

1988

William R. Kelley v. Leucadia Financial Corporation : Reply Brief

Utah Court of Appeals

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John A. Snow; Kathryn H. Snedaker; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Appellant.

David R. Olsen; Charles P. Sampson; Claudia F. Berry; Suitter, Axland, Armstrong & Hanson; Attorneys for Respondent.

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BRIEF

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

WILLIAM R. KELLEY,

Plaintiff-Respondent,

vs.

LEUCADIA FINANCIAL
CORPORATION, a
Delaware corporation,

Defendant-Appellant.

Case No. 880534-CA

Priority No. 14b

On Appeal From the Judgment of
the Third Judicial District Court
for Summit County, State of Utah
Honorable Homer F. Wilkinson and
Honorable Pat B. Brien, District Judges

REPLY BRIEF OF APPELLANT

VAN COTT, BAGLEY, CORNWALL & McCARTHY
John A. Snow
Kathryn H. Snedaker
50 S. Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333

Attorneys for Appellant

SUITTER AXLAND ARMSTRONG & HANSON
David R. Olsen
Charles P. Sampson
Claudia F. Berry
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300

Attorneys for Respondent

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WILLIAM R. KELLEY,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 880534-CA
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CORPORATION, a)	Priority No. 14b
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VAN COTT, BAGLEY, CORNWALL & McCARTHY
John A. Snow
Kathryn H. Snedaker
50 S. Main Street, Suite 1600
Salt Lake City, Utah 84144
(801) 532-3333

Attorneys for Appellant

SUITTER AXLAND ARMSTRONG & HANSON
David R. Olsen
Charles P. Sampson
Claudia F. Berry
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300

Attorneys for Respondent

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PRELIMINARY STATEMENT

Kelley's Responsive Brief (January 27, 1989) fails to give a complete and accurate representation of the proceedings below in several critical respects. Certain portions of Kelley's Brief are not supported by citations to the record as required by Rule 24(a)(7), Rules of the Utah Court of Appeals, and are, in fact, not supported by the record itself; other portions of Kelley's Brief refer to matters wholly irrelevant to this appeal and prejudicial to Leucadia; still other portions of Kelley's Brief make statements that are misleading and confusing to the Court. As to these portions, more specifically delineated below, Leucadia respectfully requests this Court to strike the misstatements and to disregard all arguments supported by these misstatements, in accordance with Rule 24(k), Rules of the Utah Court of Appeals. Alternatively, Leucadia requests that the Court strike the entire Brief. See Maughan v. Maughan, 102 Utah Adv. Rep. 44, 48 n.1 (App. 1989).

The following portions of Kelley's Responsive Brief should be stricken and disregarded by this Court:

1. Throughout his Brief, Kelley characterizes Leucadia as an "interloper" that is pursuing this appeal contrary to the wishes of the defendant below, First Security Mortgage Company ("First Security"). Kelley reiterates

throughout his Brief that "First Security accepted the judgment" and "chose not to appeal," intimating that this appeal is sought only by a third party to create problems for Kelley and his family. Examples of these statements are found in the following portions of Kelley's Brief: Parties to the Proceeding Below, ¶ 1; Statement of the Case, p. 7 n.1; Introduction, pp. 18-20; Argument, ¶ 4(k).

These statements are not only unsupported by citations to the record, the statements in fact find no support in the record. Indeed, these representations grossly mischaracterize the status of Leucadia in this appeal. Leucadia is a party to this appeal pursuant to an order of the Third District Court that Leucadia be substituted for First Security "for all purposes, including the right of appeal, concerning the decree of specific performance entered in this action, and all orders or judgments relating to or superceding said decree...."

(R. 844-46) This order was entered pursuant to a stipulation and motion of Kelley and First Security. (R. 844-46) These unsupported statements made by Kelley should be stricken and the arguments supported by these statements disregarded.

2. At page 7, note 1 of his Brief, Kelley states that "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." This statement by Kelley of the terms of the settlement is only partially correct. For clarification, the settlement agreement provides that "First Security reserves its rights to appeal the decree of specific performance and all orders relating to or superseding said decree." The settlement agreement further provides that "Kelley and [First Security] agree that if the Court-ordered specific performance is ultimately unwound, Mr. Kelley shall be entitled to the return of his down payment with interest at the rate of seven percent (7%) per annum. Any monthly payments made by Mr. Kelley after the down payment shall be retained by [First Security]. Mr. Kelley shall be entitled to no reimbursement from [First Security] for the value of any improvements he makes to the property."

Thus, again Kelley has greatly mischaracterized the nature of the relationship of the parties and the status on appeal. More importantly, these references are not supported by citations to the record; indeed, the settlement agreement is not part of the record. For these reasons, all statements concerning the settlement agreement are not properly before the Court and should be stricken.

