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IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE E. HOLMES, dba HOLMES REALTY,	)	
Plaintiff-Appellant,	)	Case No. 16549
vs.	)	
DeGRAFF ASSOCIATES, INC.,	)	
Defendant-Respondent,	)	

BRIEF OF RESPONDENT

Appeal from Judgment in favor of the Respondent by the Third Judicial District Court of Salt Lake County, Honorable Ernest F. Baldwin, Jr., Judge, Presiding.

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FILED

JAN 11 1980

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF FACTS 1

ARGUMENT I - HOLMES, BY HIS OWN AGREEMENT IS NOT ENTITLED TO A COMMISSION . . . 7

ARGUMENT II - HOLMES CANNOT NEGATE THE TERMS OF THE AGREEMENT, WHICH HE DRAFTED BY ALLEGING THEIR UNENFORCEABILITY . . . 12

ARGUMENT III- NO REPUDIATION OCCURRED ELIMINATING THE AGREEMENT CONCERNING PAYMENT OF NO COMMISSION 15

ARGUMENT IV - HOLMES' AGREEMENT SUPERSEDED ANY CONTRARY AGREEMENTS WITH THE BOARD OF REALTORS 17

CONCLUSION 20

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CASES CITED

	PAGE
Anderson v. Great Eastern Casualty Co., 51 Utah 78, 168 P. 966 (1917)	14
Bullfrog Marina, Inc., v. Lentz, 28 Utah 2d 261, 267, 501 P.2d 266, 270 (1972)	10
Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (1973)	7
Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970)	7, 15
National Surety Corporation v. Christiansen Brothers, Inc., 29 Utah 2d 460, 463, 511 P.2d 731, 733 (1973)	19
Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967)	15
Shattuck v. Chase, 86 C. A.2d 810, 813, 195 P.2d 475, 477 (1948)	10
Smith v. Burton, 4 Utah 2d 61, 63, 286 P.2d 806, 807 (1955)	9, 12
Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978)	14

OTHER AUTHORITIES CITED

17 Am.Jur. 2d, "Contracts," Section 244 at p. 631; Section 254 at pp. 647-648	14

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Bruce E. Holmes ("Holmes"), commenced action against the respondent, DeGraff Associates, Inc. ("DeGraff"), for payment of a real estate commission, allegedly owing in connection with DeGraff's sale of real property. The respondent asserted various counterclaims, none of which are before this Court on appeal.

DISPOSITION IN THE LOWER COURT

The trial court, the Honorable Ernest F. Baldwin, Jr., hearing this case without a jury, after trial of the issues, awarded judgment on the complaint to respondent and awarded judgment to appellant on the counterclaims.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that the judgment of the Third District Court be affirmed.

STATEMENT OF FACTS

Respondent does not fully agree that the statement of facts set forth by the appellant is accurate to acquaint the Court with the background facts necessary to make a decision in this case. Since this dispute primarily involves issues of fact, we deem it necessary, therefore, to state the facts in full as presented to the trial court.

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DeGraff and Holmes are both members of the Salt Lake Board of Realtors (the "Board of Realtors") (Tr. 3). In the first week of May 1977, DeGraff caused to be placed in the multiple listing catalogue of the Board of Realtors, a listing for the sale of real property in Salt Lake County, Utah (Tr. 16, Exhibit 7-P), which DeGraff, in turn, was purchasing on contract (Exhibit 36-P). On May 13, 1977, DeGraff filed with the Board of Realtors a "non-sale agreement" for the removal of that property from sale across the multiple listing service (Exhibit 9-P).

