

1998

Wesley Clock and Anne Clock v. John Green and Larue Green : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
IN THE UTAH COURT OF APPEALS
KFU

WESLEY CLOCK and)
ANNE CLOCK,)
)
Plaintiffs-Appellees)

vs)

JOHN GREEN and)
LARUE GREEN,)
)
Defendants-Appellants)

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DOCKET NO. 981612

Court of Appeals
Docket No. 981612-CA

Priority 15

APPELLANTS' REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Homer F Wilkinson, District Judge

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FILED

JUN 16 1999

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WESLEY CLOCK and)	
ANNE CLOCK,)	APPELLANTS'
)	REPLY BRIEF
Plaintiffs-Appellees)	
)	
vs)	
)	
JOHN F GREEN and)	
LARUE GREEN,)	Court of Appeals
)	Case No. 981612-CA
Defendants-Appellants)	

The Defendants-Appellants JOHN F GREEN and LARUE GREEN, through counsel, file the following as their APPELLANTS' REPLY BRIEF.

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976, Western Conference of Teamsters,
16 Utah 2d 85, 396 P.2d 47 (1964).** . . 7, 11, 12, 14, 21

**Schoney vs Memorial Estates, Incorporated,
863 P.2d 59 (Utah Court of Appeals 1993)** . . . 11, 12

Statutes cited

Section 15-1-1, Utah Code 5
Section 15-1-3, Utah Code 5
Section 15-1-4, Utah Code 6, 7

Other authorities

None

DESIGNATION OF PARTIES

In conformity with the provisions of Rule 24(d) of the Utah Rules of Appellate Procedure, the Appellants [JOHN F GREEN and LARUE GREEN] are referred to herein as "the Sellers" and the Appellees [WESLEY CLOCK and ANNE CLOCK] are referred to herein as "the Buyers".

SUMMARY OF ARGUMENT

1. The Sellers are entitled to an award of "interest", at the 10 1/2% rate which the "option agreement" clearly provides. The Court of Appeals---considering the properly-perfected "appeal" of the 1998 "judgment"---should award that "interest", as the parties contemplated and as the "option agreement" provides. The Buyers should not---particularly by reason of their own failure to pay the monies when required---be entitled to a "windfall" (i.e. no interest accrues, against either the contract purchase price or the

judgment arising from the contract) when they have agreed otherwise!

2. The Sellers' present appeal is meritorious. The Buyers have not been harmed in any way by this "appeal". The vesting of title occurred (or could have occurred), in accordance with the express provisions of the 1998 "judgment" (framed and decided after almost two years of subsequent litigation, on remand after the appeal) at the time the Buyers deposited the purchase monies. The award of attorney's fees, not provided for in the written contract, is inappropriate.

ARGUMENT

I

THE SELLERS ARE ENTITLED TO AN AWARD OF INTEREST AGAINST THEIR FORBEARANCE AND UPON THE JUDGMENT

The Buyers argue that the Sellers are not entitled to an award of interest. The Sellers claim they are so entitled.

The Buyers' arguments and position (i.e. that the Sellers are not entitled to an award of interest) are flawed, for several reasons.

The Buyers' entire case---their claims and their entitlements thereunder---is foundationed upon the 1991 "option agreement". That "option agreement" provides in

its entirety:

7-29-1991

I Wesley Clock and Anne Clock agree to pay \$675.00 per month Plus Sewer and water. There is a \$350.00 deposit plus \$1,000 for a lease option to buy. Starting July 29, 1991 prorated to Aug. 4, 1991, the selling price to be \$81500 **at 10 1/2% interest**. When option is picked up, the \$350.00 plus the \$1,000.00 will be **applied to the down Payment of \$5,000 or more**. The Seller will re-roof and make the carport into a double garage, replace the back door. Other than the things above, the Clocks will take care of any repairs during the option period. There will be a **balloon payment due on the balance of the loan** Aug 5, 1996. The rent to be pro-rated from July 29, 1991 to Aug 4, 1991. Rent to begin on Aug 5, 1991. August 2, \$500.00; Aug 5, \$700.00. Balance by Aug 20, 1991. If the Clocks do not buy they will be renters and Money will not be refunded.