3. Kelley consistently makes reference to the fact that during this transaction he did not retain Utah counsel on the advice of First Security. This statement is found in the

following portions of Kelley's Brief: Statement of the Case, p. 3, 5; Statement of the Facts, ¶ 3(f), ¶ 4(a); Introduction, p. 19; Argument, p. 23, 24. Most of these statements are not supported by citations to the record. The statement found in the Statement of Facts ¶ 3(f) does cite to the record at 289. This citation, however, does not support Kelley's statement that "[t]hroughout this period, First Security told Kelley that it was not necessary for him to retain Utah counsel." Rather, page 289 of the record is an affidavit by Mr. Kelley wherein he states that he was informed by Mr. Don Griffin, the listing agent on the Property, not to retain an attorney during the course of the transaction. Thus, the statements in fact are not supported by the record and should not be considered by the Court. In addition, Kelley did not raise below the issue of whether First Security owed a duty to advise Kelley of when to obtain counsel or whether Mr. Griffin when so advising Kelley was acting as an agent for First Security. For this additional reason, these statements are not properly before the Court and should be stricken.

4. Kelley makes various statements and insinuations about the transaction between First Security and Leucadia that are unsupported by citations to the record, are misleading, are irrelevant to this appeal and are prejudicial to Leucadia. For

example, at pages 4-5 of his Brief, Kelley recites the following statements as "facts":

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.

Similar statements regarding the transaction between First Security and Leucadia are found at pp. 7-8, 14-15 (¶ 4(i)), and 18. For the reasons cited above, these statements should be stricken from the record and disregarded by the Court.

5. Kelley also mischaracterizes the nature of his Complaint and the remedies sought therein. At page 17 of his Brief (again, without citation to the record), Kelley makes the following representations:

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.

Respondent's Brief at 17. Similar misstatements of fact (also without citation to the record) appear at pages 19-20.

In fact, in his Complaint dated September 22, 1987, Kelley requested an order of the Court that First Security was obligated to resolve the boundary dispute, rectify the property damage and then convey the property to Kelley. (R. 1-11) It was not until several months later, first reflected in the pleadings on November 25, 1987 (R. 140-274), that Kelley altered his position and requested the Court order First Security to convey "whatever title it has" to the property plus damages. (R. 181)

The remedy sought by Kelley's Complaint is of critical importance to disposition of the issues on appeal. Kelley's statement of these "facts" is misleading and confusing for the Court, and is prejudicial to Leucadia. As such, these statements should be stricken and disregarded by the Court.

6. In addition to the specific points mentioned above, Kelley's Statement of the Case, Summary of the Argument, and Point I Introduction should be stricken in their entirety. Contrary to the provisions of Rule 24(a)(7), Rules of the Utah Court of Appeals, Kelley has not limited his Statement of the Case to a brief indication of the nature of the case, the course of proceedings, and its disposition below. Rather, Kelley's Statement of the Case sets forth facts not supported

by citations to the record and, in many instances, not supported by the record itself. Moreover, these misstatements of fact permeate Kelley's entire argument. For example, Kelley's Summary of the Argument and Point I Introduction argue almost exclusively from the misstated "facts." Although Leucadia has made an effort to clarify for the Court the most egregious of these misstatements, it is difficult, if not impossible, to separate these "facts" from the subsequent argument of Kelley. Accordingly, the Court should strike and altogether disregard Kelley's Statement of the Case, Summary of the Argument, and Point I Introduction, if not his entire Brief. See Maughan v. Maughan, 102 Utah Adv. Rep. 44, 48 n.1 (App. 1989); Rule 24(k), Rules of the Utah Court of Appeals.

Leucadia respectfully requests that the Court strike the above-referenced statements that find no support in the record, refer to matters wholly irrelevant to this appeal and prejudicial to Leucadia, and/or are misleading and confusing for the Court. In addition, Leucadia requests that the Court strike in their entirety those portions of Kelley's Responsive Brief captioned Statement of the Case, Summary of the Argument, and Point I Introduction, if not the Brief in its entirety. Finally Leucadia requests that all arguments supported by these statements be disregarded by this Court.

SUMMARY OF ARGUMENT

The subject Earnest Money Agreement between First Security, as seller, and Kelley, as buyer, provided two specific options in the event First Security was unable to convey marketable title to Kelley at the time of closing. Kelley's tender of performance, which recognized the unmarketable condition of title, did not comply with those options, and was therefore ineffective. Accordingly, the agreement expired by its own terms, and the lower court erred, as a matter of law, in ordering specific performance of the agreement.

ARGUMENT

I. THE PERFORMANCE REQUIRED BY THE PARTIES IS GOVERNED BY THE TERMS OF THE AGREEMENT.

The essence of Kelley's argument as presented in his Responsive Brief seems to be as follows. First, Kelley argues he was entitled to specific performance of the Earnest Money Agreement ("Agreement") because he tendered the required down payment to First Security and was "ready, willing and able to perform" in a timely fashion. Respondent's Brief at 38, 42. Second, even if Kelley's performance was untimely, First Security waived the time of essence provision of the Agreement by its conduct and could not then set an "unreasonable deadline" for performance. Id. at 22-23, 24-26, 42. Third, First Security failed to "perform as agreed" thereby rendering

any tender of performance by Kelley unnecessary. Id. at 26-31, 35-38. Fourth, for these reasons, Kelley is entitled to specific performance of the Agreement and an abatement in the purchase price. Id. at 41-42.

