1980

David S. Grow v. Marwick Development, Inc., A Corporation; Daniel R. Southwick; Sterling Martell; Et Al. And Boardwalk Development Corporation : Brief of Respondents Boardwalk Development Corporation And Phoenix Development Corporation

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DAVID S. GROW,

Plaintiff-Appellant,

vs.

MARWICK DEVELOPMENT, INC., a corporation; DANIEL R. SOUTHWICK; STERLING MARTELL; et al.,

Defendants-Respondents,

and

BOARDWALK DEVELOPMENT CORPORATION,

Intervenor-Respondent.

#16675

BRIEF OF RESPONDENTS BOARDWALK DEVELOPMENT CORPORATION AND PHOENIX DEVELOPMENT CORPORATION

Appeal from the Judgment of the
4th District Court for Utah County
Honorable David Sam, Judge

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IN THE SUPREME COURT

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BRIEF OF RESPONDENTS BOARDWALK DEVELOPMENT CORPORATION AND PHOENIX DEVELOPMENT CORPORATION

STATEMENT OF NATURE OF CASE

This is an action by Appellant David S. Grow to obtain an Order declaring that all of Respondents' right, title and interest in and to real property, together with a downpayment in the amount of $75,000 and installment payments in the amount of $8,739.20, be forfeited. This action centers upon the interpretation of a Uniform Real Estate Contract.

DISPOSITION IN THE DISTRICT COURT

The Trial Court granted Summary Judgment in favor of Respondent Boardwalk Development Corporation, ruling that Boardwalk had a valid and existing interest in the property which was subject to a Uniform Real Estate Contract. The Court held that any alleged default on the Contract was timely cured--except for a slight difference in calculation--and that under these circumstances, forfeiture constituted a penalty.

RELIEF SOUGHT ON APPEAL

Respondents seek the following relief on appeal:

1. That the Amended Judgment of the Trial Court be affirmed and that Respondents be allowed to continue with their purchase of the property pursuant to a Uniform Real Estate Contract.

2. Alternatively, Respondents seek an Order from this Court affirming the Trial Court's ruling that forfeiture imposes a penalty upon Respondents and remanding the case to the Trial Court for an accounting of the exact sum due and payable to Appellant as of the date of the attempted forfeiture. Respondents should be granted a reasonable time to pay to Appellant any sum determined owing.

STATEMENT OF FACTS

Respondents Boardwalk Development Corporation and Phoenix Development Corporation object to Appellant's Statement of Facts upon the grounds that Appellant has misrepresented facts and has omitted material information which casts certain remaining facts in a false light. Respondents submit the following facts to supplement those provided by Appellant:

A. Identification of Parties and Contracts.

1. This action involves a Uniform Real Estate Contract, dated October 8, 1977 (herein "Contract") for the purchase and sale of property situated in Provo, Utah. The total sales price was $280,000.

2. Plaintiff-Appellant David S. Grow (herein "Grow") is the Seller pursuant to the Contract. Grow is purchasing the property on a contract from Ariel Davis, which contract, as of August 1, 1977, had an outstanding balance of approximately $175,000 (R. 6, Paragraph 6).

3. Defendants-Respondents Marwick Development, Inc., a corporation, Daniel R. Southwick and Sterling Martell are the Buyers pursuant to the Contract (herein collectively "Marwick").

4. Defendant-Respondent Boardwalk Development Corporation (herein "Boardwalk") entered into a contract

dated September 15, 1978, with Marwick for the purchase of the property. The purchase price was $400,000 (R. 154). Boardwalk intervened as a party-defendant in this action (R. 223).

5. Defendant-Respondent Phoenix Development Corporation (herein "Phoenix") purchased the interest of Daniel R. Southwick in the Contract and was substituted as a party-defendant herein in place of Mr. Southwick (R. 226).

B. Operative Facts

On or about October 8, 1977, Grow and Marwick entered into a Uniform Real Estate Contract (herein "Contract") (R. 6, 7). The property subject to the Contract was located in Provo, Utah. The total sales price was $280,000. The Contract was drafted by Grow's agent (R. 175, Paragraph 3).

Marwick's downpayment for the property was $75,000. $28,000 was paid to Grow pursuant to the Contract and $47,000 was received by Grow pursuant to an Exchange Agreement (R. 3, 6, 120). The property remained encumbered by a $175,000 obligation of Grow in favor of Ariel Davis leaving Grow an apparent equity of $30,000 (R. 6).

The payment provisions of the Contract provide as follows:

> 3. ...$205,000 plus accrued interest shall be paid in monthly installments of $1,747.44 until the balance is paid in full. Said payments are to commence on September 1, 1977, and each subsequent month to be due and payable on the first day of each month. (Emphasis added.)

Paragraph 11B of the Contract provides:

> At any time and for whatever length of time this contract may be delinquent or in default by Buyer, for any reason the interest rate on all amounts unpaid under this contract shall increase to eighteen percent (18%) per annum. (Emphasis added.)

As of April 14, Marwick had made payments totalling $8,739.20 representing the five (5) installment payments owing pursuant to Paragraph 3 of the Contract (R. 120, 121, 122).

Marwick failed to make the May 1, June 1, July 1 and August 1, 1978 payments in a timely manner (R. 70).

Grow informed Marwick by written notices dated May 15, 1978, and June 16, 1978, of its alleged defaults under the Contract and that it was in default in the following particulars:

1. Failure to pay reasonable attorney's fees in the amount of $80.00.

2. Failure to pay "delinquent charges under Paragraph 11B of the Contract" in an unspecified amount.

3. Failure to pay the "May 1, 1978, Contract payment."

4. Failure to pay the "June 1, 1978, Contract payment" (R. 87, 88, 90, 91).

Grow delivered to Marwick a written notice dated July 14, 1978, purporting to forfeit Marwick's interest in the property (R. 97).