Having seen the listing, and after initial telephone contacts with DeGraff subsequent to filing of the non-sale agreement (Tr. 65-66), Holmes met with Clara DeGraff, corporate secretary of the respondent, on June 17, 1977, for purposes of negotiating Holmes' purchase of that property (Tr. 67, Exhibit 24-D). Holmes brought to that meeting a printed, standard form of an option (Tr. 68, 102), upon which Holmes typed the proposed terms of the option and the proposed terms of sale upon exercise of the option (Tr. 102). In doing so, Holmes left various blanks to be filled in after further negotiation, including a blank in the standard language of the form providing for payment of a commission (Tr. 71, 72, 103, Exhibit 24-D). Because Holmes was obtaining the option for his own account and not as an agent for a third party, DeGraff insisted that no commission

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was to be paid in connection with this transaction (Tr. 105). Holmes, in apparent agreement, in Holmes' own handwriting, filled in the blanks, including the provision that no commission would be payable (Tr. 71, 72); and Holmes was aware, at that time, that the option would not have been executed by DeGraff if the option would have provided for payment of a commission (Tr. 105, 109).

While evidence showed that a real estate commission normally is payable to a person who is acting as agent on behalf of a third-party seller or buyer (Tr. 5, 29, 30), the evidence showed that these particular transactions at issue before the trial court involved, instead, transactions negotiated between two parties-in-interest. The record clearly shows that (1) Holmes executed the option in his own name as buyer, not as a representative or agent on behalf of any third parties (Exhibits 24-D, 25-D, 27-D, 32-D; Tr. 72, 92, 109, 110, 118, 128); (2) Holmes was aware and willing that he personally obtain the benefits of, and assume the obligations under, the option as buyer (Tr. 109); (3) Holmes paid the consideration for the option by a personal check drawn on Holmes' bank account (Tr. 74); (4) Holmes recorded a notice of interest in the office of the Salt Lake County Recorder giving public notice of his personal claimed interest in the property (Exhibit 28-D); (5) Holmes treated his interest in the option as a personal interest in that he

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formally executed documentation assigning his personal interest in the option (Exhibits 26-D, 34-D); (6) Holmes personally exercised the option (Exhibits 25-D, 27-D); and (7) Holmes submitted a request for arbitration with the Board of Realtors supplying the information that he, personally, was the buyer (Exhibit 32-D).

The record further is clear, from the testimony of Holmes himself and from the testimony of Benjamin Scott, executive vice president of the Board of Realtors, that, notwithstanding the nature of the transaction, a broker has the continuing right to negotiate the amount or percentage of any commission which may be payable to him, regardless the contents of any documents otherwise previously filed with the Board of Realtors, including a right to negotiate for no commission at all (Tr. 12, 116). The trial court did find that Holmes did negotiate an agreement providing for no commission to be paid (R. 85).

The evidence further showed that Holmes considered the option fully enforceable against DeGraff and never raised any question as to its enforceability prior to the completion of the sale (R. 85; Exhibits 25-D, 27-D, 31-D; Tr. 106, 113, 149-150). Likewise, DeGraff, at all times, considered the option enforceable and treated the final closing of the sale as the culmination of the transactions contemplated in the option as negotiated (Tr. 93, 95, 131,

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132, 138). The evidence, including the option agreement itself, showed that the parties had assumed the drafting of subsequent documentation, such as escrow instructions to complete the carrying out and closing of the option (Tr. 138, Exhibit 24-D).

Subsequent to execution of the option, and prior to closing, issues arose between Holmes and DeGraff as to the enforceability of the option, as prepared by Holmes (Tr. 138-139). Notwithstanding these disputes and discussions, DeGraff went through with the sale of the property, and the closing took place providing for the same purchase price as originally agreed in the option (Exhibits 17-P, 24-D). Negotiation of all terms of the sale with DeGraff were conducted by Holmes himself (Tr. 34, 43-44), and Holmes supplied to the title company the information to be included in the closing documents (Tr. 114).

