

1988

William R. Kelley, Jr. v. Leucadia Financial Corporation : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
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DOCKET NO. 88-0534 IN THE UTAH COURT OF APPEALS

WILLIAM R. KELLEY, JR.,
Plaintiff-Respondent,

v.

LEUCADIA FINANCIAL
CORPORATION, a Delaware
corporation,

Defendant-Appellant.

Case No. 880534-CA

Priority No. 14b

BRIEF OF RESPONDENT

ON APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON AND
HONORABLE PAT B. BRIAN, DISTRICT JUDGES

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COURT OF APPEALS

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PARTIES TO THE PROCEEDING BELOW

The following parties or attorneys are now or have been interested in this litigation or any related proceedings:

1. First Security Mortgage Company ("First Security") was the defendant below. On June 3, 1988, Leucadia Financial Corporation ("Leucadia") was substituted for First Security. Leucadia claims rights to the Property through a contract for purchase that was specifically made "subject to" the Lis Pendens filed by the plaintiff. First Security chose not to appeal and conveyed the subject Property to the plaintiff pursuant to the Trial Court's Decree of Specific Performance.

2. Craig L. Taylor, Esq., Anthony B. Quinn, Esq. and Jeffrey D. Eisenberg, Esq. of Ray, Quinney & Nebeker, previously appeared as counsel for First Security before the substitution of parties.

3. Herbert S. Armstrong, William Melbourne Armstrong, Jr., Joseph F. Ringholz and Raye C. Ringholz are defendants in the action entitled First Security Mortgage Company v. Armstrong, et al., Civil No. 9447, filed July 10, 1987 in the Third Judicial District Court in and for Summit County, State of Utah. That action seeks a decree of quiet title to the property that is the subject of this action plus an additional 15.22 feet of property that was not deeded to First Security because of an erroneous property description, a decree of quiet title to all water rights appurtenant to the property, actual damages and

punitive damages. The defendants are represented by Robert M. Felton, Esq.

4. All other parties are reflected in the caption and all other counsel have entered their appearance.

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NATURE OF PROCEEDINGS BELOW

Leucadia appeals from the following judgments and orders:

1. An Order of Partial Summary Judgment signed on February 1, 1988 (R.562-64);
2. A Final Judgment and Decree of Specific Performance signed on May 6, 1988 (R.815-24); and
3. An Order signed on May 6, 1988. (R.812-14)

These judgments and orders ordered First Security to convey a home and the accompanying 11 acres of land to plaintiff William R. Kelley, Jr.

Leucadia appealed on June 3, 1988, and on August 22, 1988, the Utah Supreme Court notified the parties that the case was poured-over to the Court of Appeals for disposition.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3(a) of the Rules of the Utah Supreme Court, in that it is an appeal taken from a district court to the Supreme Court from a final judgment and pursuant to the Supreme Court's transfer of the appeal pursuant to Rule 4A(a) of the Rules of the Utah Court of Appeals.

This case involves an appeal from a final judgment of the Third Judicial District Court.

ISSUES PRESENTED FOR REVIEW

Leucadia claims that the trial court erred in decreeing specific performance of First Security's Agreement to sell property to Kelley on the ground that Kelley's tender of performance was ineffective and/or untimely. Kelley submits that the trial court did not err.

STATEMENT OF THE CASE

On March 2, 1987, plaintiff William R. Kelley, Jr. ("Kelley"), a resident of Hull, Massachusetts, agreed to purchase from First Security Mortgage Company ("First Security"), a home and approximately 11 acres of land in Park City, Utah (the "Property"). The Property was circumscribed by natural boundaries -- a spring and a stream -- and fences. The home is located on the edge of the stream, which feeds a trout pond and irrigates pastures located on the Property. At the time the Agreement was made, both Kelley and First Security believed and intended that, at closing, First Security would convey marketable title to all of the land within the natural boundaries and fences.

Before the closing, which was to occur on or before April 20, 1987, First Security learned that the deed through which it took title contained an erroneous property description

that did not coincide with the property that it intended to convey and Kelley intended to receive. As a result, neither the spring nor the stream could be included in First Security's conveyance. In addition, the adjacent property owners, the Armstrongs, cutoff the water supply to the pond and irrigation ditches and the pond dried up. Thus, if the Agreement had closed on April 20, 1987, as agreed, Kelley would have received a home and grounds with a discrepancy between the natural, intended and legal boundaries and the deed description. He would have also received a mud-hole instead of a trout pond. More importantly, litigation with the Armstrongs was not merely a possibility, but was virtually certain.

Recognizing these problems, and hoping to salvage its deal with Kelley, First Security spent the rest of the spring and most of the summer of 1987 trying to resolve the problems. Throughout this time, First Security and Kelley cooperated in every respect. Kelley accepted First Security's offers to extend the closing date on three occasions -- two of which were made after the designated closing date had expired. In addition, Kelley, following First Security's advice, did not retain Utah counsel since he was confident that First Security would resolve the boundary and water problems and, once those problems were resolved, the sale would close.

First Security's informal attempts to resolve the problems were unsuccessful and on July 10, 1987, it filed a Complaint against the Armstrongs claiming that the erroneous legal description prevented it from conveying marketable title to Kelley. The Complaint also claimed that without the stream, spring and trout pond, the Property's value, aesthetically and economically, was substantially reduced. In addition to seeking reformation of the erroneous legal description, a decree quieting title to the Property in First Security and a declaration that First Security was the fee simple owner of all water rights appurtenant to the Property, First Security's Complaint also sought actual and punitive damages.

In late August or early September of 1988, First Security's eagerness to sell the Property to Kelley and its willingness to resolve the problems abruptly ceased when appellant Leucadia Financial Corporation ("Leucadia") expressed an interest in purchasing the Property directly from First Security. By selling the Property directly to Leucadia, First Security could avoid paying a \$45,000.00 real estate commission since its listing agreement with Gump & Ayers had expired, it could negotiate its way out of the Armstrong lawsuit and, at the same time, obtain a higher, cash purchase price for the Property. However, before these plums could be picked, First Security had to get rid of Kelley who, at the time, still believed that he and First Security

would cooperate in resolving the problems and closing the Agreement. Kelley had not retained Utah counsel -- on First Security's advice -- and he believed that a fourth extension of the closing date would be signed shortly since the last extension expired on August 31, 1987. He was wrong.

On Friday, September 4, 1987, First Security sent a letter to Kelley demanding that the sale close by September 15, 1987, or First Security would consider the Agreement to be null and void. The letter advised Kelley to retain counsel and "offered" to make title and water documents available for his or his attorney's review. The letter was sent over the Labor Day weekend and Kelley did not receive it until September 8, 1987 -- leaving him only five business days to close the \$650,000 purchase which was fraught with problems of First Security's creation. That day, he sent a telegram to First Security indicating his continued desire to purchase the Property and requesting a 30-day extension of the closing date since all previous extensions sought by First Security had been for at least 30 days. The next day he retained Utah counsel to evaluate the problems.

In view of the complexity of the issues, it was readily apparent to Kelley that First Security's closing demand was unreasonable; nonetheless, Kelley's counsel made an appointment with First Security's counsel for September 10, 1987, to review

the documents concerning the water and boundary problems. First Security's lawyers failed to keep the appointment, but offered a conciliatory, albeit meaningless, extension of its demanded closing date for an additional week to September 22, 1987. By that date, the documents still had not been provided.