/s/ Anne Clock
/s/ Wesley Clock
/s/ John F. Green
/s/ LaRue Green

Emphasis added. [RECORD at 0005 and 0042.] [A photocopy of the Agreement is included in Seller's original Brief as ADDENDUM #1.] It is this written agreement which gives the parties their rights AND THEIR OBLIGATIONS thereunder. The trial court and the Court of Appeals have found and adjudicated that the "option agreement" was enforceable until August 1996 and that the Buyers attempted to exercise their rights under the "option" prior to its expiration. The trial court ruled against the Sellers in their claim that the Buyers had---years before 1996---breached the agreement; that ruling was

implicitly affirmed on appeal to the Court of Appeals. Neither court expressly ruled upon the provisions contained within the "option agreement" pertaining to the "purchase price of \$81,500 at 10 1/2% interest" as clearly contained within the "option agreement".

Section 15-1-1, Utah Code, provides:

(1) The parties to a lawful contract **may agree upon any rate of interest for the loan or forbearance of any money**, goods or chose in action **that is the subject of their contract**.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

. . .

Emphasis added. Section 15-1-3, Utah Code, provides:

Whenever in any statute or deed, **or written or verbal contract**, or in any public or private instrument whatever, **any certain rate of interest is mentioned and no period of time is stated**, interest shall be calculated at the rate mentioned **by the year**.

Emphasis added.

In the instant situation, the "lease-option" agreement specifies "10 1/2% interest". It is reasonable to construe the contract that the "selling price" is to be adjusted by that amount. [Whether the transaction is also characterized as a "loan" probably doesn't matter. What does matter is that the Agreement

clearly contains the provision and, in light of the contract construction principles identified in Point I of Sellers original Brief, the provision MUST BE GIVEN SOME MEANING AND EFFECT!]

Section 15-1-4, Utah Code, provides:

(1) Any judgment rendered on a lawful contract **shall conform to the contract and shall bear interest agreed upon by the parties, which shall be specified in the judgment.**

(2) Other judgments shall bear interest at the federal postjudgment interest rate as of January 1 of each year, plus 2%.

. . .

Emphasis added.

A

INTEREST ACCRUING AGAINST PRE-1996 FORBEARANCE AND OBLIGATION

As noted, neither the trial court nor the Court of Appeals directly ruled on the issue. The procedural context in which the appeal arose and the conflicting views of the parties were such that the issue simply was not raised in the first appeal. Thus, it strains credibility to state (as the Buyers do) that the matter was decided and has thus become "the law of the case".

The Court of Appeals simply did not adjudicate the issue. Thus, we are not presented with a situation wherein the Court is being requested to re-examine an issue which has already been decided. The interest

issue was simply NOT decided.

B

**INTEREST ACCRUING AGAINST
POST-1996 FORBEARANCE AND OBLIGATION**

Even if the September 1996 "ORDER & JUDGMENT" entered by the trial court failed to include the award of "interest" accruing prior to that time, then certainly the judgment ought to bear interest as a "matter of law", as previously declared by case law decision [**Dairy Farmers**] and by statute [Section 15-1-4, Utah Code]

If this is not the case, then the Court is ignoring a major provision of the "option agreement" and that's not fair! The "interest" provision "at 10 1/2%" is something the Buyers agreed to! The Buyers cannot now be heard to complain that the very "option agreement" which they have been so strident about enforcing according to its terms is ENFORCED AGAINST THEM (THE BUYERS), in the same manner! If such is not done, then the Court is not enforcing the contract as written.

