

1986

Howard W. Hatch v. R. Crawford Davis, and
William G. Dyer, individually and as General
Partners for Real Estate Development consultants:
Reply Brief of Appellant

Utah Supreme Court

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Michael E. Dyer; Attorney for Defendants/Respondents.

Howard F. Hatch; Appellant Pro Se; Plaintiff and Appellant.

Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

| | | |
|--------------------------------------|---|------------------|
| HOWARD F. HATCH |) | |
| |) | |
| Plaintiff/Appellant, |) | |
| |) | Appeal No. 20960 |
| -vs- |) | |
| |) | |
| R. CRAWFORD DAVIS, and WILLIAM |) | |
| G. DYER, individually and as General |) | |
| Partners for REAL ESTATE DEVELOPMENT |) | |
| CONSULTANTS |) | |
| |) | |
| Defendants/Respondents |) | |

REPLY BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. While the plaintiff/appellant has sought relief in the lower court from torts arising out of business relations between himself and defendants/respondents (and their attorney acting in their behalf), he has at the same time asked for a quieting of title to the real property owned by Real Estate Development Consultants, (REDC), a Utah partnership in which the respective parties each claim a controlling interest. Since Section 78-13-1 of the Utah Judicial Code requires that such action "must be tried in the county in which the subject (property) is situated...", then this aspect of the case becomes controlling and dictates the proper venue.

2. Defendants claim that the plaintiff provided "none" of the elements of a quiet title action in the original complaint. While these elements might have been laid out more explicitly, yet they are contained in the complaint. Only two elements are absolutely essential:

a. That the plaintiff alleges title to the property: In Paragraph 4 of the Complaint, plaintiff alleges to being the "legitimate General Partner of said partnership" (R. 1), a partnership previously referred to as REDC, the owner of property described in Exhibit "A" of the Complaint. (R. 4)

b. That the interest claimed by others is adverse or hostile to the alleged claims of title or interest held by the plaintiff: In Paragraph 3 of his Complaint, plaintiff alleges that defendants "have performed certain illegal acts on behalf of the Limited Partnership", namely, "contracting to sell (and in fact conveying by warranty deed) property belonging to the partnership." (R. 3)

STATEMENT OF THE CASE

1. The defendants admit in Paragraph 3 of their Brief, under Statement of the Case, that Real Estate Development Consultants is a limited partnership and "is the undisputed owner of the real property in question." The quiet title issue stems not from the name in which record title resides but who may properly act for the partnership. If the plaintiff is the "legitimate General Partner", the person who is named in the only Certificate of Limited Partnership on file with the Kane County Clerk's office, then only he, and not one of the defendants, may properly sign an instrument conveying or encumbering the partnership property.

2. Plaintiff does not allege "that defendants wrongfully removed him as general partner of REDC," as defendant's claim in Paragraph 5 of their Brief, rather that he, the plaintiff, is the legitimate General Partner. The fact that Mr. Michael Dyer has presumed to act for the partnership by executing a warranty deed on behalf of REDC (a copy of which

instrument is on record in the Kane County Records Office and attached as Addendum "A") should make it abundantly clear that the interest in the property asserted by the defendants is adverse to the interest claimed by the plaintiff.

3. The defendants have failed completely to support their contention that the "same issues were before the 4th Judicial District Court" in a previously filed action. The only similarity which can be shown is that they, the defendants, asked for a "distribution of assets according to Utah State Law" (5th Cause of Action, Addendum "B" attached) while the plaintiff asked the 6th Judicial District court for an "order showing forth the proper priority of distribution of further moneys received by the partnership." (R. 3) But that was only in one of the five otherwise totally distinct causes.

STATEMENT OF FACTS

Since the defendants overlooked to make a statement of the facts or to respond to our statements in the initial Brief, we are unable to reply to theirs. We would therefore stand on our initial statement and simply observe that the defendants have provided very little information or facts to support their assertions, perhaps for obvious reasons.

SUMMARY OF ARGUMENT

Contrary to what defendants claim in the second paragraph of their Summary, the plaintiff has not tried to quiet title in his own name personally. We both agree that title rests and should rest in the record name of REDC. But the official county record also clearly shows that it is

the plaintiff who is authorized to sign for the partnership. Neither of the defendants nor their attorney is so authorized. And when anyone presumes to execute deeds on behalf of the record owner other than the one duly authorized, it creates a very serious title question which must be settled in a court of law. The form of that action would be a quiet title action.

