1979

# C & J Industries, Inc., A Utah Corporation, A. Robert Collins and Glade N. James v. Edward 0. Bailey and Ruth C. Bailey, His Wife : Respondents' Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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C & J INDUSTRIES, INC., a corporation, A. ROBERT COLLINS and GLADE N. JAMES,

Plaintiffs-Respondents,

vs.

EDWARD O. BAILEY and RUTH C. BAILEY, his wife,

Defendants-Appellants.

Case No. 16648

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# RESPONDENTS' BRIEF

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APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY HONORABLE CHRISTINE M. DURHAM, JUDGE

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| vs. | ) | |
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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This is a contract dispute. It revolves around the operation and effect of a particular clause of a real estate contract between the parties to this action. That clause is Paragraph 3(a) and it reads as follows:

> In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises, then and in that event, the Buyer must pay in full the outstanding balance on the contract prior to said transaction.

It is the position of Plaintiffs-Respondents that 1) the terms of Paragraph 3(a) have not been violated, and 2) the facts of this case do not operate to accelerate payments under the contract to the contract seller (Appellants).

Appellants contend 1) that the facts trigger acceleration of all payments under the contract, and 2) Respondents' failure to pay off the contract in full, having accelerated all payments, constitutes a material breach.

## STATEMENT OF PROCEEDINGS

Respondents filed a declaratory judgment action with the Third Judicial District Court of Salt Lake County, Utah, seeking, among other things, a declaration that the Respondent C & J Industries, Inc., be permitted to continue to make monthly payments under the contract as originally agreed and that the facts of the case did not operate to accelerate all future payments to become immediately due and owing. Appellants filed an answer to the Complaint, but did not counterclaim.

Inasmuch as there is no dispute of fact in this case, each party filed a motion for summary judgment.

The issues and law were extensively briefed. Respondents filed a Memorandum in Support of Plaintiffs' Motion for Summary Judgment (TR. 30-39) and Plaintiffs' Supplemental Memorandum in Support of Motion for Summary Judgment (TR. 57-6 Appellants filed a Memorandum in Support of Defendants' Motio for Summary Judgment and Defendants' Supplemental Memorandum in Support of Motion for Summary Judgment (TR. 70-76), and Memorandum (TR. 77-83).

On May 21, 1979, both Plaintiffs' and Defendants' motions were heard by the Honorable Christine M. Durham. The court reviewed the initial memorandums of law filed in support of the motions, and concluded that the parties should be provided an opportunity to research and brief the law regarding an additional issue not addressed in the initial memorandums, that issue being: "Does a Uniform Real Estate Contract constitute a sale of real property or an executory contract to consummate a sale?"

Both parties submitted memorandum of law with respect to this additional issue. On August 6, 1979, the court entered its order granting Plaintiffs-Respondents' motion for summary judgment and denying Defendants-Appellants' motion for summary judgment and motion for attorney fees. It is from this decision that Defendants-Appellants now take this appeal.

Defendants-Appellants do not make any specific assignments of error on appeal. It is assumed, however, that their position is either that the court erred in its interpretation of the law as it applied to the contract in question or that, having interpreted the law correctly, misapplied it to the facts.

## RELIEF SOUGHT ON APPEAL

Appellants seek to have the decision of the lower court reversed.

## STATEMENT OF FACTS

On or about April 13, 1978, Respondent C & J Indus Inc., entered into a real estate contract for the purchase f Appellants of 11 lots of real property, more particularly described in the contract which is Exhibit "A" to the Compla (TR. 6-9).

Pursuant to the terms of the contract, Respondent C & J Industries, Inc., has made monthly installment payment of $2,297.31 commencing June 1, 1978, and through and includi the present date. The purchase price is $220,000.00 plus interest at 9-1/2 per cent per annum. In addition to the monthly payments, made prior to Plaintiffs' motion for summar judgment (totalling $27,567.72), Plaintiffs-Respondents have also invested approximately $4,000.00 in improvements to the subject property.

On or about March 9, 1979, Respondents sold a smal portion of the property (i.e., 3 of 11 lots) to a third part for a total purchase price of $166,700.00, payable $15,000.0 down and the balance of $151,000.00 plus interest at 10 per cent per annum over an eight-year period in installments of $2,300.00 per month.

