

1998

KDAB v. Margaret Jane Gordon : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 980236-CA

IN THE UTAH COURT OF APPEALS

KDAB, L.L.C.,

Plaintiff-Appellant,

vs.

Case No. 980236-CA
Priority No. 15

MARGARET JANE GORDON,

Defendant-Appellee.

BRIEF OF APPELLANT

Appeal from a Judgment of the
Third Judicial District Court, Tooele County, State of Utah
Honorable L. A. Deaver

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FILED

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellant,

vs.

Case No. 980236-CA

Priority No. 15

MARGARET JANE GORDON,

Defendant-Appellee.

BRIEF OF APPELLANT

JURISDICTION OF THIS COURT

This Court has jurisdiction of this case pursuant to Section 78-2a-3(2)(j),
U.C.A.

ISSUE PRESENTED FOR APPEAL

Did the lower court err in its legal interpretation of a real estate contract provision concerning the obligations of the parties regarding the exercise of an option to purchase future property? A trial court's conclusion of law in civil cases are reviewed for correctness. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); the term "correctness" means "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. State v. Pena, 869 P.2d 932, 935 (Utah 1994). This "correctness" standard applies when a trial court is challenged as to its

interpretation of an unambiguous contract. Allstate Ins. Co. v. Liberty Mutual Ins. Co., 868 P.2d 110, 112 (Utah App. 1994).

This issue was preserved in the court below by the plaintiff's Motion for Summary Judgment and the accompanying memoranda by both parties. (R. 82-183).

NATURE OF THE CASE

This is an action commenced by the plaintiff against the defendant for specific performance of a real estate contract concerning property located in Tooele, Utah.

COURSE OF PROCEEDING

Plaintiff originally filed a Motion for Summary Judgment arguing that as a matter of law the defendant had breached the terms of an Option Agreement and therefore Plaintiff was entitled to judgment. Both parties filed various memoranda and supporting affidavits as to Plaintiff's motion. A hearing was held on October 7, 1996 before the Honorable L.A. Deaver.

The lower court issued its decision on December 18, 1996, a copy of which is attached in the Appendix to this Brief. The Court denied Plaintiff's motion on the basis that, as a matter of law, Defendant did not breach any obligation under the contract. This decision was later reduced to a formal order. (R. 187-90).

Subsequently, the defendant filed a Motion for Summary Judgment arguing that, as a matter of law, Plaintiff's Complaint should be dismissed since there was

no breach of the agreement by the defendant. (R. 191-92). The lower court agreed and issued an Amended Order of Summary Judgment in favor of the defendant and against the plaintiff. (R. 205-08).

It is from this order that the present appeal is taken. (R. 210-11).

STATEMENT OF RELEVANT FACTS

For purposes of this appeal the facts are undisputed. Although they provide useful background information, it is the language of the contract itself which is now the issue to be resolved.

In February of 1992 the defendant, a resident of Tooele County, entered into an agreement with a company known as Gordon Farms, Inc. concerning the option to purchase certain real property located in Tooele, Utah. A copy of this agreement is contained in the Appendix of this Brief. Gordon Farms, Inc. exercised the option to purchase approximately twelve acres of the property for \$93,700.

On June 17, 1994 the option agreement was assigned by Gordon Farms, Inc. to the plaintiff KDAB, L.L.C., which is a limited liability company formed in Utah with its principal place of business in Tooele County. Defendant consented and accepted this assignment. It was formally recorded on June 20, 1994 in the Tooele County Recorder's office.

Plaintiff maintains that pursuant to Section 3 of the Option Agreement they extended the option on August 16, 1994 by sending a letter *via* regular mail to the

home of the defendant. The defendant denied ever receiving this notification. Since Plaintiff failed to send the notification letter by certified mail as was required by the contract, Plaintiff has conceded in this litigation that the notification was not properly sent in accordance with the contract requirements and therefore cannot be relied upon as a proper notice to exercise the option agreement.

After the assumption of the option contract the plaintiff purchased approximately 14 acres of the property for \$115,000. The combined purchase of Gordon Farms, Inc. and the plaintiff resulted in nearly 26 acres being purchased for \$208,000. Under paragraph 5(b) of the Option Agreement the rate was to be \$8,125 per acre even though the actual purchase price was \$6,500 per acre as stated in paragraph 1. Under the terms of the agreement the plaintiff was required to pay 125 percent of the purchase price or \$8,125 per acre. This overpayment was to be used as a credit to purchase future portions of the property. At the time of filing the Complaint, Plaintiff or its predecessor had actually paid for 32 acres and was therefore entitled to an additional 6.4 acres.

In May of 1996 Plaintiff notified the defendant that it wished to purchase additional property in accordance with the terms of the Option Agreement. At that time Defendant notified Plaintiff that the option was no longer viable since Plaintiff had not properly extended the Option Agreement pursuant to paragraph 3 of the contract. Accordingly, on May 22, 1996 Plaintiff's attorney sent a letter to

Defendant notifying her of the previous written notice to extend the option mailed on August 26, 1994 and once against giving notice of such intention with the May 22nd letter.

