

1979

Management Services Corp. et al v. Development Associates : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * *

MANAGEMENT SERVICES CORP.,
a Utah corporation,

Plaintiff-Respondent,

vs.

Case No. 16341

DEVELOPMENT ASSOCIATES,
a Utah corporation, and
JOHN and JANE DOES One
through Eight,

Defendants-Appellants.

* * *

BRIEF OF RESPONDENT

* * *

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE PETER F. LEARY, JUDGE

* * *

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STATEMENT OF THE NATURE OF THE CASE

This action was commenced by plaintiff respondent, Management Services Corporation (hereinafter "Management Services"), Purchaser, against Development Associates, Seller, for the breach of a Uniform Real Estate Contract dated December 7, 1976 (hereinafter "the Contract"), wherein Management Development Associates agreed to sell to Management Services eight (8) improved lots in the Daybreak Phase III Subdivision for a total price of Eighty Thousand Dollars (\$80,000), calculated at Ten Thousand Dollars (\$10,000) per lot.

DISPOSITION IN LOWER COURT

This matter was tried May 31, 1978, before the Honorable Peter F. Leary, of the Third Judicial District Court, who sat without a jury. The trial court, after having received and considered the evidence and memoranda submitted by the parties, found that the Contract was divisible; that respondent defaulted with respect to the purchase of the first two lots by not making payment therefor in March of 1977 and thereby forfeited all of its right, title, and interest in the two lots; and that appellant wrongfully terminated the Contract with respect to the remaining six (6) lots which were to be paid in full by respondent in April, May, and June of 1977. Accordingly, on February 1, 1979, the trial court entered judgment dismissing the quiet title claim of plaintiff respondent, but awarding it, as damages for defendant-

appellant's breach of contract, the amount of Seven Thousand, Seven Hundred Dollars (\$7,700) in lost profits, Two Thousand, Four Hundred Thirty-Eight Dollars (\$2,438) for lost commissions, Six Hundred Dollars (\$600) for the deposit wrongfully retained by Defendant, costs of One Hundred Fifty-Nine Dollars and Five Cents (\$159.05) and attorney's fees of One Thousand, Eight Hundred Fifty Dollars (\$1,850) for a total judgment of Twelve Thousand, Seven Hundred Forty-Seven Dollars and Five Cents (\$12,747.05) with interest at the rate of Eight Percent (8%).

RELIEF SOUGHT ON APPEAL

Respondent, Management Services, asks this Court to affirm the judgment of the trial court and issue an order to the trial court directing it to determine and award to respondent its costs and expenses, including a reasonable attorney's fee, incurred in connection with this appeal.

STATEMENT OF MATERIAL FACTS

Respondent accepts the appellant's Statement of Material Facts, as supplemented by the information that follows:

The Uniform Real Estate Contract executed on December 7, 1976 by Development Associates and Management Services was prepared by Development Associates. (R. at 134, 135). The same day the contract was executed, an Earnest Money Receipt and Offer to Purchase was executed by Edward A. White for Management Services as Purchaser, and by Marvin J. Kirkham, for Development Associates, as Seller, of Lots 208 and No. 212 of

Phase II of the same Daybreak Subdivision wherein were located the eight (8) lots of the Contract at issue. (R. at 1]3). Subsequently, the sale of those two apparently noncontiguous lots to Management Services was closed and the lots were transferred by Management Services to Red Carpet Construction. (R. at 228, 128).

Mr. Kirkham of Development Associates had brought great experience to his negotiations with Mr. White of Management Services Mr. Kirkham had graduated from college with a degree in business management, had attended one (1) year of law school, had worked for several years as a real estate agent, and later as a broker, and had been involved in five or six hundred transactions where either the Uniform Real Estate Contract form or an Earnest Money Receipt and Offer to Purchase form was used. (R. at 239-42).

The consideration for the eight (8) lots named in the Contract was calculated on the basis of Ten Thousand Dollars (\$10,000) per lot. (R. at 129). The deposit on the Contract was likewise calculated at One Hundred Dollars (\$100) per lot for a total of Eight Hundred Dollars (\$800). (R. at 265). Separate warranty deeds were to be issued by Development Associates for each lot as it was paid for. (R. at 266).