Kelley was left with three options: (1) accept a return of his earnest money deposit, absorb his losses and walk away from a purchase he truly wanted to make; (2) accept a deed, pay the full purchase price and waive all claims against First Security -- pursuant to either the merger doctrine or the express waiver demanded by First Security -- despite the fact that First Security admitted in the Armstrong Complaint that the Property was less valuable due to the boundary and water problems; or (3) ask the court to require a conveyance to him of First Security's interest in the Property and interpret the Agreement to determine whether an adjustment in the sales price was warranted under the terms of the Agreement. The first two options required Kelley to accept First Security's unilateral interpretation of what was required of it under the Agreement, while the third option vested that interpretation where it properly belonged -- with the court.

Needless to say, Kelley selected option (3) and filed this action on September 22, 1987, seeking a decree requiring First Security to convey to him whatever interest it had and a

declaration of the parties' rights and obligations under the Agreement. The Complaint also sought an abatement of the purchase price and damages, if appropriate.¹ Kelley also tendered his \$124,000 down payment into escrow along with a demand that First Security perform as agreed and intended by the parties. He also caused a Lis Pendens to be recorded. In response, First Security agreed to extend the closing date to October 8, 1987, if Kelley agreed to purchase the Property "as is" and release his claims against First Security. Kelley refused and transferred his significant down payment to the Clerk of the Court.² First Security declared that the Agreement was void.

On September 25, 1987, Leucadia made its first formal offer to purchase the Property and on November 25, 1987, the sale to Leucadia closed; however, the sale was expressly made subject to the prior rights of Kelley.

The Agreement between Leucadia and First Security provides that if First Security loses this lawsuit, First Security must return with interest any money received from Leucadia and must indemnify Leucadia for all of its costs and expenses incurred

¹ First Security and Kelley have settled the issues of an abatement of the purchase price, damages and attorneys' fees. Kelley has released First Security from those claims and First Security has deeded the Property to Kelley.

² To the credit of the Summit County Treasurer, he was able to invest the tender and earn an 8.61% annual return which was almost 2% better than banks were paying on money market accounts during the same period of time.

as a result of its purchase of the Property. In other words, Leucadia contracted to be made whole when Kelley received the Property.

First Security filed a Motion to Dismiss Kelley's Complaint and Kelley filed a Cross-Motion for Partial Summary Judgment. Both motions were supported by Affidavits. On December 6, 1987, Kelley's Motion was granted and First Security's Motion was denied. On January 20, 1988, the court entered an Order that Kelley was entitled to a decree of specific performance requiring First Security to convey its interest in the Property, but retained jurisdiction to determine, among other things, the rights and obligations of the parties under the Agreement and whether Kelley was entitled to an abatement of the purchase price and/or damages. The Order stated that First Security's conveyance could wait until final judgment was entered.

Final judgment was entered on May 6, 1988, and First Security conveyed to Kelley the Property that it owned by special warranty deed plus the 15.22 feet caused by the boundary discrepancy by quit-claim deed. Kelley and his family now occupy the Property. On June 3, 1988, Leucadia was substituted as defendant for First Security and filed this appeal.

STATEMENT OF THE FACTS

1. The Agreement Between Kelley and First Security.

a. On or about March 2, 1987,³ Kelley, as buyer, and First Security, as seller, executed an Earnest Money Sales Agreement for the purchase of residential property located at 320 Snows Lane, Park City, Utah. (R.14-22)

b. The Agreement contains the following terms:

(1) "Condition and Conveyance of Title. Seller represents that Seller holds title to the property in fee simple. Transfer of Seller's ownership interest shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by a current policy of title insurance in the amount of purchase price." (R.14 3)

(2) "Property sold 'as is' without warranty. Title conveyed by special warranty deed corp form. Other terms to remain the same." (R.14)

(3) "Current certified survey will be provided by Seller." (R.18)

(4) "Closing to be on or before April 20, 1987." (R.18)

³The Earnest Money Agreement is dated February 20, 1987; however, an agreement between the parties was not reached until March 2, 1987.

(5) "Time is of the essence." (R.17 Q)

c. Other relevant terms of the Agreement are as set forth in Leucadia's Brief, pages 3-6.

d. In reliance on the Agreement, Kelley deposited \$10,000 with Gump & Ayers and began arranging the funds necessary by liquidating assets. (R.276)

2. The Property in Dispute.

a. At the time the Agreement was signed, both Kelley and First Security understood the Property to consist of a residence surrounded by approximately 11 acres of grounds. The grounds are substantially enclosed by fences, a spring and a stream. The home is situated on the edge of the stream, which feeds the pond and irrigates the pastures located on the Property. (R.207-08, 275)

b. Shortly after the Agreement was signed, First Security, in accordance with the Agreement, had the Property surveyed. The survey revealed that the quit-claim deed by which it acquired its interest contained an erroneous property description that placed the boundaries of the Property 15.22 feet farther south than the actual Property which First Security and its predecessors occupied and intended to convey. (R.23-58)

c. As a result of the erroneous property description, the spring and the stream could not be conveyed by First Security to Kelley. (R.194-95)

d. Moreover, after the Agreement was executed, the adjacent property owners sawed off a pipe supplying water to the pond and removed fish from the pond. (R.82) Consequently, the pond dried up and there was no irrigation water. (R.82)

3. The Extension of the Agreement to Resolve Boundary and Water Rights Problems.

a. First Security recognized that the boundary and water problems affected not only the value of the Property, but also its ability to convey marketable title. To give it time to resolve these problems, First Security, on April 22, 1987-- two days after the initial closing date had expired -- requested that the closing date be extended to June 1, 1987. Kelley agreed to the request. (R.19, 277 8)

b. On May 28, 1987, First Security again requested that the closing date be extended to July 1, 1987. Kelley agreed to the request. (R.20)

c. On July 6, 1987 -- five days after the extant closing date had expired -- First Security again requested that the closing date be extended, this time to August 31, 1987. Kelley agreed to the request. (R.21)

d. First Security was unable to informally resolve the boundary and water problems with the Armstrongs and on July 10, 1987, it filed a Complaint in the Third Judicial District Court, entitled First Security Mortgage Co. v. Herbert S. Armstrong, et al., Civil No. 9447 (the "Armstrong Suit").