Appellants contend that this transfer operated to accelerate all future payments under the primary contract. Appellants further contend that Respondents' failure to pay the contract (the outstanding balance of which is approximat $213,000.00) constitutes a material breach thereof.

Paragraph 3(a) reads as follows:

> In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises, then and in that event, the Buyer must pay in full the outstanding balance on the contract prior to said transaction.

Some time in April of 1979, and after the transaction to which Appellants object, Appellants served upon Respondents a notice entitled "Notice to Reinstate the Terms of the Contract to Purchase by Payment of All Delinquent Amounts Due and Owing By Virtue of the Sale of Property Subject to Said Contract or Forfeit All Rights Under Said Contract."

## ARGUMENT

### I

### A UNIFORM REAL ESTATE CONTRACT CONSTITUTES A PROMISE TO CONVEY, TRANSFER, SELL OR ASSIGN, BUT DOES NOT CONSTITUTE A PRESENT SALE, ASSIGNMENT, TRANSFER OR CONVEYANCE.

The law holds that a purchase-money real estate contract such as the one between these parties (TR. 6-9) is an executory contract for a sale. It does not constitute a present sale, and, therefore, does not trigger the acceleration of the contract pursuant to Paragraph 3(a) thereof, and Respondents' refusal to pay off the total outstanding balance of the contract does not constitute a breach thereof.

The issue with respect to this particular aspect of the case is whether a Uniform Real Estate Contract constitutes a sale of real property or an executory contract to consummate

a sale. The focal point of that issue is: "What is a sale? In that regard, reference can usually be made to Black's Law Dictionary where we find the following definitions:

> A contract between two parties called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price of money, transfers to the latter, the title and possession of property. Butler v. Thomson, 92 U.S. 414; 23 L.Ed. 684. In re Franks Estate, 277 N.Y.S. 573, 154 Misc. 472 [other citations omitted.]
>
> A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of a general and absolute title, as distinguished from a special interest falling short of complete ownership. Arnold v. North American Chemical Co., 232 Mass. 196, 122 N.E. 283, 284; Falkner v. Town of South Boston, 140 Va. 517, 127 S.E. 380, 381. (Emphasis added.) Black's Law Dictionary, 4th Ed., p. 1503.

In short, it is obvious that a sale constitutes the transfer of absolute title. In 67 Am.Jur. 2d, "Sale", §8, we find a similar statement.

> A sale has been distinguished from a contract to sell. The latter was considered a contract whereby the seller agreed to transfer the property and goods to the buyer for consideration called the price. It has been said that under the Uniform Sales Act "a sale" implied and involved passing of title. Accordingly, there has been a material distinction between a sale and a mere executory contract for a sale. In the case of the former transaction, the title to the goods passed to the buyer; in the case of the latter, it remained with

> the seller. When an executory contract for a sale was performed with respect to the transfer of title, there was said to be a sale or an executed contract for sale.

The transfer of title as the essential element of sale is a principle of law of such an elementary nature that the courts have not addressed it on frequent occasion. The Utah Supreme Court expressed the principle 36 years ago in Union Portland Cement Co. v. State Tax Commission, 110 Ut. 135, 170 P. 2d 164 (1943). when it observed: "The essence of a sale is the transfer of title to goods from the seller to the buyer [citations omitted]."

Although the foregoing two references deal with the definition of a "sale" in the context of the transfer of title to goods, the principle is the same with respect to real property.

By its own terms, a uniform real estate contract does not permit the transfer of title from the seller to the buyer until all of the terms of the contract are performed and all of the payments contemplated by the contract are made. Paragraph 19 of the secondary contract (TR. 10-11) states:

> The Seller on receiving the payments herein reserved to be paid at the time and in the manner above-mentioned, agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above-described premises free and clear of encumbrances. . . .

In addition to the fact that there has been no transfer of title from Respondents a third party of the real property here in question, it is also helpful to consider the other

language of the contract (TR. 10-11). For example, Paragraph 2 states:

> That Seller, for the consideration herein mentioned, agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned, agrees to purchase the following described real property. . . . (Emphasis added.)