The eight (8) lots named in the Contract were encumbered by a mortgage in favor of State Savings & Loan and by an obligation of approximately Two Thousand Dollars (\$2,000) per lot in favor of Land Funding, Inc., the party from which

Development Associates was purchasing the property. (R. at 268) As Management Services paid for each lot, Development Associates intended to transfer money to State Savings & Loan and to Land Funding, Inc., satisfying the obligations owed those parties, and thereby procure a release from those parties of each lot on a lot by lot basis. (R. at 268).

Paragraph 21 of the Contract provides for the defaulting party to pay "all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, . . . or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise." (R. at 10).

ARGUMENT

Point I

THE PARTIES INTENDED THE CONTRACT TO BE SEVERABLE

The only issue raised by appellant on this appeal is the correctness of the trial court's determination that the Contract is divisible or severable. In this situation, it is elementary that:

(o)n appeal the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence or it manifestly appears that the court misapplied the law to the established facts. (Citations omitted).

Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28, 29-30 (1972).

Admittedly, this Court has every advantage a trial court has in construing an instrument from its written terms. Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221, 223 (1958). However, where a document is ambiguous, as the instant Contract will shortly be shown to be, thus opening the door to extraneous explanation, it is appropriate to defer to the findings of the trial court.

The fact that the trial court found against the appellant on the severability issue accords with the well-established principle that an ambiguous document is to be "strictly construed against him who draws it." Maw v. Noble, 10 Utah 2d 440, 354 P.2d 121, 123 (1960). The fact that a form contract was used in the instant case does not militate otherwise where, as here, the use of that form was suggested by the appellant who had opportunity to modify or make additions to the form as he saw fit. (R. at 265-66).

As this case demands construction of the Contract at issue, standard principles of contract construction apply.

The most fundamental of these is that the meaning and effect to be given a contract depends upon the intent of the parties.

Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 446, 448 (1973) citing Jensen's Used Cars v. Rice, 7 Utah 2d 276, 323 P.2d 259 (1959).

Clearly, if the parties had agreed at the outset on the issue whether the transaction were to be severable and if the parties had plainly expressed that intent in the Contract, the

matter would be closed. As the Contract is silent on that precise issue, an ambiguity arises. The fact of that ambiguity is substantiated by appellant's recourse to testimony at trial and to other matters outside the language of the Contract for support for appellant's position. (Brief of Appellant at 11-14).

Appellant's attempt at disclaimer with the phrase "the language of the contract speaks for itself" (Brief of Appellant at 10) is conclusory and self serving. The only relevant contract language is contained in paragraphs 2, 3, and 6. (R. at 9). Paragraph 2 designates the eight (8) lots to be conveyed by naming them, one by one. Paragraph 3 specifies that, as consideration for those lots, the sum of Eighty Thousand Dollars (\$80,000) is to be paid, Eight Hundred Dollars (\$800) down and the remaining Seventy Nine Thousand Two Hundred Dollars (\$79,200) in four (4) equal installments of an amount precisely calculated to complete payment on two (2) lots at a time. Paragraph 6 states that the property to be conveyed is encumbered by obligations amounting to "Eight Thousand, Six Hundred Dollars (\$8,600) per lot." These provisions just cited contain no clear expression of the intent of the parties on the issue of the Contract's severability. However, one desiring to make inferences therefrom is struck by the divisible nature of both the property being conveyed and the consideration to be exchanged therefor and by the pairing of the installment payments with the closing on two lots per month. The silence of

the Contract on the severability issue also raises the possibility that the parties may not have even thought about severability, let alone arriving at a mutual understanding thereon and reducing it to writing.

In any case, the ambiguity of the Contract begets the necessity of resort to extraneous evidence on the issue whether the parties intended the Contract to be severable, or, short of that, on what the parties would have agreed upon had they thought about the matter. In the words of this Court

. . . The parties' intent . . . is derived from looking at the entire contract and the relationship of the parts to the whole and whether it was intended that the total agreement be severable.

In exploring a contract on this issue, the factfinder '. . . may and should look to extraneous evidence concerning the background and surrounding circumstances in order to make that determination.

Brown v. Board of Education of Morgan County School Dist., 560 P.2d 1129, 1131 (Utah 1977) quoting Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., supra, 515 P.2d at 448.

Point II

THE CONTRACT AS A MATTER OF LAW

IS SEVERABLE

An analysis of the evidence extraneous to the Contract shows that the Contract is divisible under any appropriate legal standard of severability. Those standards must be examined before proceeding to a consideration of the evidence.