First Security sought the following relief: (1) quiet title to the Property and correction of the erroneous legal description so that the property description would match the natural boundaries; (2) a declaration that First Security was the fee simple owner of all water rights appurtenant to the Property; (3) damages resulting from drainage of the trout pond; (4) punitive damages in the amount of \$50,000; and (5) attorneys' fees, costs and expenses. (R.23-59)

e. In its Complaint, First Security claimed that because of the erroneous legal description, it could not convey marketable title to the Property and that the Property's value had been substantially reduced, both aesthetically and economically, because of the loss of the stream, spring and trout pond. (R.29-31)

f. Throughout this period, First Security told Kelley that it was not necessary for him to retain Utah counsel. (R.289)

4. The Dispute Between Kelley and First Security.

a. On September 4, 1987, First Security's attorney, Craig Taylor, Esq., sent a letter to Kelley demanding that the sale close by September 15, 1987, or First Security would consider the Agreement to be null and void. First Security also informed Kelley for the first time that he should obtain legal counsel. (R.114-15) Before he received the September 4

letter, Kelley was under the impression that First Security was doing its best, including filing the Armstrong Suit, to clear up the boundary and water problems. (R.277-78)

b. The September 4 letter was sent over the Labor Day weekend and Kelley, a resident of Hull, Massachusetts, did not receive it until September 8, 1987. (R.278)

c. On September 9, Kelley retained David R. Olsen, Esq., of the firm of Suitter Axland Armstrong & Hanson, to serve as his counsel in his transaction with First Security. (R.278) On that day, Kelley sent a telegram to First Security stating that he did not want to walk away from the Property and that he needed a customary 30-day extension before he could close. (R.288-89)

d. Kelley's Utah counsel immediately contacted First Security's counsel. First Security agreed to provide all of the documents concerning the boundary and water problems for review so that Kelley could make an informed decision regarding the Property. An appointment was made for the production of those documents. (R.282-83)

e. On September 10, 1987, Dan W. Egan, Esq., of Suitter Axland Armstrong & Hanson, went to First Security's counsel's office to obtain copies of all documents in First Security's possession concerning the boundary and water problems. Mr. Taylor failed to keep the appointment. (R.282-83)

f. As a result of his failure to keep the appointment with Mr. Egan, Mr. Taylor extended the deadline for closing to September 22, 1987. (R.116) The requested documents were not provided by that date; nevertheless, Kelley wired approximately \$124,000 into an account at Williamsburg Savings Bank so that the necessary funds would be available for the closing. (R.278-80) Kelley's attorney informed Taylor by letter that Kelley was ready, willing and able to close the Agreement, that the funds necessary for the down payment were on deposit with Williamsburg Savings Bank and he demanded that First Security perform as agreed. (R.119-21)

g. On September 22, 1987, this action was filed seeking a declaration of the rights of the parties pursuant to the Agreement and a decree of specific performance requiring First Security to convey the Property subject to Kelley's claim for damages. (R.1-62) A Lis Pendens was filed the same day. The escrow funds were subsequently deposited with the Summit County Clerk. (R.68)

h. On September 22, 1987, First Security declared the Agreement null and void and, on September 24, 1987, executed the release of Kelley's \$10,000 earnest money deposit. (R.122-23) Kelley refused to accept the release.

i. On September 25, 1987, Leucadia offered to purchase the Property from First Security. The earnest money

Agreement between Leucadia and First Security, as amended, provides in part: (1) that Leucadia would pay a purchase price of \$675,000, cash upon closing; (2) that if Leucadia purchased the Property, First Security would "use its best efforts to obtain a settlement, dismissal with prejudice or final judgment" in the lawsuit with Kelley in First Security's favor; (3) that if First Security lost the lawsuit, and the Property was conveyed to Kelley, that First Security would indemnify Leucadia for all of its costs and expenses incurred as a result of its purchase of the Property; and (4) that if Leucadia were brought into this lawsuit by the plaintiff or any other party, First Security would pay Leucadia's litigation costs, including attorneys' fees. (R.312, 493-514)

j. On January 10, 1988, the trial court entered an Order granting Kelley's Motion for Partial Summary Judgment and ordering First Security to convey the Property. The court retained jurisdiction over Kelley's claim to an abatement of the purchase price, damages and attorneys' fees. The conveyance was ordered to occur when final judgment was entered in this action. (R.562-64)

k. On May 6, 1988, Final Judgment was entered. (R.815-24) First Security accepted the moneys deposited with the court and conveyed the Property that it owned to Kelley by special warranty deed and the 15.22 foot discrepancy caused by

the erroneously legal description by quit-claim deed. (See Appendix "A," attached hereto.)

1. On June 3, 1988, Leucadia was substituted as defendant in this action and filed this appeal. (R.844-46, 847-49)

SUMMARY OF THE ARGUMENT

Kelley submits that the trial court did not err in granting his motion for Partial Summary Judgment ordering First Security to specifically perform the Agreement to the extent that it could perform, while reserving Kelley's claim for an abatement in the purchase price and/or damages for trial.

Leucadia argues that the trial court's decision granting a decree of specific performance to Kelley should be reversed on the ground that Kelley's tender was untimely and/or ineffective.

As will be demonstrated below, Kelley's tender was neither untimely nor ineffective. In fact, it was unnecessary. The undisputed facts before the trial court concerning the conduct of the parties mandated a holding that the "time is of the essence" provision was waived. As such, First Security, before it could claim that Kelley had breached the Agreement, was not only required to provide Kelley notice and a reasonable time to close, but also to tender its own performance. The undisputed facts showed that the seven days provided by First Security was

unreasonable -- these facts were untraversed below. Thus, Kelley was not in breach of the Agreement when he deposited his down payment into court and, through his Complaint, asked the Court to require First Security to convey whatever property it owned that was subject to the Agreement and interpret whether the Agreement required First Security to convey the property free of the water and boundary problems. If so, Kelley would be entitled to an abatement of the purchase price; if not, the full purchase price would be paid.

Alternatively, Kelley claims that First Security could not convey marketable title which was required by the Agreement. First Security's inability to perform, relieved Kelley of the duty to tender his performance.

Third, the "tender" attacked by Leucadia is not ineffective because it is conditional. It merely demanded First Security to perform as it had agreed to perform, that is, convey marketable title to the Property with all the pertinent water rights. It was submitted in conjunction with the filing of a lawsuit which asked the court to interpret the Agreement and structure the appropriate decree.

ARGUMENT

I. INTRODUCTION

This appeal must be viewed in light of the interests of Leucadia. It is not being pursued by First Security -- First Security accepted the judgment below by accepting the money deposited with the Clerk of the Court and delivering its deeds to Kelley. Rather, the appeal is being pursued by Leucadia-- an interloper whose contract reveals that it took its interest in the Property with express and full notice of Kelley's prior rights. More importantly, it entered into a deal where it has nothing to lose.

Leucadia's contract with First Security specifically provides that Leucadia will be fully indemnified for any losses, including attorneys' fees, engineering fees, costs and interest, if Kelley prevails in this lawsuit. Leucadia also delegated the duty to pursue the lawsuit to First Security.

Leucadia's contract was so precise that it designated the interest rate to be paid on all indemnified funds as the prime interest rate as was charged from time to time by Chase Manhattan Bank during the same time period. It is with this background that Leucadia seeks to disrupt the lives of the Kelley family and continue with litigation which the parties below wished to end.

The arguments raised by Leucadia seek to divert this court's attention from the import of what really happened below. What has never been disputed is that Bill Kelley wanted to move his family to Utah. He found property he liked, he paid for it and he was willing to fight for it. His financial ability was never at issue -- it couldn't be because his money was on deposit with the court. Nor has it ever been disputed that Kelley relied on the Agreement with First Security to his detriment since he liquidated assets to meet the down payment.

Instead of addressing these issues, Leucadia attempts to elevate the chaos created by First Security to a justifiable excuse for First Security's dishonoring of the Kelley Agreement and taking a better deal.