Subsequent to its earlier Notice of Forfeiture, and apparently as a result of defects in earlier notices, Grow delivered another Notice of Default dated August 9, 1978, specifically allowing Marwick fifteen (15) days within which to cure the default under the Contract (R. 92). This notice for the first time itemized the "delinquent charges under the Contract" and sought an incredible $21,750.36 in addition to the amounts already paid (R 95). At the time the Notice of Default was sent, only nine (9) payments of $1,747.44 each had matured pursuant to Paragraph 3 of the Contract. Marwick had paid five (5) of these installments (R. 120, 121, 122). The Notice of Default provided that in the event Marwick failed to remedy its default, Grow would not convey the property and all payments made by Marwick "would be forfeited" (R. 92, 93).

On or about August 22, 1978--thirteen days after the Notice of Default--Marwick tendered to Grow

Central Bank and Trust Cashier's Check No. 117363 in the amount of $7,394.00. This check represented monthly payments for May, June, July and August of $1,747.44, together with eighteen percent (18%) interest thereon and attorney's fees in the amount of $300.00 (R. 37, 122). This check was held by Grow until October 13, 1978, at which time it was returned to Marwick (R. 37, 122).

Subsequent to Marwick's tender and while retaining the Cashier's Check, Grow served Marwick with a Notice of Forfeiture. On September 1, 1978, this Notice was personally served upon Marwick, together with a Complaint and Amended Complaint (R. 30, 31, 32). Curiously, the Complaint had been filed on July 18, 1978, but never served.

On September 18, 1978, Marwick entered into a Contract with Boardwalk for the sale of the property. The purchase price was $400,000 (R. 151).

Grow retained Marwick tender until October 13, 1978--approximately one month after the Boardwalk Contract was executed and Boardwalk's Notice of Interest was recorded--at which time it was returned to Marwick. Marwick promptly tendered to the Registry of the Court the Cashier's Check, together with the monthly payments on the Contract which were due (R. 37).

Grow filed a Notice of Lis Pendens on November 9, 1978, approximately two months after the Boardwalk Contract was executed and four months after the lawsuit was commenced (R. 45). At the time Boardwalk entered into its Contract, no Lis Pendens was recorded.

On April 12, 1979, Boardwalk was allowed to intervene as a party-defendant and Phoenix was substituted as a defendant in place of Daniel R. Southwick (R. 223, 226).

Boardwalk promptly moved for summary judgment in its favor that Grow's attempted forfeiture was ineffective as a matter of law and that Boardwalk had a valid interest in the property. The Trial Court granted Boardwalk's Motion for Summary Judgment and reinstated the Contract (R. 290).

C. Misrepresentations of Fact.

Boardwalk does not wish to supplement the record on appeal; however, Grow's brief contains substantial misstatements of fact which could mislead the Court and which can only be refuted by producing a summary of recorded documents filed with the Utah County Recorder. These documents are summarized in the Preliminary Title Report, Commitment No. 079-3901, attached hereto as

Appendix "A". The material misrepresentations made by Grow are as follows:

1. Statement. "Boardwalk...acquired [its] position with constructive notice and actual knowledge of the default history, the recorded forfeiture notices and the pendency of this lawsuit." (Appellant's Brief, p. 5)

A. Fact. No notice of forfeiture was ever recorded. (See, Appendix A.)

B. Fact. No Lis Pendens was recorded until November 9, 1978, nearly two months after Boardwalk purchased its interest in the property. (See, Appendix "A", Schedule B, Item 12.)

C. Fact. The record is devoid of any evidence showing that Boardwalk had knowledge of the forfeiture notices or default history.

2. Statement. "After 10 months marked only by two late payments, non-payment of taxes, bad checks, four payments not made at all...Buyers tendered to Appellant a cashier's check in the amount of $7,394.60. (Appellant's Brief, p. 5.)

Fact. During the 10-month time frame referred to by Appellant, nine payments were due and owing. As of April 14 1978, Marwick submitted and Grow accepted checks totalling $8,739.20, representing the five

installment payments payable pursuant to Paragraph 3 of the Contract in the amount of $1,747.44 each (R. 122, R. 94). On or about August 22, 1978, in response to a Notice of Default, Marwick tendered to Grow a Cashier's Check in the amount of $7,394.60, representing four monthly installment payments, together with interest and an attorney's fee in the amount of $300.00. Grow's own documents clearly demonstrate that he accepted more than "two late payments".

3. Statement. "On July 18, 1978, Appellant filed a Complaint initiating the above-captioned action" (Appellant's Brief, p. 4).

Fact. Although this statement is technically correct, it puts the facts in a false light. The record reveals that this Complaint was not served upon Marwick until September 1, 1978, at which time R. C. Palmer served the Complaint, Amended Complaint and Notice of Forfeiture on Marwick (R. 30, 31, 32).

4. Statement. "[A]ppellant's Motion for Partial Summary Judgment was denied by the Trial Court, the Honorable David Sam presiding, upon an express finding of 'genuine issues ...that should be considered at trial'" (R-312) (Appellant's Brief, p. 2).