After several other requests and demands, Defendant refused to appear at a title company for the purpose of closing the additional requested purchase of the land in dispute. Plaintiff then brought suit against the defendant seeking specific performance of the Option Agreement as to the desired purchase in May of 1996 as well as a request for specific performance of the approximately 6 acres that had been prepaid but not delivered.

SUMMARY OF ARGUMENT

The plaintiff maintained in the lower court and maintains in this appeal that the specific language of the Option Agreement must be enforced regardless of the general nature of an ordinary option. In this specific case, paragraph 3 of the agreement required that the plaintiff (buyer) could extend the initial period of the option in two-year increments by delivering to the seller the sum of \$8,125 together with written notice that the option was being extended. It is undisputed that the sum required to be paid was not a fee but was actually a credit requiring a 1 acre purchase every two years.

Had Plaintiff sent the August 26, 1994 notification of intent to extend the option by certified mail with proof of service upon the defendant, this lawsuit would not have occurred. Unfortunately, however, regular mail was utilized and

Defendant denied ever receiving such notification. Without more, the failure of the plaintiff to properly notify the defendant would extinguish the option right and plaintiff would not be able to request specific performance.

However, this was not an ordinary option agreement. Contained within the very same paragraph 3 relating to the extension requirements was a provision requiring the defendant to give a notice to the plaintiff of any procedural failure relating to the right to extend the option. Accordingly, because Defendant did not give Plaintiff an opportunity to cure the defective notification, Plaintiff was entitled to correct the notice requirement once Defendant alerted it of the problem. As such, therefore, the Agreement is binding upon the defendant and specific performance is required.

ARGUMENT

THE LOWER COURT ERRED AS A MATTER OF LAW IN APPLYING GENERAL PRINCIPLES OF OPTION LAW RATHER THAN THE SPECIFIC LANGUAGE OF THE BINDING CONTRACT.

The heart of this lawsuit and appeal centers around paragraph 3 of the Option Agreement. For that reason this paragraph is reproduced for the convenience of this Court and the parties.

3. Option Consideration: Term. The initial period constituting the Option shall commence on the date of this Agreement and shall expire at 5:00 p.m., Salt Lake City time, on November 30, 1994. As consideration for Seller granting to Buyer the Option for the initial period constituting the Term, Buyer shall pay to Seller the sum of \$16,250 on or before December 1, 1992. Buyer may extend the initial period constituting the Term for four (4) additional two (2) year periods by delivering to Seller the following

sums on or before the commencement of each such extension period, accompanied by written notice of such extension:

First Two-Year Extension (On and after December 1, 1994 through and including November 30, 1996)	\$8,125.00
Second Two-Year Extension (On and after December 1, 1996 through and including November 30, 1998)	\$8,125.00
Third Two-Year Extension (On and after December 1, 1998 through and including November 30, 2000)	\$8,125.00
Fourth Two-Year Extension (On and after December 1, 2000 through and including November 30, 2002)	\$8,125.00

Notwithstanding the foregoing, no right, title or interest of Buyer under this Agreement shall be impaired, terminated or forfeited, including, without limitation, the Option or the right to extend the Term, unless and until Seller has given Buyer written notice, describing in reasonable detail the default or failure concerned (including, without limitation, that Buyer has failed to timely pay to Seller any consideration for the extension of the Term), and Buyer has failed to cure or remedy any such default or failure within thirty (30) days after the receipt by Buyer of such notice.

For purposes of the Motion for Summary Judgment and this appeal, the parties have agreed to two facts: (1) in terms of the contract requirement the plaintiff failed to properly notify the defendant in August of 1994 of its desire to extend the option time since it did not send the notice by certified mail and cannot dispute Defendant's denial that it was received; (2) the sum of \$8,125.00 is not a

fee for the option but is the price for one acres of land pursuant to paragraph 5(b) of the Agreement. Thus, this monetary amount requirement would have been satisfied had a closing occurred and at least an acre of land purchased at the time of closing.

With this in mind, the only area of dispute addressed by the Court below and now on appeal concerns the meaning of the last paragraph of paragraph 3. The sole question is whether the defendant was obligated to notify the plaintiff of its failure to extend the December 1994 option period and to give the plaintiff a thirty-day opportunity to cure.

Defendant argues that this provision does not apply to the extension of the Option Agreement and therefore under the ordinary rules of option construction, Defendant had no obligation to notify Plaintiff of a default or failure since the decision not to exercise an option is neither a default nor a failure. Under the defendant's argument and that of the lower court, because this language did not require any action on behalf of the defendant to offer the plaintiff a thirty-day cure period, the option expired in 1994-95 when the plaintiff failed to correctly exercise it.

Plaintiff disputes this argument and the lower court's reliance upon general rules of contract construction. It is Plaintiff's position that because Defendant did not notify Plaintiff of its failure to exercise the 1994 option period that it was

entitled to cure this deficiency once notice of “failure” was actually given in May of 1996 by the defendant.

Plaintiff acknowledges that it is only the specific language contained at the conclusion of paragraph 3 which allows it to contest the normal rule regarding contractual option agreements. There is no doubt that the decision of the Utah Supreme Court in Catmull v. Johnson, 541 P.2d 793 (Utah 1975) which was relied upon by the lower court clearly establishes the normal rule that an optionee, prior to acceptance, is not contractually bound to perform any duty. As such, therefore, when an optionee fails to exercise an option there is normally no obligation on the optionor to take any action whatsoever. The negative action of the optionee, therefore, does not require any affirmative action of the optionor.