Two main tests of severability emerge from the reported cases and treatises. The first test, the "apportionability test," looks to whether the consideration for the Contract may be apportioned to distinct acts to be performed under the Contract. The second test, "the essence of the contract," seeks an answer to the question whether the Contract would have been entered into at all if a part alleged to be divisible had not been made a part of the original bargain.

Perhaps the most succinct formulation of the apportionability test is that given by the Idaho Supreme Court in Huggins v. Green Top Dairy Farms, 75 Idaho. 436, 273 P.2d 399, at 406 (1954):

Where several things are to be done under a contract, and if the money consideration to be paid is apportioned to each item, the covenants are severable and independent. (Citations omitted).

In Huggins, the plaintiffs contracted to sell the defendant the real and personal property of the Huggins dairy. A price was agreed upon for the real property and most of the personal property, to be paid in installments. The remaining items, inventory, accounts receivable, and similar things, were to be paid for in a sum to be later determined by procedure and methods provided for in the contract. After defendant missed three installment payments, the plaintiffs served the defendant a written notice claiming that defendant had defaulted in the payment of the installments missed and that defendant had failed to pay a specified amount allegedly due for the accounts

receivable and inventory. By this notice, plaintiffs demanded possession of the property. Defendant tendered the amount claimed due for the installment payments, but refused to tender anything for the accounts receivable or inventory, claiming that the price of those items was an unliquidated amount. This tender was wrongfully refused, and plaintiffs instituted suit for rescission of the contract and for the appointment of a receiver to operate the dairy. On appeal from the trial court's decision granting the relief requested, the Idaho Supreme Court held that the plaintiffs had wrongfully refused the tender of the missed installment payments and that even assuming the defendant was in default for the amount allegedly due for the accounts receivable and inventory, that part of the contract was severable as a separate consideration was apportioned to those items and default in the payment for those items would not justify rescission of the rest of the contract.

Another formulation of the apportionability test was given by the Nevada Supreme Court in Dredge Corporation v. Wells Cargo, Inc., 82 Nev. 69, 410 P.2d 751, 754 (1966) as follows:

A contract is divisible where, by its terms, performance of each party is divided into two or more parts; the number of parts due from each party is the same; and the performance of each part is the agreed exchange for a corresponding part by the other party.

In that case, Wells, a gravel business operator, contracted to improve and perform the annual assessment work on numerous unpatented mining claims owned by Dredge. In return, the

contract obligated Dredge to convey to Wells an undivided one-half interest in each claim "when patents have been issued on any of said claims." Wells gave the agreed performance on many of the mining claims, but not on the remaining claims for various reasons. After patents were issued to Dredge on several of the improved claims, Dredge refused to convey the promises interest to Wells on the ground that Wells had failed to perform its contractual obligations on all claims on which patents had not been issued. Wells filed suit against Dredge for specific performance of the promises to convey an undivided one half interest in the patented claims and for a partition. The Nevada Supreme Court upheld that ruling of the trial court that the contract was divisible as to each mining claim even in the face of a contract cancellation clause which provided that, if Wells failed to perform "any condition, covenant, term, or agreement herein, at the time and in the manner herein set forth after five (5) days' written notice of such failure, then this agreement is automatically cancelled" The state supreme court held that this clause was compatible with a divisible contract and granted specific performance of the covenant to convey the undivided one-half interest in each patented claim as to which Wells had fully performed.

In the instant case, the performance of each party was divided into several discreet acts, each of which was the agreed exchange for a corresponding counterperformance of the other party. Upon receipt of the \$800 deposit of respondent,

appellant covenanted to hold the lots in question for the respondent until the times specified in the Contract had expired and to not convey or offer to convey the lots to any other party until after those dates had passed. As each installment payment of \$19,800 was made, the sale of two lots was to be closed and the lots conveyed to respondent. Indeed, the emphasis of the brief of appellant on the importance of the alleged intention of the parties to the exclusion of other factors concedes the facts that this Contract meets the requirements of the apportionability test of severability.