Fact. The Court actually ruled that "genuine issues of material facts exist as to Plaintiff's Motion that should be considered at trial" (TR-312). The full quote is necessary to demonstrate that the Trial Court very carefully limited any ruling to Grow's Motion. No opinion was expressed as to whether Boardwalk was entitled to Summary Judgment. In fact Boardwalk was not even allowed to intervene as a party-defendant until the date of the hearing on Grow's Motion for Summary Judgment.

SUMMARY OF ARGUMENT

Respondents do not dispute the fact that Marwick was often dilatory in making monthly payments during the brief Contract term. They recognize and understand Grow's frustration with the payment history. However, Grow's frustration is not a sufficient legal basis to support the harsh remedy of forfeiture. Marwick timely tendered all delinquent payments owing on the Contract within the 15-day period allowed in Grow's Notice of Default dated August 9, 1978. Once the default was cured, forfeiture was not available as a remedy (Point I, infra).

Grow based his attempted forfeiture on an interpretation of Paragraph 11B which would require eighteen percent (18%) interest to be paid on the entire Contract

balance in the event of a default. This interpretation had the result of effectively tripling the tender necessary to bring the Contract current. Grow attributes this difference to "Specifically Implied Interest." This position is untenable and the Trial Court correctly ruled that this was not the clear meaning of Paragraph 11B (Point III, infra).

The Trial Court properly ruled that Grow's interpretation of Paragraph 11B, if accepted as true, would impose a penalty which is unenforceable at law. When broken down to its lowest common denominator, the amount sought by Grow was approximately 8,000% greater than the actual damages obtained pursuant to the Trial Court's ruling which applied the eighteen percent (18%) interest rate to delinquent payments only. Under the circumstances of this case, the damage figures sought by Grow bore no relation to actual damages suffered and were unconscionable. As such, Grow sought a penalty which was unenforceable at law or in equity (Point V, infra).

The Courts look with disfavor upon forfeitures and will seize upon slight circumstances to relieve a party from the oppression imposed by a forfeiture. The Courts will strictly construe a forfeiture provision

against the draftor. They will not impose a forfeiture unless the terms are clear and unequivocal. Clearly, the Court will not impose a forfeiture as a result of "specifically implied interest" (Point II. p. 15, infra). The Trial Court properly held that under these circumstances the remedy of forfeiture itself constituted a penalty which was unenforceable as a matter of equity or law (Point IV, infra).

As a final point, it is the province of the Court to reinstate the Contract when adequate compensation can be made (Point II A, infra). In the present case, installment payments have been made and tendered to the Registry of the Court. In addition, Boardwalk has purchased a Certificate of Deposit with Commercial Security Bank in the amount of $70,000 and would tender whatever amounts, pursuant to the direction of the Court, are necessary to clear the default (R. 151). Grow could clearly be made whole under any circumstances.

ARGUMENT

I.

ANY ALLEGED DEFAULT WAS TIMELY CURED AND FORFEITURE IS UNAVAILABLE AS A REMEDY

It is axiomatic that the default and forfeiture provisions in a contract are not self-executing. The

seller must give the buyer notice of and a reasonable period to cure any alleged default. LaMont v. Evjen, 25 Utah 2d 266, 508 P.2d 532 (1973). The August 9, 1976, Notice of Default upon which Grow of necessity must rely, specifically allowed Marwick fifteen (15) days to cure the default. At the time the Notice was sent, Marwick had paid five of the nine installments owing on the Contract. Within the fifteen (15) day period, Marwick tendered to Grow payment of all delinquent installments on the Contract together with eighteen percent (18%) interest thereon and attorney's fees in the amount of $300. Once this default was cured, Grow had no right to assert a forfeiture.

II.

THE COURTS LOOK WITH EXTREME DISFAVOR UPON THE REMEDY OF FORFEITURE

Forfeitures are "odious to the law". Morgan v. Sorenson, 3 Utah 2d 428, 286 P.2d 229, 231 (1955). The Courts will "seize upon slight circumstances" to relieve a party from the oppression imposed by a forfeiture. Jameson v. Wurtz, 396 P.2d 68, 74 (Alaska 1964). In Knickerbocker Life Ins. Co. of New York v. Norton, 96 U.S. 234, 242 (1878), the United States Supreme Court addressed the subject of forfeiture and held:

> Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made....

This Court has adopted a standard for interpreting forfeiture provisions consistent with the strong policy stated above. A forfeiture will not be enforced unless the terms are "clear and unequivocal." Wingets Incorporated v. Bitters, 28 Utah 2d 231, 500 P.2d 1007, 1010 (1972). The general principle that the provisions of a contract are construed against the draftor is strictly applied in a forfeiture setting. Wingets Incorporated, supra, at 500 P.2d 1010. In addition, an interpretation which provides an equitable result will be preferred over a harsh and inequitable one. Plain City Irrigation Co. v. Hooper Irrigation Co. 11 Utah 2d 188, 356 P.2d 625 (1960); Wingets Incorporated, supra, 500 P.2d 1010.

This is the standard of law with which Grow must live when he seeks the windfalls incident to forfeiture. Grow would have been made whole had he chosen to accelerate the Contract balance and to foreclose on the mortgage. Instead, in a Contract in existence for only

ten (10) months of its twenty-seven (27) year term, he sought to: (a) recover property which had subsequently been sold for $120,000 above the Contract sale price; (b) retain $75,000 representing a downpayment of twenty-five percent (25%) of the Contract sales price; and (c) retain $8,739.20 representing payments accepted on the Contract. This results in a windfall to Grow in excess of $200,000. There could be no better illustration of why the courts have adopted such a strong policy against forfeiture.

III.