However, it is also a basic rule of contract interpretation that the intent of the parties is to be determined from the writing itself with each provision being considered in relation to all others. Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766 (Utah 1995). Furthermore, a contract interpretation begins with the examination of the contract itself to determine the intention of the parties and the document should be interpreted in a manner to harmonize all of its provisions and terms to the greatest extent possible. Home Savings & Loan v. Aetna Casualty & Surety Co., 817 P.2d 341 (Utah App. 1991).

The concluding paragraph of paragraph 3 of the Agreement is not ambiguous. Even though both parties have urged diverse definitions of the

terminology, this is not sufficient to render the terminology ambiguous. Land v. Land, 605 P.2d 1248 (Utah 1980). As such, it is the function of this Court to determine whether the lower court properly interpreted the contractual terms correctly when there was no reliance on extrinsic evidence. Nielsen v. O'Reilly, 848 P.2d 664, 665 (Utah 1992). In other words, did the lower court properly interpret this unambiguous contractual provision? Edwards & Daniels Architects, Inc. v. Farmers Properties, Inc., 865 P.2d 1382, 1385 (Utah App. 1993).

A review of the provision itself shows that the lower court erred in its interpretation and requires this Court to rule as a matter of law that Plaintiff is entitled to specific performance. This assertion is based upon the following.

First, the contested provision is contained specifically within paragraph 3 which deals with the schedule of two-year extensions. Had this provision been made into a separate paragraph of the Option Agreement, the defendant's argument that this provision only took effect once the option had been exercised could be more logically made. However, its location within paragraph 3 itself clearly shows that it was intended to apply to the "exercise" provisions of that paragraph regardless of any residual effect it may have on the remainder of the contract.

Second, the plain meaning of the words must be given effect by this Court. It is basic hornbook law that the terms of a contract are to be interpreted in accordance with their usually accepted meanings and should be read as a whole in

an attempt to harmonize and give effect to all contractual provisions. Nielsen v. O'Reilly, 848 P.2d 664 (Utah 1992). This Court has held that the ordinary meaning of contract terms is often best determined through a standard non-legal dictionary. Warburton v. Virginia Beach Federal Savings & Loan Assn., 899 P.2d 779 (Utah App. 1995). As such, examination of the words themselves requires that the cure provision applies to the failure to exercise the option.

The phrase “no right, title or interest of buyer” clearly applies to the exercise of the option extension. The term “right” is defined as “that to which one has a just claim; any power or privilege vested in a person by the law.” Webster’s New Collegiate Dictionary, 6th Ed. Likewise, the word “interest” is defined as a “right, title, or share in a thing, participation in advantage, profit and responsibility.” *Id.* As such, these words clearly apply to Plaintiff’s right and interest in being able to periodically extend the option time in which to purchase the property.

Furthermore, the language of the contract itself specifically mentions this right of extension. It states: “Notwithstanding the foregoing, no right, title, or interest of Buyer under this agreement . . . including . . . the option or the right to extend the term. . . .” (Emphasis added). Thus, the third line of the provision specifically regards the plaintiff’s “right to extend the term” as a protected “right” or “interest” under the first line of the provision.

Next, the provision prohibits this right from being “impaired, terminated or forfeited.” The term “forfeited” is especially germane to the facts of this case. It is defined as “to lose, or lose the right to, by some error, fault, offense, or crime.” *Id.* There can be no question that the lower court essentially held that because the plaintiff did not properly notify the defendant of its right to extend the option that it “forfeited” that right and therefore cannot now require specific performance of the contract. The fact that the option gives the plaintiff the right to decide whether or not it will enter into a future enforceable contract is immaterial to this provision. It is the “right” of the plaintiff to make this choice by properly exercising the notification requirement which is protected.

Third, the language of the provision requires that the defendant give written notice to the plaintiff in reasonable detail of “the default or failure concerned.” (Emphasis added). This phrase is further defined in parentheses by stating “including, without limitation, that buyer has failed to timely pay to seller any consideration for the extension of the term.” (Emphasis added). Here, the word “failure” is completely applicable to the facts of this transaction. Defendant herself in her Memorandum In Opposition To Plaintiff’s Motion For Summary Judgment stated the following:

The plaintiff attempts to argue that the failure to give the required notice should be considered a default and a cure period be allowed. It is well accepted law that the failure to exercise an option is not a default and no default is claimed or suggested by the defendant. (R. 151). (Emphasis added).

Thus, the “failure” of the plaintiff to send proper notice is included within the scope of the provision giving opportunity to cure. The defendant argued below that the fact that the limiting parenthetical expression referred to payment only necessarily excluded notification. (Oct. 7, 1996 Hearing, pp. 15-16). However, Defendant’s counsel failed to address the “without limitation” modifier within that phrase which clearly expands the “failure” to include “failure to give notice”.


The lower court based its decision upon basic principles of options and not upon the specific language of the provision entered into by the parties. The plain meaning of these words in context of their location to the entire agreement requires this Court to find as a matter of law that the cure provision was applicable. Upon learning of the defective notice of 1994, Plaintiff gave proper notice of intent to exercise the option within the 30-day cure period.