These arguments, however, fail entirely to deal with the facts that are dispositive of the issues on appeal -- the terms of the Agreement. The terms of the contract entered into by the parties govern the performance required of them. They are as follows:

1. The Agreement is conditioned on the seller furnishing good and marketable title to the property as evidenced by a current policy of title insurance. (R. 16 ¶ 3)

2. In the event the seller cannot deliver title free of defects not curable through an escrow agreement at closing, the buyer has the option of (1) waiving the defects and proceeding with the closing, or (2) requiring the seller to return the earnest money deposit and declaring the Agreement null and void. (R. 15 ¶ G)

3. In the event there is damage to the property by reason of vandalism, and if seller is able to cure the damage, the buyer may proceed with the transaction. If, however, the

seller is unable to repair or replace the damaged property, the Agreement shall be null and void.¹ (R. 17 ¶ P)

4. With regard to the extension of closing dates, time is of the essence of the Agreement. (R. 17 ¶ Q)

A. Kelley Never Tendered Performance in Accordance With the Terms of the Agreement

Kelley argues he was entitled to specific performance of the Agreement because Kelley's tender of performance was not 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."

Respondent's Brief at 17. Kelley argues he "remained ready, willing and able to perform under the contract and did in fact place funds in an account . . . to be used for the down payment [Kelley] 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." Respondent's Brief at 38.

The critical assumption of Kelley's entire argument is that the only performance required by Kelley was to tender down

1. Kelley fails entirely to deal with the issue of damage to the property by virtue of vandalism and the performance required by the parties in that event. This issue is discussed in Appellant's principal brief at 14-15 and will not be reiterated herein.

payment to First Security but that otherwise, First Security was required to deliver marketable title regardless of any intervening circumstances. This assumption is erroneous; it ignores the plain language of terms bargained for by the parties to the Agreement.

The Agreement anticipated the situation presented in this case where a seller would be unable to deliver marketable title and, in such a case, altered the performance required by the parties. In the event a seller is unable to deliver marketable title, the buyer is to perform by selecting one of two options: either waive the defects and proceed with the closing, or declare the Agreement null and void and accept a return of the earnest money deposit. In such a case, the seller is to perform by either conveying whatever title it has, or returning the earnest money deposit to the buyer, at the buyer's option.

Kelley, however, did not tender either of these two options. Instead, he tendered a third. Kelley tendered his down payment on the condition that First Security "convey marketable title to the Property and the water rights that both First Security and Kelley intended and agreed would be conveyed." Respondent's Brief at 17; R. 61. Thus, Kelley sought to require First Security to convey marketable title, even though such a conveyance was impossible due to intervening

circumstances, and even though such a conveyance was not required by the terms of the Agreement. Such a tender was not in conformity with the terms of the Agreement for which the parties had bargained and, as such, is the same as if no tender was made at all. See Gerritsen v. Draney, 351 P.2d 667, 673 (Wyo. 1960) (a tender made not in conformity with the contract is the same as if no tender is made at all); Johnson v. Goldberg, 130 Cal.App.2d 571, 279 P.2d 131 (1955) (conditional tender of performance is a refusal to perform).

Moreover, Kelley's tender was not deficient merely because of the time it was tendered. In fact, Kelley never tendered performance as required by the terms of the Agreement in the event of unmarketable title problems. Indeed, First Security offered to allow closing on October 8, 1987, if Kelley would make an unconditional tender of performance.

(R. 296) Again, however, Kelley refused, stating that First Security was obligated to provide a remedy to the title and property damages disputes. Indeed, when Kelley initially filed this action, the Complaint requested an order of the Court that First Security was obligated to resolve the boundary dispute, rectify the property damages and then convey the property to Kelley. (R. 1-11) It was not until several months later, first reflected in the pleadings on November 25, 1987 (R. 140-274), that Kelley altered his position and requested the Court

order First Security to convey "whatever title it has" to the property plus damages. (R. 181) Even then, Kelley sought damages in the form of abatement of the purchase price -- a remedy not bargained for in the Agreement.

B. First Security Tendered Performance in Accordance with the Terms of the Agreement

Kelley argues that because First Security failed to furnish marketable title to the property, First Security failed to "perform as agreed" thereby rendering any tender of performance by Kelley unnecessary.² Respondent's Brief at 26-31, 35-38. Kelley argues at length that the Agreement required First Security to furnish good and marketable title to the property. Kelley's argument misses the point. First Security does not dispute that marketable title could not be conveyed due to the discrepancy between the erroneous property description and the natural boundaries of the property, and the ongoing litigation with the Armstrongs. The real issue, and the issue which Kelley fails to address, is what First Security's obligations were in the event it discovered it could not convey marketable title.

2. At pages 32-34 of his Brief, Kelley also seems to argue that the fact that the property 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. Although Kelley suggests that Leucadia makes this argument, Leucadia has no knowledge of any portion of its brief to which the argument relates.

Kelley argues that First Security's inability to convey marketable title constituted a breach of the Agreement thereby rendering any tender of performance by Kelley unnecessary.³ Respondent's Brief at 31. This argument ignores the express language of the Agreement which anticipated and resolved this very question. As noted above, the Agreement provides that if the seller is unable to deliver marketable title, the seller is to perform by either conveying whatever title it has, or returning the earnest money deposit to the buyer, at the buyer's option.