Subsequent to execution of the option, Holmes entered into arrangements with American Development Company, whereby American Development Company ultimately became purchaser of the subject property (Exhibit 17-P). The evidence disclosed, however, that DeGraff, at no time prior to closing of sale, was made aware of any buyer being involved other than Holmes himself; and, in fact, upon closing DeGraff still assumed that American Development Company, the ultimate buyer, was still Holmes doing business

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in another name (Tr. 57, 87, 114, 131, 134, 135, 136, 137). Glen Saxton, President of American Development Company, testified that, even as of the time of trial, he had never met the president of DeGraff Associates, Inc., who signed the final closing documents (Tr. 36). Indeed, evidence shows that Holmes purposely withheld from DeGraff the knowledge of a third party buyer being involved (Exhibit 33-D), although Holmes kept American Development Company fully advised of the progress of the sale, negotiations of disputes, and other events leading to final closing of the sale under the option (Tr. 110). With the exception of the Option Agreement, Holmes and DeGraff never entered into any other agreement with respect to a commission or otherwise (R.86). Finally, Holmes obtained an agreement from American Development Company whereby American Development Company agreed to pay a commission to Holmes if Holmes was not successful in obtaining a commission from DeGraff through arbitration (Exhibit 35-D).

The evidence showed, further that Holmes privately assumed that the rules and regulations of the multiple listing service would mandate payment of a commission regardless of his clear and unambiguous written agreement to the contrary (Tr. 105, 106; Exhibit 30-D).

The trial court, having heard and examined the evidence, and being aware of the disputed facts and issues

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of law, found that Holmes and DeGraff had entered into a valid agreement whereby Holmes agreed that he was not entitled to a commission from this sale and that Holmes' agreement continued in effect at all times (R. 85-86). Holmes, at no time, has filed any challenge or objection to the substance or wording of the court's Findings of Fact. The trial court, therefore, gave deference to the provisions of Holmes' agreement and concluded that, as agreed, no commission was payable. Holmes has petitioned this Court to adopt a contrary view which requires the overruling of the trial court's Findings of Fact.

ARGUMENT I

HOLMES, BY HIS OWN AGREEMENT, IS NOT ENTITLED TO A COMMISSION

Holmes' recitation of facts in his brief essentially set forth facts as Holmes would like to have them interpreted by this Court. However, this Court should review the facts and circumstances in this case as found by the trial court and not necessarily as urged by Holmes. Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (1973); Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970).

This lawsuit, in effect, constitutes Holmes' attempt by judicial fiat to circumvent the terms of Holmes'

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written agreement that no commission would be payable. Holmes has not disputed the clear and unambiguous language of the option agreement itself, as far as it pertains to the matter of a commission. Rather, Holmes seeks to negate his agreement by attempting to convince this Court that, as a matter of law, either the agreement concerning a commission is not in force or else the agreement is superceded by the rules of the multiple listing service and documents on file with the Board of Realtors which were executed prior to execution of the option agreement.

The multiple listing services rules and agreements, of course, generally contemplate payment of commissions among the real estate brokers and agents representing buyers and sellers of real property because the commissions typically are the sole source of payment to the broker or agents; and, normally, these rules and agreements are inapplicable with regards to a broker buying on his own account where he would get his profit through normal means of investment, not by commission.

The respondent does not acknowledge the applicability in this case of documentation on file with the Board of Realtors. But assuming, ad arguendo, that Holmes would have been entitled to a commission in the absence of his written agreement to the contrary, Holmes clearly has the continuing right to contract for a different amount of

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commission or, indeed, for no commission at all. Smith v. Burton, 4 Utah 2d 61, 63, 286 P.2d 806, 807 (1955).

In the testimony at trial, both Holmes himself and Benjamin Scott, executive vice-president of the Board of Realtors, acknowledged the continuing right to negotiate a commission. Since this right exists for a broker acting as agent for a third party, a fortiori, Holmes, as a principal in the matter at issue, had no less of a right. The trial court found that, in fact, Holmes did enter into a valid and enforceable agreement binding on Holmes. This right of negotiation of a commission was again exercised by Holmes, prior to closing of the sale, wherein he obtained an agreement for receipt of a commission from American Development Company in the event Holmes does not recover a commission from DeGraff (Exhibit 35-D).