And while the defendants' attorney continues to assert that the issues are "identical" in the two cases, he offers absolutely no information in support of this bald-faced assertion. The most precursory examination made of the two complaints discloses the fact that on only one point is there even any similarity (please compare defendants' Complaint filed in the 4th Judicial District attached as Addendum "B" and plaintiff's Complaint found in the record, R. 1 through R. 4.)

The action brought by the plaintiff can hardly be called frivolous when the defendants' attorney is deeding off property belonging to the limited partnership and refusing to account for funds thus obtained. As to his proposed alternative, i.e., refiling the case in the 4th District, this would hardly speed things along if that were the wrong jurisdiction. The plaintiff has no desire to delay the matter. He obtains nothing by delay since it is he who has advanced substantial sums of money to the partnership and is now being deprived of any immediate opportunity of having that money returned.

ARGUMENT

Point I

PLAINTIFF'S TORT CLAIMS STEM FROM A QUIET TITLE ISSUE
WHICH IS CONTROLLING AS TO VENUE.

All of the causes of action brought by the plaintiff stem from the presumption of the defendants to act for the general partner. If these actions by the defendants, Davis and Dyer, are without the foundation of due process, as the plaintiff alleges, then the plaintiff does indeed have a case for damages against the defendants. But since these "illegal acts" grew out of or led up to the deeding of real property, adverse to the interests of the plaintiff who claims to be the true general partner, it has as its basis a quiet title action.

The state statute authorizing a quiet title action is set forth as follows:

78-40-1. An action may be brought by any person against another who claims an estate or interest in real property...adverse to him for the purpose of determining such adverse claim. Utah Code Annotated (1953 as amended)

Since an action to quiet title can only be brought in the county where the partnership property lies, then that becomes the controlling place of trial or venue.

78-13-1. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated... (1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. U.C.A. (1953 as amended)

Point II

THE ACTS COMPLAINED OF ARE IN THE CHARACTER OF THOSE TYPICALLY HANDLED IN A QUIET TITLE ACTION.

According to 74 C.J.S., Section 1 under "Quieting Title",

The purpose of a suit to quiet title or remove a cloud is to determine the existing title to property and the validity of adverse claims thereto.

Ballentine's Law Dictionary defines "quieting title" as follows:

A remedy, originating in equity, enlarged and supplemented in many jurisdictions by statute, having for its purpose an adjudication that a claim of title to or an interest in property, adverse to that of the plaintiff, is invalid, so that the plaintiff and those claiming under him may be forever afterward free from any danger of the hostile claim.

Even though the instant case differs somewhat from a traditional quiet title action, because the litigants are all partners in the same partnership, yet the effect sought by the plaintiff is identical with those described above and so must qualify in the "quiet title" category. It is one thing for partners to dispute among themselves about partnership business but when limited partners presume to be general partners without establishing their legal right to do so by due process, and then issue deeds on behalf of the partnership, they have clearly set up a hostile claim against the claims of the legitimate general partner who had heretofore executed deeds on behalf of the partnership.

We would here cite from 65 Am Jur 2d, Section 20, under "Quieting Title" (p.158):

In some cases, courts have canceled instruments which have been executed without authority by executors and administrators, and by agents, officers, and other fiduciaries, as constituting a cloud on title.

To further clarify the issue we would like to quote the definition given in Black's Law Dictionary, (4th Edition):

Quiet, v. To pacify; to render secure or unassailable by the removal of disquieting causes or disputes. This is the meaning of the word in the phrase "action to quiet title," which is a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after stopped from asserting it.

This is precisely what we seek to do with the action brought against the defendants.

Point III

THE ESSENTIAL ELEMENTS ARE PRESENT WHICH CONSTITUTE A QUIET TITLE ACTION.

In the annotations under "Complaint" in Sec.78-40-1, (Quiet Title), Utah Code Annotated (1953 as amended):

A complaint under this section is sufficient which states the ultimate facts that plaintiff is the owner of the lands and that defendant claims an interest adverse to him, without setting out the facts in detail; Glasman v. O'Donnell, 6 U. 446, 24 P. 537, applying to C. L. 1888, Section 3468 and following Mining Co. v. Kerr, 130 U.S. 256, 9 S. Ct. 511.