First Security in fact tendered performance in accordance with these terms. By letter dated September 4, 1987, First Security advised Kelley as follows:

3. The only case cited by Kelley in support of this argument, Willcox Clinic Ltd. v. Evans Products Co., 136 Ariz. 400, 666 P.2d 500 (App. 1983), is easily distinguishable. In Willcox, the purchasers of real property brought an action for rescission of the purchase contract based on the sellers' failure to provide marketable title as warranted. The Arizona Supreme Court held the purchasers were entitled to rescind the contract and recover the purchase price paid, noting that the "failure to deliver marketable title to property under an agreement to provide a warranty deed constitutes a breach of the vendor's contract."

The Willcox case has no bearing on the issues presented here for at least two reasons. First, the purchasers in Willcox were seeking the remedy of rescission, not specific performance as in this case. Second, it appears the agreement, if any, in Willcox did not govern the unmarketable title situation. In this case, the Agreement expressly anticipated this situation and, in fact, provides the buyer with the option of rescinding the contract.

First Security is prepared to sell the property to you "'as is' without warranty" in accordance with the terms of the earnest money. . . . Otherwise, if you elect to refuse and walk away from the deal, First Security will return the \$10,000.00 earnest money deposited in escrow to you and pursue other alternatives.

(R. 114-15)

This tender satisfied First Security's obligations under the Agreement. At this point, in accordance with the Agreement, Kelley was obliged to accept either of the options tendered by First Security.⁴ It was Kelley's failure to tender performance by opting for one or the other of the alternatives bargained for in the Agreement, and not First Security's, that resulted in a breach of the Agreement.

4. Kelley cites Huck v. Hayes, 560 P.2d 1124 (Utah 1977), to support his argument that Kelley need not tender performance because First Security failed to perform. The facts in Huck, however, also are distinguishable from those presented in this case. In Huck, the seller was delayed from conveying marketable title due to a tax lien. The parties agreed that a release of the tax lien should be obtained and then they would go forward with the closing. Instead, when the lien was removed, the seller indicated he was no longer interested in closing the transaction and cited the buyer's failure to make payments during the interim period as the breach of the agreement which released him from the obligation. The Huck court held that the seller was required to perform his part of the agreement, i.e., furnish marketable title, as a condition precedent to his right to demand that the buyer make payments due under the agreement. The Court enforced the contract and ordered the seller to convey title to the property that had since been cleared.

(continued on p. 16)

C. The Agreement was Properly Terminated by Virtue of the Time of Essence Clause

Kelley's next argument seems to be that, contrary to the teachings of Century 21 All Western Real Estate & Invest., Inc. v. Webb, 645 P.2d 52 (Utah 1982) (discussed in Appellant's Brief at p. 16-17), the time of essence provision did not terminate the Agreement on September 22, 1987, even though Kelley had not performed or tendered performance as of that date. Kelley argues that First Security waived the time of essence provision of the Agreement by its conduct and could not then set an "unreasonable deadline" for performance. Id. at 22-23, 24-26, 42.

The usual case holding a waiver of the time of essence provision by conduct arises in the context of a seller who grants the purchaser an indefinite extension of time within which to perform. Indeed, the cases cited by Kelley so hold. See, e.g., Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980)

(continued from p. 15)

In contrast, the Court in this case is not faced with a situation of First Security merely deciding that it was "not interested" in going forward with the closing. First Security was unable to go forward with the closing and unable to convey marketable title due to circumstances entirely out of its control. Furthermore, the court in Huck apparently was not faced with similar contractual provisions. In this case, the real issue is what was the nature of the parties' performance obligations in the event marketable title could not be conveyed. The Huck case has no bearing on this point.

(seller waived time of essence provision for payments due for purchase of real estate where seller never communicated any urgency for buyer to arrange for financing and continually made extensions over a nine-month period without setting a specific extension deadline) (cited in Respondent's Brief at 23-24); Schwoyer v. Fenstermacher, 251 Pa. Super. 243, 380 A.2d 468 (1977) (seller waived time of essence provision where seller indefinitely extended closing dates until title searches could be completed) (cited in Respondent's Brief at 22). In those cases where the seller has waived the time of essence provision, he must give the purchaser a reasonable time within which to perform before he can declare a termination of an earnest money contract. Baadsgaard, 612 P.2d at 347.

Such is not the situation presented in this case, however. In this case, there is no dispute that the Agreement provided that time was of the essence. (R. 117 ¶ Q; Respondent's Brief at 10) Indeed, the Agreement expressly states that the time of essence provision relates "only to extensions of the closing date." (R. 117 ¶ Q) With respect to the extensions, the time of essence provision was annexed to the extensions ending on June 1, 1987, on July 1, 1987, and on August 31, 1987, as each of these extensions was written on a form addendum which provided that "all other terms of the Agreement shall remain the same." (R. 18-21) (Appendix A)

The extension made by letters dated September 4, 1987 (R. 114) and September 14, 1987 (R. 116) (Appendices B and C, respectively), extending the time for performance to September 22, 1987, each provided clear notice that if Kelley failed to perform by September 22, 1987, his right to purchase the property under the earnest money agreement would terminate. Any question of First Security's intentions to adhere strictly to the time for performance was dispelled by its letter dated September 17, 1987 (R. 117-18) (Appendix D), which unequivocally stated that if Kelley failed to tender performance the Agreement would be considered null and void. See Boehnlein v. Ansco, Inc., 61 Or.App. 389, 657 P.2d 702 (1983); Wachung Realty & Development Co. v. Llewellyn Holding Corp., 126 A. 326 (N.J. 1924).