THE TRIAL COURT CORRECTLY RULED THAT PARAGRAPH 11B APPLIED TO ONLY DELINQUENT PAYMENTS

The threshold issue on appeal is the interpretation and application of Paragraph 11B: Does the eighteen percent (18%) interest rate apply only to the delinquent installments or does it apply to the outstanding Contract balance? All parties submitted to the Court that the language of the Contract was clear and unequivocal. Grow and Boardwalk alternately moved and argued for summary judgment on these grounds (R. 65, 241, TR. 330). Counsel for Grow stated in his argument in opposition to Boardwalk's Motion for Summary Judgment:

> Second, I would like to respond to defendant's argument that the contract is clear on its face. I do believe it is clear on its face. It is clear that the 18 per cent interest applies to "all unpaid amounts" (TR. 330).

The accepted principle is that the interpretation of a contract is a question of law for the Court. Where the terms of the contract are clear and unambiguous, summary judgment is proper. Overson v. United States Fidelity and Guaranty 587 P.2d 149, 151 (Utah 1978). Although Grow argues on apeal that the Affidavit of Stephen Thomas creates an issue of fact which prevents summary judgment, this contention blithely ignores the provisions of Rule 56(e), Utah Rules of Civil Procedure, which requires affidavits to contain facts admissible in evidence. It is fundamental that parol evidence cannot be used to alter an unambiguous contract. Fox Film Corp. v. Ogden Theatre Co., 82 Utah 279, 17 P.2d 294 (1932).

Grow alleges that Marwick was in default because interest at the rate of eighteen percent (18%) per annum must be applied to the outstanding contract balance upon the occurrence of a default. Therefore, Grow was entitled to reject a timely tender representing four delinquent payments in the amount of $1,747.44 each,

together with interest thereon at eighteen percent (18%) per annum and attorney's fees in the amount of $300. The theory was that even though the amount of the alleged delinquent payments was only $6,989.76, plus interest and attorney's fees, a payment of $21,750.36--three times the "delinquent payments"--was necessary to bring the Contract current (R. 95). This is the practical effect of Grow's application of the eighteen percent (18%) interest rate.

Grow's position ignores the express language of the Contract. Paragraph 11B provides as follows:

> At any time, and for whatever length of time, this contract may be delinquent or in default by buyer, for any reason the interest rate on all amounts unpaid under this Contract shall increase to 18 percent (18%) per annum. (Emphasis added.)

When this provision is read in conjunction with Paragraph 3, it becomes clear that "amounts unpaid" refers only to the monthly payments. Paragraph 3 provides in pertinent part as follows:

> Said payments are to commence on December 1, 1977, and each subsequent month to be due and payable on the first day of each month. (Emphasis added.)

The only amounts "unpaid" under the Contract were the delinquent monthly payments as by definition those payments were the only amounts "due and payable." If Grow desired to collect eighteen percent (18%) on the entire contract balance, his remedy was to accelerate the payments and to foreclose as a mortgage pursuant to Paragraph 16C. However, this remedy would deny Grow the windfall profit he attempts to obtain through a forfeiture.

The law is clear that the written words of the Contract govern its interpretation. Holley v. Federal American Partners, 29 Utah 2d 212, 507 P.2d 381 (1973); Jensen's Used Cars v. Rice, 7 Utah 2d 276, 323 P.2d 259 (1958). The intention of the parties is to be ascertained in accordance with the ordinary and accepted meaning of the words used. Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221 (1958). The clear meaning of the words "amounts unpaid" is those amounts which were due and payable under the Contract. This is the clear meaning of the Contract and the interpretation that must be given. If Grow would have desired to collect eighteen percent (18%) per annum on the outstanding contract balance, he could have very easily used those precise words.

Throughout the Contract, Grow uses the language "contract balance" when he refers to total principal outstanding in the agreement. Paragraph 8 provides in part:

> 8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder ... (Emphasis added.)

Paragraph 13 provides:

> 13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, ... (Emphasis added.)

The words "contract balance" have an accepted and understood meaning and no doubt would have arisen had these terms been used. However, "unpaid amounts" has a different meaning and would more commonly and properly refer to a debt due than undue, which is the construction the Trial Court adopted. See, Magnolia Bldg. & Inv. Co. v. Sulzman, 57 Ohio App. 421, 14 N.E. 2d 633 (1937).

The frailty of Grow's interpretation of the Contract is evidenced by his own implementation of Para-

graph 11B. As can be observed from a review of the "Itemization of Charges under Contract and Automatic Interest Adjustment Provisions of September 15, 1977 Contract" which was served upon Marwick with the August 9, 1978 Notice of Default. Grow summarizes his exorbitant interest charges under a heading styled, "Interest Specifically Implied" (R. 95). This curiously contradictory caption classically illustrates the difficulty with the argument asserted by Grow in this case. To be enforceable, the language of the Contract must be clear and unequivocal. The law will not allow a forfeiture based upon "implied" terms or "specifically implied" interest.

IV.

THE INTERPRETATION URGED BY APPELLANT IMPOSES A PENALTY WHICH IS UNENFORCEABLE AT LAW

A. The Doctrine of Penalty Allows Reinstatement of the Contract.

This Court has specifically allowed the reinstatement of an installment land contract upon reasonable compensation being made to the seller. Call v. Timber Lakes Corporation, 567 P.2d 1108 (Utah 1977). See also, Croft v. Jensen, 86 Utah 13, 40 P.2d 198 (1935). In Call a basis for reinstatement was that a forfeiture constituted a penalty. The Court clearly did not limit

the application of the doctrine of penalty to only those amounts paid by the buyer under the Contract, but specifically prevented the seller from taking the land. In reaching its decision the Court applied the penalty standard enunciated in Jacobson v. Swan, 3 Utah 2d 59, 65, 278 P.2d 294, 298 (1954), to wit:

> It is now established in this state that where a forfeiture provision allows an unconscionable and exorbitant benefit to be retained by the seller which bears no reasonable relationship to the damages which have been sustained or reasonably could have been contemplated, it provides for a penalty or punitive damages which the courts of equity will not enforce.