CONCLUSION

The decision of the lower court concerning the obligations of the parties in a normal option agreement would have been correct were it not for the specific language contained at the end of paragraph 3. The parties clearly modified the various obligations and duties in an option environment by requiring an affirmative duty by the defendant to advise the plaintiff that they had failed to exercise their right of option extension. This shift of burden was fully agreed to by both parties when they executed the agreement. The lower court exceeded its authority by rewriting this provision in terms of general law rather than the intent of the parties.

This Court should reverse that decision and order specific performance of the Option Agreement.

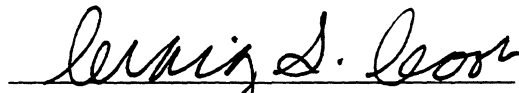
DATED this 12th day of June, 1998.



Craig S. Cook
Attorney for Plaintiff-Appellant
3645 East Cascade Way
Salt Lake City, Utah 84109

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to George Daines, Esq., 108 North Main, Suite 200, Logan, Utah 84321 this 12th day of June, 1998.



APPENDIX

OPTION AGREEMENT
[Margaret Jane Gordon]

THIS OPTION AGREEMENT (this "Agreement") is entered into as of the 22 day of February, 1992, between MARGARET JANE GORDON, an individual ("Seller"), whose address is 151 South Coleman, Tooele, Utah 84074, and GORDON FARM, INC., a Utah corporation ("Buyer"), whose address is 480 East 6400 South, Murray, Utah 84107.

FOR THE SUM OF TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Seller and Buyer agree as follows:

1. Definitions. Each of the following terms shall have the indicated meaning:

"Closing" means, collectively, the closing(s) of the purchase and sale of any portion of the Property between Seller and Buyer, which may occur from time to time in accordance with the provisions of this Agreement. (Under this Agreement, Buyer may, at its option, purchase all of the Property at one time, or, as is anticipated, may from time to time purchase any portion of the Property equal to or greater than two (2) acres in the first purchase, and equal to or greater than one (1) acre in any subsequent purchase.)

"Closing Date" means the date on which any Closing occurs.

"Deed" means a general warranty deed, dated as of the relevant Closing Date, conveying and warranting to Buyer good, marketable and indefeasible fee simple title to that portion of the Property then being purchased, free and clear of all liens, encumbrances and other matters, except for the Permitted Exceptions.

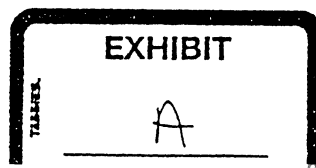
"Option" means the option granted to Buyer in Paragraph 2 to purchase all or any portion of the Property.

"Permitted Exceptions" means, collectively, non-delinquent real property taxes and assessments and the following:

(i) right-of-way for County Road along the North 16.5 feet, more or less;

(ii) various pole line easements in favor of Utah Power and Light Company, recorded in the Tooele County Recorder's Office in Book C of Miscellaneous at Pages 462 and 463, in Book G of Miscellaneous at Page 41, in Book 44 at Page 489 and in Book 180 at Pages 621 and 623;

(iii) various easements in favor of Tooele City,



recorded in the Tooele County Recorder's Office in Book 77 at Page 122, in Book 125 at Page 508 and in Book 181 at Page 802;

(iv) right-of-way easement in favor of Mountain States Telephone and Telegraph Company, recorded in the Tooele County Recorder's Office in Book 183 at Page 942; and

(v) reservation in patents which reads in part as follows: "subject to all rights of way for ditches, tunnels and telephone and transmission lines that may have been constructed by authority of the United States."

"Property" means, collectively, the parcels of land located in Tooele County, Utah, more particularly described as follows, together with all structures and other improvements located on such land, and all appurtenant easements and rights-of-way and all other appurtenances in any way appertaining to such land, including, without limitation, all oil, gas, water and mineral rights, and all right, title and interest of Seller in and to any land lying in the bed of any street, road, avenue or alley, whether open, closed or proposed, and any strips and gores, in front of or adjoining such land:

PARCEL 1:

Beginning at a point 16.5 feet South of the Northeast corner of Section 34, Township 3 South, Range 4 West, Salt Lake Base and Meridian, and running thence South 2611.51 feet; thence South 89°44'38" West 1062.325 feet; thence North 2612.61 feet, more or less; thence North 89°48'11" East 1062.325 feet to beginning.

LESS AND EXCEPTING: Beginning at a point 16.5 feet South and 89°48'11" West 1062.325 feet from the Northeast corner of Section 34, Township 3 South, Range 4 West, Salt Lake Base and Meridian, and running thence South 290.4 feet; thence North 89°48'11" East 150 feet; thence North 290.4 feet; thence South 89°48'11" West 150 feet to the point of beginning.

PARCEL 4:

Beginning at a point 4085.65 feet West along the North line of Section 34 and South 1043.55 feet, more or less, from the Northeast corner of Section 34, Township 3 South, Range 4 West, Salt Lake Base and Meridian, and running thence West 208.71 feet; thence South 1588.90 feet, more or less; thence West 208.71 feet; thence North 1588.90 feet, more or less; thence East 208.71 feet to the point of beginning.