It is noteworthy that the language does not state "the Seller hereby sells and conveys to the Buyer, and the B hereby purchases the following described real property". Th language is prospective.

Again, turning to Black's Law Dictionary, we find the following:

> An executory sale is one which has been definitely agreed on as to terms and conditions which have not yet been carried into full effect in respect to some of its terms and details, as where it remains to determine the price, quantity or identity of the things sold, or to pay installments of purchase money, or to effect a delivery. [Citations omitted.] (Emphasis added.) Black's Law Dictionary, 4th Ed., p. 1504. See also Universal Sales Corp. v. California Press Mfg. Co., 128 P.2d 665 (Cal. 1942).

Obviously, in this case the contract in question h not yet been carried into full effect as there remains the obligation to pay installments of purchase money; consequent this contract constitutes an executory contract for the sale as opposed to a completed sale.

In the case of Noto v. Blasco, 198 So. 429 (1940), the plaintiff entered into a contract to purchase three lots of real property from Defendant. Plaintiff made a partial payment of $50.00 on the total contract price of $1,700.00. Defendant later prevailed upon plaintiff to release him from his contract to sell the lots. Plaintiff alleged that he was induced to release the contract on account of fraudulent misrepresentations of the defendant. He prayed for damages in an amount equal to the difference between his contract price and the higher price for which the property was sold by the defendant shortly after plaintiff gave his release. The court concluded that if the contract between the parties constituted a sale, then plaintiff could recover the benefit of his bargain (i.e., the difference between his contract and the contract by which the property ultimately sold). On the other hand, in the event the contract was not a sale but only a promise to sell, the plaintiff could only recover the partial payments made by him. Regarding this issue, the court stated,

> An agreement for the sale of real estate, which contemplates the passing of the property (or title) not immediately and by virtue of the agreement, but by an act to be executed at a later date, and which contains all of the elements of the sale, such as the price, the property and the consent of the parties, is merely a promise of sale, unless the intention of the parties clearly indicates that the agreement itself constitutes a completed sale.

> As there was no completed sale, and as the parties contemplated the completion of the sale in the future by the execution of a deed transferring the ownership, the contract in this case, according to the following cases, must be construed as a contract or promise of sale and not a completed sale, and the amount deposited must be considered as earnest money, and the purchaser limited to the recovery of the earnest money. [Citations omitted.] Ibid 432.

The third party contract (TR. 10-11) is an executor contract which contemplates the passing of title eight years hence when all of the terms of the contract shall be complete Until that time, there has been no sale, and the acceleration clause of Paragraph 3(a) of the primary contract does not beccome operative under the facts of this case.

The foregoing argument applies primarily to the operational effect of Paragraph 3(a) as it relates to the transaction between Respondents and a third party (TR. 10-11). Appellants, however, have raised a new issue and a new argument on appeal. Appellants argue that,

> The court must assume a sale, assignment or conveyance of C & J Industries, Inc.'s rights or interests to Glade N. James and A. Robert Collins in order for them to enter the contract executed by them on March 9, 1979 (Exhibit "B" p. 10). If there was a sale, assignment or conveyance by C & J Industries, Inc., to Glade N. James and A. Robert Collins, then it was a breach of Paragraph 3(a). Appellants' Brief, 8.

This argument is not one which Respondents now address because it was not plead, argued or submitted in any

fashion in the court below. The Court has repeatedly held and recognized that it will not consider a matter raised for the first time on appeal. Edgar v. Wagner, 572 P.2d 405 (Ut. 1977); State by and through Road Commission v. Larkin, 27 Ut. 2d 295, 495 P.2d 817 (1972); Riter v. Cayias, 19 Ut.2d 358, 431 P.2d 788 (1967); Hamilton v. Salt Lake County Sewerage Improvement District No. 1, 15 Ut.2d, 260 P.2d 235 (1964); Tygesen v. Magna Water Co., 13 Ut.2d 397, 375 P.2d 456 (1962); Carson v. Douglas, 12 Ut.2d 424, 367 P.2d 462 (1962).