This Court has evaluated two factors in determining whether a forfeiture is a penalty:

1. Does the benefit retained by the seller bear a reasonable relationship to the damages actually sustained or contemplated?

2. Is the benefit retained by the seller unconscionable and exorbitant?

An analysis of these tests clearly reveals that the forfeiture sought by Grow is a penalty which courts of equity will not enforce and the Trial Court so held.

B. The Benefits Retained By Grow Bear No Reasonable Relationship To Actual Damages.

The damages sustained by Grow in the event of default are easy to calculate. The interest rate on the Contract is nine and one-half percent (9-1/2%) per annum. Monthly payments are $1,747.44 per month. Thus, for each monthly payment not received, plaintiff's actual damages are in amount of the payment, plus an additional $13.83 per month attributable to interest on the amount unpaid. However, these damage figures are of little significance in the present case due to the fact that all delinquent monthly payments, together with interest at the rate of eighteen percent (18%) per annum and attorney's fees, were tendered to Grow within the time specified by the August Notice of Default.

The benefits received by Grow upon forfeiture are likewise easy to calculate. Grow would retain the $75,000 downpayment and the $8,739.20 in monthly payments received on the Contract from Marwick. In addition, Grow would receive property with a minimum value of $400,000--$120,000 more than Grow's Contract price--as evidenced by Marwick's Contract with Boardwalk. Thus, for a default which was timely cured, Grow attempts to obtain a windfall profit which exceeds $200,000. The $200,000 figure is over and above any actual damages suffered by Grow.

The relief sought by Grow is clearly unconscionable and exorbitant. This is especially true when viewed in the light that at the time of the alleged default, only nine monthly payments of $1,747.44 each had matured pursuant to the Contract, five of which had been paid prior to the Notice of Default and all of which were tendered to Grow prior to the service of the Notice of Forfeiture upon which Grow relies in his Amended Complaint. Grow's refusal to be compensated cannot be the basis for the extreme remedy of forfeiture.

V.

GROW'S INTERPRETATION OF PARAGRAPH 11B IMPOSES A PENALTY WHICH IS UNENFORCEABLE AT LAW OR IN EQUITY

The remedy of forfeiture constitutes a penalty as discussed in Part IV, infra. In addition, Grow, through his interpretation of Paragraph 11B, sought to impose another blatant penalty provision upon the Respondents. He sought to increase interest on the entire Contract from nine and one-half percent (9-1/2%) to eighteen percent (18%). This interest increase is solely for the purpose of punishing Respondents for a default.

The law is clear that a penalty provision in a contract is unenforceable. Jacobson v. Swan, supra; Reed

v. Armstrong, 6 Utah 2d 291, 312 P.2d 777 (1957). A penalty as compared to a liquidated damage sum involves a stipulated amount which is entirely disproportionate to the amount of damages actually sustained. See, Kay v. Wood, 549 P.2d 709 (Utah 1976). A penalty is a sum inserted in a contract not as a measure of compensation for its breach, but rather as a punishment for default. 22 Am. Jur. 2d, "Damages," §213.

In the case of a contract for the payment of money, a stipulation to pay a fixed sum in case of default is a penalty and as such unenforceable. The reason being that damages resulting from a late payment are readily ascertainable--the law awards interest on the unpaid amount. Reed v. Armstrong, supra, 312 P.2d 777, 778. When damages can easily be ascertained at the time the agreement is executed, it is impossible to contract for liquidated damages.

As illustrated earlier, at an interest rate of nine and one-half percent (9-1/2%) per annum, the actual interest damage suffered by Grow on a delinquent monthly payment would be $13.80 per month ($26.20 per month with an eighteen percent (18%) delinquency charge). These damages are easy to ascertain. Grow argues that an additional interest penalty averaging $2,175.03 per

month--8,302% of the actual interest damage--should be imposed whenever a default in the Contract occurs. The only reason for the imposition of this sum is to punish Marwick for a late payment. Such a result is clearly unconscionable, bears no relationship to actual damages and is unenforceable at law or in equity.

CONCLUSION

The Trial Court properly granted Boardwalk's Motion for Summary Judgment. All amounts owing on the Contract had been tendered prior to the service of a forfeiture notice and the default had been cured. To hold otherwise would have imposed a blatant penalty upon Respondents.

Grow's choice of remedies clearly indicates his intention to obtain an unconscionable and exorbitant benefit which bears no relationship to actual damages. If Grow had desired to be compensated for his damages, he would have invoked the remedies of Paragraph 16C of the Contract allowing for the acceleration of payments and foreclosure as a mortgage. The only reason to impose a forfeiture upon Marwick and innocent third parties such as Boardwalk is to allow Grow to retain a substantial down-payment and to receive a windfall profit which exceeds

$200,000. Grow unsuccessfully urged this result upon the Trial Court. The Trial Court ruled that such a result was so unjust and oppressive, that it was not enforceable in equity or at law.