The post-1996 "interest" is a substantial sum: by September 1999---three years after the September 1996 "judgment" was first entered by the trial court and about the time the case will be heard by the Court of Appeals---the interest will be approximately \$24,000!
[3 years x 10.5% per year x 76,500 unpaid balance =

\$24,097.50. The Record is unclear whether the \$3650 deposited "into court" was ever released to Surety Title Company. The foregoing calculation nevertheless gives the Buyers "credit" for such transfer as though it had been timely made.] Apparently, the Buyers too feel that such is a sizeable sum: they have intentionally failed to "close" on the purchase, pending resolution of the appeal. [As noted in Point II, below, the 1998 "judgment" of the trial court---from which this "second appeal" is taken does NOT prevent the Buyers from closing. In fact, the vesting of title in the names of the Buyers is not conditioned upon the Sellers doing anything. The vesting can occur, as a matter of law, as soon as the Buyers will pay to the title company the remainder of the purchase monies.] That they have waited now over three years (from the time they first sought to exercise the option) certainly should invoke the payment of the "interest"---the interest at the rate stated in the contract which they signed! The Buyers have not only had full use of their money for those three years; they have also had full use of the property!

The District Court initially adjudicated the case pursuant to jointly-filed motions for summary judgment. The Buyers moved for summary judgment on the basis of

their averments that they (as Buyers) had presented a notice of intent to exercise the "option" within a timely fashion. The Sellers moved for summary judgment in their favor on the basis that the Buyers' notification was defective, in that the Buyers were in breach of the agreement because they had failed to make the required down payment and because the option was not exercised in a timely manner. The specific issue of the price to be paid---as required by the "at 10 1/2% interest" phrase---was NOT directly raised or adjudicated. The District Court ruled in favor of the Buyers. The Sellers appealed. The Utah Supreme Court "poured-over" the appeal to the Utah Court of Appeals, which issued an unpublished opinion, affirming the District Court's judgment in favor of the Buyers. The Utah Supreme Court ultimately denied the Defendant's Petition for Writ of Certiorari.

Following the filing of the first appeal, the Buyers (as purchasers) took no action to comply with provisions of the agreement concerning the exercise of the "option" and/or the Court's judgment upholding the option and its exercise. The Buyers tendered no money to the Sellers, although they continued to reside upon the premises.

On remand, the District Court---over the objection

of the Sellers---entered judgment in favor of the Buyers, automatically quieting title to the real estate in the name of the Buyers, upon their deposit with the title company of the "option" price. The "at 10 1/2% interest" clause (pertaining to the purchase price) was given NO EFFECT by the trial court. This latter judgment---which is the basis of the instant appeal---failed to take into account the provisions of agreement concerning the "at 10 1/2% interest" as such affected (i.e. increased) the purchase price. The District Court also seemingly ignored the contractual provisions characterizing the purchase transaction as a "loan".

The major flaw in the Buyers' argument [that the appeal (or that the appellate consideration of this issue) is time-barred] is that the argument ignores all of the facts and the procedural history of this case.

In the first instance, the Court of Appeals did NOT rule on the "interest issue". [A careful reading of the abbreviated "memorandum decision" confirms this fact.] Before the Court of Appeals were simply a couple of conflicting issues: the Buyers asserted that they were entitled to enforce the "option" agreement. The Sellers---as original appellants---responded that the "option" was not exercisable, due to the fact that it was not exercised in a timely fashion. The original

appeal followed from a decision of the district court in a "summary judgment" setting. On appeal, the Sellers argued that there were genuine issues of material fact to preclude summary judgment. The Court of Appeals determined otherwise. The "interest" issue was not presented to the Court of Appeals, because it was not an issue at the time. In the minds of the parties (and their counsel), THE issue concerning the appeal was the appropriateness of the summary judgment disposition and the terms of the "option", not the judgment. Furthermore, as indicated below, the judgment should have incorporated the "interest" provisions of the "option" agreement, as a matter of law [per **Dairy Distributors**, *infra*], whether the judgment said so or not.

The Court of Appeals decision---a "Memorandum Decision" designated "not for publication"---is brief and to the point: to resolve the "option" issue and that's it.

The cases cited by Buyers are generally inapplicable to the case at bar. The Sellers' reliance upon **Schoney vs Memorial Estates, Incorporated**, 863 P.2d 59 (Utah Court of Appeals 1993), is misplaced. **Schoney** involved a second appeal where the issue was thoroughly litigated, by both the trial court AND the

appellate court; such is not the case at bar.