First Security encountered a problem with marketable title and couldn't deliver what it had agreed to deliver. It told Kelley not to retain a lawyer and attempted to solve the problem without his assistance or input. After over five months of failure, First Security tried to pass the problem on to Kelley and demanded that he give up his rights to question whether First Security had honored its Agreement. Even under these circumstances, Kelley was willing to pay the price and take the Property. He sought only to have the court determine through a declaratory judgment action if First Security's unilateral interpretation of the Agreement was correct. If it wasn't

correct, Kelley sought the appropriate adjustment to the purchase price; if it was, Kelley would pay the full purchase price.

In its effort to champion rights which the parties to the Agreement have long since resolved, Leucadia conducts a somewhat misleading discussion of the "tender letter." It focuses on one sentence and seeks to disregard every other word of the letter as well as the facts of the transaction. The letter is three pages and it was delivered in conjunction with the filing of the Complaint. It recites the history of the transaction and discusses the missed appointments and First Security's failure to deliver promised deeds and closing documents. It states that the closing date is unreasonable and petitions First Security for a reasonable time period within which to close. That is the substance of the letter.

The letter cannot be separated from the Complaint which was filed on the same date. The Complaint seeks to have the court -- not First Security -- determine the meaning of the Agreement and award judgment consistent with its interpretation. There was no risk to First Security because the required down payment was placed under the control of the court to distribute consistent with its judgment. It is difficult to imagine a situation where the right to have the court interpret an Agreement is more appropriate. Kelley's rights would have been lost or compromised if he closed pursuant to First Security's demand

since the Agreement specifically provided that its terms were merged into the deed. Kelley showed his willingness to close by giving the court control of the \$124,000 down payment.

If Mr. Kelley cannot petition a court for assistance under these circumstances, the remedy of a declaratory judgment is meaningless. The mighty's judgment becomes infallible because the time, expense and risks of litigation allow those in Mr. Kelley's situation to be bludgeoned into submission. This is not a policy the law should promote. For these and the reasons discussed below, the trial court's decision was guided by common sense and fairness and was correct under the law.

II.

EVEN THOUGH THE AGREEMENT BETWEEN KELLEY AND FIRST SECURITY STATED THAT "TIME IS OF THE ESSENCE," THIS PROVISION WAS WAIVED BY THE CONDUCT OF THE PARTIES.

Time is of the essence in a land sale contract only if the parties so intend. That intention, or the lack thereof, may be demonstrated by a contract provision or by the circumstances of the transaction. Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987), citing, Century 21 All Western Real Estate v. Webb, 645 P.2d 52 (Utah 1982); Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982); Huck v. Hayes, 560 P.2d 1124 (Utah 1977). It follows that a specified time for performance may be waived by the conduct of the parties, thereby indicating that time is

not of the essence -- despite a contrary contract provision. Huck v. Hayes, 560 P.2d at 1126; Cline v. Hullum, 435 P.2d 152 (Okla. 1967).

For example, in Schwoyer v. Fenstermacher, 380 A.2d 468 (Pa. Super. Ct. 1977), the sales agreement stated that time was of the essence; however, because the title searches were incomplete by the closing date, the parties extended the closing date for six weeks. At the end of the six weeks, the title searches were still incomplete. When the seller was told of the new delay, he didn't object. When the title searches were completed nearly two months later, the seller informed the purchasers that the agreement was "null and void." Id. at 470. The court held that the seller had waived the provision that time was of the essence:

Even though the agreement of sale makes time of "the essence of the contract" this provision may be waived by agreement or by the conduct of the parties. . . . We find that appellant's [seller's] actions demonstrated that she "affirmatively assented" to settlement being held at some date later than January 14, depending on when Merkel [the attorney conducting the title searches] completed the title searches.

Id. at 470.

First Security waived the "time is of the essence" provision when it asked for and Kelley granted three successive extensions of the closing date -- two of which were offered and accepted after the closing date had expired. Throughout the

period when First Security asked for extensions in order to resolve the boundary and water problems, the parties intended to carry out the terms of the Agreement for sale of the Property as soon as the problems were remedied. First Security even advised Kelley that it was unnecessary for him to retain counsel. Thus, Leucadia's "time is of essence" argument supporting First Security's termination of the Agreement is unsupported.

III.
BECAUSE THE "TIME IS OF ESSENCE" PROVISION
WAS WAIVED, FIRST SECURITY WAS REQUIRED TO
GIVE KELLEY A REASONABLE TIME IN WHICH TO PERFORM

After compliance with the closing date is waived, the time for closing becomes indefinite and the party seeking performance must give notice and a reasonable period of time for the other party to perform before the Agreement is breached.

In Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980), plaintiff (the assignee of the purchasers) sued for specific performance of a contract for the sale of undeveloped property. The plaintiff, over a period of several months, attempted to arrange financing for the purchase. During this period, several payments due under the contract were not made. Plaintiff informed the vendor several times of the assignment of the original purchaser's interest and of the fact that the plaintiff was having difficulty with financing and the defendant didn't complain about the delay. When the plaintiff finally arranged financing and

informed the vendor so that a closing date could be arranged, the vendor told plaintiff that he planned to sell the property to a third party and that he would not accept any money from the plaintiff. The Utah Supreme Court upheld the trial court's finding that:

[By] his conduct, the defendant had waived requirement of strict compliance with the dates of payment stated in the earnest money agreement . . . The court applied the rule that after such a waiver, the seller must give notice and a reasonable time to perform before he may insist upon holding the buyer strictly to the time requirements. The trial court concluded that the plaintiff would be entitled to specific performance of the contract. . .

Id. at 347. See also, Three-O-Three Investments, Inc., v. Moffitt, 622 S.W.2d 736 (Mo. Ct. App. 1981); Cline v. Hulum, 435 P.2d 152 (Okla. 1967); Schwayer v. Fenstermacher, 380 A.2d 468 (Pa. Super. Ct. 1977).

First Security, by its letter dated September 4, 1987, did not provide Kelley with a reasonable time to perform. The letter, mailed to Kelley in Massachusetts over the Labor Day weekend, informed Kelley that First Security had no intention of proceeding with the Armstrong lawsuit, advised him to get counsel -- despite its prior advice to the contrary -- and demanded that the sale close on or before September 15, 1987. Thus, Kelley had only five business days to engage an attorney, to come to Utah and to close on the Property. Kelley stated in

his Affidavit filed in support of his Motion for Partial Summary Judgment that First Security's denial provided him an unreasonable period of time to evaluate the problems. This fact was untraversed by First Security. Further, First Security's preemptory notice sharply contrasted with the parties' prior conduct since no previous extension had been for less than 30 days.

On September 9, 1987, Kelley retained Utah counsel and an appointment was made for Kelley's counsel to review First Security's files. First Security failed to keep the appointment but extended the closing deadline to September 22, 1987, and committed to provide by that date information, title opinions and research on the water and boundary problems. By the time First Security terminated the Agreement, no such information had been provided for Kelley's review nor had First Security tendered a deed to Kelley which was a requirement to closing under any interpretation of the Agreement. Under these circumstances, Kelley acted reasonably in refusing to close on First Security's terms.