The second test of divisibility of a contract, the essence of the contract test, has also been variously stated. An oft-quoted formulation of that test is that of the Arizona Supreme Court in Waddell v. White, 51 Ariz. 526, 78 P.2d 490, 496 (1938) where the Court stated:

A contract may both in its nature and by its terms be severable, and yet rendered entire by the intention of the parties. We think that perhaps the best test is whether all of the things, as a whole, are of the essence of the contract. That is, if it appeared that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable.

This test has been formulated by Williston in the following terms:

The essential test to determine whether a number of promises constitute one contract or more than one, is simple. It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a

single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.

Williston on Contracts, Vol. II, p. 1652; Rev.Ed. Vol. III, p. 2422, as quoted in Morgan v. Firestone Tire & Rubber Co., 68 Id. 506, 201 P.2d 976, 980 (1948).

The view taken by cases adopting the essence of the contract test is that the court will consider as an important, but not the determinative, factor, if applicable, the divisibility of the subject matter of the contract and the apportionability of the consideration. If the contract meets the requirements of this divisibility or apportionability test, the contract is considered prima facie severable. The essence of the contract test is then applied to settle the issue. See, e.g., Waddell v. White, supra; Boesiger v. DeModena, 88 Idaho. 337, 339 P.2d 635 (1965).

Applying the essence of the contract test to the instant case, there is little doubt that the parties would have contracted for the sale of less than eight lots. There is the fact that the same day the contract was executed, the same parties signed an Earnest Money Receipt and Offer to Purchase for two other lots in a different phase of the same subdivision containing the eight lots to be conveyed under the contract. The sale of the two lots in Phase II of the Daybreak Subdivision was later closed by respondent with appellant and title to the lots was eventually passed to the designee of respondent, Red Carpet Construction. (R. at 128, 200). This

transaction evidences the apparent willingness of appellant to sell to respondent as many (or as few) lots as respondent desired to purchase.

Appellant's willingness to sell the eight lots in Phase III as separate parcels is shown even more conclusively by the fact that after appellant wrongfully forfeited respondent's interest in six of the eight lots, appellant sold those same eight lots to seven different parties. (R. at 236-37).

The fact that the encumbrances on the Phase III lots could be removed "on a lot release basis" only substantiates this point of view. (R. at 268). Nor is a different conclusion indicated by the trial testimony of Mr. Kirkham, appellant's agent, when he stated: "As each lot was paid for and cleared we would issue a warranty deed." (R. at 266).

Appellant, in its brief, attempts to make much of the fact that the total consideration for the conveyance of the eight lots under the contract was \$80,000, in an attempt to imply that a contract for the sale of fewer lots and a correspondingly smaller amount of money would not have been entered into. That reasoning does not withstand analysis. A consideration expressed in terms of money is the most divisible consideration possible. It is the very divisibility of money that has enabled it to supplant barter as a means of trade. The use of the phrase "total payment" in reference to the \$80,000 consideration (R. at 266) does not help appellant as linguistically, the use of the word "total" in such a context

implies that the speaker had in mind the sum of several separate items. The fact that the parties allocated the sum of \$19,800 "to complete payment on two (2) lots" at a time completes the destruction of any argument based on the specification of the consideration for an intent to sell all eight lots as a group or none at all.

The conclusion that the parties had no intent to contract for all eight lots or none at all is buttressed by the fact that appellant knew from the outset that respondent would merely be reconveying the lots to other and various parties. (R. at 256). Thus, appellant would have had no expectation that might have justified a sale of not less than all eight lots to respondent such as might have been the case if respondent were a builder who had planned to impose a uniform scheme of construction on all eight lots.

The conclusion is inescapable that the only reason for listing all eight lots under the one contract was appellant's apparent perception that it had a willing buyer for the lots who could provide appellant with the money it desired out of the project sooner than anyone else. That desire of appellant to receive its money out of the development is entirely consistent with an intent to sell any number of lots, either eight or fewer than eight, that any prospective purchaser would be willing to buy.

Respondent concedes that under the contract it could take title to any two of the eight lots to be conveyed upon tender

of the proper payment therefor. However, that fact does not render the contract entire. It simply does not follow from paragraph 19 of the contract, as appellant asserts at p. 13 of its brief, that if the parties had agreed beforehand as to the order in which the lots were to be conveyed upon receipt of proper payment therefor, title to all eight lots would have remained in Development Associates. Indeed, respondent fails to see how any specification of the order in which the lots were to be conveyed or lack thereof would affect appellant's obligation under paragraph 19 to transfer a warranty deed on each lot to respondent upon its tender of proper payment as appellant's agent testified at trial it was obligated to do. (R. at 266).