II

EVEN IF THE THIRD PARTY CONTRACT TRANSACTION IN THIS CASE WERE CONSIDERED TO BE A PRESENT SALE, THE TRANSFER OF A SMALL PORTION OF THE TOTAL REAL PROPERTY SUBJECT TO THE PRIMARY CONTRACT DOES NOT ACCELERATE PAYMENTS UNDER THE CONTRACT OR VIOLATE THE PROVISIONS OF PARAGRAPH 3(a) THEREOF.

As mentioned, Paragraph 3(a) requires the buyer to pay off the contract in full in the event the buyer desires to transfer "Buyer's rights" under the contract. It is Respondents' contention and understanding the the broad language in question requires the contract to be paid in full in the event the buyer transfers all its rights under the contract. Appellants, on the other hand maintain that the language imposes an obligation to pay off the contract if any of the buyer's rights were transferred or any of the property sold, however small.

The construction of the language in contracts requ that the words be given their ordinary meaning, i.e., the meaning which they would convey to reasonable men. 17 Am.Ju "Contracts" §§243, 247.

> Stated in slightly different words, the language and acts of a party to a contract are to receive such a construction as at the time he supposed the other party would given to them or such a construction as the other party was fairly justified in giving to them and he will not at a later time be permitted to give them a different operation in consequence of some mental reservation. §248:641 (Emphasis added).

The words "Buyer's rights" without specific limitation or reservation denote the meaning of "all rights". Normally, words are thought to describe the whole unless oth wise stated. A grantor, for example, is said to convey all property described in the document of conveyance unless a pa cular portion thereof is specifically reserved. Similarly, "Buyer's rights" reasonably means all rights possessed by th buyer unless more narrowly or specifically defined. Had the parties agreed to a more narrow term in this regard, it woul have been a simple and logical matter to have stated,

> In the event Buyer desires to sell or assign, transfer or convey any of Buyer's rights under this contract or Buyer's interest in said premises, then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction. (Additional words underlined.)

The interpretation placed upon this language by Appellants flies in the teeth of reasonableness. Appellants maintain that the term in question would be violated and consequently a material breach of the contract would result upon the transfer or conveyance of any right of the buyer, however small or insignificant. This would require the payment of the entire unpaid balance of the contract if the buyer were to convey to a neighboring property owner a one-foot strip on which the neighbor could place a fence. Such an interpretation is not reasonable and does not serve the purpose it was originally designated to accommodate.

Although Respondents believe that the language in question is clear and denotes "all" of buyer's rights under the contract, Respondents also contend, in the alternative, that at the very worst the language is ambiguous. Assuming ambiguity for the sake of argument, the ambiguous language must be construed strictly against the drafter -- in this case it is the Appellants.

Wingets, Inc. v. Bitters, 28 Ut.2d 231, 500 P.2d 1007 (1972) was an action by the seller of real property against the buyers for recovery of the balance due on the contract price which seller had declared "immediately due and payable" on the ground that buyers were in default. The court stated that forfeiture is not favored in the law and that the buyers were entitled to the most favorable interpretation that could be placed upon the forfeiture provision by a person

of ordinary intelligence and understanding, and in light of existing circumstances. In ruling against the seller, the court applied the general rule of law that the provisions of the contract should be construed most strictly against the party who drafted the contract. See also Wells Fargo Bank N.A. v. Midwest Realty & Finance, Inc., 544 P.2d 882 (1975); Wagstaff v. Reinco, Inc., 540 P.2d 931 (1975).

In this particular instance, Appellants, or their attorney, drafted the contract in question, and therefore, its provisions (in particular Paragraph 3(a)) should be construed strictly against them and resolved in favor of Respondents, declaring the language to refer to the transfer of all buyer's rights.

Appellants contend in their brief that they do not seek a forfeiture in this case; it should be noted, however, that as previously mentioned the Appellants served upon Respondents a Notice to Reinstate Terms of Contract to Purchase by Payment of All Delinquent Amounts Due and Owing by Virtue of the Sale of the Property Subject to said Contract or Forfeit All Rights Under Said Contract. (Emphasis added.) Furthermore in the event the payments under the primary contract were accelerated and Respondents were required to pay off the outstanding balance (approximately $213,000.00), it could well be that Respondents would be unable to pay off the outstanding balance, in which case Appellants' only viable remedy would be to seek a forfeiture.