In action to quiet title, plaintiff may allege his title, ownership, and possession in general terms and thereunder may prove whatever title he has. State v. Rolio, 71 U. 91, 262 P. 987.

Good pleading requires that plaintiff allege, in action to quiet title, that he was the owner or entitled to possession of real estate at time of commencement of the action, and that the estate or interest claimed by defendant is adverse or hostile to plaintiff's alleged claim of title or interest. Express averments are not required; it is sufficient if that may be inferred from the allegations made. Worley v. Peterson, 80 U. 27, 12 P. 2d 579, applying C.L. 1917, Section 7247 and following Tate v. Rose, 35 U. 229, 99 P. 1003.

Some references say possession must also be claimed but others make it clear this is not an essential:

Contrary to the rule originally administered by the courts of equity, our statutory action to quiet title does not require that a plaintiff allege and prove his possession of the disputed property. U.C.A. 1953, Section 78-40-1; State v. Santiago, Utah, 590 P.2d 335, 337-38 (1979); Gibson v. McGurkin, 37 Utah 158, 165-66, 106 P. 669, 671 (1910). (Quoted from Wood v. Myrup, Utah 1984, 681 P. 2nd 1255, at p. 1257)

We must reassert what we have said in the Statement of the Issues: the Complaint as filed in the 6th Judicial District Court did in fact contain the necessary elements to sustain a quiet title action. As our citation from the Utah Code Annotated makes clear, "Express averments are not required; it is sufficient if that may be inferred from the allegations made." (Emphasis added) (quoted from Worley v. Peterson, 80 U. 27, 12 P 2d 579.)

The complaint states as follows:

1. The real property subject of the action is located in Kane County (Para. 2, R. 1)
2. The defendants are accused of performing "certain illegal acts on behalf of the limited partnership" (Para. 3, R. 1)
3. That partnership is identified as Real Estate Development Consultants (REDC) in Paragraph 3, (R. 1), a full legal discription being attached to the complaint as Addendum "A". (R. 4)
4. Those "certain illegal" acts are identifed in Paragraph 3 as "contracting with third parties for the sale of partnership property."
5. That in so doing, they were "claiming an interest adverse" to those of the plaintiff, i.e. presuming to own or control the property for the partnership. (Para. 5 and 6, R. 2)

6. And which was "jeopardizing the financial interests of the plaintiff," by challenging his property rights as the "legitimate General Partner for said partnership." (Par. 4, R. 1)

The plaintiff's assertion that he, and only he, was the legitimate general partner is his claim to being the "owner" of the subject real property. Not that he claimed personal ownership as the defendants would construe it, but simply that he as the General Partner was solely empowered to control partnership business, and specifically to "sell or exchange" partnership property. (See p. 3 of Partnership Agreement attached as Addendum "C")

CONCLUSION

Since the action filed in the 6th Judicial District Court had as its basis a dispute over the control of title to real property, it needed to be filed in the county where the real property was located. A court in any other county lacked appropriate jurisdiction. The statute says that "actions...for the the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest," must of necessity be brought in "the county in which the subject of the action...is situated." (Judicial Code 78-13-1 U.C.A.)

It was clearly error for Judge Tibbs to rule "improper venue." We would ask that his Order of Dismissal be set aside and the case be remanded to the 6th Judicial District Court with instructions.

Dated this 15 day of March, 1986.

15
HOWARD F. HATCH, Pro se

ADDENDUM "A"

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to Grantee, c/o Myron Child Address 999 South Main, Salt Lake City, UT.
84111

WARRANTY DEED

grantor
of REAL ESTATE DEVELOPMENT CONSULTANTS, a Utah Limited Partnership hereby
CONVEYS AND WARRANTS

to YOUR WORLD, INC., a Utah Corporation

grantee
of Ten dollars and other good and valuable considerations for the sum of
DOLLARS,

the following described tract of land in Kane County,

State of Utah:

All of Parcels No. 14, 21, and 10 of the proposed
STEVENS CANYON ESTATES, an unrecorded Subdivision
located in Sections 29 and 32, Township 38 South,
Range 8 West, Salt Lake Base and Meridian. The
legal descriptions are provided as follows: (*See Exhibit "A"

