

1980

Kenneth K. Bradford and Tammy Bradford v.
Michael Alvey and Vaughn Alvey, D/B/A C.
Howard Alvey & Sons, A Partnership; and Michael
E. Crowley, A General Partner, D/B/A Micro
Investment : Brief of Respondent

Utah Supreme Court

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Ronald L. Poulton; Attorney for Respondents; Randall S. Feil; Attorney for Respondents Michael Alvey and Vaughn Alvey;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH K. BRADFORD and :
TAMMY BRADFORD, his wife, :

Plaintiffs- :
Appellants, :

vs. :

MICHAEL ALVEY and :
VAUGHN ALVEY, d/b/a :
C. HOWARD ALVEY & SONS, :
a Partnership; and :
MICHAEL E. CROWLEY, a :
General Partner, d/b/a :
MICRO INVESTMENT, a Utah :
Limited Partnership, :

Case No. 16829

Defendants- :
Respondents. :

RESPONDENTS' BRIEF

Appeal from the Judgment in the Third Judicial
District Court of Salt Lake County, State of Utah

Honorable Dean E. Conder, Judge

Ronald L. Poulton
9 Exchange Place, Suite 520
Salt Lake City, Utah 84111

Attorney for Respondents
Michael E. Crowley and
Micro Investment

Randall S. Feil
2000 Beneficial Life Tower
Salt Lake City, Utah 84111

Attorney for Respondents Michael Alvey and
Vaughn Alvey

Grant A. Hurst
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

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Attorney for Respondents Michael Alvey and
Vaughn Alvey

Grant A. Hurst
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

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General Partner, d/b/a :
MICRO INVESTMENT, a Utah :
Limited Partnership, :

Defendants- :
Respondents. :

DEFENDANTS-RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This is an action brought by the Appellants against the Respondents in which the Appellants seek specific performance or in the alternative for damages for the alleged breach of a real estate Earnest Money Agreement.

DISPOSITION IN THE LOWER COURT

The trial court entered judgment in favor of the Respondents on the ground that the Appellants failed to obtain financing for the purchase within a reasonable time as required by the Earnest Money Agreement.

RELIEF SOUGHT ON APPEAL

The Respondents seek to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

In February of 1978, the Appellants, Kenneth and Tammy Bradford made an offer to purchase a home from the Respondents, Michael and Vaughn Alvey, d/b/a C. Howard Alvey & Sons (R. 371). The home was under construction on Lot 95 of the Shiloh subdivision located in Salt Lake County. (R. 371, Exhibit 1) Michael Herzog, a real estate agent employed by Mid-Valley Investment, a corporation, acted as the Appellants' agent in preparing an Earnest Money Receipt and Offer to Purchase Agreement on the home. (R. 372, 397, 443) The Appellants inserted in the Earnest Money Agreement a condition which read, "Subject to Buyer obtaining financing (FHA)." (R. 373, 397) The Respondents, Alvey accepted Bradfords' offer as it was presented by Herzog. (Exhibit 1).

Appellants were familiar with the clause "Subject to Buyer obtaining financing", having inserted the same clause in one of their two prior purchases of real property. (R. 410-11) Appellants concurred with their real estate agent that it was in their interest to insert the subject to financing clause. (R. 397) Appellants purpose in inserting the clause was to enable them to avoid all obligations under the Earnest Money Agreement unless or until they obtained a loan commitment. (R. 375, 406)

A few days after the Earnest Money Agreement was submitted and accepted by the Respondents Alvey, Appellants' real estate agent make an appointment for them to commence the loan application process at American Home Mortgage. (R. 375) During this meeting the Appellants discussed the qualifications for a home loan but did not make application for a loan. (R. 375) Appellants knew that prequalification was different from obtaining a commitment on a loan and that after the initial meeting at American Home Mortgage, Appellants were aware that they had not obtained a loan commitment. (R. 419) Despite their obligation to obtain financing, the Appellants made no effort to do so and in the Fall of 1978, the Appellants purchased another home in Salt Lake County. (R. 407-08) Subsequently, the Appellants sold that home and made inquiry of the construction foreman when the home subject to the Earnest Money Agreement would be completed, but still the Appellants made no effort

to procure financing for the home (R. 419, 441, 386, 389, 397).