Thus, the conduct surrounding the extensions agreed to between First Security and Kelley does not give rise to a claim of waiver of the time of essence provision. First Security never granted an indefinite extension of time for closing the transaction. Each extension clearly and unequivocally stated that failure to perform would result in the Agreement being declared null and void, either by annexation of the words "time is of the essence" or by clear indications that failure to perform would not be excused.

Assuming the Court finds the time of essence provision was waived by the conduct of First Security, the question of what notice was reasonable is one of fact and is not appropriate for summary judgment. See, e.g., Bell v. Yale Dev. Co., 102 Ill. App. 3d 108, 429 N.E.2d 894 (1981) (30 days reasonable notice under the circumstances); Drazin v. American Oil Co., 395 A.2d 32 (D.C. 1978) (15 days notice reasonable under the circumstances); Bishop v. Tolbert, 249 S.C. 289, 153 S.E.2d 912 (1967) (1 day notice reasonable under the circumstances); Doering v. Fields, 187 Md. 484, 50 A.2d 553 (1947) (10 days notice reasonable under the circumstances).

II. THE TRIAL COURT ERRED BY ALTERING THE TERMS OF THE PARTIES' AGREEMENT AND ORDERING SPECIFIC PERFORMANCE OF TERMS NOT FOUND IN THE AGREEMENT.

In Point VI of his brief, Kelley argues that "[e]ven 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." Respondent's Brief at 41. The remedy of abatement, however, is not one that was bargained for by the parties to the agreement. Kelley discusses two cases in support of his argument that First Security is obligated to transfer what interest it can and to abate the purchase price.

The first of these cases, Reed v. Alvey, 610 P.2d 1374 (Utah 1980)⁵ (cited in Respondent's Brief at 39), involved a contract for the purchase of commercial property on which the seller was to construct a four-plex. Seller failed to perform and the buyer brought an action for specific performance. At trial, the buyer presented evidence that the seller had encumbered the land in question with something other than the building bargained for. In that case, the court ordered specific performance and held that the seller was required to remove the encumbrance prior to the buyer taking the possession of the property. The court noted that this "removal" could be accomplished either by a reduction in the purchase price in the amount of the encumbrance, or payment of the total price after the seller removed the encumbrance. 610 P.2d at 1379-80.

The case at hand, however, does not involve a situation where the property has been encumbered by a structure or lien that deteriorated the value of the land and which could be cured by "removal." More importantly, the contract at issue

5. Kelley also cites Reed v. Alvey, 610 P.2d 1374 (Utah 1980), for the proposition that Kelley's tender of performance was not a prerequisite for an action for specific performance because the failure to tender was excused by First Security's failure to perform. As discussed in Point II B, supra, however, First Security tendered performance by letter dated September 4, 1987.

in Reed apparently did not address the situation presented in that case. Here, however, the contract expressly anticipated the situation of unmarketable title and the parties expressly bargained for the remedies available in such an event.

Kelley also cites Castagno v. Church, 552 P.2d 1282 (Utah 1976), at page 41 of his Brief, for the proposition that abatement is an appropriate remedy. In Castagno, the sellers were unable to convey water rights they had contracted to convey along with the sale of land. The court ordered specific performance by the seller to the extent the seller was able to perform with an abatement in the purchase price equal to the value of the deficiency in water rights based on the following circumstances:

At the time of the execution of the contract, [sellers] knew there was no existing water right to the well. They undertook the duty to procure such a right, but they made no provision in the contract to excuse them, if the State Engineer did not grant their change application to divert a water right to the well.

552 P.2d at 1284. Obviously, this holding has no application in this case where the Agreement expressly contained a provision to excuse the performance required in the event First Security was unable to convey marketable title. In this case, the remedies bargained for in the Agreement in the event of unmarketable title govern the options available to the parties.

Interestingly, Kelley fails to note that the recent opinion of this Court in Barker v. Francis, 741 P.2d 548 (Utah App. 1987) (discussed in other sections of Kelley's Brief), is dispositive of this issue. In Barker, the parties to an earnest money agreement had negotiated to exchange certain lands. However, the first party discovered it could not convey title to the entire parcel of land under consideration. The second party requested that because the first party couldn't convey title to a portion of the property, the contract should be modified and the first party required to purchase the second party's property for cash. The trial court denied the second party's request to modify the contract.