If this Court finds that the Trial Court erred in its interpretation of Paragraph 11B, the case should be remanded for an accounting to determine what sums were actually owing on the Contract. The Trial Court's decision prohibiting a forfeiture should be affirmed and Respondents should be given a reasonable opportunity to bring the Contract current.

DATED this 31st day of March, 1980.

Respectfully submitted,

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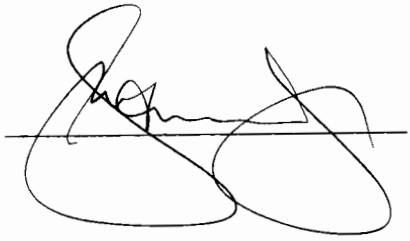
CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing Brief of Respondents Boardwalk Development Corporation and Phoenix Development Corporation were mailed postage prepaid, to Ronald R. Stanger, Esq., 38 North University, Provo, Utah 84601 and C. Keith Rooker, Esq., and Neal B. Christensen, Esq., Martineau, Rooker, Larsen & Kimball, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, this 31st day of March, 1980.



Commitment No. 079-3901 copy

St. Paul Title Insurance Corporation

ST. PAUL TITLE INSURANCE CORPORATION, a Missouri corporation, herein called the Company, for a valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies commited for have been inserted in Schedule A hereof by the Company, either at the time of the issuance of this Commitment or by subsequent endorsement.

This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate THREE MONTHS after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company.

IN WITNESS WHEREOF, ST. PAUL TITLE INSURANCE CORPORATION has caused this commitment to be signed and sealed by its duly authorized officers, the commitment to become valid when countersigned by an authorized signatory as of Effective Date shown in Schedule A.

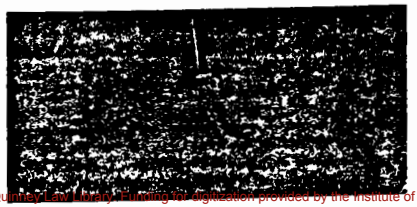
ST. PAUL TITLE INSURANCE CORPORATION

BY: _____
CHAIRMAN OF THE BOARD

ATTEST: _____
SECRETARY

COUNTERSIGNED:

BY _____
AUTHORIZED SIGNATURE



ALTA COMMITMENT – 1966

SCHEDULE A

Commitment No.

1. Effective date: December 20, 1979 @ 8:00 A.M.

Amount

$ To Be Determined

2. Policy or Policies to be issued:

_____ ALTA Owner's Policy Form A-1970 (Amended 10-17-70)

(a) X ALTA Owner's Policy Form B-1970 (Amended 10-17-70)

_____

Proposed Insured:

_____ ALTA Loan Policy (Amended 10-17-70)

(b) _____

_____

Proposed Insured:

3. The estate or interest in the land described or referred to in this Commitment and covered herein is:

Fee Simple

4. Title to the ~~Fee Simple~~ estate or interest in said land is at the effective date vested in:

ARIEL R. DAVIS and DOROTHY JEAN HARDING DAVIS, his wife, as joint tenants and tenants in common, with full rights of survivorship.

5. The land referred to in this Commitment is situated in the ~~County~~ of ~~Utah~~

State of ~~Utah~~, and is described as follows:

See Exhibit "A"

Schedule A consists of _____ pages

EXHIBIT "A"

Commencing 1299.77 feet North along section line and 893.39 feet West perpendicular to section line from the East quarter corner of Section Section 36, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence South 1°15' West 130.0 feet; thence South 4°15' West 124.00 feet; thence Northwesterly 336 feet, more or less along the arc of a spiral to the right which is concentric with and 80 feet radially distant northeasterly from a portion of a 600 foot ten chord spiral for a 10°00' curve (Note: Tangent to said spiral at point of beginning bears approximately North 46°45' West) to a point 80 feet perpendicularly distant Northeasterly from the center line of said North bound traffic lanes at Engineer Station 217+42.46; thence North 36°30' West 415 feet, more or less, to said easterly railroad right of way line; thence North 4°53' East 223.7 feet; thence South 39°03' East 722.59 feet along southerly boundary of BYU property to the place of beginning.

ALSO KNOWN AS:

Beginning on the Northeasterly right of way line of a Utah State Expressway at Right of Way Marker 217+42.46, said point being West 1116.83 feet and North 1281.28 feet from the East Quarter corner of Section 36, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North 36°30' West along said right of way line 415.66 feet to the East right of way line of the Rio Grande Railroad; thence North 4°09' East along said railroad right of way 223.70 feet; thence South 39°03' East along the Southerly boundary of the BYU property 722.59 feet; thence South 1°15' West 130.00 feet; thence South 4°15' West 131.26 feet to a point on the Northeasterly right of way line of a Utah State Expressway; thence along the arc of a spiral curve to the right 336.00 feet, more or less, the said curve being concentric with and 80 feet radially distant, Northeasterly from a portion of a 600 foot ten chord spiral for a 10°00' curve the long chord of which bears North 38°38' West 338.95 feet to point of beginning.

ALTA COMMITMENT – 1966

SCHEDULE B-II
(EXCEPTIONS)

Commitment No. E

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in records or attaching subsequent to the effective date hereof but prior to the date the proposed quires for value of record the estate or interest or mortgage thereon covered by this Commitment.

2. (A) Rights of dower, curtesy, homestead or other marital rights of spouse, if any, of any individual (B) Any lien, or right to lien, for services, labor, or material heretofore or hereafter furnished impos and not shown by the public records. (C) Survey: Any encroachments, measurements, party wall facts which a correct survey of the premises would show. (D) Easements, or claims of easements by the public records. (E) Rights or claims of parties in possession not shown by the public records

3. All assessments and taxes for the year 19 79 and all subsequent years. Taxes for the year are delinquent in the amount of $1,372.78, plus penalty and interest. Taxes the year 1978 and 1977 have been paid. Serial No F 1495-18-D.