Parcel 14

Beginning at a point which is N00°03'W 2,102.43 feet along
the section line and S89°14'07"E 362.68 feet from the Southwest
corner of the Section 29, Township 38 South, Range 8 West, Salt
Lake Base and Meridian, and running thence S89°14'07"E 462.72
feet; thence S13°33'W 84.36 feet, thence S08°10'W 396.53 feet;
thence S66°17'E 169.13 feet; thence S72°53'E 104.02 feet; thence
S46°26'E 143.56 feet; thence S56°23'54"W 400.28 feet; thence
N61°18'W 154.75 feet; thence N63°06'W 238.50 feet; thence N15°
27'W 320.27 feet; thence N46°14'W 118.85 feet; thence N04°52'W
126.72 feet; thence N27°42'E 173.31 feet; thence N39°07'E 60.61
feet to the point of beginning. Containing 9.88 acres.*

WITNESS, the hand of said grantor, this 21st day of
November, A. D. 1984

Signed in the Presence of

D. Black

Real Estate Development Consultants

By: *Michael Dyer*

Its: *Attorney*

STATE OF UTAH,

County of Salt Lake

ss.

On the 21st day of November
personally appeared before me *Michael Dyer*

A. D. 1984

the signer of the within instrument, who duly acknowledged to me that he executed the
same.

Canon Chatman

Notary Public.

My commission expires *June 15, 1988* Residing in *Salt Lake City, Utah*

700
FEE

RECORDED AT REQUEST OF

54064
12-6-84

ENTRY NO
DATE

Parcel 21

Beginning at a point which is S89°12'38"E 1,367.80 feet along the section line and South 2.02 feet from the Southwest corner of Section 29, Township 38 South, Range 8 West, Salt Lake Base and Meridian; and running thence N19°23'W 168.62 feet; thence S88°15'51"E 233.29 feet; thence N17°47'46"E 481.81 feet; thence N77°59'E 579.72 feet; thence S16°45'E 209.98 feet; thence S41°54'W 244.19 feet; thence S12°24'W 179.29 feet; thence S62°46'W 174.66 feet; thence S06°33'E 239.33 feet; thence S39°20'W 100.88 feet; thence N54°45'W 247.44 feet; thence N20°31'W 239.79 feet; thence N87°09'W 40.50 feet; thence S09°59'W 183.34 feet; thence S61°04'W 76.97 feet; thence N62°00'W 150.39 feet to the point of beginning.

Containing 10.18 acres.

Parcel 10

Beginning at a point which is S86°34'14"E 1324.20 feet from the West Quarter Corner of Section 29, Township 38 South, Range 8 West, Salt Lake Base and Meridian (the Southwest corner of said Section 29 bears S00°03'E 2834.45 feet from said West Quarter Corner of Section 29); the point of beginning also being the Southwest corner of the SE1/4 NW1/4 of said Section 29; and running thence N00°10'50"E 282.69 feet along the 40 acre line; thence N45°46'E 182.32 feet; thence S44°31'E 611.29 feet; thence S45°29'W 212.83 feet; thence S07°45'W 249.95 feet; thence S25°-15'W 179.51 feet; thence S61°12'W 129.78 feet; thence S50°15'W 100.28 feet; thence N68°03'W 333.20 feet, thence N27°26'46"E 436.47 feet; thence N00°10'50"E 200.00 feet to the point of beginning.

Containing 10.00 acres.

Exhibit "A"

ADDENDUM "B"

MICHAEL E. DYER
RICHARDS, BRANDT, MILLER
& NELSON
Attorney for Plaintiff
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CSB TOWER, SUITE 700
50 SOUTH MAIN STREET
P.O. BOX 2465
SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

R. CRAWFORD DAVIS, an)
individual; JANICE DAVIS, ()
an individual; and)
WILLIAM G. DYER; an in- ()
dividual,)

Plaintiffs,)

C O M P L A I N T

vs.)

HOWARD F. HATCH, an)
individual; CASCADE ()
FALLS CORPORATION,)
formerly a Utah Corpora- ()
tion; and REAL ESTATE ()
DEVELOPMENT CONSULTANTS, ()
a Utah limited partner- ()
ship,)

Civil No. 63025

Defendants,)

Plaintiffs, by and through their attorney, complain of
defendants and for a cause of action allege as follows:

GENERAL ALLEGATIONS

1. R. Crawford Davis is and has been a resident of Utah County at all times material hereto.
2. Janice Davis is and has been a resident of Utah County

50 SOUTH MAIN STREET
P.O. BOX 2465
SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

County at all times material hereto.