"Purchase Price" means the sum of \$6,500.00 per acre

actually purchased. (The Purchase Price for any fractional acre shall be determined by multiplying the sum of \$6,500.00 by such fraction. For example, if that portion of the Property then being purchased is land with an area of 1.5 acres, the Purchase Price for such portion would be \$9,750.00 (1.5 X \$6,500.00).)

"Survey(s)" means, collectively, one or more current certified boundary survey(s) of all or any portion of the Property, prepared by a registered land surveyor in accordance with the land survey requirements of the State of Utah, as well as any other reasonable requirements of Buyer.

"Term" means the initial period of the Option, as the same may be extended, as set forth in Paragraph 3.

"Title Company" means Associated Title Company, a Utah corporation, whose address is 563 West 500 South, Suite 160, Bountiful, Utah 84010.

"Title Policy" means an ALTA owner's so-called "extended coverage" title policy (6-1-90 form, as amended), issued by First American Title Insurance Company through the Title Company pursuant to the Commitment for Title Insurance, dated December 17, 1991, Order No. T-91-2390-Amend#1, as the same may have been or may be amended, covering that portion of the Property then being purchased, containing none of the usual printed "standard exceptions," having liability limits equal to the Purchase Price being paid for that portion of the Property then being purchased, insuring indefeasible fee title to such portion as being vested in Buyer, subject only to the Permitted Exceptions, deleting by endorsement Paragraphs 7(b) and 14 from the Conditions and Stipulations, and containing such endorsements as may be reasonably requested by Buyer. (Notwithstanding the foregoing, Buyer may elect to receive a standard coverage title policy, subject to the usual printed standard exceptions, for all or any portion of the Property.)

2. Option. Subject to the provisions of this Agreement, Seller grants to Buyer an option during the Term to purchase all or any portion(s) of the Property for the Purchase Price. Buyer may exercise such option to purchase portions of the Property at as many different Closings as Buyer may elect, provided that at the first Closing, Buyer must purchase at least two (2) acres of the Property, and at any subsequent Closing, Buyer must purchase at least one (1) acre of the Property. Buyer may exercise the Option from time to time and at any time during the Term by giving Seller written notice of such exercise, specifying which portion of the Property Buyer wishes to purchase with respect to each such exercise.

3. Option Consideration; Term. The initial period constituting the Option shall commence on the date of this

Agreement and shall expire at 5:00 p.m., Salt Lake City time, on November 30, 1994. As consideration for Seller granting to Buyer the Option for the initial period constituting the Term, Buyer shall pay to Seller the sum of \$16,250.00 on or before December 1, 1992. Buyer may extend the initial period constituting the Term for four (4) additional two (2) year periods by delivering to Seller the following sums on or before the commencement of each such extension period, accompanied by written notice of such extension:

First Two-Year Extension (On and after December 1, 1994 through and including November 30, 1996)	\$8,125.00
Second Two-Year Extension (On and after December 1, 1996 through and including November 30, 1998)	\$8,125.00
Third Two-Year Extension (On and after December 1, 1998 through and including November 30, 2000)	\$8,125.00
Fourth Two-Year Extension (On and after December 1, 2000 through and including November 30, 2002)	\$8,125.00

Notwithstanding the foregoing, no right, title or interest of Buyer under this Agreement shall be impaired, terminated or forfeited, including, without limitation, the Option or the right to extend the Term, unless and until Seller has given Buyer written notice, describing in reasonable detail the default or failure concerned (including, without limitation, that Buyer has failed to timely pay to Seller any consideration for the extension of the Term), and Buyer has failed to cure or remedy any such default or failure within thirty (30) days after the receipt by Buyer of such notice.

4. Access; Development Cooperation. Seller shall assist and cooperate with Buyer and Buyer's representatives in obtaining access to the Property from time to time for the purpose of making inspections, surveys and soils, environmental and other studies of the Property as reasonably required by Buyer, to be made at Buyer's expense. From time to time, Seller shall, at Buyer's request and expense, execute any requests, petitions or applications for zoning or use changes, any subdivision, dedication or other plats and any other plats, documents, instruments or agreements necessary or appropriate to enable Buyer to develop all or any portion of the Property as a residential development for condominiums, single or

multiple family dwellings or other residential dwellings and related structures and improvements, as may be determined by Buyer. Seller shall have no liability to Buyer if, despite Seller's reasonable cooperation, any such requests, petitions or applications are denied.