III

EVEN TAKING APPELLANTS' POSITION THAT RESPONDENTS BREACHED THE CONTRACT, THE "BREACH" WAS OF A MINOR NATURE AND DOES NOT EQUITABLY JUSTIFY AN ACCELERATION.

It is a well established principle of law that although a minor breach gives rise to an immediate cause of action for damages caused by the breach, it does not give rise to a cause of action for breach of the entire contract as urged by the Appellants. Viewing this principle from another perspective -- from the point of view of what has been done under the contract as opposed to what was not done -- the same principle is expressed as the doctrine of "substantial performance" which is simply the mirror image of the "minor-breach doctrine." It looks to the spirit of the contract and not the letter of it.

The question is not whether there has been a literal compliance, but whether there has been a substantial performance. This has long been the rule in equity. Accordingly, substantial and not exact performance accompanied by good faith is all the law requires in the case of any contract to entitle a party to recover on it.

> Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand and preserve the rights of the defendant on the other, by permitting a recoupment. 17 Am.Jur.2d "Contracts" §375:818.

This rule of law prevents the inequities of forfe where there has been substantial compliance while preservin the injured party's right to recover damages for the minor breach. It is important to note, however, that Appellants have not been damaged in any degree as a result of the contract to sell the three lots.

The question now becomes: "What is 'substantial performance', or what constitutes a 'minor breach'?" The answer is provided by the Restatement of the Law of Contract §275, pp. 402, 403. The Restatement lists six factors to be taken into consideration in determining whether a breach is material or minor in nature. The text of §275 is:

> In determining the materiality of a failure to fully perform a promise, the following circumstances are influential.
>
> (a) The extent to which the injured party will obtain the substantial benefit which he would have reasonably anticipated;. . .

Appellants as sellers of the property are entitled primarily to receive payment for their property in the amoun and at the intervals set forth in the contract ($220,000.00 at $2,297.31 per month with 9-1/2 per cent interest). That benefit has not been interrupted and is secure. It has not been jeopardized in the least as a result of the alleged "breach" of which Appellants complain.

> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;. . . Id.

Here again, while Appellants may argue that they have a cause of action for the contract to sell three lots, they have not been damaged in the least as a result thereof.

> (c) The extent to which the party failing to perform has already performed or made preparations for performance. Id.

The official comments to §275 state that,

> [W]here the failure is at the outset, a very slight failure is often sufficient to discharge the injured party. But even in that case, and more obviously if the failure of a promissor occurs after part performance by him, the question becomes one of degree. Both the amount that he has done and the benefit that the injured party has received are to be considered. Id. 403.

In this instance there has been substantial performance. Respondents have faithfully made the payments required by the contract, not to mention some $45,000.00 invested in inprovements on the property.

> (d) The greater or lesser hardship on the party failing to perform and terminating the contract; . . . Id.

In this regard the official comments are as follows:

> The question then to be answered is: Will it be more conformable to justice in the particular case to free the injured party [of the contract] or, on the other hand, to require him to perform his promise, in both cases giving him a right of action if the failure to perform was wrongful. Id. 403.

As indicated before, Respondents will suffer a severe hardship in having to pay the outstanding balance on the contract (presently approximately $213,000.00), which

constitutes the price for all 11 lots because Respondents sold 3 of them. The hardship becomes especially onerous by the fact that the proceeds from the 3-lot sale are not in hand but are to be received by contract over a period of 8 years. Also, there would be a substantial charge to Respondents for increased rates of interest of Respondents have to borrow money to pay off the $213,000.00.

In the event Respondents cannot obtain adequate financing to pay off the contract, Appellants will suffer the property to be foreclosed by judicial sale or forfeiture and Respondents will stand to lose most or all of their investment.

> (e) The willful, negligent or innocent behavior of the party failing to perform;. . . Id.

