchase of the land. This also reduces some of the risk of the developer and gives assurance that the project can be consummated before the expiration of the agreement.

The Contract clearly requires a joint venture agreement. In his affidavit, Kenneth Holman stated that he intended to enter into a joint venture agreement with Plaintiffs and that he would not have agreed to the deal if it did not include a joint venture. On the other hand, Plaintiffs stated at trial that they would not have entered into the deal if they had been "aware" that it included a joint venture agreement (since the provision for a joint venture appears in the offer, one wonders how the Plaintiffs could not have been aware that this was part and parcel of the Agreement). Clearly there was not a meeting of the minds on this critical provision and thus a contract was not effectuated. Further, there was never a meeting of the minds as to what terms the joint venture agreement would contain. Therefore, at a minimum, a question of fact exists as to what each party's understanding

was regarding the joint venture agreement. Strand v. Cranney, 607 P.2d 295, 296 (Utah 1980) (whether a joint venture exists is usually a question of fact).

Although there are disputes and arguments about Plaintiffs' contentions, there can be no dispute or question that Plaintiffs have not established their contentions so as to be entitled to summary judgment. The Brunettis were to be involved in developing the Property to the extent they would contribute the land up front in exchange for a payment if a construction loan was obtained by Overland. This was an integral part of the parties' Agreement and, based upon the parties' testimony, there was never a meeting of the minds on this issue, or at least there is a question of fact as to whether there was a meeting of the minds. Because there is a question of material fact on whether the parties ever had a meeting of the minds regarding the joint venture, the trial court's ruling granting summary judgment to Plaintiffs was error.

The other important provision on which the parties did not reach a mutual understanding was under what circumstances the earnest money became due and payable. Overland's original offer of April 6, 1990 states in pertinent part as follows:

- a. A \$15,000.00 earnest money would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance being paid from the proceeds of the construction loan. (emphasis added)
- b. Overland, by separate agreement, would agree to pay the land owner the agreed upon price, in cash, at the closing of the construction loan.

- c. It is estimated that the construction loan and all approvals can be obtained within 120 to 180 days, however, if additional time is needed the developer agrees to release the original \$15,000.00 earnest money to the land owner and to deposit an additional \$15,000.00 non-refundable earnest money for an additional extension of 180 days. (emphasis added)

**See, Exhibit A.** It is clear from Overland's initial offer that the original \$15,000.00 gets paid only "at the time of closing" of the construction loan or if "additional time is needed past the 120 days." Overland was unwilling to proceed because of difficulties with the zoning applicable to the Property. **See, Exhibits F and G.** Therefore, on August 25, 1990, towards the end of the initial contract period, Overland proposed an entirely different transaction. This offer included additional time to complete the transaction without the release of the original earnest money and extending the time in which the parties were to enter into the joint venture agreement. Further, on September 6, 1990, the date on which the extension had to be requested, Overland explicitly stated that the original agreement was terminated and proposed an offer on the Brunettis' entire 11 acres. **See, Exhibit G.** Neither the August 25 or September 6, 1990 offer was accepted. **(R. 608).**

Plaintiffs' counteroffer raised the price to \$895,000 and stated that the initial contract term shall be for 90 days. This was subsequently modified by Overland's counteroffer, which was accepted by Plaintiffs, to provide for an initial contract term of 120 days. Furthermore, in the counteroffer Plaintiffs stated: "Should additional time be required the developer agrees to release the original \$15,000.00 earnest money to seller and replace it with another \$15,000 non-refundable

earnest money for an additional 60 days." Again, the language shows that both the initial \$15,000 and the subsequent \$15,000 would be released to Plaintiffs only if the construction loan on the Property closed or if Overland requested an extension beyond the 120 day initial period.

Apparently, Plaintiffs believed that they were entitled to the first \$15,000 if Overland did not close the purchase within 120 days. This is in direct contravention with language of the Agreement and the understanding of Overland. In addition, Plaintiffs' position is not supported by the documents. There is no place in **Exhibits A, B, or C** which states that the original \$15,000 is non-refundable or that it gets forfeited if there is not a closing within 120 days. Clearly, had the parties wanted the original \$15,000 to be non-refundable they would have said so as they had done with the second potential \$15,000 earnest money payment.