It follows that after Kelley failed to close the Agreement on September 22, 1987, he did not breach the Agreement, and when he deposited his down payment in the amount of \$124,408.86 into court on October 9, 1987, First Security's duty of performance arose. The down payment was transferred from

escrow and tendered into court 31 days after the receipt of First Security's September 4 letter. The first two extensions offered by First Security and accepted by Kelley were 30-day extensions, while the last such extension was a 60-day extension. Clearly, when reviewed in the light of the past history, missed appointments and unobtained documents, Kelley's tender 31 days after First Security's precipitous and unexpected demand to close was not unreasonable. In fact, First Security made no effort to traverse the affirmative, sworn stipulation of Mr. Kelley relating to unreasonableness of the closing demand.

IV.
FIRST SECURITY BREACHED THE AGREEMENT
BETWEEN THE PARTIES

A. The Agreement Required First Security to Furnish Good and Marketable Title to the Property.

The Agreement between Kelley and First Security provided that First Security would furnish good and marketable title to the Property. Section 3 of the Agreement (R.16) provides as follows:

Seller represents that Seller holds title to the property in fee simple. Transfer of Seller's ownership interests shall be made as set forth in Section F. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by a current policy of title insurance in the amount of the purchase price.

For title to property to be marketable, "title must be such as to make it reasonably certain that it will not be

called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto.'" Hedgecock v. Stewart Title Guar. Co., 676 P.2d 1208, 1210 (Colo. Ct. App. 1983), citing, Morley v. Gieseke, 142 Colo. 490, 351 P.2d 392 (1960). See also, Edwards v. St. Paul Title Insurance Co., 563 P.2d 979 (Colo. Ct. App. 1977); Michaelson v. Tieman, 541 P.2d 91 (Colo. Ct. App. 1975); Darby v. Keeran, 211 Kan. 133, 505 P.2d 710 (Kan. 1973).

An erroneous property description renders title unmarketable. In Hedgecock v. Stewart Title Guar. Co., the court held that title was unmarketable where the property description used by the title company in its policy of insurance was faulty in a number of respects, including a metes and bounds description from which it was impossible to determine the property's location on the ground. The trial court concluded that "the uncertainty caused by the description is so great that a failure of title to the property occurs," and "[l]itigation over the property was a possibility.'" 676 P.2d at 1210.

Similarly, in Michaelson v. Tieman, 541 P.2d 91 (Colo. Ct. App. 1975), another case involving a faulty metes and bounds description, the court stated as follows:

The standard to be applied in disputes of this type is not that the complainant must show a "reasonable probability of litigation" in order to have title held unmarketable, but rather that the party asserting the validity of the title must show with

reasonable certainty that litigation will not occur. "The title must be such as to make it reasonably certain that it will not be called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto."

Id. at 92.

By First Security's own admission in the Armstrong Complaint, title to the Property was unmarketable. Paragraph 17 alleges as follows:

17. As the result of a discrepancy between the description of the Subject Property contained in plaintiff's Quit-Claim Deed and the actual property occupied by the Princes [First Security's predecessors], enclosed by fences, and bounded in part by a spring and ditch, plaintiff was, and is, unable to convey marketable title to the Subject Property.

(R.29-30)

The Complaint further alleges the Armstrongs refused to exchange deeds as requested by First Security, allegedly for the purpose of frustrating First Security's sale of the Property.

(R.30)

These allegations indicate that on April 20, 1987, First Security believed that it was required to provide marketable title which was precluded by the boundary and water problems. Obviously, if First Security felt that title was marketable irrespective of the boundary or water problems or that it had no obligation to furnish marketable title, it would not have filed the Armstrong Suit.

Moreover, the very fact that the Armstrong Suit existed is clear evidence that the hazard of litigation was not merely a possibility, but rather, a reality. Given this circumstance, First Security could not convey marketable title as provided in the Agreement between the parties.

Leucadia argues that the hand-written phrase inserted in paragraph 11 of the Agreement relieved First Security of the requirement to furnish marketable title: "property sold 'as is' without warranty. Title conveyed by Special Warranty Deed Corp. Form." (R.16) First Security fails to point out that the hand-written insertion also provides that "[all] other terms to remain the same."

Contrary to Leucadia's assertion, the hand-written provision that the conveyance will be by "special warranty deed" and that the property is sold "as is without warranty" did not alter First Security's obligation to furnish marketable title. In the context of agreements for the purchase of real property, a promise to furnish marketable title is entirely compatible with conveyance by warranty deed, special warranty deed or quit-claim deed. In other words, a provision requiring the seller to furnish marketable title does not necessarily imply that the seller must convey the property by warranty deed only. Department of Public Works and Buildings v. Halls, 220 N.E.2d 167 (Ill. 1966); Lininger

v. Blackhills Greyhound Racing Association, 149 N.W.2d 413 (S. D. 1967).

Similarly, if the seller agrees to convey only by a quit-claim deed, an implied covenant that title will be marketable is not negated. Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912). Thus, First Security's insertion in the Agreement that it will convey title by special warranty deed, corporate form, is compatible with the provision in paragraph 3 of the Agreement that it must furnish marketable title.

Nor does the fact that First Security agreed to sell the property "as is without warranty" relieve it of the requirement that it convey marketable title. The insertion of "as is without warranty" can only refer to the physical condition or habitability of the property and not to any implied warranties of title, as Leucadia seems to argue. From the time that a contract for the sale of real property is executed, and continuing up to the time when the deed is delivered and accepted, there are no implied warranties of title that can be disclaimed. Indeed, the seller need not even have title to the property at the time the contract for sale is executed. "[T]he law does not require the vendor to have clear and marketable title at all times during the performance of his contract, and is not ordinarily so obliged until the time comes for him to perform." Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417, 421 (1973). See also,

Callister v. Millstream Associates, Inc., 738 P.2d 662 (Utah Ct. App. 1987) (seller does not have to have marketable title during the executory period of a contract).

Because there are no implied warranties of title associated with the contract of sale, the only warranties that can be disclaimed by a seller at the time the contract of sale is executed are the warranties of habitability, good and workmanlike construction or compliance with building codes. All of these warranties concern the physical condition of the property, not the status of its title. See Schepps v. Howe, 665 P.2d 504 (Wyo. 1983); Schoeneweis v. Herrin, 443 N.E.2d 36 (Ill. App. 1982); Tibbitts v. Openshaw, 425 P.2d 160 (Utah 1967); Mulkey v. Waggoner, 338 S.E.2d 755 (Ga. App. 1985).

Moreover, if the "as is without warranty" clause referred to warranties of title which, as shown above, it cannot, it would be inconsistent with First Security's promise to convey by special warranty deed.

B. Failure of the Seller to Deliver Marketable Title Constitutes a Breach of the Seller's Contract.

Because the boundary line and water rights problems existed, First Security was unable to furnish marketable title. This failure constituted a breach of the Agreement, Willcox Clinic, Ltd., v. Evans Products Co., 136 Ariz. 400, 666 P.2d 500 (Ariz. Ct. App. 1983) reh'g denied, thereby rendering any tender of performance by Kelley unnecessary.

Leucadia also argues that First Security merely agreed to convey property located at 320 Snows Lane in Park City, Utah, and that by describing the property by its address, First Security made no representations concerning the location of boundary lines or water rights. Accordingly, First Security asserts that it was capable of delivering clear title to the land that it agreed to convey, whether the northern property line was 15.22 feet farther to the north or to the south. Further, according to Leucadia, since water rights are real property and are conveyed with the land unless expressly reserved by the grantor, and since no representations were made concerning which water rights were appurtenant to the property, Kelley merely contracted to buy whatever water rights existed.