Furthermore, appellant's attempted use of the judgment phrase "the first two lots" to imply that the court erred (Brief of Appellant at 12-13) gives to that language a meaning unnatural for its context and additionally is irrelevant to the question of the intent of the parties. The trial court's use of the quoted phrase was simply meant to convey the idea that respondent defaulted with respect to the purchase of the first two lots it claimed a right to in March, 1977 under the allowance of choice given the respondent by the contract and did not in the least intend to convey the idea that any order, either that in which the lots were listed on the contract or any other, had been imposed upon respondent restricting it to take certain lots only at designated times.

Rather than imposing "upon the parties a contract to which they would not have assented," as appellant asserts in its brief at 14, the trial court in this case simply found, as it was obligated to do on the facts before it, that the contract at issue is divisible and "established separate obligations and responsibilities between plaintiff and defendant." (R. at 99). This conclusion of law was not the result of a misapplication of the appropriate legal standards to the facts before the court. The divisible nature of the contract's subject matter, and its apportionment of the considerations on each side into equivalent and corresponding parts, meet the requirements of the apportionability test and this contract is prima facie severable. Nothing appearing in the record to justify the conclusion that the parties intended to contract for all or nothing, the court could do no other than declare the severability of the contract absolute. To quote the Supreme Court of California

The rule is well settled that where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent. (Citation omitted) The argument that the court cannot apportion because the parties did not expressly apportion is without merit. That argument exalts form over substance.

Keene v. Harling, 61 Cal.2d 318, 38 Cal.Rptr. 513, 392 P.2d 273, 277 (1964).

As this court has acknowledged in Prudential Savings & Loan Association v. Hartford Accident & Indemnity Co., 7 Utah 2d 366, 325 P.2d 899, 903 (1958):

(I)t is a recognized principle of contract law that a breach of an insubstantial nature, which is severable and does not vitally change the transaction, does not release the other party completely from performing his obligations under the contract, but gives rise to a right for damages for any loss occasioned thereby. (Footnote omitted).

All legal standards of severability having been met by the facts of this case, this Court should affirm the judgment of the trial court awarding respondent the damages it suffered as a result of appellant's wrongful termination as to six of the eight lots to be conveyed under the contract.

POINT III

RESPONDENT SHOULD BE AWARDED ITS COSTS AND REASONABLE ATTORNEY'S FEES FOR SUCCESSFULLY RESISTING THE INSTANT APPEAL.

The contract between the parties to this suit contains the following language at paragraph 21 on the payment of attorney's fees:

The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah

whether such remedy is pursued by
filing a suit or otherwise. (R. at 10)

Respondent respectfully requests that this Court enforce this contractual provision by issuing an order directing the trial court to award to respondent the amount incurred by it for reasonable attorney's fees in successfully resisting this appeal.

This Court has stated that "Attorneys' fees on appeal are discretionary with this court" Swain v. Salt Lake Real Estate & Investment Co., 3 Utah 2d 121, 279 P.2d 709, 711 (1955). Admittedly, the facts in Swain which involved an action for forfeiture under a Uniform Real Estate Contract which was successfully defended against at trial and the result was upheld on appeal, are similar to the instant case. However, in Swain the parties stipulated that \$250 would be a reasonable attorney fee for either party. After finding that the Swain action was one to enforce the contract, this Court construed the stipulation to cover services rendered also on appeal. Accordingly, the prevailing party in that case was awarded the amount specified in the stipulation for attorneys' fees.

In the instant case, appellant has taken this appeal arguing, in essence, only that the legal standard of severability, as to which standard there is no disagreement, was not properly applied to the facts. Having been put to the necessity by this appeal of showing that the judgment of the trial court soundly applied the facts of the instant case to

the proper legal standard, the respondent, under any reasonable view of how this Court ought to exercise its discretionary power, is entitled to be reimbursed for attorney's fees incurred by it in connection with this appeal. As the parties have made no stipulation as to what a reasonable attorney's fee would be for the trial of this case with an appeal, thus distinguishing it from Swain, and as the record clearly shows that the amount awarded respondent for attorney's fees at the trial below was only for services rendered up to and including the day of that trial (R. at 274), respondent should be awarded an additional amount to compensate it for fees incurred as a result of this appeal.