Plaintiffs are attempting to have the court write into the agreement a clause which is not present, i.e., that the first \$15,000 is "non-refundable" and that it be forfeited. Since the term "non-refundable" does not appear anywhere with respect to the initial \$15,000, the Court should not rewrite the Agreement to supply this term. Hal Taylor Associates v. Unionamerican, Inc., 657 P.2d 743 (Utah 1982). To do so would wrongly make a better deal for Plaintiffs than they made for themselves. Rio Algen Corp. v. Jimco Ltd., 618 P.2d 497 (Utah 1970). Plaintiffs ask the court to ignore the condition that they will be paid only when there is a construction loan or if Overland requested an extension to the initial period. However, it is clear that none of these events occurred. Regardless, it shows that there was not a meeting of the minds on the critical element of when payment of the earnest money was to be made. In such a case, the trial court should find that there

was no contract or hear evidence as to whether the parties had a mutual understanding on the terms of the Agreement.

**B. Because the terms of the Contract are so vague and ambiguous, this Court should vacate Plaintiffs' Summary Judgment and remand to the trial court to hear evidence regarding the parties' understanding on those terms.**

At a minimum, the Agreement between the parties is ambiguous. A contract is ambiguous if the words used to express the intention of the parties are insufficient so as the contract can be understood to encompass two or more plausible meanings. C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988). Here there are arguably two plausible meanings as to when the earnest money was to be paid; (1) Plaintiffs' proposed meaning and, (2) Defendants' position that the earnest money was only to be paid if the construction loan closed or Overland requested an extension. If the Agreement cannot be resolved by an objective and reasonable interpretation, a court must resort to extrinsic evidence. Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225 (Utah 1987); Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981). This includes parol evidence as to the parties' intentions under the Agreement. Id.

Here, based upon the Holman Affidavit, Overland's intention was that the original \$15,000 would not be payable unless one of two things happen: (1) either Overland requested an extension beyond the initial 120 day contract period; or (2) the construction loan on the Property closed. **R. 174.** Overland never requested an extension past the 120 day period and the construction loan did not close. Therefore, based upon the parol testimony of Holman, the original \$15,000 never became payable to Plaintiffs. **R. 173.** Where extrinsic evidence is necessary to determine the terms

of an agreement, there exists a question of fact for determination by the finder of fact after a trial. Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const. Co., 731 P.2d 483 (Utah 1986); Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

With regard to the additional \$15,000, this amount was due only if Overland requested an extension beyond the initial 120 day Contact period. **R. 174.** It is Holman's testimony, supported by his August 25, 1990 and September 6, 1990 letters, that Overland did not request an extension past that period. Plaintiffs dispute this fact. Where there is a disputed material fact, summary judgment is not appropriate. Therefore, at least concerning the additional \$15,000, Plaintiffs are not entitled to partial summary judgment. However, as addressed below, Overland requests that this Court reverse the trial court's ruling on Plaintiffs' Motion for Partial Summary Judgment and require the trial court to hear evidence regarding the terms of the Agreement, but limit Plaintiffs' potential damages to the first \$15,000.

**VI. This Court should enter summary judgment for Overland regarding the second \$15,000.**

Overland believes that there exists numerous questions of fact with regard to Plaintiffs' Motion prohibiting summary judgment for Plaintiffs on any issue. However, based upon those facts not in dispute and the documents, especially Overland's August 25, 1990 and September 6, 1990 letters, Overland maintains that the Court can determine as a matter of law that Plaintiffs were not entitled to summary judgment on the second \$15,000 and that Overland was. Christensen v. Farmers Insurance Exchange, 443 P.2d 385, 389 (Utah 1968). This is true whether or not Overland has previously moved for summary judgment on this issue. Id.; Security Title Co. v. Payless Builders



Supply, 407 P.2d 141 (Utah 1965) (where there are no true issues of material fact, a court may grant summary judgment without formal advanced notice).