The fact that property subject to a purchase agreement is described in the Agreement by its street address does not negate the seller's obligation to convey the property that the parties agreed constitutes the subject of their agreement. The terms of an agreement must only be reasonably certain so as to allow the parties to know what is required of them and definite enough to allow courts to delineate the intent of the contracting parties. Reed v. Alvey, 610 P.2d 1374 (Utah 1980). Any ambiguities inherent in the language used to describe the property being sold may be explained by extrinsic evidence as to the

parties' intent. Continental Bank & Trust Co. v. Stewart, 4 Utah 2d 228, 291 P.2d 890 (1955).

In Reed v. Alvey, the contract described the property as the "corner of Hillview and Ninth East." The purchaser sued for specific performance of the contract, but the trial court found in favor of the defendant on the ground that the contract was too vague to be enforced by a decree of specific performance. The Utah Supreme Court reversed. Although conceding that the description "corner of Hillview and Ninth East" was vague and incomplete on its face, the Supreme Court held that the extrinsic evidence presented by the plaintiff concerning the transaction defined the subject matter in question in sufficient detail to support a decree of specific performance. According to the Court:

Thus, everyone connected with the deal knew what land was involved and the ambiguous nature of the terms used in the written agreement when viewed in light of the extraneous evidence presented at trial does not render the contract unenforceable or defeat an action for specific performance.

Id. at 1378.

In Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987), the plaintiff and a group of doctors agreed to a land exchange. The earnest money agreement stated that the doctors would purchase the plaintiff's Nine-Mile Ranch along with 80 acres of plaintiff's 150-acre farm and 180 shares of water stock, but it didn't

describe which 80 acres the plaintiff was to convey. The doctors failed to perform and, at trial, claimed that the agreement was too indefinite to enforce. The trial court and this Court disagreed holding that the contract need not contain every particular of the agreement; rather, the crucial factor is that the parties agreed on each essential element of the agreement. Accordingly, this Court held that the trial court properly received extrinsic evidence to show that the parties had agreed that a specific 80 acres owned by plaintiff were to be transferred to the doctors.

First Security's Complaint against the Armstrongs repeatedly asserts that First Security owned and intended to convey to Kelley, that land "substantially enclosed by fences, a spring and a ditch," along with sufficient water rights to maintain the aesthetics of the Property. Thus, it was undisputed before the trial court that the address used in the Agreement to describe the Property was intended by the parties to include that land substantially enclosed by fences, a spring and a ditch with all appurtenant water rights, and it is that Property that First Security was obligated to convey.

V.
KELLEY'S TENDER OF THE DOWN PAYMENT FOR THE PROPERTY,
RATHER THAN BEING IMPERFECT, AS DEFENDANT ASSERTS, WAS
NOT EVEN REQUIRED SINCE DEFENDANT FAILED TO PERFORM

The law does not require a contracting party to do a "useless act and tender performance where the other contracting party cannot or will not perform his part of the agreement." Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987), citing Jenson v. Richens, 442 P.2d 636, 639 (Wash. 1968) (Where vendors had undertaken to deliver an encumbrance-free title, the court held that the promise to furnish good title is a condition precedent to the promise to purchase.). See also, McFadden v. Wilder, 6 Ariz. App. 60, 429 P.2d 694 (Ariz. Ct. App. 1967) (Where the seller does not tender marketable title, the duty of the purchaser to tender performance does not arise; the seller is, therefore, not excused from performance).

In Huck v. Hayes, 560 P.2d 1124 (Utah 1977) the purchaser sued to compel specific performance of an agreement to purchase residential property. The agreement provided that the defendant would furnish marketable title with a title insurance policy in the purchaser's name. Upon receipt of the title insurance policy, however, the real estate broker realized that the property was burdened by a federal tax lien and several other exceptions to title. The broker contacted each party regarding these title problems and she was instructed to resolve

them as soon as possible. On the original closing date, the purchaser had sufficient funds to make the payment required by the agreement but did not tender payment. After several meetings and a delay of six weeks, the real estate broker informed the vendor that all of the problems had been resolved and that closing could be accomplished at any time. It was at that time that the vendor first indicated that he was no longer interested in closing the transaction. About a month later, the real estate broker again contacted the vendor to secure the closing. The vendor then stated that since the purchaser had failed to make the payment required by the contract on the first closing date, he recognized no further obligations under the contract. Upon the vendor's continued refusal to cooperate, the purchaser sued for specific performance.

The Utah Court of Appeals upheld the trial court's finding that the vendor could not demand payment from the purchaser since furnishing marketable title was a condition precedent to any such demand:

Inasmuch as under the contract it was the defendant's responsibility to furnish good title and a title insurance policy, the furnishing thereof was a condition precedent to his right to demand payment from the purchaser (plaintiff).

It is fundamental that a party to a contract should obtain no advantage from the fact that he is himself unable to perform. Since the defendant had not come forth with the agreed title insurance policy demonstrating that he

could convey a clear and marketable title as of the proposed closing date, March 8, 1974, he could neither demand payment by the plaintiff on that date, nor claim that the latter was in default for failing to make the payment.

Id. at 1126. See also, Fischer v. Johnson, 525 P.2d 45 (Utah 1974); Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1912).

In this case, First Security was required to furnish marketable title as a condition precedent to its right to demand that Kelley tender the down payment specified in the Agreement. The fact that First Security was unable to furnish the title called for by the Agreement excused Kelley's tender of performance. King v. Allen, 398 N.E.2d 510 (Mass. App. Ct. 1980).

As in Huck v. Hayes, the delays in closing were solely due to First Security in its pursuit of the quiet title action against the Armstrongs so that it could fulfill its obligations under the Agreement. When First Security finally decided in early September that it no longer wished to sell the property to Kelley, it demanded that Kelley perform within an unreasonably short period of time; then, when Kelley was unable to meet First Security's arbitrarily imposed deadline, First Security declared that Kelley had failed to perform and that it would not, therefore, go through with the sale. "One party to a contract cannot by willful [sic] act or omission make it impossible or difficult for the other to perform and then invoke the other's

non-performance as a defense." Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979).

In this case, the failure of First Security to provide marketable title prevents it from complaining about Kelley's performance. Kelley's only "failure" was his unwillingness to meet defendant's September 22, 1987, deadline. Despite First Security's unreasonable notice and the problems surrounding title to the Property, Kelley remained ready, willing and able to perform under the contract and did in fact place funds in an account in Williamsburg Savings Bank in Salt Lake City, to be used for the down payment, which funds were shortly thereafter placed into an interest-bearing account with the Clerk of the Court.

Moreover, Kelley's September 22, 1987 letter was not conditional. It merely demanded that First Security perform as agreed: convey marketable title to the Property and the water rights that both First Security and Kelley intended and agreed would be conveyed. (See R.1-62, Complaint dated September 22, 1987, entitled William Kelley v. First Security Mortgage Co., Civil No. 9532 filed concurrent with the September 22, 1987, letter to First Security's counsel.)