In March of 1979, the Respondent Micro Investment, through its General Partner, Michael E. Crowley, gave an Earnest Money Receipt and Offer to Purchase to the Respondents Alvey, covering the entire Shiloh subdivision, including the home contracted on Lot 95. (Ex. 11) The Micro Investment Earnest Money Agreement indicated that the home on Lot 95 was "pre-sold". (R. 452)

The term "pre-sold" was not intended by the Respondents Alvey to express any opinion as to the validity of the Appellants' Earnest Money Agreement, only that an Earnest Money Receipt had been received. (R. 457) In fact, Respondents Alvey had stated to the Respondents Crowley that the Appellants' Earnest Money Agreement would probably not be an obligation of Respondent Micro Investment because Respondent Alvey had been informed that the Appellants did not want to go forward with the sale. (R. 452) The only reason the Earnest Money Agreement was listed by the Respondents Alvey was to make a full and complete disclosure to the Respondent Micro Investment of the history of the subdivision. (R. 457-58) The term "pre-sold" was understood by the Respondent Crowley to mean only that Micro Investment would pay the seller's portion of any real estate commission on sales of homes already subject to valid Earnest Money Agreements. (R. 508-09)

The Appellants contacted the Respondent Crowley during the month of April 1979, regarding the Earnest Money Agreement. (R. 394) During the conversation, Respondent Crowley indicated that he would not honor the Earnest Money Agreement because the Appellants had made no effort to secure a loan committment during the preceeding thirteen months. (R. 509) Thereafter, the Appellants commenced this law suit, still having never procured a loan committment. (R. 419)

ARGUMENT

In this appeal, the Appellants alleged three errors of the trial court. The first error alleged is that the trial court erred in finding that the Appellants failed to obtain financing as required by the Earnest Money Agreement within a reasonable time. The Respondents' reply to this allegation is addressed in Point I.

Second, the appellants allege that the trial court erred in sustaining respondents' objection on the ground of hearsay to the Appellants' attempts to testify as to statements made by a real estate agent. Respondents address this alleged error in Point II.

Finally, error is alleged in the trial court's refusal to permit Appellants to amend their complaint after trial pursuant to U.R.C.P. 15(b). This issue is addressed in Point III.

POINT I

THE RECORD ON APPEAL DOES NOT CLEARLY PREPONDERATE AGAINST THE FINDING THAT THE APPELLANTS FAILED TO USE REASONABLE DILIGENCE TO OBTAIN FINANCING AND THEREFORE THE TRIAL COURT RULING MUST BE AFFIRMED

The trial court properly ruled that where an Earnest Money Agreement provides that payment of the balance of the purchase price is conditioned upon the securing of a loan, an implied condition precedent is imposed on the buyer to use reasonable diligence to procure the loan. Anaheim Company v. Holcombe, 246 Or. 541, 426 P.2d 743 (1967); Lach v. Cahill, 85 A.2d 480, 482 (Conn. 1951); Annot., 81 ALR 2d 1338 (1962). If the condition precedent is not performed within the time granted by the agreement, then there is no binding obligation on either party. Baker v. Fell, 144 S.W. 2d 255, 257 (Texas App. 1940); Mecham v. Nelson, 551 P. 2d 529, 533 (Idaho 1969); Highland Plaza, Inc. v. Viking Investment Corp., 2 Wash. App. 192, 467 P.2d 378, 383 (1970). Because the Earnest Money Agreement in this case did not state when the Appellants had to obtain financing, the trial court ruled that the Appellants had to obtain financing within a reasonable time.

In Commercial Security Bank v. Johnson, 173 P.2d 277, 281 (Utah 1946), this Court defined reasonable time as, "So much time as is necessary, under the circumstances, to do conveniently what the contract or duty required should be done in a particular case."

Additionally, when the remedy of specific performance is sought, the court must find that the party requesting such

remedy has fully and fairly performed all of the conditions which he has agreed to perform under the contract. Larson v. Larson, 129 N.W. 2d 566, 567 (N.D. 1964). As this court stated in Fischer v. Johnson, 525 P.2d 45, 46 (Utah 1974):

Specific performance is a remedy of equity; and one who invokes it must have clean hands in having done equity himself. That is he must take care to discharge his own duties under the contract; and he cannot rely on any mere inconvenience as an excuse for his failure to do so. Even if inconvenience or difficulty is encountered, he must make an effort to perform, or to tender performance, which manifests reasonable diligence and bona fides his desire to keep his own promises.

After having heard and considered the evidence produced at trial, the trial court held that the Appellants failed to use reasonable diligence to obtain a financing agreement.