In this case there are no disputed material facts as to whether Plaintiffs repudiated the contract by not intending to joint venture the development of the Property. Also there is no dispute that under the terms of the agreement as written, Overland never requested, nor was it granted, an extension beyond the 120-day period. It is clear from Overland's August 25 and September 6, 1990 letters that Overland had determined not to go forward with the development of the Property and had terminated the deal. Therefore, under no circumstances did Plaintiffs become entitled to the second \$15,000.

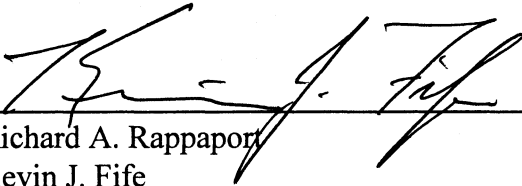
There is no question of material facts regarding the second \$15,000 earnest money and that Plaintiffs never became entitled to this sum as a matter of law. Therefore, the Court may reverse the trial court's decision as to the second \$15,000 earnest money and grant summary judgment to Overland, limiting Plaintiffs' damages to a maximum of \$15,000.

### **CONCLUSION**

Based upon the foregoing, Overland respectfully requests that the Court vacate the trial court's grant of partial summary judgment for Plaintiffs and remand this case for a trial on the merits due to the fact that material questions of fact exist, precluding a grant of summary judgment. Overland also requests that this Court direct the entry of partial summary judgment in favor of Overland limiting Plaintiffs' potential damages to the first \$15,000.

DATED this 30<sup>th</sup> day of May, 1997.

COHNE, RAPPAPORT & SEGAL P.C.



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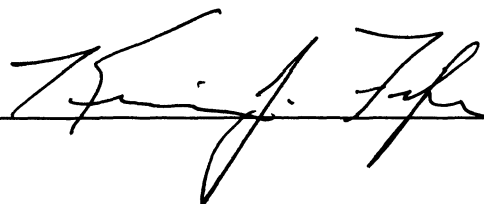
Richard A. Rappaport  
Kevin J. Fife  
Attorneys for Defendant/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, postage prepaid, this 30th day of May 1997, to the following counsel of record:

Brian W. Steffensen, Esq.  
Attorney for Plaintiffs  
675 East 2100 South, Suite 350  
Salt Lake City, UT 84106

Paul Van Dam, Esq.  
**ANDERSON & WATKINS**  
136 South Main, Suite 900  
Salt Lake City, Utah 84101



A handwritten signature in cursive script, appearing to read "King J. Fyfe", is written over a horizontal line.

**Tab A**



April 6, 1990

Gil Turner  
Turner Co. Real Estate  
P.O. Box 2264  
Salt Lake City, Utah 84110

Dear Mr. Turner:

Overland Development Company would like to purchase the 5.33 (+ or -) acres, Parcel No. 38019-0000, located on North Temple west of Redwood Road. The terms of the purchase are slightly different from the normal Earnest Money Agreement that is presented, however, we have found our approach to be very sound and profitable for both the landowner and the developer. Over the past 6 years we have developed over \$30 million of real estate using this method. Our proposal is as follows:

Overland Development Company would agree to purchase the property for an agreed price of \$850,000. Included in the purchase price is the assignment of the private club license and purchase of the existing building, excluding any inventory. A \$15,000 earnest money would be deposited in an independent trust account to be credited to the purchase price at the time of closing with the balance being paid from the proceeds of the construction loan. Overland would then enter into a joint venture agreement with the landowner, within two weeks, to develop the property. It would be Overland's responsibility to pay for all the development and approval costs, including: a feasibility study; an appraisal; environmental studies; engineering drawings; architectural drawings; city approvals; and all other costs incident to the development of the property for the purpose of building a hotel and restaurant/club.