The decision of the Utah Supreme Court in the case of **Dairy Distributors, Incorporated vs Local Union 976, Joint Council 87, Western Conference of Teamsters**, to be directly on point and to be controlling. In **Dairy Distributors** the Utah Supreme Court wrote:

[cited, but omitted, cases] . . . will be found to actually support plaintiff's position in recognizing that **the interest follows the judgment as a matter of law.**

Our statute, Sec. 15-1-4, Utah Code Ann. 1953, provides that unless otherwise agreed by the parties, " * * * judgments shall bear interest at the rate of eight per cent per annum." **This interest follows the judgment as a matter of law and would be collectible even though the judgment did not so provide.** See Blair v. Durham, 139 F.2d 260 (6th Circuit 1943). The trial court in no way transgressed its authority in filling in the omission and making the record show what was true under the law anyway. Its action was in conformity with the well-established precept that mere lapse of time will not prevent the court from correcting errors or omissions. We so recognized in the recent case of Kettner v. Snow, 13 Utah 2d 382, 375 P.2d 28, stating that " * * * in proper circumstances where the interests of justice so require, the court has power to act nunc pro tunc, that is, to do an act upon one date and make it effective as of a prior date. It is recognized that clerical errors may be corrected or omissions supplied so the record will accurately reflect that which in fact took place." To the same effect see Cook v. Gardner, 14 Utah 2d 193, 195, 381 P.2d 78.

563 P.2d at _____. Emphasis added.

If the obligation to pay interest follows the (first) judgment "as a matter of law", then there

simply was no need to raise that issue at the first appeal. When Judge Wilkinson refused in 1998---following remand subsequent to the Court of Appeals decision---to order the assessment of interest against the purchase price to be paid (in 1998), the appealed issue became "ripe".

The irony inherent in the objection of the Buyers as to the "interest" issue is the fact that they struggled so hard to convince the Court of Appeals that the "option" contract was enforceable, according to its terms. The Court of Appeals accepted that argument and so held. Now the Buyers want to ignore the "interest" provisions.

The Buyers have not been harmed at all. They have been allowed (since 1991) to live in the house, according to the "rental" provisions (i.e. payment of \$675 per month). Since 1996 they have been allowed---per the trial court's order---to live there rent-free.

In the intervening three years that this case has taken "on appeal", what should the purchase price actually be? Whether that purchase price reflects the pre-1996 accruing interest "at 10 1/2% interest" as the "option" contract clearly states---is one question. Whether the "interest" applies to post-1996 interest is a second---and totally different---question. The

Appellants are entitled to a judicial decision on both.

That Judge Wilkinson of the trial court in 1996 refused to require interest at the "10 1/2% interest" as the contract clearly provides IS an appealable issue. [The "judgment" bears interest, "as a matter of law", per **Dairy Distributors**, supra.] That for the intervening three years (1996 to 1999) NO interest was included in the purchase price to be paid (??) by the Buyers hurry) is presently appealable!

The issue is NOT---as the Buyers are prone to so characterize it---whether the judgment is "personal" or for a "sum certain"; THE ISSUE is whether the provisions of the statute will be followed, by incorporating the "10 1/2% interest" which so readily appears on the face of the "option" agreement. The original "agreement" and the "judgment", whether from 1996 OR 1998, it doesn't matter is specific enough! Furthermore, the Buyers should not be entitled to profit from sloppy drafting of the "judgment".

If the "10 1/2% interest" phrase does not mean exactly this result, then what does the phrase mean? The parties (in 1991) obviously had intended some meaning for it! What simply does it mean? The Buyers, having prevailed on the enforceability of the "option" agreement, cannot now be heard to complain if the

"option" is enforced according to its clear import!

The Buyers acknowledge [p. 12 of their brief] that the "option agreement" provides for the assessment of interest. The Sellers' explanation, however, as to when that interest is actually invoked is not only confusing, but it is not supported in the Record (due to the procedural context in which this case was litigated and adjudicated by the trial court). Further, the Buyers' version as to what the "at 10 1/2% interest" means flies directly in the face of the written agreement and the reasonable meaning of the selected language. It is ludicrous to assert---as Buyers do---that the phrase only has meaning IF AND WHEN a "contract purchase" was to be invoked! The whole transaction was, in essence, "a contract purchase" (whatever that term-of-art phrase might mean)!