The Appellants commence their argument against the trial court ruling by correctly stating that the request for specific performance of the agreement creates an equitable action which permits this Court to review both the law and the facts of the case. However, Appellants fail to set forth the relevant standard of review established by this court. In Timpanogas Highland, Inc. v. Harper, 544 P.2d 481, 483 (Utah 1975), this Court in reviewing a trial court's refusal to give specific performance of an Earnest Money Agreement stated:

Even though we may review the facts, the well established and long followed rule, is that due to the prerogative of the trial court as the initial trier of the facts, and his advantaged position to judge the credibility of the witnesses

and the evidence presented, we indulge the trial court with considerable latitude in those matters. Therefore, we do not review in the manner plaintiff suggests: To determine whether we would agree that the 'evidence fairly preponderates in favor of the findings.' But due to the tolerance indulged as just stated, we do not reverse unless we are persuaded that the evidence clearly preponderates against the findings.

Therefore, in order for the Appellants to prevail on appeal, this Court must find that the evidence clearly preponderates against the Lower Court's finding that the Appellants failed to use reasonable diligence to do what the contract required them to do. The record of the proceedings below, however, provides firm support for the trial court's ruling.

Initially, the importance of the subject to financing clause to the Appellants, as buyers, and to the Respondents, as sellers, must be understood. The Appellants in this case were sophisticated buyers. From previous experience they knew that the subject to financing condition would give them a way out of the Agreement in the event that they decided not to go forward with the purchase. (R. 375, 406) And in their prior experience they took immediate steps to satisfy the financing condition precedent. (R. 411)

It is also important to understand that the Respondents as building contractors must have the financing condition satisfied as soon as possible. First, a builder, such as the Respondents Alvey, is restricted by a lender as to the number of speculation homes, those commenced without an identified buyer, which

may be under construction at one time. (R. 472) Once an offer is received on a speculation house, such as the house on Lot 95, and the buyer obtains a commitment for financing, then the lender no longer considers the house as a speculation house for purposes of determining whether or not the builder is entitled to commence another house on a speculation basis. (R. 472-73)

Second, a builder must be assured that the buyer has the financial resources to complete the purchase before the builder makes improvements suited to the particular taste of the Buyer which would affect the marketability of the house in the event the buyer declines to complete the purchase. (R. 474)

Third, once an offer is received on a house, the house is taken off the real estate market listing board and if the buyer fails to take immediate steps to obtain financing and is later unable to obtain financing then the builder is deprived of valuable time and exposure necessary to market the property. (R. 491) For these reasons it was the general practice of the Respondents Alvey to either require the buyer to make the offer subject to financing which would thereby require the buyers to obtain proof of their ability to complete the transaction or the Respondents Alvey would insert a 72 hour clause which stated that if a second offer were received by the Respondent on the home, then the first buyers would have 72 hours to tender payment for the home or the second offer could be accepted by the builder. (R. 474) Here the 72 hour clause was not

inserted by Respondents Alvey because the offer was subject to Appellants obtaining financing.

The house on Lot 95 was in the early stage of construction when the Appellants entered the Earnest Money Agreement. (R. 488) Within a couple of days after the Agreement had been accepted, the Appellants' real estate agent took them to American Home Mortgage for the purpose of commencing the procedure to obtain financing. (R. 375) A buyer is considered to have obtained financing when he obtains a letter of commitment from the lender. (R. 488-89) After the application procedure is completed and the loan has been approved by the lender, the lender will send a letter to the builder informing the builder that the buyers have qualified for a loan commitment of a particular sum, at a particular interest rate and that the commitment will be binding upon the lender for a stated time. (R. 488) Upon receipt of this letter the buyers have satisfied the condition precedent and their offer to purchase is no longer subject to obtaining financing. (R. 489)

At the conclusion of the meeting at American Home Mortgage, the Appellants were instructed by their real estate agent to continue to pursue the loan. (R. 414) However, rather than follow the agent's advice, the Appellants did not bother to even commence the process by making an application for a loan. (R. 419)

An FHA loan commitment can only be obtained after qualification of both the property and the buyer. (R. 515) Qualification

of a house which is in the early stages of construction, as was the home on Lot 95, is done by appraisal from a set of plans and specifications. (R. 513) If the home is approved by FHA from the plans and specifications then FHA will issue a conditional commitment on the property subject only to the home being completed according to the plans and specifications. (R. 362) While the property is being qualified by FHA, the mortgage lender prepares a package establishing the qualification of the Buyers, for example, verification of employment, income and debts. (R. 513) Upon receipt of the conditional commitment, the lender will then submit the buyer qualification package and request from FHA a firm commitment. (R. 363) When both the house and buyer have been approved by FHA, a letter of firm commitment is issued which is binding for a period of six months. (R. 515)