4. Howard F. Hatch is and has been a resident of Utah County at all times material hereto.

5. Cascade Falls Corporation was a Utah Corporation until it was dissolved in 1975 by the Secretary of the State of Utah for failing to maintain its good standing within the State of Utah. Howard F. Hatch was an officer and/or director of said corporation until its dissolution in 1975.

6. Real Estate Development Consultants, a Utah Limited Partnership, (hereinafter referred to as "REDC"), is authorized to conduct business within the State of Utah and has its principal place of business in Provo, Utah County, State of Utah.

7. On July 15, 1971, the parties entered into a Limited Partnership Agreement, a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A". Plaintiffs R. Crawford Davis and William G. Dyer are named as limited partners in said Limited Partnership Agreement. Plaintiff Janice Davis is the wife of the late D. Evan Davis who is named as a limited partner in said Limited Partnership Agreement and whose interest devolved upon plaintiff Janice Davis pursuant to said Limited Partnership Agreement and by operation of law.

8. The initial general partner of REDC was Cascade Falls Corporation, a Utah corporation. In November, 1975, the certificate of limited partnership of REDC was amended with Howard F. Hatch and Larry Don Smith named as general partners. A copy of the amended certificate of limited partnership is

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SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

F. Hatch and Larry Don Smith named as general partners. A copy of the amended certificate of limited partnership is attached hereto and incorporated herein by reference as Exhibit "B".

9. On or about September 19, 1978, defendant Howard F. Hatch purchased the interest of Larry Don Smith, leaving Howard F. Hatch as the sole general partner of the above-referenced partnership as indicated in a letter from Howard F. Hatch to the limited partners, a copy of which is attached hereto and incorporated herein by reference as Exhibit "C".

10. On September 28, 1978, the limited partners purchased an additional five (5%) percent interest in the limited partnership, leaving each of the limited partners with a fifteen (15%) percent interest in the limited partnership. Defendant Howard F. Hatch holds the remaining twenty-five (25%) percent interest in the limited partnership.

11. The principal asset of REDC is approximately 750 acres of real property known as Stevens Canyon Estates, a plat of which is attached hereto and incorporated herein by reference as Exhibit "D". The property was purchased from Mr. C. E. Meeks and was to be paid off over time from the sale of parcels of the property.

12. On information and belief, plaintiffs allege that defendant, Howard F. Hatch, has mismanaged their investment and has breached his fiduciary duties to them, all to their economic detriment as set forth below.

500 AUSTIN, SUITE 700
50 SOUTH MAIN STREET
P O BOX 2465
SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

FIRST CAUSE OF ACTION

(Conflict of Interest)

13. Plaintiffs reallege and incorporate herein by reference paragraphs one through and including twelve of plaintiffs' complaint.

14. As the general partner for REDC, defendant Howard Hatch engaged in numerous business transactions with other entities in which he already had significant and substantial financial interests, creating a severe conflict of interest in defendant Hatch as the general partner for REDC.

15. As general partner of REDC, defendant Howard Hatch transacted business numerous times with Howard Hatch & Associates, an entity over which Howard Hatch had and continues to have principal if not exclusive control. Defendant Hatch also worked for or had an interest in Equitable Realty, and, as general partner of REDC, transacted business with this entity. Plaintiffs allege that these conflicts of interest have adversely affected their economic interest in REDC.

16. As general partner of REDC, defendant Howard Hatch has engaged in several business transactions with University Avenue Development Associates, an entity for which Howard Hatch is either the general partner or the owner. Plaintiffs allege that University Avenue Development Associates loaned in excess of \$42,000 to REDC, and this conflict of interest has adversely affected plaintiffs' interest in REDC.

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SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty)

17. Plaintiffs reallege and incorporate herein by reference paragraphs one through and including sixteen of plaintiffs' complaint.

18. Pursuant to the limited partnership agreement, the general partner, already given a fifty percent (50%) interest in REDC, was not entitled to receive a management fee for his services. See Exhibit "A" at 4. Nevertheless, over the past 11 years, defendant Howard Hatch has, either individually or through Howard Hatch & Associates, received commissions from the sales of parcels of real property belonging to REDC.