The landowner would agree to permit Overland Development Company, or another entity to which Overland assigns its interest, to represent to the City and to lending institutions that the land has been contributed to the partnership. This enables Overland to establish an equity position in the deal to comply with the lending institutions requirements.

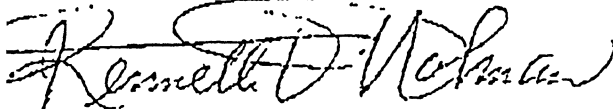
Overland, by separate agreement, would agree to pay the landowner the agreed upon price, in cash, at the closing of the construction loan.

The benefit of a joint venture relationship of this type is that it enables the developer to use it's limited resources on the development of the property instead of the purchase of the land. This also reduces some of the risk of the developer and gives assurance that the project can be consummated before the expiration of the agreement.

000587

Under the conventional method of purchasing a property, the landowner, usually, would be required to accept an earnest money agreement which had enough contingencies in the agreement to insure that the developer could develop the property. In most cases, the length of time to close the deal would be about the same. It is estimated that the construction loan and all approvals can be obtained within 120 to 180 days, however, if additional time is needed the developer agrees to release the original \$15,000 earnest money to the landowner and to deposit an additional \$15,000 nonrefundable earnest money for an additional extension of 180 days. It is the intention of the developer to proceed with the development as rapidly as possible. Any delays in the process will likely be due to delays in obtaining City approvals.

Sincerely,



Kenneth T. Holman  
President

Accepted:

✓

✓

Date: \_\_\_\_\_

THE ACCEPTANCE OF THIS PROPOSAL BY SELLER  
IS SUBJECT TO THOSE CHANGES IN THE ATTACHED  
COUNTER OFFER DATED APRIL 25, 1990.

010598

Tab B

**CERTIFIED COPY**

IN THE THIRD JUDICIAL DISTRICT COURT

- - oOo - -

JOSEPH R. and FLORENCE  
BRUNETTI,

Plaintiffs,

vs.

GILBERT R. TURNER,  
KENNETH T. HOLMAN, and  
OVERLAND DEVELOPMENT CORP.,

Defendants.

Case No. 93090886

DEPOSITION OF

**JOSEPH BRUNETTI**

Judge Dennis Frederick

- - oOo - -

BE IT REMEMBERED that on the 12th day of May, 1993, the deposition of **JOSEPH BRUNETTI** was taken at the instance and request of **RICHARD A. RAPPAPORT** at the offices of **COHNE, RAPPAPORT & SEGAL**, 525 East 100 South, Fifth Floor, Salt Lake City, Utah, before **ANNI HARMON**, a Registered Professional Reporter and Notary Public in and for the State of Utah.

Reported By:

**ANNI HARMON, RPR, CSR**



EXHIBIT B

**Associated Professional Reporters**  
10 West Broadway / Suite 200 / Salt Lake City, Utah 84101  
Phone (801) 322-3441



1 for Overland Management and Realty Company  
2 Incorporated."

3 Q. BY MR. RAPPAPORT: You may not have paid  
4 attention to it, but in fact, it was written on there  
5 right from the beginning. Is that true?

6 A. Yes, sir, it is.

7 Q. Did you ever tell Mr. Turner that you would  
8 not enter into a joint venture agreement with Overland  
9 Development?

10 A. Yes.

11 Q. When was that?

12 A. I can't remember at this time. All I wanted  
13 was my money. I wasn't going to be in joint venture  
14 with them.

15 Q. Was that sometime during the summer of 1990?

16 A. It could have been. Mr. Turner came over to  
17 my house a lot.

18 Q. We had that undated letter that you signed.  
19 I'm not sure if it's already an exhibit.

20 (Deposition Exhibit No. 22  
21 marked for identification.)