The Utah Court of Appeals affirmed the lower court, noting that "[w]hile a court may interpret contracts which are open to interpretation, a court may not make a new one for the parties and may not alter or amend one which the parties themselves have made." 741 P.2d at 553 (citations omitted; emphasis original.) The Court further noted:

[Where] the agreement is for an exchange of lands, to compel specific performance thereof as to that portion of the land to which the defendant has title, and to render a money judgment against him for the value of that portion which he is unable to convey, would require the performance of a contract which the defendant did not make.

741 P.2d at 553.

The Agreement in this case is clear with respect to the remedies of the parties in the event of an unmarketable title. The Agreement clearly provides that if the seller cannot deliver title free of defects not curable through an escrow agreement at closing, the buyer has the option of (1) waiving the defects and proceeding with the closing, or (2) requiring the seller to return the earnest money deposit and declaring the Agreement null and void. (R. 15 ¶ G) Nowhere in this Agreement is the remedy of abatement provided. Had Kelley wanted such an option in the event of unmarketable title, such a remedy should have been written in the contract and bargained for with First Security along with the other terms.

The lower court erred by altering the terms of the Agreement and ordering specific performance of terms not found in the Agreement. Under the Agreement, if Kelley wanted a reduced purchase price, his option was to declare the Agreement null and void, to have his earnest money returned to him, and to submit a new offer with a lower purchase price. This would have left First Security free to accept the lower price, if it so desired, or to negotiate with other interested buyers for a different price. Inasmuch as the terms of the Agreement are clear, however, the lower court erred by requiring First Security to perform a contract which it did not make.

CONCLUSION

It is indeed curious that Kelley in his Brief fails to recognize and deal with the terms of the Agreement which were bargained for by the parties in the event that title was unmarketable. These terms altered the performance required by the parties in such an event. Viewed in this way, it is clear that First Security tendered the performance required in the unmarketable title situation. It is equally clear that Kelley never tendered performance consistent with the terms of the Agreement. As such, the Agreement expired by its own terms and is incapable of being specifically enforced.

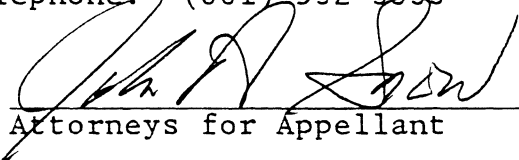
Moreover, the Agreement which the trial court did enforce was not the parties' Agreement. Rather, the trial court rewrote the terms of the Agreement, added the remedy of abatement to the remedies actually bargained for the parties, and enforced this new Agreement. As this Court recently noted in Barker, a court may not make a new contract for the parties and may not alter or amend one which the parties themselves have made.

The trial court erred, as a matter of law, in ordering specific performance of the Agreement and should be reversed.

DATED this 30th day of March, 1989.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
John A. Snow
Kathryn H. Snedaker
50 South Main, Suite 1600
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

By


Attorneys for Appellant

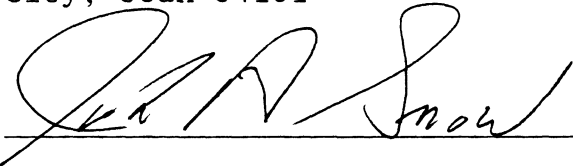
By

Attorneys for Appellant
(Original Signature)

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing Reply Brief to be hand delivered this 30th day of March, 1989, to the following:

David R. Olsen, Esq.
Charles P. Sampson, Esq.
Claudia F. Berry, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101



(Original Signature)

3002Q

320 West Snow's Lane
Summit County, Utah

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

1. Purchase price to be \$650,000 with total earnest money deposit of \$10,000. Seller to finance 80% of purchase price, upon qualification and approval by Seller; with 7% interest only payments quarterly and balance due in full 9 months from close of escrow. No pre-payment penalty for early pay-off of this note. Loan fees to be one percent of mortgage amount plus regular closing costs.
2. Closing to be on or before April 20, 1987
3. Current certified survey will be provided by Seller

All other terms of THE AGREEMENT shall remain the same. ~~the~~ Seller ~~the~~ Buyer shall have until 5:00 (A.M./P.M.) March 3, 1987 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date February 27, 1987
Time 5:00 (★M./P.M.)

Signature of (X) Seller () Buyer

First Security Inty
J. Wayne C. [Signature]

ACCEPTANCE COUNTER OFFER REJECTION

Check One

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

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

William A. Kelly
Signature

Signature

March-2
Date

87-1225

() 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 March 2

19 77 by Certified Mail and return receipt attached hereto to the (X) Seller () Buyer

1942 'P.L. 22' - 51 Feb.

BY ENDORSEMENT/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes () a COUNTER OFFER (X) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February 1987 between William Kelley as buyer(s) and First Security Mtg as seller(s) covering real property described as follows

320 W Snow Lane
Park City, UT

The following terms are hereby incorporated as part of THE AGREEMENT

Closing date hereby extended to on or before
June 1, 1987.