19. Not only did defendant Howard Hatch wrongfully awarded himself commissions in violation of the limited partnership agreement, the commissions he gave himself were far in excess of those permitted by realtors generally. Plaintiffs allege that, as a general rule, realtors' fees have fluctuated between 5 to 10 percent of the price of the property, 10% coming to a realtor only in the event of an extremely fine effort to sell difficult land. However, for almost every parcel of REDC land sold, defendant Howard Hatch awarded himself a realtor's commission of at least twenty (20%) percent, and in most cases thirty (30%) percent. Said commissions, totaling approximately \$50,000.00, plus interest, rightfully belong to and are assets of REDC, all to the detriment of the plaintiffs.

20. Defendant Howard Hatch is and has been a realtor at

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50 SOUTH MAIN STREET
P.O. BOX 2465
SALT LAKE CITY, UTAH 84110
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all times material hereto, and knew or should have known of the prevailing realtor's fees for the sale of this type of land. That defendant Howard Hatch willfully, deliberately, and intentionally awarded himself realtor's fees up to four-hundred (400%) percent higher than the generally prevailing rate cannot, under any set of circumstances, be considered excusable neglect or mere negligence. The defendant has intentionally and deliberately violated his fiduciary duties of care and loyalty to REDC and to the limited partners, knowing that the fees he awarded to himself, either individually or through Howard Hatch & Associates, unreasonably exceeded those fees typically charged by all realtors. This type of willful, deliberate and intentional conduct by the defendant requires the application of punitive damages in this case.

THIRD CAUSE OF ACTION

(Self Dealing)

21. Plaintiffs reallege and incorporate herein by reference paragraphs one through and including twenty of plaintiffs' complaint.

22. Defendant Howard Hatch sold to himself two ten acre parcels of land of REDC, the purchase price of which is presently unknown. Plaintiffs allege that any purchases of REDC land by Howard Hatch must be for the fair market value. If the price paid by Howard Hatch for said parcels was less than fair market value, plaintiffs allege that Howard Hatch should be required to pay the difference.

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P.O. BOX 2465
SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

23. Plaintiffs allege that lots 6, 9, 60 and 61 have been taken off the market by defendant Hatch and "reserved" for himself. Thus, while defendant Howard Hatch has not paid for said lots, said lots have not been available to the public for sale, all to the detriment of the plaintiffs.

FOURTH CAUSE OF ACTION

(Failure to Provide Financial Statements)

24. Plaintiffs reallege and incorporate herein by reference paragraphs one through and including twenty-three of plaintiffs' complaint.

25. The Limited Partnership Agreement requires the defendant to have prepared by Certified Public Accountant an annual financial statement containing a balance sheet and an income statement. Moreover, a copy or condensed version of such financial statement as well as the partnership tax returns were required to be furnished to each member of the partnership at the close of each accounting year. The defendant has, however, failed to provide such formal accounting to the limited partners on an annual basis, all to the detriment of the plaintiffs.

FIFTH CAUSE OF ACTION

(Distribution of Assets upon Dissolution)

26. Plaintiffs reallege and incorporate herein by reference paragraphs one through and including twenty-five of plaintiffs' complaint.

27. The Limited Partnership Agreement provides for the following method of distribution of assets upon dissolution:

500 SOUTH MAIN STREET
50 SOUTH MAIN STREET
P.O. BOX 2465
SALT LAKE CITY, UTAH 84110
TELEPHONE: (801) 531-1777

- a. The expenses of liquidation and the debts of the partnership, other than any other debts owing to the partners, shall be paid.
- b. Such debts of the partnership as are owing to the partners, including any loans and advances ~~and~~ in reimbursement for expenses ~~for~~ of the partnership, shall be paid.
- c. The partner's initial capital contribution.
- d. The total of the partner's addition captial contributions paid pursuant to paragraph 10(a) hereof.
- e. The remaining proceeds shall be distributed to the partners to the same extent and in the same manner that the partners share in the profits and losses.
- f. Should the general partner cease to act as a general partner for any reason during the term of this agreement, he shall be treated as a limited partner and shall not lose his right to share in profits and losses in the ratio set forth in Exhibit "A".

28. The above referenced method of distribution is, however, in direct conflict with the applicable Utah statute which governs the distribution of assets. That statute, Utah Code Annotated, §48-2-23 (1981), states as follows:

1. Distribution of Assets. In settling accounts

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after dissolution, the liabilities of the partnership shall be entitled to payment in the following order:

- a. Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners.
- b. Those to limited partners, in respect to their share of the profits and other compensation by way of incomes on their contributions.
- c. Those to limited partners, in respect to the the capital of their contributions.
- d. Those to general partners, other than for capital and profits.
- e. Those to general partners, in respect to profits.
- f. Those to general partners, in respect to capital.