The only other Utah case to expressly articulate this rule of discretion contains additional qualifying language that is disturbing to respondent is Downey State Bank v. Major-Blakeney Corp., 556 P.2d 1273 (Utah 1976). After citing Swain for the proposition that attorney's fees on appeal are discretionary with this Court, the opinion adds "and then only when specifically authorized by statute or rule of court." Id. at 1275. As authority for that qualification, the opinion cites first of all Marks v. Culmer, 7 Utah 163, 25 P. 743 (1891). At issue there was the allowability of certain items included by defendants in a list of costs incurred on a previous appeal wherein the court had given the defendants their costs. Reasoning by analogy from a federal statute (the court was then a territorial court) which provided for the allowance of an

attorney fee of \$20 on a trial before a jury, which statute was construed by the Utah court to apply only to the trial in the nisi prius courts, the Marks opinion held that an attorney's fee could not be included as part of the costs awarded defendant after stating "as to the item charged as 'attorney fee,' we know of no law authorizing its allowance for trials in this court on appeal." Id., 26 P. at 744. The Marks opinion stands only for the proposition that attorney's fees are not costs, and are not to be awarded to a successful party who receives an award of costs without explicit mention of attorney's fees.

The second authority cited in support of the qualifying language in Downey State Bank was Keller v. Lonsdale, 216 Or. 339, 339 P.2d 112 (1959). That was an action to foreclose the interest of the defendants, the purchasers of ten coin-operated television sets, under two conditional sales contracts. The defendants appealed from a trial court decree in favor of the plaintiff which included an award to plaintiff of its attorney's fees. In affirming the trial court's opinion, the Oregon court denied plaintiff's request for an allowance of a reasonable sum for attorney's fees incurred on appeal stating "in the absence of precedent, legislative sanction, or a contractual stipulation contemplating such an allowance on appeal, the request will be denied." Id., 339 P.2d at 118. That case established the Oregon rule that attorney's fees on appeal would not be awarded pursuant to a contractual provision

for attorney's fees unless the contract specifically mentioned attorney's fees on appeal in addition to attorney's fees generally. Though this judicial rule has been consistently applied in Oregon, see, e.g., McMillan v. Golden, 262 Or. 317, 497 P.2d 1166 (1972), that jurisdiction is in a distinct minority in holding to that view as will later be shown. However, even this narrow interpretation applied in Oregon recognizes the importance of enforcing a contractual provision for attorney's fees.

The final authority cited in Downey State Bank in support of the qualifying language therein set forth and the apparent source of that qualifying language is 5 Am.Jur.2d, Appeal and Error, 1022. That section includes the statement:

Attorneys' fees are taxable as costs on appeal only when authorized by statute or rule of court. Id. at p. 445.

This statement merely reiterates the position taken in Marks v. Culmer that a party awarded its costs on appeal may not include as a part thereof its attorney's fees for the appeal unless expressly authorized to do so by statute or court rule or order. It does not detract from the view that a contractual provision for attorney's fees should be enforced.

The rule of discretion previously announced by this court has much to recommend itself as applied to suits in equity such as divorce actions which actions seem to provide the most frequent occasion for the award of attorney's fees on appeal. See, Bates v. Bates, 560 P.2d 706 (Utah 1977); Eastman v.

Eastman, 558 P.2d 514 (Utah 1976) and cases cited therein at 516 N. 3. However, in cases where a contractual provision for attorney's fees is operative, respondent submits that this court may forge a rule of law in awarding attorney's fees incurred on appeal by the prevailing party as a matter of course, thus lessening the burden on this Court of examining the detailed circumstances of each such case to decide whether the award would be appropriate. Oregon has already done so to a limited extent as explained above and virtually every other Western jurisdiction to consider the matter in recent years has adopted the rule that where a contract provides even generally for the award of attorney's fees as a part of the expenses incurred in enforcing the contract, the prevailing party on an appeal is to receive its attorney's fees for that appeal notwithstanding the lack of mention of an appeal in the contract. See, generally, the annotation at 52 A.L.R.2d 863-874 and cases cited therein and in the later case service.