In the present instance, Respondents never understood nor do they now understand or believe, that the contract in question required them to pay off the outstanding balance in the event any portion of the property, however small, were sold to a third party. Certainly it cannot be said that the contract to sell 3 lots to a third party was a willful contravention of the **primary** contract.

> (f) The greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. Id.

Respondents have faithfully performed their obligations under the contract to date and will continue to do so in the future.

It is clear from the foregoing principles that the alleged wrong is not material to the contract. Appellants stand to receive the full benefit bargained for under the contract; they have not been damaged as a result of the alleged wrong; Respondents have substantially performed and would incur great hardship if the contract were terminated by the acceleration of payments; the contract to sell 3 lots in question was not done in willful disregard of the terms of the primary contract; and there exists no uncertainty as to the prospect of future performance by Respondents.

In Krentz v. Johnson, 343 N.E.2d 165 (Ill. C.A., 1976), the court considered an action by purchasers of real property seeking specific performance of the contract which had been declared forfeited by sellers for a default of a single payment. The court observed that the sum of $11,000.00 plus interest had been paid on the original contract price of $27,500.00. The buyers had also made substantial improvements on the property and had affected re-zoning of the entire property showing expenditures in the amount of $22,500.00. The default declared amounted to $182.81. On that basis, sellers attempted to foreclose the contract. The court stated,

> It has been stated generally, as defendants contend, that where a forfeiture has been declared in the manner prescribed in the contract the court will give effect to it. [Citations omitted.] It would appear, however, that the cases give effect to this rule when the result is not essentially unfair to either party. The equally familiar rule is that forfeitures are not

> favored by courts of equity and that parties will be relieved from a technical forfeiture of rights under a contract if injustice results from its enforcement.

Another case dealing with the same principle is Northwestern National Bank of Minneapolis v. Williamson, 545 F.2d 76 (8th Cir., 1976). This case involved two corporations, one of which acquired the other. The acquired company amended its employee pension trust so as to require assets to the trust to be transferred to the acquiring compan The acquiring company agreed to make all former employees of the acquired company eligible to participate in the new company's plan. Obviously, the intent was to benefit the acquired company's former employees. The acquiring company, however, did not fully comply in that it included only 112 of 117 employees of the former company in its own pension plan. The court found that the new company had "substantially performed" its obligation to include the former employer's employees in its own pension plan and, therefore, refused to deprive the new company of the entire fund.

As in Krentz and Northwestern National, supra, the Respondents in this case have substantially performed all of their obligations under the contract in queston; therefore, the contract should be enforced to allow them to continue to make regular monthly payments for the purchase of the property and to retain the possession, use and enjoyme thereof pursuant to the terms of the contract.

IV

APPELLANTS' POSITION WOULD WORK AN UNCONSCIONABLE RESULT TO RESPONDENTS' INTEREST.

Appellants maintain that "according to value", 75 per cent of the property sold by Appellants to Respondents has now been sold by Respondents to a third party. Appellants' Brief, p. 21. That assertion is fallacious in that it compares apples with oranges. Appellants are comparing the contract price between these parties with the contract price between Respondents and the third party. The fact is that only 3 of the 11 lots involved are the subject of the second contract. Appellants' position is also blind to the fact that Respondents have not received a lump sum of money in hand but that the contract price is to be paid out over a period of time (8 years).

Contrary to Appellants' assertion that no claim of unconscionability has been raised (Appellants' Brief, p. 21), Respondents argued in each memorandum submitted below that they will suffer a severe hardship in having to pay the outstanding balance on the contract (approximately $213,000.00), which constitutes the price for all 11 lots. That burden becomes more onerous by the fact that there would be a substantial charge to Respondents for the now higher rates of interest that Respondents would have to pay in order to obtain sufficient financing to pay off the contract.