All other terms of THE AGREEMENT shall remain the same () Seller (X) Buyer shall have until 5.00 (A M P M) 4-29 1987 to accept the terms specified above Unless so accepted this Addendum shall lapse

Date 4-22-87
Time 249 (A M P M)

Signature of ~~Seller~~ () Buyer

First Security Mtg
By William Kelley

ACCEPTANCE COUNTER OFFER REJECTION

Check One

(X) I hereby ACCEPT the foregoing on the terms specified above

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

William R Kelley
Signature

Signature

4/27/87
Date

3.10
Time

() I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

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

William R Kelley 4/27/87
Signature of Buyer(s) Date

Signature of Seller(s)

Date

(X) 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

mtg

**ADDENDUM/COUNTER OFFER ()
TO EARNEST MONEY SALES AGREEMENT**

This ADDENDUM/COUNTER OFFER constitutes () a COUNTER OFFER (X) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February 1987 between William Kelley as buyer(s) and First Security Mtg. as seller(s).

covering real property described as follows
320 W. Snows Lane

Park City, Utah

The following terms are hereby incorporated as part of THE AGREEMENT

Closing date hereby extended to on or before July 1, 1987.

*WAYNE
P. [unclear]
Sign. (of [unclear])
& Return
last day*

All other terms of THE AGREEMENT shall remain the same () Seller (X) Buyer shall have until 5:00 (~~XXX~~ P M) June 1 1987 to accept the terms specified above Unless so accepted this Addendum shall lapse

Date May 28, 1987

Signature of (X) Seller () Buyer

Time 12:14 (A M / P M)

First Security Mtg

[Signature]

ACCEPTANCE COUNTER OFFER REJECTION

Check One

(X) I hereby ACCEPT the foregoing on the terms specified above

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

William Kelley
Signature

Signature

May 29-87 11:30
Date Time

() I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

(X) I acknowledge receipt of a true copy of the foregoing bearing all signatures

William Kelley May 29-87
Signature of Buyer(s) Date

Signature of Seller(s)

Date

(X) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on 6/1

1987, by Certified Mail and return receipt attached hereto to the (X) Seller () Buyer

Sent by

[Signature]

0020

**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 20 day of February 1987 between William R. Kelley as buyer(s), and First Security Mtg as seller(s), covering real property described as follows:

320 W. Snows Lane
Park City, UT

The following terms are hereby incorporated as part of THE AGREEMENT

Closing date is extended to on or before 8-31-87

All other terms of THE AGREEMENT shall remain the same () Seller (☒) Buyer shall have until 12: PM 7/18/87 (A.M./P.M.) July 18, 1987 to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date 7-6-87
Time _____ (A.M./P.M.)

Signature of ☒ Seller () Buyer

First Security Mtg
by Wayne Clark

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

William R. Kelley
Signature

Signature

7/9/87
Date

1:10
Time

() I hereby reject the foregoing _____ (Initials)

DOCUMENT RECEIPT

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

William R. Kelley
Signature of Buyer(s)

7/9/87
Date

First Security Mtg
Wayne Clark
Signature of Seller(s)

7-14-87
Date

() I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on July 9th - 87

19____, by Certified Mail and return receipt attached hereto to the (☒) Seller () Buyer

Sent by William R. Kelley

0021

RAY, QUINNEY & NEBEKER

PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ALONZO W. WATSON, JR.
STEPHEN B. NEBEKER
MITCHELL MELICH
L. RIDD LARSON
DON B. ALLEN
MERLIN O. BAKER
CLARK P. GILES
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400 DESERET BUILDING
79 SOUTH MAIN STREET
P. O. BOX 45365
SALT LAKE CITY, UTAH 84145-0385
TELEPHONE (801) 532-1500
TELECOPIER NO. (801) 532-7543

210 FIRST SECURITY BANK BLDG
92 NORTH UNIVERSITY AVENUE
PROVO, UTAH 84601-4420
(801) 226-7210

1020 FIRST SECURITY BANK BLDG
2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401-2306
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OF COUNSEL
ALBERT R. BOWEN
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C. PRESTON ALLEN (1921-1971)
MARVIN J. BERTOCH (1915-1978)
A. H. NEBEKER (1895-1960)
S. J. QUINNEY (1893-1963)

September 4, 1987

William Kelly
Courtney Industries
843 Nantasket Avenue
Hull, Massachusetts 02045

William Kelly
P.O. Box 257
Hull, Massachusetts 02045

Re: Park City, Utah Property

Dear Mr. Kelly:

As you may be aware, this firm represents First Security Mortgage Company in a lawsuit against Mel and Herb Armstrong to establish correct boundaries and quiet title to certain land and water rights appurtenant to property located at 320 West Snows Lane in Park City, Utah. In February of this year you entered into negotiations with First Security for the purchase of the property. Those negotiations culminated in your acceptance on March 2nd of a counteroffer, dated February 27th, by First Security. The agreement provided for closing within 60 days of acceptance by the seller. However, the closing has been extended by several addenda, the last of which provided for closing by the end of August. The purpose of this letter is to advise you that First Security is hereby extending the closing date to September 15, 1987, at which time First Security will consider the agreement to have terminated by its own terms.