29. The conflict between the above two methods of distributing assets is immediately apparent. While parties are typically free to contract according to their desires, the general rule of law does not permit parties to enter into a contract which conflicts directly with applicable state law. In other words, the method of distribution as outlined by Utah State Statute must prevail over that outlined in the limited partnership agreement.

30. This exact type of dispute was recently litigated in

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Dycus v. Belco Industries, Inc., 569 P2d 553 (Okla. App. 1977), and the court expressly held that the method of distribution as outlined in the Uniform Limited Partnership Act took priority over any other agreed upon method of distribution. The Court concluded as follows:

"We hold, then that [the general partner's] claim for advances must take a statutory place behind creditors and limited partners." 569 P.2d at 556.,

31. Plaintiffs allege, therefore, that, upon dissolution, the assets of REDC should be distributed in the manner provided by Utah State law.

WHEREFORE, plaintiffs pray for judgment against defendant, Howard Hatch as follows:

1. For an accounting of REDC, the cost of which to be borne by the defendant Howard Hatch.
2. For the sum of \$100,000, or such other greater sum as may be proved at trial, as a return of the commissions wrongfully taken by defendant Hatch and for additional actual damages.
3. For a dissolution of the limited partnership, REDC, with its assets to be distributed according to Utah State law.
4. For interest at the highest legal rate on all sums wrongfully taken by the defendants.
5. For general damages in an amount not less than \$10,000.
6. For punitive damages in an amount not less than \$25,000.
7. For costs of this action, including a reasonable attorney's fee.

8. For such other and further relief as the Court deems just and reasonable in the premises.

DATED this 15th day of February, 1983.

RICHARDS, BRANDT, MILLER & NELSON


MICHAEL E. DYER, Counsel for
Plaintiffs

Plaintiffs' address

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Portion of Partnership Agreement

real property described on Exhibit "B" at the price indicated thereon. The partnership will pay the general partner for the property the sum indicated on Exhibit "B," and the general partner is authorized upon conveyance of the property to the partnership to make payment to himself from the partnership assets, the purchase price.

11. Duties and Management.

(a) The general partner shall contribute his services and experience in connection with the adoption of plans for, and the supervision of the project; shall devote such time as shall be reasonably required in furtherance of the purposes and objects of the limited partnership; and shall cause to be constructed and completed in a good workmanlike manner any structures to be erected on the subject real property in accordance with such plans and specifications as the general partner shall approve on behalf of the limited partnership. Such structures to be constructed within a reasonable time after execution hereof, due allowance being made for completion of plans and specifications, the obtaining of necessary financing, and the issuance of necessary permits by the appropriate governmental authority, and shall be diligently carried forward to completion. The general partner shall also use his best efforts to obtain the necessary construction financing and shall let the necessary contracts for construction work for said development.


(b) The general partner shall have control of the partnership business and all actions shall require the consent of the general partner. The general partner shall have exclusive control over the business of the partnership and shall have authority to act on behalf of the partnership in all matters respecting the partnership, its business, and its property, subject to the limitations stated elsewhere in this agreement. Without limitation upon the generality of the above, the general partner shall have authority to employ at the expense of the partnership, such agents, land surveyors and/or employees, independent contractors, attorneys, and accountants as they deem reasonably necessary; to sell or exchange, in whole or in part, the partnership property; to create by grant or otherwise easements and servitudes; to alter, improve, repair, raze, replace and rebuild partnership property; to let or lease property for any purpose, including exploration for and removal of gas, oil and other mineral and natural resources, and for any period; to effect necessary insurance for the proper protection of the partnership and of the general and limited partners, or of any of them; to pay, collect, compromise, arbitrate, or otherwise adjust any and all claims or demands of or against the partnership; and to bind the partnership in all transactions involving the partnership's real or personal property or business affairs including the execution of all deeds, loan obligations, deeds of trust and notes. The general partner shall devote such time to the business of the partnership

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MAILING CERTIFICATE

I certify that four true and correct copies of the foregoing were hand delivered or mailed to the attorney for the Defendants by first class mail, postage prepaid, this 15th day of March 1986 and addressed as follows:

Mr. Michael D. Dyer
CSB Tower
Suite 700
50 South Main Street
Salt Lake City, Utah 84110



Howard F. Hatch