5. Closing. If Buyer timely exercises the Option with respect to any portion of the Property, the Closing for such portion shall occur at the Title Company as soon as reasonably practicable after Seller receives notice of such exercise. (It is contemplated that Buyer will exercise the Option as to portions of the Property from time to time, in increments of two (2) acres or more at the first Closing, and in increments of one (1) acre or more at any subsequent Closing.) At each Closing, the following shall occur:

(a) Seller shall deliver to Buyer the Deed and a so-called "non-foreign affidavit," both duly executed and acknowledged by Seller, and shall cause the Title Policy to be delivered to Buyer;

(b) Buyer shall deliver or cause to be delivered to Seller one hundred twenty-five percent (125%) of the Purchase Price, based on the actual amount of acreage then being purchased (to be established by Buyer's surveyor or engineer), reduced by all consideration paid by Buyer to Seller pursuant to Paragraph 3 to the extent that such consideration has not previously been credited to Buyer in any prior Closing;

(c) Seller and Buyer shall instruct the Title Company to record the Deed in favor of Buyer, and to record all other documents, including, without limitation, deeds of reconveyance and releases of liens, necessary for title to that portion of the Property then being purchased to be conveyed to Buyer free and clear of all liens, encumbrances and other matters, except for the Permitted Exceptions, on satisfaction of all of the conditions of, and requirements for, such Closing set forth in this Agreement;

(d) Seller and Buyer shall each provide to the Title Company or other closing agent any information and materials reasonably necessary to enable such closing agent to comply with the real estate transaction reporting requirements of Section 6045 of the Internal Revenue Code, as amended; and

(e) Seller and Buyer shall deliver to the Title Company and to each other such further documents and instruments as may be reasonably necessary or appropriate to consummate the transactions contemplated by this Agreement.

6. Conveyance of Balance of Property.

(a) As set forth in Paragraph 5(b), at any Closing,

Seller will receive one hundred twenty-five percent (125%) of the Purchase Price for that portion of the Property being purchased. Therefore, as of the first Closing, Seller will have received moneys in excess of the Purchase Price of the Property conveyed to Buyer, and the amount of such excess moneys will be increased as of any subsequent Closing. Such excess moneys shall be handled in accordance with the remainder of this Paragraph 6.

(b) Buyer may, at any time, give Seller written notice that Buyer has elected to terminate this Agreement. As of the expiration of the Term or any sooner termination of this Agreement (whether as a result of the notice given pursuant to the immediately preceding sentence or for any other reason), Buyer may elect to apply some or all of such excess moneys and/or any consideration paid by Buyer to Seller pursuant to Paragraph 3 (to the extent that such consideration has not previously been credited to Buyer in any prior Closing) to the purchase of any portion of the Property not purchased as of the date of such expiration or sooner termination. Buyer shall set forth such election in a writing delivered to Seller, and Seller shall promptly comply with the election made by Buyer.

(c) If Buyer elects to apply some or all of such excess moneys or such consideration to the purchase of such portion of the Property, Seller shall, without any additional consideration being paid, convey such portion to Buyer. If such excess moneys and/or consideration are less than the Purchase Price of such portion of the Property, Buyer shall pay the balance of the Purchase Price for such portion concurrently with the conveyance of such portion to Buyer, but shall not be required to pay any amount in excess of the Purchase Price of such portion. (That is, the one hundred twenty-five percent (125%) factor shall not apply.) Such conveyance shall otherwise be consummated in accordance with the provisions of this Agreement applicable to any Closing.

7. Prorations. Subject to the immediately following sentence, ad valorem and any other general or special taxes on or allocable to that portion of the Property then being purchased that are due and payable in the calendar year in which the relevant Closing Date falls shall be prorated as of such Closing Date. At or prior to any Closing, Seller shall pay in full all "rollback taxes" payable on or after such Closing under the Farmland Assessment Act due to a change in use of that portion of the Property then being purchased, and any general or special assessments that are a lien against or allocable to such portion. If taxes or any other items are prorated as of any Closing on any basis other than actual amounts charged for the current period, or if a reassessment of taxes occurs which relates to the calendar period in which the relevant Closing Date occurs, such items shall be reprorated on receipt of such actual amounts or on such reassessment and the party owing funds to the other shall promptly remit such funds to the other. If the party owing such funds to

the other fails to remit such funds within thirty (30) days after demand, such funds shall bear interest, commencing on the date such demand is made, at the rate of eighteen percent (18%) per annum.

8. Closing Costs. Seller shall pay for the standard coverage portion of the Title Policy, and Buyer shall pay for the additional cost of insurance over the usual printed standard exceptions (that is, for the extended coverage portion of the Title Policy), if Buyer does not elect to receive a standard coverage title policy. Seller and Buyer shall share equally the escrow charges of the Title Company, and recording costs and any other amounts shall be customarily allocated. Buyer shall pay for any Survey(s) ordered by Buyer.

9. Possession; Risk of Loss. Possession of that portion of the Property then being purchased shall be transferred by Seller to Buyer on the relevant Closing Date. Until each Closing is consummated with respect to any particular portion of the Property, the risk of loss to such portion shall be borne solely by Seller.

10. Seller's Representations, Warranties and Covenants. Seller makes the following representations, warranties and covenants for the benefit of Buyer, which are true as of the date of this Agreement, shall be true as of each Closing Date with respect to that portion of the Property then being purchased and shall survive the Closing:

(a) No hazardous substances, hazardous wastes, pollutants or contaminants are or have at any time been used, deposited, stored, disposed of, placed or otherwise located in or on, or released from, the Property or any facility operated on the Property. Seller has received no notice, and is not aware that any notice to any other person has been given, of any violation or claimed violation of any law, ordinance, rule or regulation relating to hazardous substances, hazardous wastes, pollutants or contaminants, and neither Seller nor the Property is in violation of any such law, ordinance, rule or regulation. No underground tank for storage of gasoline or other purpose is located on the Property.