4. Notice of Existing Uniform Real Estate Contract, dated October 8, 1976, wher ARIEL R. DAVIS gives notice of his interest in and to said property by way of unrecorded Uniform Real Estate Contract, dated October 8, 1976, by and betwe DAVID GROW, as Seller, and ARIEL R. DAVIS, as Buyer. Said Notice recorded, Entry No. 26547, in Book 1505, at Page 50 and re-recorded October 28, 1976, Entry No. 27909, in Book 1507, at Page 606, Utah County Recorder's Office.

5. Notice of Existing Uniform Real Estate Contract, dated January 20, 1978, whe MARWICK DEVELOPMENT, INC., a corporation, DANIEL R. SOUTHWICK, and STERLING MARTELL, jointly and severally give notice of their interest in and to said property by way of an unrecorded Uniform Real Estate Contract, dated October 1977, by and between DAVID S. GROW, as Sellers, and MARWICK DEVELOPMENT, IN corporation, DANIEL R. SOUTHWICK, and STERLING MARTELL, jointly and severall Buyers. Said Notice recorded January 25, 1978, as Entry No. 3174, in Book 1 Page 408, Utah County Recorder's Office.

6. Notice of Existing Uniform Real Estate Contract, dated September 18, 1978, w BOARDWALK DEVELOPMENT CORP. give notice of their interest in and to said pro by way of an unrecorded Uniform Real Estate Contract, dated September 18, 19 and between MARWICK DEVELOPMENT, INC., as Sellers, and BOARDWALK DEVELOPMENT as Buyers. Said Notice recorded September 20, 1978, as Entry No. 38015, in 1682, at Page 456, Utah County Recorder's Office.

7. Notice of Existing Uniform Real Estate Contract, dated June 2, 1978, wherein JENSEN gives notice of his interest in and to said property by way of an unre Uniform Real Estate Contract, dated June 2, 1978, by and between STERLING MA and DANIEL SOUTHWICK, as Sellers, and ALAN JENSEN, as Buyers. Said Notice re June 7, 1978, as Entry No. 22119, in Book 1652, at Page 794, Utah County Rec Office.

8. Notice of Interest in Real Property, dated November 8, 1978, wherein CENTUR GOLDEN WEST, INC., a Utah Corporation gives notice of their interest in and property by way of an Sales agency contract, dated July 14, 1978, by and betwe CENTURY 21 GOLDEN WEST, INC., a Utah Corporation, as listing broker and MARW DEVELOPMENT CORP., DANIEL R. SOUTHWICH and STERLING MARTELL, as owner. Said recorded November 9, 1978, as Entry No. 45239, in Book 1696, at Page 28, Utah County Recorder's Office.

Schedule B-II consists of pages.

44-044

9. Assignment of Uniform Real Estate Contract, dated April 4, 1979, wherein DANIEL R. SOUTHWICK, Assignor, assigns, transfers and conveys his interest in and to the subject property by way of an unrecorded Uniform Real Estate Contract, dated October 18, 1977, by and between DAVID S. GROW, as Seller, and MARWICK DEVELOPMENT INC., a orporation, DANIEL R. SOUTHWICK and STERLING MARTELL, jointly and severally, as Buyer, to REPURLIC INVESTMENTS, as Assignee. Said Assignment of Contract recorded April 4, 1979, as Entry No. 12557, in Book 1732, at Page 876, Utah County Recorder's Office.

10. Assignment of Uniform Real Estate Contract, dated April 1, 1979, wherein DANIEL R. SOUTHWICK, Assignor, as to an undivided one-half interest, assigns, transfers and conveys his interest in and to the subject property by way of an unrecorded Uniform Real Estate Contract, dated September 16, 1977, by and between DAVID S. GROW, as Seller, and MARWICK DEVELOPMENT, INC., and DANIEL R. SOUTHWICK and STERLING MARTELL, as Buyer, to PHOENIX DEVELOPMENT CORPORATION, as Assignee. Said Assignment of Contract recorded April 6, 1979, as Entry No. 12917, in Book 1733, at Page 537, Utah County Recorder's Office.

11. Assignment of Uniform Real Estate Contract, dated September 12, 1979, wherein STERLING MARTELL, MARTELL, of Orem, Utah County, Utah, Assignor, assigns, transfers and conveys his interest in and to the subject property by way of an unrecorded Uniform Real Estate Contract, dated October 18, 1977, by and between DAVID S. GROW, as Seller, and MARWICK DEVELOPMENT, INC., a corporation, Daniel R. Southwick and Sterling Martell, jointly and severally, as Buyer, to DAVID MCKELL, MCKELL of Provo, Utah County, Utah, as Assignee. Said Assignment of Contract recorded September 12, 1979, as Entry No. 35992, in Book 1776, at Page 884, Utah County Recorder's Office.

12. Notice of Lis Pendens, by and between DAVID S. GROW, as Plaintiff vs. MARWICK DEVELOPMENT, INC., a corporation, DANIEL R. SOUTHWICK; STERLING MARTELL; JOHN DOE I, II, and III; and JANE DOE I, II, and III; and all known heirs, devisees, legatees, creditors, successors and assigns of said named Defendants, or any of them in case they or any of them, are deceased; and all other persons unknown claiming any right, title, interest in or lien or cloud upon the real property described in Plaintiff's Complaint adverse to the Plaintiff's ownership. Said Notice of Lis Pendens recorded November 9, 1978, as Entry No. 45264, in Book 1696, at Page 67, Utah County Recorder's Office.