VI.
KELLEY IS ENTITLED TO SPECIFIC PERFORMANCE
WITH RESPECT TO THE INTEREST WHICH
FIRST SECURITY CAN TRANSFER

In Reed v. Alvey, 610 P.2d 1374 (Utah 1980), the Utah Supreme Court stated the rule regarding the availability of specific performance as a remedy:

Generally, in a suit for specific performance of a contract for the sale of realty, the purchaser must show that he paid the purchase price, or tendered it, to the defendant prior to the commencement of the suit. However, an action for specific performance may also be maintained if the plaintiff presents an excuse for his failure to make such payment or tender and avers his ability, readiness and willingness to pay the contract amount.

Id. at 1379.

In Reed v. Alvey, the purchaser agreed to purchase commercial property on which the vendor was constructing a four-plex. After signing a standard form earnest money agreement and offer to purchase, the vendor obtained construction financing and began building the four-plex. Construction continued over the next eleven months, which the purchaser regularly monitored. The purchaser complained several times about the dilatory construction efforts of the defendants. Finally, the purchaser received a letter from the defendants informing him that the property would be available for closing in two or three weeks. The vendor also requested that the purchaser deposit \$13,500.00

into an escrow account. Although disputing the necessity of depositing this money under the terms of their agreement, the purchaser complied; however, construction again slowed and the plaintiff removed the money from the non-interest bearing escrow account. During this period the purchaser tried repeatedly to communicate with the vendor, but was unsuccessful. Eventually, the purchaser brought an action for specific performance.

The Court, in concluding that the plaintiff could maintain an action for specific performance, stated as follows:

In the present case the payment of the purchase price was contingent upon the completion of the construction of the four-plex unit. Since, prior to the institution of this suit, the defendants had failed to complete construction, the plaintiff was under no obligation to tender the full purchase amount prior to the present litigation. The plaintiff's ability and willingness to tender the purchase amount as averred in his complaint is sufficient to support a suit for specific performance of the contract in this situation.

Id. at 1379.

Because the vendor had subsequently encumbered the land, the Court required that the vendor remove the encumbrance prior to the purchaser taking possession of the property. The Court stated that:

This can be accomplished either by a reduction in the purchase price, in the amount of the encumbrance, or payment of the total price after defendants remove the encumbrance.

Id. at 1380.

Even though First Security could not convey the quality of title called for by the Agreement, it was obligated to convey title and abate the purchase price. Where a vendor of real estate cannot convey all that he contracted to convey in an earnest money agreement, the purchaser has the right to insist upon performance by the vendor to the extent the latter is able to perform with an abatement in the purchase price equal to the value of the deficiency or defect. Castagno v. Church, 552 P.2d 1282 (Utah 1976).

In Castagno, the defendants, vendors, had agreed to convey 40 acres of land, together with all water rights, including one-second foot of water in and to a well. However, the vendors were unable to procure water rights for the well. The real property had a value of \$1,500.00 per acre if one-second foot of water was available, but without water, its value was only \$500.00 per acre.

The trial court ordered conveyance of the property with a rebate on the purchase price and the Utah Supreme Court rejected the vendors' argument that they should not have to convey since the purpose of the contract had been frustrated because of the defendants' inability to convey the water rights. The Court stated that the purchasers were entitled to specific performance and an abatement in the purchase price equal to the value of the deficiency or defect. See, also, Reed v. Alvey,

610 P.2d at 1380; Atkin v. Cobb, 663 S.W.2d 48 (Tex. Ct. App. 1983).

Kelley was entitled to specific performance of the Agreement on the ground that he not only tendered the required down payment to the defendant within a reasonable time after being informed that the defendant desired to close by September 15, 1987, even though the tender was unnecessary, but he also was ready, willing and able to perform in a timely fashion. By its conduct, First Security waived timely performance under the Agreement and could not then set an unreasonable deadline and fault Kelley for untimely performance.

Even if Kelley's tender of performance was found to be untimely, any such defect is excused under the rule enunciated in Reed v. Alvey. Thus, Kelley need not have performed according to the terms of the Agreement since Kelley was ready, willing and able to perform but was delayed and, therefore, excused by First Security's conduct. Any delay in tendering the down payment was fully justified under the circumstances, and Leucadia cannot now attempt to charge Kelley with non-performance. In sum, Kelley was entitled to specific performance since he performed his obligations under the Agreement within a reasonable period of time, his performance was excused since he was ready, willing and able to perform but was prevented from doing so by the

defendant or his tender was effective to put First Security in breach.

CONCLUSION

Based upon the arguments set forth above, and the cases cited therein, this Court should affirm the trial court's Partial Summary Judgment granting Kelley a decree of specific performance on the grounds that, based upon the undisputed facts, Kelley's tender of performance was neither untimely nor defective and/or was unnecessary. Consequently, Kelley was entitled to specific performance as a matter of law.

Dated this 27th day of January, 1989.



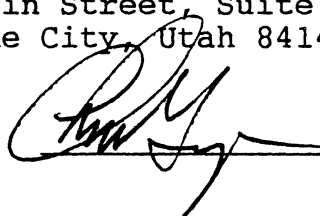
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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the foregoing Brief of Respondent to be hand delivered this 21st day of January, 1989, to:

John A. Snow, Esq.
Kathryn H. Snedaker
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorneys for Appellant
50 S. Main Street, Suite 1600
Salt Lake City, Utah 84144



APPENDIX "A"
SPECIAL WARRANTY DEED
AND
QUIT-CLAIM DEED

REC'D 270223

SUMMIT COUNTY TITLE

83 MAY 13 PM 3:10

WHEN RECORDED, MAIL TO:

David R. Olsen, Esq.

P. O. Box 1168

Salt Lake City, UT 84110

Space Above for Recorder's Use

SPECIAL WARRANTY DEED

FIRST SECURITY MORTGAGE COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to WILLIAM R. KELLEY, JR., grantee, of P. O. Box 257, Hull, Massachusetts 02045, for the sum of TEN AND NO/100 DOLLARS and other consideration, the following described tracts of land in Summit County, State of Utah:

See Exhibit "A" attached hereto and by this reference incorporated herein and made a part hereof.

Grantor makes no warranty as to the effect of any of the following:

1. An action pending in the District Court of the Third Judicial District in and for the County of Summit, State of Utah, entitled First Security Mortgage Company, a Utah corporation (successor in interest to R E H, Incorporated), Plaintiff, vs. Hebert S. Armstrong, William Melbourne Armstrong, Jr., Joseph F. Ringholz and Raye C. Ringholz, Defendants, and filed as Civil No. 9447, records of Summit County, Utah.

Lis Pendens in said action was recorded on July 10, 1987, as Entry No. 273994, in Book 438, at Page 20, records of Summit County, Utah.

2. An action pending in the District Court of the Third Judicial District, in and for the County of Summit, State of Utah, entitled William R. Kelley, Jr., Plaintiff, vs. First Security Mortgage Company, a Utah corporation, et al., Defendant, filed as Civil No. 9532, records of Summit County, Utah. (See copy of complaint for purpose of action.)

Lis Pendens in said action was recorded September 22, 1987, as Entry No. 277037, in Book 445, at page 193, records of Summit County, Utah.

3. A Special Warranty Deed executed in favor of Leucadia Financial Corporation, dated November 25, 1987, recorded November 30, 1987, as Entry No. 280465, in Book 454, at Page 217, records of Summit County, Utah.
4. A Quit-Claim Deed executed in favor of Leucadia Financial Corporation, dated November 25, 1987, recorded November 30, 1987, as Entry No. 280466, in Book 454, at Page 220, records of Summit County, Utah.