22 Q. BY MR. RAPPAPORT: Let me hand you what has  
23 been marked as Exhibit 22. Are you familiar with that  
24 letter?

25 A. Yes, sir.

Tab C

# CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

--oOo--

JOSEPH R. and FLORENCE	:	
BRUNETTI,	:	
	:	Case No. 93090886
Plaintiffs,	:	
	:	DEPOSITION OF
vs.	:	
	:	FLORENCE BRUNETTI
GILBERT R. TURNER,	:	
KENNETH T. HOLMAN, and	:	Judge Moffatt
OVERLAND DEVELOPMENT CORP.,	:	
	:	
Defendants.	:	

--oOo--

BE IT REMEMBERED that on the 3rd day of May, 1994, the deposition of **FLORENCE BRUNETTI** was taken at the instance and request of **RICHARD A. RAPPAPORT** at the offices of **COHNE, RAPPAPORT & SEGAL**, 525 East 100 South, Fifth Floor, Salt Lake City, Utah, before **ANNI HARMON**, a Registered Professional Reporter and Notary Public in and for the State of Utah.

Reported By:

**ANNI HARMON, RPR, CSR**



Associated Professional Reporters

16 West Broadway / Suite 200 / Salt Lake City, Utah 84101

Phone (801) 322-3441

**EXHIBIT C**

1           A.     Not that I remember.

2           Q.     Did you hear your husband's prior testimony  
3 that he did not want to sign such an agreement?

4           MR. STEFFENSEN:  Objection.

5 Mischaracterization.  He said he would not subordinate  
6 the property, which is different.

7           MR. RAPPAPORT:  I can find it in the  
8 deposition if you want.

9           MR. STEFFENSEN:  Okay.  I think it's a  
10 mischaracterization.

11          MR. RAPPAPORT:  I'm not talking about what  
12 he said today.

13          MR. STEFFENSEN:  I think before it's the  
14 same thing.

15          Q.     BY MR. RAPPAPORT:  Had you been willing to  
16 sign a joint venture agreement with Overland?

17          A.     No.

18          Q.     Was it your understanding that  
19 Gilbert Turner was supposed to be yours and your  
20 husband's agent?

21          A.     Yes.

22          MR. STEFFENSEN:  Objection.  Vague and  
23 ambiguous.  Agent?

24          Q.     BY MR. RAPPAPORT:  Was he supposed to be the  
25 real estate agent?

Tab D

ADDENDUM/COUNTER OFFER  
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes: (✓) a COUNTER OFFER ( ) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 6th day of April, 1990, between OUELAND Dev. Co. as buyer(s), and Joseph R. & Florence W. Brunetti as seller(s),

covering real property described as follows:

5.33 (+ or -) ACRES . TAX ACCELOS JARILL CO.  
03-34-381-019

The following terms are hereby incorporated as part of THE AGREEMENT:

THE TERMS AND CONDITIONS OF THE LETTER DATED  
APRIL 6, 1990, ARE ACCEPTABLE WITH THE  
FOLLOWING CHANGES:

- 1) THE PRICE SHALL BE 895,000.-
- 2) THE INITIAL CONTRACT TERM SHALL BE  
FOR 90 DAYS. SHOULD ADDITIONAL TIME  
BE REQUIRED, THE DEVELOPER AGREES TO  
RELEASE THE ORIGINAL \$15,000 EARNEST  
MONEY TO SELLER AND REPLACE IT  
WITH ANOTHER \$15,000 NON REFUNDABLE  
EARNEST MONEY FOR AN ADDITIONAL 60 DAYS.

All other terms of THE AGREEMENT shall remain the same. ( ) Seller (✓) Buyer shall have until 5:00 (A.M./P.M.)  
4-30 1990 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date 4-26-90  
Time 9:50 (A.M./P.M.)

Signature of (✓) Seller ( ) Buyer  
✓ Joseph R. Brunetti  
✓ Florence W. Brunetti

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One

- ( ) I hereby ACCEPT the foregoing on the terms specified above.  
( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum.

Signature	Signature	Date	Time
( ) I hereby reject the foregoing _____ (Initials)			

DOCUMENT RECEIPT

- ( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures.

Signature of Buyer(s)	Date	Signature of Seller(s)	Date
-----------------------	------	------------------------	------

- ( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on \_\_\_\_\_

19\_\_\_\_, by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer.