(b) Wardley Better Homes and Gardens/Ila Sprouse and Allsop Realty and Appraising/William L. Allsop are the only real estate brokers/agents which may be involved in this transaction and may have been retained by Seller. Any compensation due to such brokers/agents as a result of this Agreement or any Closing is and shall be the exclusive responsibility of Seller, and Buyer shall have no liability or responsibility for such compensation. Seller shall indemnify, defend and hold harmless Buyer from and against all claims, liabilities, causes of action, costs and expenses (including, without limitation, attorneys' fees) arising from any claim by any person for any brokerage fee, finder's fee or other similar fee related to the sale or attempted sale of the Property

to Buyer, unless Buyer has entered into a written brokerage commission agreement with such person.

11. Attorneys' Fees. If either Seller or Buyer brings suit to enforce or interpret this Agreement, for damages on account of the breach of a covenant, representation or warranty contained in this Agreement or with respect to any other issue relating to this Agreement, the prevailing party shall be entitled to recover from the other party such prevailing party's reasonable attorneys' fees and costs incurred in any such action or in any appeal from such action, in addition to the other relief to which the prevailing party is entitled.

12. Notices. Any notice or demand to be given by Seller or Buyer to the other shall be given in writing by personal service, telegram, express mail, Federal Express, DHL or any other similar form of courier or delivery service, or mailing in the United States mail, postage prepaid, certified, return receipt requested and addressed to such party as follows:

If to Seller:

Margaret Jane Gordon
151 South Coleman
Tooele, Utah 84074

If to Buyer:

Gordon Farm, Inc.
480 East 6400 South
Murray, Utah 84107
Attention: R. Kent Buie, President

With a required copy to:

Victor A. Taylor, Esq.
Kimball, Parr, Waddoups, Brown & Gee
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Either Seller or Buyer may change the address at which such party desires to receive notice on written notice of such change to the other party. Any such notice shall be deemed to have been given, and shall be effective, on delivery to the notice address then applicable for the party to which the notice is directed; provided, however, that refusal to accept delivery of a notice or the inability to deliver a notice because of an address change which was not properly communicated shall not defeat or delay the giving of a notice.

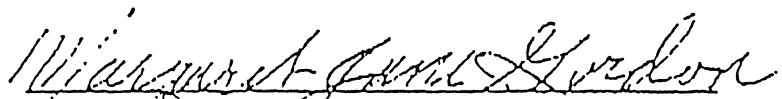
13. Memorandum of Option. Concurrently with the execution of this Agreement, Seller and Buyer shall enter into original

counterparts of a recordable memorandum or short form of this Agreement, in form and substance mutually acceptable to Seller and Buyer, reflecting the basic terms and conditions of this Agreement (other than the Purchase Price). Buyer may, at its expense, record such memorandum or short form in the official records of the Tooele County Recorder.

14. General Provisions. A modification of, or amendment to, any provision contained in this Agreement shall be effective only if the modification or amendment is in writing and signed by both Seller and Buyer. Any oral representation or modification concerning this Agreement shall be of no force or effect. This Agreement shall inure to the benefit of, and be binding on, Seller and Buyer and their respective heirs, personal representatives, successors and assigns. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws (excluding the choice of laws rules) of the State of Utah. This Agreement shall be construed according to its fair meaning and not strictly for or against Seller or Buyer, as if both Seller and Buyer had prepared it. This Agreement constitutes the entire agreement of the parties to this Agreement and supersedes all previous contracts, correspondence and documentation relating to the subject matter of this Agreement.

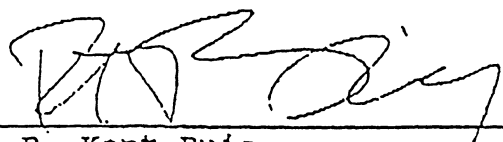
SELLER AND BUYER have executed this Agreement on the respective dates set forth below, to be effective as of the date first set forth above.

SELLER:


MARGARET JANE GORDON
Date 22 Feb. 1992

BUYER:

GORDON FARM, INC.

By 
R. Kent Buie
President
Date 3/3/92

96 DEC 18 AM 9: 32

FILED BY

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH**

KDAB, L.C.

Plaintiff,

-VS-

MARGARET JANE GORDON,
Defendant.

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ORDER**Case No: 960300025 CV****Judge L. A. Dever**

This matter came on for Summary Judgment hearing on October 7, 1996. At the conclusion of the evidence the parties asked to submit post hearing memoranda. Defendants' memorandum was received on October 15, 1996, and the plaintiff's memorandum was received on October 23, 1996. Although no Notice to Submit has been received, the Court will treat the matter as having been submitted.

UNDISPUTED FACTS AND CONCLUSIONS

The parties entered into a contract for the sale of land in Tooele. The contract provided that the plaintiff had the right to exercise the option to purchase the property in a piecemeal fashion. The contract had a provision for the plaintiff to exercise an

option on a periodic basis. The parties agree that the plaintiff failed to exercise its option in August of 1994. The plaintiff contends that because the defendant failed to notify the plaintiff it was in default that the contract is still in force. The defendant contends that she had no obligation to notify the plaintiff that it failed to exercise the option. There are no facts that are in dispute in this matter.