Further impliedly acknowledging the certainty of the option language, Holmes, relying as a matter of law on the doctrines of integration and merger of contracts, attempts to convince this Court that this language is superfluous because the specific agreement providing for no commission was somehow superseded by subsequent documentation. The overriding problem with this argument, however, is that the trial court considered this argument and, after hearing evidence, specifically found that, as the parties intended, the agreement providing for no commission

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continued throughout the entire transaction for the sale of the subject property. An irony in Holmes' purported reliance upon the doctrines of merger and integration is Holmes' continued argument that rules of the multiple listing service are applicable. If any merger and integration occurred in this case, it occurred through the merger and integration of the multiple listing service agreements into the subsequent option agreement wherein Holmes cemented his negotiated commission terms.

Whether an integration or merger of contracts has occurred is not an arbitrary universal matter of law, but is a factual determination to be made after examination of the totality of the circumtances. Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 267, 501 P.2d 266, 270 (1972). In that same case the Court also said:

> The trial court did not err in following the rule of law that where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other. 501 P.2d at 271. See also, Shattuck v. Chase, 86 C. A.2d 810, 195 P.2d 475, 477 (1948)

Ample evidence was presented to the trial court that the parties, by executing the option agreement, contemplated the necessity of further documentation to

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complete the terms of the option agreement. A notable example is Holmes' language in his letter exercising the option that he would "arrange for the escrow closing" through the title company (Exhibit 25-D), although the option agreement contains no language which contemplates any escrow arrangement.

Significantly, the final documents of sale and closing make no mention of a commission, with the exception of the self-serving language arbitrarily supplied by Holmes and inserted on the closing statement to the effect that the amount of a commission was "in arbitration."

Common transactions analagous to the issue before this Court exist in the State of Utah whereby a standard form Earnest Money Receipt and Offer to Purchase is used in contemplation of the subsequent execution of a final standard-form Uniform Real Estate Contract which "shall abrogate this Earnest Money Receipt and Offer to Purchase." While the Earnest Money Agreement contains a sentence providing for payment of a commission, the Uniform Real Estate Contract makes no mention of a commission. One can fairly inquire as to whether Holmes, who earns much of his living by commissions, would contend that the subsequent contract, by integration or merger, eliminates the Earnest Money Agreement terms regarding commission.

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Finally, it should be emphasized that DeGraff did not prepare any of the documents involved in the sale. All of the documents either were prepared by Holmes himself or as a result of information supplied by Holmes. To the extent the issues and disputes exist between the parties as a result of ambiguities or uncertainties in the documents themselves, these documents should be construed most strongly against Holmes himself. Smith v. Burton, 4 Utah 2d 61, 63, 286 P.2d 806, 807 (1955).

ARGUMENT II

HOLMES CANNOT NEGATE THE TERMS OF THE AGREEMENT, WHICH HE DRAFTED, BY ALLEGING THEIR UNENFORCEABILITY

In his attempt to circumvent the specific contractural provision which should be dispositive of the issues, Holmes argues that the option agreement is unenforceable as a matter of law because the language of the option agreement, which Holmes prepared, provides for terms of payment which purportedly violate the rule against perpetuities. The respondent understands the reasons that Holmes in his brief makes little mention of the fact that Holmes himself negotiated the option, drafted the allegedly unenforceable language, and filled in the handwritten language in issue. The respondent, further, finds no reason to dispute Holmes' inartful drafting of the option

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agreement. The respondent, however, cannot accept the unreasonable leap of logic that assumes that Holmes' language automatically created an unenforceable document. Holmes certainly has the least standing to raise this argument because DeGraff would have been the party to raise this issue as an excuse for non-performance. Moreover, even assuming that DeGraff could have refused to perform under an unenforceable contract does not mean that the contract is, in fact and for all purposes, nullified. Holmes' implication is that the rule against perpetuities is a self-operating rule which automatically nullifies the contract even in the absense of the appropriate party's raising of the issue as a defense. Every case which Holmes cites in his brief as authority for the nullification of this contract merely discusses the principles of law in the context of non-performance by a party, unlike the circumstances of this case as found by the trial court.