Sent by \_\_\_\_\_

This form has been approved by the Utah Real Estate Commission.

000509  
**EXHIBIT D**

Tab E

ADDENDUM/COUNTER OFF  
TO EARNEST MONEY SALES AGR

This ADDENDUM/COUNTER OFFER constitutes: (✓) a COUNTER OFFER ( ) an ADDENDUM to that EARNEST MONEY

SALES AGREEMENT (THE AGREEMENT) dated the 6th day of April, 1990, between OVERLAND Dev. Co. as buyer(s), and Joseph R. & Florence W. Brunetti as seller(s),

covering real property described as follows:

5.33 (+ or -) Acres, Tax Assessors Parcel No.  
08-34-381-019

The following terms are hereby incorporated as part of THE AGREEMENT:

THE TERMS AND CONDITIONS OF THE LETTER DATED  
April 6, 1990, ARE ACCEPTABLE WITH THE  
FOLLOWING CHANGES:

1) THE PRICE SHALL BE \$895,000

2) THE INITIAL CONTRACT TERM SHALL BE

FOR 120 DAYS. SHOULD ADDITIONAL TIME  
BE REQUIRED, THE DEVELOPER AGREES TO  
RELEASE THE ORIGINAL \$15,000 EARNEST  
MONEY TO SELLER AND REPLACE IT  
WITH ANOTHER \$15,000 NON REFUNDABLE  
EARNEST MONEY FOR AN ADDITIONAL 60 DAYS.

All other terms of THE AGREEMENT shall remain the same. ( ) Seller (✓) Buyer shall have until 5:00 (A.M. (P.M.))  
4-30, 1990 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date 4-26-90  
Time 9:50 (A.M. (P.M.))

Signature of (✓) Seller ( ) Buyer

✓ Joseph R. Brunetti  
✓ Florence W. Brunetti

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One

(✓) I hereby ACCEPT the foregoing on the terms specified above.

( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum.

Joseph R. Brunetti 5/7/90 5:00 pm.  
Principal and Broker for Overland Right & Realty, Inc.  
( ) I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures.

Joseph R. Brunetti 5-9-90  
Joseph R. Brunetti 5-9-90  
Signature of Buyer(s) Date Signature of Seller(s) Date

( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on \_\_\_\_\_

19\_\_\_\_ by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer.

Sent by \_\_\_\_\_

This form has been approved by the Utah Real Estate Commission

EXHIBIT E



Tab F



August 25, 1990

Joseph R. Brunetti

Dear Mr. Brunetti:

On May 9, 1990 you and your wife, Florence, accepted an offer I made to purchase 5 (+ or -) acres located on North Temple near Redwood Road for \$895,000. The Agreement gave me 120 days to complete the sale. If I needed additional time I would be required to release the original \$15,000 Earnest Money deposit to you and pay an additional \$15,000 non-refundable Earnest Money for an additional 60 day extension. September 6, 1990 will be the 120th day since our Agreement was signed on May 9th.

So far I have spent considerable time and money trying to get Salt Lake City to rezone the property from R-6 to C-1. Gil Turner and I have met with members of the Planning Commission on four separate occasions. Two of those meetings have been with the Development Coordination Committee. Because the Committee will not rezone a property without a specific development project in mind I have had my architect design a conceptual site showing two restaurant pads and a hotel. After meeting with the Development Coordination Committee for the second time they ask me to completely revise the conceptual plan. They wanted wider streets for Duder and Gertie. They wanted to eliminate any access into the property from Redwood Road to Gertie and they wanted Duder to dead end instead of tying into New Star Road. Additionally they requested changes in the height of buildings and in the parking layout and landscaping schemes.

Besides the time delays we have experienced in dealing with the City there have been some other major issues to resolve. In order to enter the property, with the elimination of access from Gertie, we need a left hand turn lane to replace the island on North Temple. Although the State has expressed a willingness to provide a left hand turn lane into the property I will need to have an engineer design the turn lane and submit it to the Utah Department of Transportation for approval.