The more logical, reasonable explanation as to the meaning of the phrase "purchase price of \$81,500 at 10 1/2% interest", particularly when coupled with the "balloon payment" and "loan" phrases found later within the text of the option agreement, is that the purchase price was to increase over time: at 10 1/2% per year, as the option went on. It makes absolutely no sense to think otherwise! Why would any person sell a structure for the same price five years LATER? The Sellers didn't

intend such.

The Sellers and the Buyers clearly agreed to written provisions which clearly provide that "interest" is to accrue to the outstanding obligation, until it is actually paid. That the Buyers have voluntarily chosen to wait for almost THREE YEARS and haven't yet paid the purchase price should invoke the "interest" provisions specified in the "option agreement".

II

CLAIMED FRIVOLOUS APPEAL AND AWARD OF ATTORNEY'S FEES

The instant appeal is not frivolous or filed in bad faith. The Sellers should be entitled to have an appellate decision on the "10 1/2 interest" phrase clearly contained within the "option" agreement. They to this date have not had such a decision.

As far as the statements of the Buyers that the appeal has caused the Buyers to incur additional attorney's fees and/or to wait to "close", such problems are of their own making.

As written, the 1998 judgment---from which this appeal is taken---does NOT require the Sellers to do anything. The "judgment" is clear: it unequivocally states, in relevant part:

1. Plaintiffs are quieted in fee simple as to the following described property . . . Said real property shall hereby be quieted in the Plaintiffs, Wesley Clock and Ann (sic) Clock, upon their deposit of the sum of \$76,500 plus the sum of \$3,650 now held by the court with Surety Title Company.

5. Evidence of the quieting title in the plaintiffs shall be sufficient upon the recording of a notice by Surety Title Company evidencing the deposit of the funds required herein.

Emphasis added. All the Buyers [the Clocks] have to do is deposit the money [\$76,500 and the \$3,650, held in court] with Surety Title Company, record a "notice" and the property is theirs! There is simply nothing for the Sellers to do. Thus, the Buyers' assertions that the resultant (from the appeal) delay is causing a "cloud on their title" [Summary Disposition Motion] is absolutely false, for legal and factual reasons!

The Court must remember, also, that the particular "form" of the 1998 "judgment" was prepared solely by Buyers' counsel. It apparently conforms to the trial court's "decision", as Judge Wilkinson signed it. The "judgment" (order) is operative, IMMEDIATELY: all the Buyers have to do is deposit the money.

The fact that this Court might rule that they have to pay "interest" at the "10 1/2% interest" rate as the "option" agreement clearly specifies---might cause them some discomfort in finally "closing" (by depositing the

money with Surety Title Company), but that's not the fault of the Greens. The "judgment" has been prepared the way the Buyers' counsel wanted it; the Sellers are not the cause of any delay as to the "closing".

The Buyers have changed their position: in the present they seek to have the Court enforce the 1996 "judgment". And yet in the trial court below, the Buyers sought (and obtained) other relief. The introductory phrase of the 1998 "judgment" is that Buyers had moved for "summary judgment", which was granted. [It is important to note that it is Buyers' counsel who prepared the Order! It is Buyers who framed up the issues in the trial court!] The Buyers-Appellees have NOT filed a "cross-appeal" (of the 1998 "judgment") and now should not be heard to complain about it.

Buyers have previously claimed [paragraph 3 of the Wesley Clock affidavit, submitted with the Summary Disposition motion] that

"Surety Title informs us that they will not insure title until the second appeal is resolved. Thus, the Greens' have clouded the title to the property to delay the closing."