13. Notice of Lis Pendens, by and between DAVID S. GROW, Plaintiff, vs. MARWICK DEVELOPMENT, INC., et al., as Defendants. Said Notice of Lien recorded September 19, 1979, as Entry No. 37028, in Book 1778, at Page 741, Utah County Recorder's Office.

14. Subject to the effects of that certain judgment wherein there was a determination of existing property interest in and to real property. (Judgment dated August 29, 1979, recorded September 9, 1979, as Docket No. 49549, in Book 28, at Page M-6, Utah County Clerk's Office.)

NOTE: The following names have been checked for judgments:

1. Sterling Martell
2. Daniel R. Southwick
3. Phoenix Development
4. David S. Grow
5. Marwick Development

No unsatisfied judgments have been filed in the past eight years, EXCEPT TH
FOLLOWING:

Judgment against DAVID GROW, STEVEN L. GROW, et al KING HENRY APARTMENTS, a
vs. STATE TAX COMMISSION, as Creditor. Creditor awarded $43.91, plus penal
interest. Said Judgment recorded August 14, 1979, as Docket No. A-27-283,
28, at Page G-3, Utah County Clerk's Office.

BRIGHAM YOUNG
UNIVERSITY
17619-62 (24)

925p620

N1°08'E 551.0'

S0°39'10" 624.3'

This Plat is made solely for the purpose of assisting in locating the land, and the company assumes no liability for variation, if any, with an actual survey.

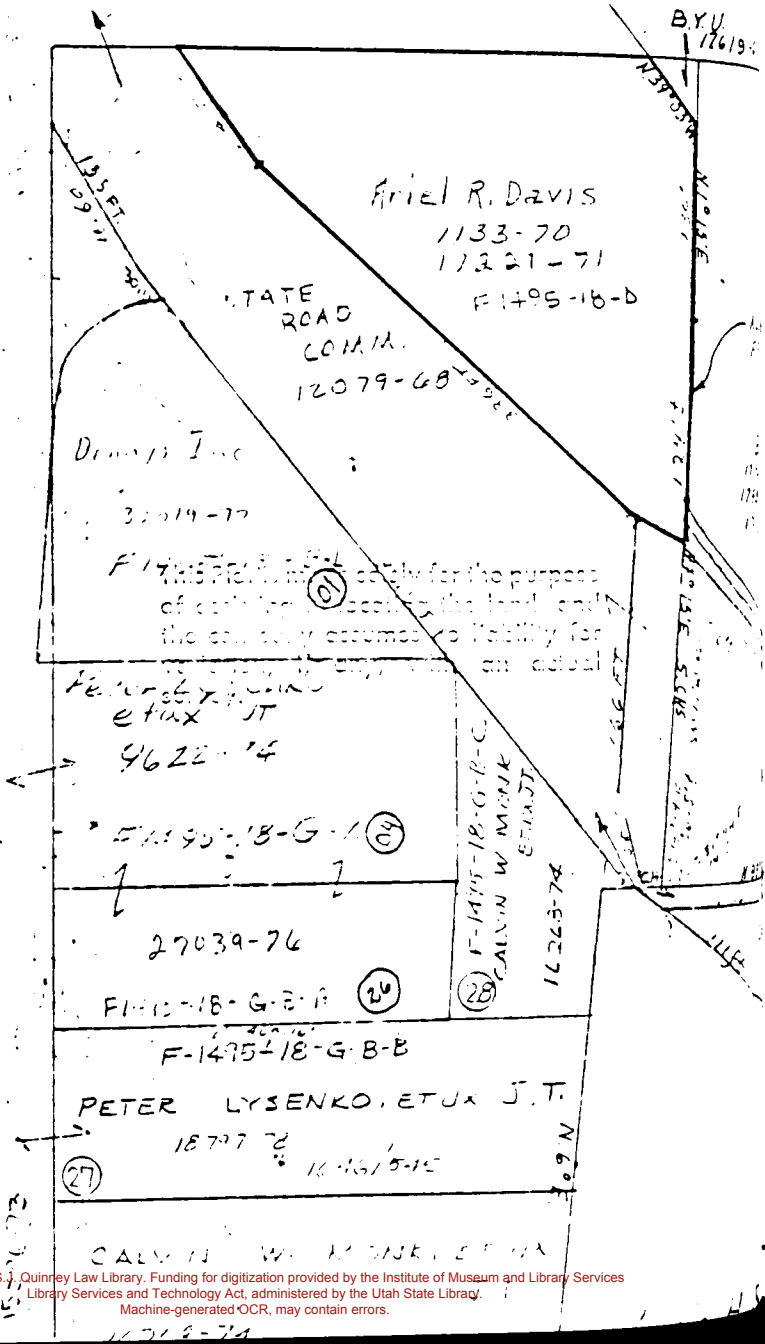
S.0°21'E 503.3#'

S.65°22' M.E.0.6EN

Ariel K. Davis
et ux E.T.
1133-70 (6)
F1495-18-D

12079 W

SE 1/4 OF NE 1/4 Section 36



Conditions and Stipulations

1. The term mortgage, when used herein, shall include deed of trust, trust deed, or other security instrument.

2. If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to Paragraph 3 of these Conditions and Stipulations.

3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions, the Conditions and Stipulations, and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

4. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

St. Paul Title Insurance Corporation

Commitment
For Title