There are other issues that still need to be addressed before we can finalize our Agreement. It is likely that there is soil contamination on the east side of your property because of its proximity to the Cash Saver

gas station. I need to have a soil test run to determine if this is the case. If it is I still intend to buy the property at the agreed price but it will require that I move one of the restaurant pad sites and maybe redesigning the hotel layout.

With so many issues still unanswered I do not intend to permit Mr. Turner to release my \$15,000 check until these issues are resolved and the property is rezoned. Otherwise I could be left with a property that is improperly zoned for my purposes.

I would therefore request that our Agreement be extended for an additional 120 days for no additional Earnest Money deposit. If this is acceptable I will authorize Mr. Turner to hold my deposit until the rezoning has been approved at which time I will then authorize in writing its release to you.

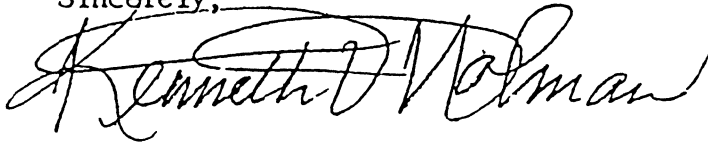
I appreciate your patience and apologize for the delay. I can't believe how incredibly slow the City is rezoning property. Regardless of the City's delays I am moving forward as fast as I can on all the other issues. It appears that I have tentatively lined up an additional equity partner to joint venture the development of the hotel. I have also received verbal approval from Hampton Inn regarding the acquisition of the Franchise rights for the location. Mr. Turner and I have also secured two very strong national restaurant chains who are now going through their review and approval process.

I apologize for the delay. A lot of the blame rests with the City and their inability to move faster on rezoning the property. I believe that even if another developer were found to replace me that they would have to go through the same process and frustrations of rezoning the property before they would agree to buy it.

In my original letter to you dated April 6, 1990, I indicated that Overland Development Company would enter into a Joint Venture Agreement with you to develop the property. The purpose of this Agreement was not to get you involved in our development but merely as a way of permitting Overland to represent that it was also an owner of the property for purposes of getting the property rezoned and for financing the restaurant and hotel developments. At this stage you have signed a letter to the City indicating that I can represent you in getting the property rezoned. There is no need to enter into a Joint Venture Agreement until we have rezoned the property and are preparing to get a construction loan on the hotel and/or restaurant/s. At that time it will be necessary to prepare the Joint Venture Agreement to obtain the financing and pay you for the land.

If you and Mrs. Brunetti agree to provide the extension requested above and to permit me to continue forward with the rezoning and construction financing as has been outlined above please sign the acceptance below.

Sincerely,

A handwritten signature in cursive script, reading "Kenneth T. Holman". The signature is written in dark ink and is positioned above the printed name and title.

Kenneth T. Holman  
President

Accepted:

\_\_\_\_\_  
Joseph R. Brunetti

\_\_\_\_\_  
Florence W. Brunetti

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

000587

Tab G



September 6, 1990

Joseph R. & Florence W. Brunetti

Re: Offer to Purchase 5 +/- acres  
on North Temple near Redwood Rd

Dear Mr. & Mrs. Brunetti:

I have requested Mr. Gil Turner to prepare a new Earnest Money Sales Agreement purchasing the entire 11 +/- acres to supercede my original Offer to Purchase 5 +/- acres.

The termination of the original offer and the inclusion of the additional acreage will enable us to get the entire parcel rezoned. It will also eliminate the necessity of requiring you to joint venture the development with me.

I intend to move forward on the rezoning as fast as possible. There are several zoning requirements that the planning commission stipulated in its Preliminary Project Review (Petition 400-655 - Holman/Turner [Brunetti] Request to rezone property at 1750 West North Temple from Residential "R-6" to Commercial "C-1"). My architect is moving forward to make the necessary changes.

As I progress through the zoning process I would welcome any suggestions you may have.

Sincerely,

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

Kenneth T. Holman  
President

cc: Gil Turner

000000