Holmes' argument ignores the fact that no determination has been made by the trial court, or by any other authoritative tribunal, that the language of the option created an unenforceable document. Although DeGraff did raise questions as to the enforceability of the option agreement, DeGraff nevertheless did carry through with the sale of the properties and chose not to refuse to perform on the basis of unenforceability, which was peculiarly

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DeGraff's to raise. Since the trial court expressly found that the transactions contemplated by the option agreement were carried to fruition, the issue is moot as to whether any language of the agreement might have been uneforceable. Holmes' approach is both novel and interesting in the way Holmes attempts to raise a specter of unenforceability, not to compel performance, but to defeat the prior performance of the agreement by the parties.

One may reasonably inquire as to whether Holmes intended to draft an unenforceable document. The policy of the law is to recognize that a person who enters into a contract does so in good faith to carry out the intent of the parties. Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978). In addition, the presumption under the law is that parties, in entering into agreements, intend to prepare enforceable arrangements. Anderson v. Great Eastern Casualty Co., 51 Utah 78, 168 P. 966 (1917) 17 Am.Jur., "Contracts" Section 254 at pp. 647-48; Section 244 at p. 631. Who is to say at this time whether a trial court, if properly confronted with this specific issue, would have enforced or invalidated the agreement? Indeed, this Court has said:

> We recognize the validity of the rule relied upon by the defendants that to be enforceable a contract must be sufficiently definite in its terms that the parties know what is required of them. But like all rules,

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> which are necessarily stated in generality, it is only applicable in the proper circumstances, where the justice of the case requires: as a shield to protect a party from an injustice, and not as a weapon with which to perpetrate an injustice. Under the evidence and the particular facts of this case, we are not convinced tht we should disagree with the view of this matter which it is apparent was taken by the trial court: when the parties had reached agreement and committed themselves on the major aspects of the transaction. (Citations omitted). Kier v. Condrack, 25 Utah 2d. 139, 478 P.2d 327, 330 (1970). See also, Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967).

To adopt the logic of Holmes' rationale would be to accept the proposition that a person can draft a contract poorly and then refuse to perform his responsibilities because the other party might have challenged the contract's enforceability.

ARGUMENT III

NO REPUDIATION OCCURRED ELIMINATING THE AGREEMENT CONCERNING PAYMENT OF NO COMMISSION

Through a self-serving and highly selective summary of the alleged "facts" in this case, not in accordance with the trial court's findings, Holmes claims that DeGraff repudiated the terms of the option agreement. Under Holmes' argument, the terms of the option agreement, therefore, somehow became inapplicable, resulting in a requirement for payment of a commission because of documentation of the

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multiple listing service. By arguing a repudiation of these transactions, Holmes impliedly acknowledges the existence in the first place of Holmes' agreement; and, therefore, Holmes further impliedly acknowledges that Holmes is not entitled to a commission in the absense of such a repudiation.

The simple and obvious response to this allegation is not only the express findings of the trial court to the contrary but, also, the fact that the sale did go through with the same sale price as stated in the option. DeGraff did not repudiate the contract nor refuse to complete the sale.

The respondent agrees with Holmes' argument on page 14 of Holmes' brief that a repudiation of a contract will be determined only when the showing is "positive and unequivocal." The trial court, obviously, did not find that such evidence existed but, rather, found that the transaction was completed as contemplated by the terms of the option.