Appellants' position is simply untenable. At the outset, they have asserted that Paragraph 3(a) of the contract between these parties would require Respondents to pay off

the entire unpaid balance of the contract if they were to se to a third party any portion of the 11 lots in question. Gi that interpretation, if the Respondents were to sell a one-f parcel of any of the property, the acceleration would operat

Appellants have now taken the argument an addition step further. With respect to the language of Paragraph 3(a which states in part that: "In the event Buyer desires to s assign, transfer or convey Buyer's rights. . ." Appellants now claim that the acceleration clause is triggered the mome the Respondents thought of the idea of selling the property any portion thereof to a third party. Thus, not only must Respondents pay the full contract price in the event they se any portion of the property, they must do so the moment the idea pops into their heads. It simply cannot be said that such an interpretation is reasonable or remotely similar to what the parties contemplated when they entered into these transactions.

V

APPELLANTS ARE ESTOPPED FROM ASSERTING RESPONDENTS' ALLEGED "BREACH".

It is widely recognized that a default in the performance of the contract may be waived and the injured party may accept or insist on performance after such breach of the contract. "The acceptance of the benefit under the contract with the knowledge of a breach thereof ordinarily constitutes a waiver of the wrong." 17 Am.Jur.2d "Contract

§44-1-908-910.

After Respondents received Appellants' 30-day notice of termination and cancellation of the contract, Appellants continued to demand that the subsequent monthly payments be made. Respondents complied; they have made all regular monthly payments to date as demanded and accepted by Appellants. Respondents urge, therefore, that Appellants have elected to continue to accept performance by Respondents according to the terms of the contract and have thereby waived their right to assert the alleged breach of contract arising out of the contract to sell the 3 lots to the third party.

VI

APPELLANTS ARE NOT ENTITLED TO AN AWARD FOR ATTORNEY FEES.

Appellants maintain that they are entitled to an award for attorney fees arising out of the present action. Appellants' petition for attorney fees should be denied on the basis of any one or all of the following reasons:

1. There has been no event of default or breach on the part of Respondents under the terms of the contract between these parties. In this regard, reference should be made not only to the arguments set forth in the briefs, but also to those set forth in the memorandums filed in support of the motions for summary judgment heard below.

2. Appellants failed to file a counterclaim seeking affirmative relief which would have provided the basis for seeking an award of attorney fees.

3. Appellants have maintained throughout these proceedings that it is an action to enforce a contract and not an action for breach and forfeiture. For the purpose of this argument, assuming that there has been a "sale" as contemplated by Paragraph 3(a) of the primary contract, such a "sale" would not constitute a default. It would merely tri acceleration of payments, a term of the contract. Respondent however, maintain that no event has occurred which constitute a "sale" or which would accelerate payments under the primary contract in any event.

4. This is an action for a declaratory judgment and not one for affirmative relief.

## CONCLUSION

The provisions of Paragraph 3(a) of the primary contract have not been violated by Respondents. There has been no sale of property.

Even assuming that a Uniform Real Estate Contract were construed to be a consummated sale, still there has been no violation of Paragraph 3(a) because that provision does no contemplate the conveyance, sale or transfer of simply a smal portion of the "Buyer's rights". Reasonably constructed, that paragraph leads one to conclude that it relates to the transfer, sale or conveyance of <u>all</u> of "Buyer's rights".

At the very worst, Paragraph 3(a) is ambiguous as to its intent and must be construed strictly against the Appellants inasmuch as they are the drafters of the contract.

Even if one assumes further that Paragraph 3(a) is triggered by the conveyance, sale or transfer of any portion of the subject real property, Respondents have substantially performed all of their obligations under the contract, and under the "minor-breach doctrine", the alleged wrong is not material to the contract.

Although a minor breach would give rise to an immediate cause of action for damages (which are nil in this case), it does not give rise to a cause of action for breach of the entire contract as urged by the Appellants. Appellants stand to receive the full benefit bargained for under the contract; they have not been damaged as a result of the alleged wrong; Respondents have substantially performed and would incur great hardship if the contract were terminated by the acceleration of payments; and there exists no uncertainty as to the prospect of future performance by Respondents.

For the foregoing reasons, Respondents respectfully petition this court to affirm the decision of the lower court.

Respectfully submitted,

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I hereby certify that I mailed two copies of the foregoing Respondents' Brief to T. Quentin Cannon, Attorney for Appellants, 510 Ten Broadway Building, Salt Lake City, Utah, this 13th day of December, 1979, postage prepaid.

Marilu Peterson