For example, the Supreme Court of California has ruled that a party who successfully defends on appeal the correctness of a lower court judgment in enforcing a contract is to be awarded the reasonable attorney's fees incurred in connection with that appeal where the contract provides for a reasonable attorney's fee "in case suit is instituted to collect this note." Wilson v. Wilson, 54 Cal.2d 264, 5 Cal.Rptr. 317, 352 P.2d 725, 731 (1960). Subsequently, the Arizona Supreme Court adopted the same rule in Steele v. Vanderslice, 90 Ariz. 277, 367 P.2d 636 (1961) and there stated, at 367 P.2d 643:

The more recent authorities considering contracts which provide for attorneys' fees have made allowances for additional fees for the prosecution or defense of an action in the appellate courts. (Citations omitted).

Arizona has not only maintained that position, Amos Flight Operations, Inc. v. Thunderbird Bank, 112 Ariz. 263, 540 P.2d 1244 (1975), but has extended the award of attorney's fees on appeal to the prevailing party in any contested action arising out of a contract, apparently even in the absence of contractual language providing for attorney's fees generally. Gressley v. Patterson Tillage & Leveling, Inc., 579 P.2d 1124 (Ariz. App. 1978).

Other jurisdictions adopting the rule which respondent urges this court to adopt are set forth as follows: Washington, Puget Sound Mutual Savings Bank v. Lillions, 50 Wash. 2d 799, 314 P.2d 935 (1957); Idaho, Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967); New Mexico, Cabot v. First National Bank of Santa Fe, 81 N.M. 795, 474 P.2d 478 (1970); Colorado, Zambruk v. Perlmutter Third General Builders, Inc., 510 P.2d 472 (Colo. App. 1973) approved in Hartman v. Freedman, 591 P.2d 1318 (Colo. 1979); and Montana, Hollinger v. McMichael, 594 P.2d 1120 (Mont. 1979).

An insightful analysis of this issue was given by the Appellate Court of Colorado in Zambruk v. Perlmutter, supra, wherein the court stated, at 510 P.2d 475-76:

The question presented is whether a contractual provision for attorney's fees, as contained in a contract,

includes an allowance for legal services rendered upon an appellate review of an action growing out of the instrument containing such provision. In similar situations, some cases have held that attorneys' fees should not be allowed for successfully defending an appeal. These decisions are based on various grounds, i.e., that the contract was merged in the judgment or that the fees were not within the contemplation of the parties. See Ann., 52 A.L.R.2d 863. However, the majority view expressed in the more recent cases allows such fees on appeal. (Citations omitted). In our opinion, these cases present the better reasoned rule which we adopt.

The purpose of a provision for attorneys' fees is to indemnify the creditor or the prevailing party against the necessity of paying an attorney's fee and to enable him to recover the full amount of the obligation.

The appropriateness of modifying the rule of discretion in this state so as to more readily award attorneys' fees on appeal in the manner and under the circumstances just suggested by the Colorado court has already been implicitly recognized by this Court in Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620 (Utah 1979) wherein, at 625-26, it was stated:

The general rule on this point is that attorneys' fees are not recoverable unless allowed by statute or contracted for by the parties unless, of course, equity permits otherwise. (Footnotes omitted).

In the instant action, the parties contracted for an award of attorney's fees. Accordingly, this case presents an appropriate occasion for this Court to not only award

respondent its attorney's fees incurred in connection with this appeal under the rule of discretion heretofore in effect in this state, but also to modify that rule so as to make the award of attorney's fees on appeal more a matter of course where the contract enforced by the action on appeal provides for an award of attorney's fees to the prevailing party.

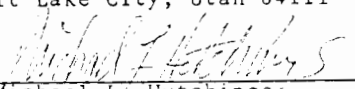
CONCLUSION

As the facts in this case show that the contract at issue was both prima facie severable under the apportionability test and meets the requirements of the essence of the contract test in that it would have been entered into even for fewer than eight lots, the finding of the trial court that the contract was severable should be sustained and its judgment upheld. As this appeal taken by appellant has caused the respondent to incur additional attorney's fees in its action to enforce the contract, this Court should issue an order directing the trial court to determine and award to respondent the reasonable attorney's fees it incurred as a result of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent were served upon the Appellant by mailing the same, postage prepaid, to Steven H. Stewart, of Stewart, Young, Paxton & Russell, 220 South Second East, Suite 450, Salt Lake City, Utah, 84111, this 23rd day of October.

Michael L. Hitchings