Holmes, further, argues on page 18 of his brief that American Development Company (who was not a party at any time to the agreements in issue involving a commission) somehow chose to discharge the contract between Holmes and DeGraff and to negotiate a new agreement. Holmes does not explain the process by which any such action by this third-party could purportedly operate to obviate a separate

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agreement between Holmes and DeGraff. Moreover, Holmes' argument ignores the facts that (1) Holmes never entered into any subsequent agreement with DeGraff altering the terms of the option agreement relative to a commission and no documents purporting to do so were ever offered into evidence; (2) the final agreement with American Development Company makes no mention at all of a commission; and (3) Holmes' argument assumes facts contrary to the trial court's express findings.

It is respectfully submitted that the only repudiation in the entire transaction was Holmes' attempted repudiation of his agreement entitling himself to no commission.

ARGUMENT IV

HOLMES' AGREEMENT SUPERSEDED ANY CONTRARY AGREEMENTS WITH THE BOARD OF REALTORS

Holmes finally urges that, the option agreement purportedly being unenforceable, the rules, regulations and documents involved in the multiple listing service of the board of realtors mandate payment of a commission. Evidence indicates that Holmes assumed, despite the specific language Holmes inserted in the option, that documentation filed with the Board of Realtors governs in any regard (Tr. 105, 106; Exhibit 30-D). The respondent does not agree that the Board

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of Realtors documentation is applicable in this case. Assuming, however, for the sake of argument, that it is applicable, Holmes, without citing any statutory or other authority for this position, presumably considers the Board of Realtors documents to constitute some type of "super contract" which will preclude any subsequent negotiation or agreement to the contrary by the brokers.

The dealings and documents of the board of realtors normally contemplate agreements for commissions involving a sale by brokers of properties involving third parties. This case, however, involves a transaction directly between a buyer and seller of properties in which a commission normally is not involved.

Holmes acknowledged in his testimony that he had some people in mind to whom he might sell the property and, further, somehow considered that he was, in effect, getting an exclusive listing of the property through means of this option (Tr. 108). The fact that he may have had someone in mind to whom he might sell the property, however, does not place this transaction in the same category in which a person is clearly acting as an agent for another party. No agency relationship was in existence; and Holmes simply negotiated the arrangements of the transactions as a party-in-interest to the sale and purchase.

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Even less complimentary to Holmes' position is the fact that the evidence indicated that Holmes (ostensibly in good faith) agreed in writing that no commission would be payable while he, at the same time, secretly intended to seek a commission regardless of the express agreement (Exhibit 33-D). This Court, in a case cited by appellant, discussed principles of fair dealing which is applicable here:

> To be considered in that connection is the fact that it seems to us that openhanded and fair dealing would have required the defendant to state any claims it intended to assert. Contrariwise, it should not be permitted to remain silent and induce the other party into a settlement, and thereafter come forward with such a claim. To permit it to do so would run afoul of the well-established rule: that were paries engage in negotiations concerning a transaction, pursuant to which they enter into a written contract, it is presumed that all matters relating to the subject are merged in and constitute a complete integration of their agreement. National Surety Corporation v. Christiansen Brothers, Inc., 29 Utah 2d 460, 463, 511 P.2d 731, 733 (1973).

The respondent strongly urges that the Courts should not be placed in the position of rewarding Holmes' method of dealings, and the manner of his negotiation in this case, by overriding the clear language of the option, and the clear and unambiguous findings of fact by the trial court.

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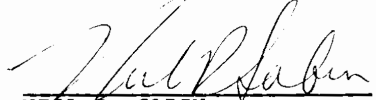
CONCLUSION

The issues raised by the appellant involve issues of fact which were resolved in the respondent's favor. The fact that Holmes, subsequent to entering into his agreement, may have had regrets, or the fact that Holmes may now believe that he received less of a bargain or benefit than he otherwise might have, should not be of concern to the Courts.

The respondent, therefore, respectfully requests that the Judgment of the trial court be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 1980, I served two (2) copies of the attached Brief of Respondent upon Wayne C. Petty, Esq., 600 Deseret Plaza, Salt Lake City, Utah by hand delivering two (2) copies thereof.

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