First Security is prepared to sell the property to you "as is" without warranty" in accordance with the terms of the earnest money agreement. First Security is also prepared to assign you its rights in the lawsuit against the Armstrongs. Absent any obligation

William Kelly
September 4, 1987
Page Two

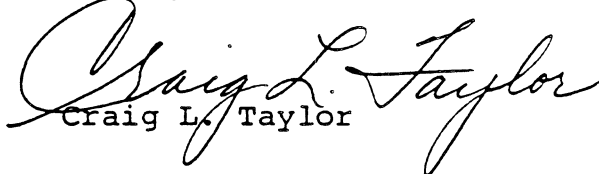
to the contrary or reimbursement from you for its legal costs and fees, First Security is no longer desirous of pursuing the lawsuit with the Armstrongs. First Security has not pursued the legal action against the Armstrongs as a result of any legal obligation, but simply because of its interest in closing the deal with you. First Security has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation. Accordingly, as indicated above, First Security will sell the property in accordance with the terms of the earnest money agreement, as extended by this letter to September 15th. Otherwise, if you elect to refuse and walk away from the deal, First Security will return the \$10,000.00 earnest money deposited in escrow to you and pursue other alternatives.

I am aware that you have some questions regarding the legal issues of the lawsuit and strongly encourage you to obtain legal counsel to advise you concerning those issues. I will be happy to cooperate with whomever you select as counsel in order that you can make a fully informed judgment. Otherwise, if you would like to discuss this matter with me personally, please do not hesitate to call. If I do not hear from you or a representative by the close of business on September 15th, I will consider the agreement as having expired and will have the funds in escrow returned to you.

Thank you for your prompt attention to this matter. I sincerely hope that this matter can be resolved quickly and in the best interests of all involved.

Sincerely,

RAY, QUINNEY & NEBEKER


Craig L. Taylor

CLT/jp

cc. Wayne Lantz
Dave Grant
Don Griffin

RAY, QUINNEY & NEBEKER
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ATTORNEYS AT LAW

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OF COUNSEL
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MARVIN J. BERTOCH (1915-1978)
A. H. NEBEKER (1895-1980)
S. J. QUINNEY (1893-1983)

September 14, 1987

Dan Egan
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

HAND DELIVERED

Re: First Security Bank's Sale of 320 West
Snows Lane Property in Park City to
William Kelly

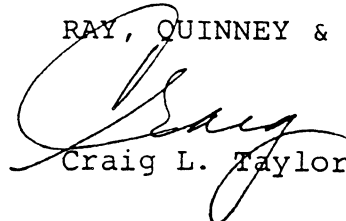
Dear Dan:

This letter confirms my agreement to extend the closing date to the close of business on September 22, 1987. This extension is granted on the basis that Mr. Kelly did not receive my letter dated September 4, 1987, until September 8, 1987. A copy of my September 4th letter to Mr. Kelly is attached. Beyond the extension to September 22nd, granted herein, the effects of the September 4th letter remain in full force and effect.

I look forward to hearing from you.

Sincerely,

RAY, QUINNEY & NEBEKER


Craig L. Taylor

CLT/jp
Enc.
cc. Wayne Lantz
Don Griffin

Exhibit "B"

0116

RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

ALONZO W. WATSON, JR.
STEPHEN B. NEBEKER
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A. H. NEBEKER (1895-1980)
S. J. QUINNEY (1893-1983)

September 17, 1987

HAND DELIVERED

David Olsen
Dan W. Egan
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

Re: First Security Bank's Sale of 320 West
Snows Lane Property in Park City to
William Kelly

Dear David and Dan:

This letter is in response to your request on September 15th that First Security extend the closing date for the sale of the Park City property to the end of the month. My letter addressed to Dan, dated September 14, 1987, indicated that First Security would extend the closing date to September 22, 1987. First Security is not willing to grant an additional extension. Nor is First Security willing to extend credit at the rate provided in the Earnest Money Agreement beyond the period specified therein. As previously indicated, First Security is prepared to sell the property to Mr. Kelly "as is" without warranty" in accordance with the terms of the Earnest Money Agreement. First Security is not obligated to clear title prior to conveying the property to Mr. Kelly. Any suggestion that the limiting language mentioned above refers only to personal property is absurd.

Once again, if the sale is not closed by close of business on September 22nd, First Security will return the \$10,000.00 earnest money deposited in escrow and pursue other alternatives. First Security will not consider the act of placing \$140,000.00 in escrow as sufficient to close the deal.

Exhibit "C"

0117

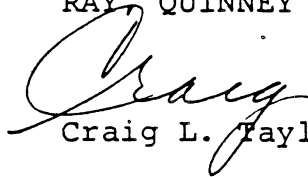
David Olsen
Dan W. Egan
September 17, 1987
Page Two

In our conversation you indicated that one of Mr. Kelly's concerns was the prospect of pursuing a lawsuit against his neighbors should he buy the property with the lawsuit at this time. I previously made the offer to Don Griffin that First Security would be willing to extend the closing and pursue the lawsuit against the Armstrongs if Mr. Kelly is willing to pay the attorney's fees and costs associated with pursuing that action. I am willing to discuss this proposal with you, but this question must be resolved prior to the 22nd of September.

I look forward to hearing from you.

Sincerely,

RAY, QUINNEY & NEBEKER


Craig L. Taylor

CLT/jp

cc. Wayne Lantz
Dave Grant