The Court concludes as a matter of law that the plaintiff is not bound to exercise an option to purchase and therefore cannot be in default for not exercising the option. If the plaintiff is not in default, the defendant has no obligation to give the plaintiff notice to cure or risk termination of the contract because this obligation only arises if the plaintiff is in default.

Plaintiff's Motion for Summary Judgment on causes 1 through 3 is denied. No objection to summary judgment on cause 4 being made, summary judgment on that cause is granted.

Each side to bear their own costs and fees. Counsel for defendant to prepare the appropriate order.

Dated this 17th day of December, 1996.



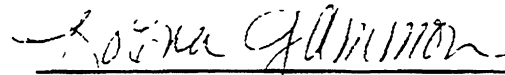
L. A. Dever, Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed
this 18 day of December, 1996, to the following:

Scott A. Broadhead
250 South Main St
Tooele, UT 84074

N. George Daines
108 North Main, Ste 200
Logan, UT 84321


Deputy Court Clerk

833-0900

19 Aug 97

I will call you
in a few min.

RE: what to file
as Notice of App

Thanks
JB

N. George Daines (0803)
BARRETT & DAINES
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4000

RECEIVED
57 AUG 1997
FILED BY JB

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

KDAB, L.C.

Plaintiff,

vs.

MARGARET JANE GORDON,

Defendant.

AMENDED
ORDER ON MOTION FOR
SUMMARY JUDGMENT

Civil No. 960300025

THIS MATTER came before the court on the Plaintiff's Motion for Summary Judgment. Defendant also moved for Summary Judgment on these same issues. Each party submitted briefs and the court heard oral argument concerning the issues on October 15, 1996. Thereafter each party further supplemented the record with written memorandums. The court issued its Order on December 18, 1996, wherein it directed Defendant's counsel to prepare an Order to implement its decision. After a further hearing this Amended Order was approved by the court and counsel.

The court finds that there are no material disputed facts which would preclude it from entering summary judgment on the Motion for Summary Judgment. The court, based upon the uncontested facts before it, enters its determinations as follows:

1. That the parties or their successors in interest entered into the Option Agreement attached to Plaintiff's Complaint as Exhibit A.

2. That the Option Agreement provided that the Plaintiff had the right to exercise the option to purchase the property in a piecemeal fashion on a periodic basis.

3. That the Plaintiff failed to exercise its option to obtain the First Two-Year Extension as required by Section 3, which requires payment of additional funds, written notice and service of that notice.

4. That the Plaintiff contends that Plaintiff's failure to exercise its option to obtain the First Two-Year Extensions was a default by it. Plaintiff further contends that because the Defendant failed to notify the Plaintiff of this default the Option Agreement is still in effect.

5. That the Defendant denies both of the contentions of the Plaintiff and urges that the Option Agreement has expired by its own terms.

6. The court concludes as a matter of law that the Plaintiff is not bound to exercise an option to purchase and therefore cannot be in default for not exercising the option to obtain the First Two-Year Extension or any other extensions and, thus, the Option to Purchase

Agreement has expired by its own terms.

7. The court finds that the Defendant has no obligation to provide a notice of default to Plaintiff when it fails to exercise such options.

8. That Plaintiff's Motion for Summary Judgment on the First, Second and Third Causes of Action is denied.

9. That Defendant is entitled to Summary Judgment that Plaintiff's First, Second and Third Causes of Action be dismissed.

10. That Plaintiff's Motion for Summary Judgment as to its Fourth Cause of Action is conceded by Defendant and based upon that concession, summary judgment thereon is awarded to the Plaintiff.

11. That the parties are directed to determine the purchase moneys to be credited toward additional land purchases and the legal description of said land to be released by Defendant and prepare a Stipulation to that effect. If the parties are unable to agree then a supplemental court hearing on this matter should be requested.

12. That Defendant's First, Second and Third Causes of Action are resolved by the court's decisions with respect to Plaintiff's Causes of Action inasmuch as this decision quiets title to the remaining property of Defendant, and given the relief ordered the court will not assess damages for slander of title.

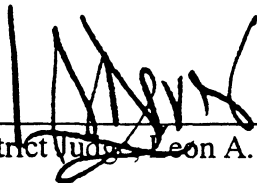
13. That all Causes of Action by and between the parties are hereby resolved.

14. Each party shall bear their own attorneys fees and costs.

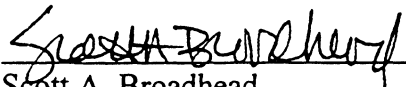
DATED

August 19, 1997

THIRD DISTRICT COURT


District Judge, Leon A. Dever

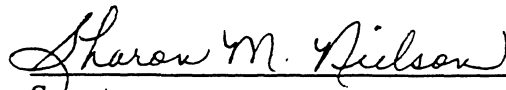
APPROVED AS TO FORM:
YOUNG & BROADHEAD


Scott A. Broadhead

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER postage
prepaid, July ^{30th} 29, 1997, to the following:

Scott A. Broadhead (#6501)
YOUNG & BROADHEAD
250 South Main Street
P.O. Box 87
Tooele, Utah 84074


Secretary