[Paragraph 3 of Wesley Clock affidavit.] That's absolutely incorrect. As written, the 1998 "judgment" easily works through that contingency. The Sellers are not required (by court order) to "close"; rather, the

vesting of title operates as a matter of law, by reason of the Court's judgment! That the title company chosen by the purchaser (the Clocks) won't insure title pending the second "appeal" is not the fault of the Greens, who cannot be expected to give up their appellate rights to have the "option" contract enforced according to its terms. The Sellers are not "clouding" the title. Nor is the "closing" delayed! The Buyers merely need to pay the money and the property is theirs. [The instant "appeal" might have the result that the Clocks might have to pay more than the \$81,500 price they agreed to in 1991, BUT THAT'S BECAUSE THAT IS WHAT THE "OPTION" CONTRACT THEY SIGNED SAID WAS TO HAPPEN! That the purchase price would increase "at 10 1/2% interest". So when they finally pay in 1999 or later---more than three years after the 1996 date (which is the absolute latest date contemplated by the parties as to the transfer of the parcel), shouldn't the Buyers pay the amount they agreed to? The Sellers think so, and have filed this appeal to enforce the contract, according to its terms.

It appears that Judge Wilkinson (and perhaps even Buyers' counsel) framed up the 1998 "judgment" so as to avoid a situation wherein the Sellers---represented by other counsel, not counsel handling this appeal---might

refuse to sign over the necessary conveyances. The 1998 judgment doesn't require that they do! The 1998 "judgment" provides the quiet title vesting upon the deposit of the Buyers' monies with Surety Title. Those Buyers cannot now be heard to complain about "delay" or "clouds on title", because the vesting of time is entirely within their control!

With respect to the sanctions the Buyers-Appellees have requested this Court impose for the "appeal" and/or the claimed "delay" and "cloud on title" effected thereby, those same arguments were, in essence, advanced before Judge Wilkinson. However, Judge Wilkinson's "minute entry", dated as of 6 August 1998, indicates that "sanctions are reserved". [See 1998 "judgment", ATTACHMENT #2 to Sellers' original brief.] As heretofore stated, Buyers have not filed a "cross-appeal" from the 1998 "judgment". Those Buyers cannot now be heard to complain on those issues.

If there is a res judicata or "law of the case" concept applicable to the instant situation, it is that the Buyers cannot now be heard to complain about the 1998 "judgment". They procured it. They prepared it! That "judgment"---in procedure and substance---was obviously designed to supersede and take the place of the 1996 "judgment". The 1998 "judgment" is THE final

judgment from which this appeal is properly perfected. The Sellers should be allowed to raise the "interest" issue which the trial court has failed to resolve.

In each appeal the Sellers did NOT file a supersedeas bond to prevent the Buyers from complying with the judgment. Thus, the fact that the instant appeal has been filed has in no way, shape or form harmed the Buyers in any particular! Their claim for sanctions and/or an award of attorney's fees is inappropriate.


CONCLUSION

The contractually-stated "interest" follows the judgment, "as a matter of law". **Dairy Distributors**, supra. Thus, there was no necessity for the first appeal to address that issue. Only when Judge Wilkinson refused to honor the contractual terms (in 1998) did it become apparent that the issue arose, which prompted this appeal. The Appellants should be entitled to have the appellate court correct the trial court's error in not so including that interest. The Court of Appeals should award the Sellers their interest, at the "10 1/2%" per year rate, from 1991 but at least from 1996!

The Sellers' appeal is meritorious. The Buyers' claim for attorney's fees incurred on appeal is improper. If there has been any deleterious effect upon

the Buyers from the delay, that effect arises from their own shortcomings in failing to follow the 1998 "judgment", as carefully crafted by the Court and as prepared by that counsel. The Defendant's are not obligated to do anything: title "vests" when the Buyers deposit the money! It's that simple!

Respectfully submitted this 14th day of June, 1999.


STEPHEN G. HOMER
Attorney for Appellants
JOHN F GREEN and
LARUE GREEN

CERTIFICATE OF MAILING

I certify that I caused two copies of the foregoing APPELLANTS' REPLY BRIEF to be mailed, first-class postage prepaid, to Mr Bryan W Cannon, Attorney at Law, 871 East 9400 South, Sandy, Utah 84070, this 14th day of June, 1999.