The officer who signs this deed hereby certifies that this deed and the transfer represented thereby was duly authorized by the grantor.

In witness whereof, the grantor has executed this deed as of this 6th day of May, 1988.

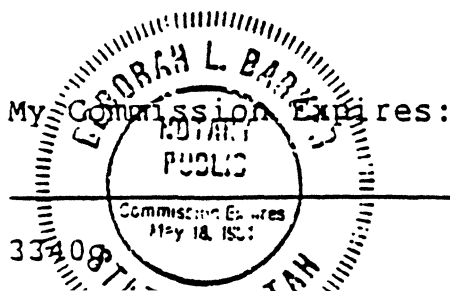
FIRST SECURITY MORTGAGE CORPORATION

By: Wayne L. Lantz

Its: Asst. V.P.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 6th day of May, 1988, personally appeared before me Wayne L. Lantz, who being by me duly sworn, did say, that he is the Asst. V.P. of First Security Mortgage Company, and that said instrument was signed in behalf of said corporation by authority of its bylaws or a resolution of its board of directors, and said Wayne L. Lantz acknowledged to me that said corporation executed the same.



Deborah L. Barker
Notary Public
Residing at Salt Lake City, Utah

EXHIBIT "A" TO SPECIAL WARRANTY DEED

The real property is located in Summit County, State of Utah.

Said real property is also described as follows:

Parcel No. 1: Beginning at a point South 2630.74 feet and West 2776.80 feet from the northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence South 56 degrees 22' West 261.80 feet; thence South 50 degrees 52' West 278.0 feet; thence South 47 degrees 34' West 500.0 feet; thence North 28 degrees 34' West 538.0 feet to the center line of a ditch; thence North 53 degrees 10' East 36.0 feet along said ditch to an old spring; thence North 40 degrees East 181.0 feet; thence North 71 degrees East 87.0 feet; thence North 66 degrees 38' East 147.61 feet; thence North 30 degrees 35' East 43.50 feet; thence East 111.0 feet; thence North 45 degrees East 86.0 feet; thence North 37 degrees 38' East 125.0 feet; thence North 59 degrees 50' East 207.0 feet; thence South 67 degrees 05' East 23.0 feet; thence North 37 degrees 55' East 55.0 feet; thence North 34 degrees 15' East 75.0 feet; thence East 43.82 feet; thence South 37.0 feet; thence South 88 degrees 25' East 77.0 feet to the point of beginning.

PARCEL NO. 2: Beginning at a point South 2630.74 feet and West 2776.80 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence North 53 degrees 40' East 112.67 feet; thence North 0 degrees 53' East 154.74 feet; thence South 89 degrees 30' West 126.00 feet to the point of beginning.

TOGETHER WITH a right-of-way for ingress to and egress from Parcel No. 1 and Parcel No. 2 over a roadway which is approximately three rods wide, the centerline of which is more particularly described as follows:

BEGINNING AT a point South 2607.61 feet and West 2853.77 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South

89 degrees 36' East, 2597.86 feet, more or less, to the center of the state highway.

LESS AND EXCEPTING from Parcel No. 1 and Parcel No. 2, the following:

BEGINNING AT a point South 2615.05 feet and West 2724.10 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, said point also being on a fence line and running thence South 1 degree 24'14" West along said fence line 151.84 feet; thence North 88 degrees 25' West 132.89 feet; thence North 0 degrees 16' West 150.00 feet; thence South 88 degrees 25' East 84.595 feet; thence North 89 degrees 30' East 52.69 feet to the point of beginning.

SUBJECT TO easements, restrictions, and rights of way appearing of record.

ALSO SUBJECT TO the lien of general property taxes after January 1, 1988.

STATE OF UTAH)

County of Summit)

I, Alan Spriggs, County Recorder in and for Summit County, State of Utah,
do hereby certify that the attached and foregoing is a full, true and correct copy
of that certain

Special Warranty Deed

which appears of record in my office in Book 477 . Page 253-56
being Entry No. 296223

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
official seal, this 17 day of May, 1988

Alan Spriggs

WHEN RECORDED, MAIL TO:

David R. Olsen, Esq.

P. O. Box 1168

Salt Lake City, UT 84110

290224

SUMMIT COUNTY TITLE

80 MAY 13 PM 3:10
Space Above for Recorder's Use

Quit-Claim Deed NP 800

FIRST SECURITY MORTGAGE COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby QUIT CLAIMS to WILLIAM R. KELLEY, JR., an individual, grantee, of P. O. Box 257, Hull, Massachusetts 02045, for the sum of TEN AND NO/100 DOLLARS and other consideration, the following described tracts of land in Summit County, State of Utah:

See Exhibit "A" attached hereto and by this reference incorporated herein and made a part hereof.

The officer who signs this deed hereby certifies that this deed and the transfer represented thereby was duly authorized by the grantor.

In witness whereof, the grantor has executed this deed as of this 6th day of May, 1988.

FIRST SECURITY MORTGAGE COMPANY

By
Its

Wayne L. Lantz
Asst. VP

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 6th day of May, 1988, personally appeared before me Wayne L. Lantz, who being by me duly sworn, did say, that he is the Asst. U.P. of First Security Mortgage Company, and that said instrument was signed in behalf of said corporation by authority of its bylaws or a resolution of its board of directors, and said Wayne L. Lantz acknowledged to me that said corporation executed the same.



Deborah L. Barker
Notary Public

EXHIBIT "A" TO QUITCLAIM DEED

The real property is located in Summit County, State of Utah.

Said real property is also described as follows:

Beginning at a point South 2615.05 feet and West 2724.10 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence North 89°30'00" East 73.31 feet; thence South 00°53'00" West 369.97 feet; thence South 53°40'00" West 112.67 feet; thence South 56°22'00" West 261.80 feet; thence South 50°52'00" West 278.0 feet; thence South 47°34'00" West 500.00 feet; thence North 28°34'00" West 550.31 feet to the center line of a ditch; thence North 53°10'00" East 43.37 feet along said ditch to an old spring; thence along said centerline of ditch the following twelve courses: thence 1) North 40°00'00" East 181.00 feet; thence 2) North 71°00'00" East 87.00 feet; thence 3) North 66°38'00" East 147.61 feet; thence 4) North 30°35'00" East 43.50 feet; thence 5) East 111.00 feet; thence 6) North 45°00'00" East 86.00 feet; thence 7) North 37°38'00" East 125.00 feet; thence 8) North 59°50'00" East 207.00 feet; thence 9) South 67°05'00" East 23.00 feet; thence 10) North 37°55'00" East 55.00 feet; thence 11) North 34°15'00" East 75.00 feet; thence 12) East 43.82 feet; thence South 37.00 feet; thence North 88°25'00" West 7.60 feet; thence South 00°16'00" East 150.00 feet; thence South 88°25'00" East 132.89 feet; thence North 01°24'14" East 151.84 feet to the point of beginning.

STATE OF UTAH)

County of Summit)

I, Alan Spriggs, County Recorder in and for Summit County, State of Utah,
do hereby certify that the attached and foregoing is a full, true and correct copy
of that certain

which appears of record in my office in Book of _____ Page _____
being Entry No. _____

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
official seal this // day of //, 2007.