The president of American Home Mortgage, where the Appellants initially inquired about financing, and the Appellants' expert witness from Mason-McDuffy, where a conventional loan was eventually obtained in July of 1979, both testified that FHA financing could have been obtained at the time the Appellants first went to American Home Mortgage. (R. 515) According to the testimony at trial, a final commitment from FHA is usually received within at least 13 working days from the request for the commitment. (R. 364) At its longest, the entire procedure for obtaining an FHA loan commitment does not extend beyond 90 days. (R. 362-63, 515)

The uncontradicted testimony at trial was that if the Appellants had obtained a loan commitment, the Respondents Alvey could have completed the house on Lot 95 within a month and a half from the date of receipt of the commitment. (R. 482, 501)

The Appellants took the position that they did not have to obtain financing until construction of the home was completed. (R. 403) However, the Appellants also maintained that they always intended to rely on the financing condition as a means to avoid obligation under the contract. (R. 422)

The Appellants cite in support of the reasonableness of their conduct, the several conversations between Appellants and the secretary and construction foreman of the Respondents Alvey. However, Appellants never discussed their obligations under the Earnest Money Agreement but only the obligations which would arise on the part of the Respondents after receipt of the loan commitment. (App. Brief at 11-13) The Appellants also admitted that neither of the Respondents Alvey instructed the Appellants to deal in any manner with the secretary or construction foreman as to either the construction or the sale of the house. (R. 415, 448)

Further, the Appellants never attempted to deal directly with either of the Respondents Alvey regarding any matter of financing or construction on the home. (R. 404)

The record also contains numerous references to what is considered to be a reasonable time necessary to procure a

loan in the housing industry. The Respondents Alvey, as builders, testified that a reasonable time to obtain financing was thirty to sixty days. (R. 482) Appellants' expert witness, a mortgage banker, testified that it takes as much as thirteen working days to get a firm commitment from FHA. (R. 363-64) The President of American Home Mortgage testified that the normal length of time it takes to obtain a commitment from FHA is sixty days, at the outside, ninety days. (R. 517) Respondent Crowley, as a developer, testified that a reasonable time to obtain financing is ninety days at the outside. (R. 525) Lynn Marsing, as a real estate broker, testified that at the outside an FHA commitment can be obtained within ninety days. (R. 521) Mr. Marsing stated that the industry intent and purpose of the subject to financing clause was to release all parties to an Earnest Money Agreement if the condition to obtain financing was not met or failed to materialize within a reasonable time. (R. 520).

Finally, and most important, the Appellants simply failed to take any steps to procure a loan commitment until several months after this action was commenced. (R. 445, 419, 345-46)

POINT II

AS PRESENTED TO THE TRIAL COURT, THE STATEMENTS OF MICHAEL HERZOG WERE HEARSAY EVIDENCE NOT WITHIN ANY EXCEPTIONS TO UTAH RULES OF EVIDENCE NO. 63 AND THEREFORE WERE PROPERLY EXCLUDED BY THE TRIAL COURT.

Michael Herzog was a licensed real estate agent employed by Mid-Valley Investment, a corporation. (R. 372) The Respondents Michael Alvey and Vaughn Alvey were general partners doing business as C. Howard Alvey & Sons, a general construction company. (R. 450) Michael Herzog was requested by the Appellants to act as their agent in presenting an offer for the purchase of property from the Respondents Alvey, d/b/a C. Howard Alvey & Sons. (R. 443)

The Appellants did not obtain the attendance of Mr. Herzog at the trial, for reasons which were not disclosed in the record. Rather, the Appellants attempted to testify as to their conversation with Michael Herzog and later an affidavit was prepared for Mr. Herzog which was submitted to the court after trial. (R. 194-96)

The Appellants' efforts to testify as to statements made by Michael Herzog were objected to by the Respondents on the ground of hearsay. The Appellants established no connection between Mid-Valley Investment, a corporation, and C. Howard Alvey & Sons, a general partnership, other than at one time, Michael Alvey was an acting vice president and treasurer of the corporation and Vaughn Alvey was the acting president and secretary of the corporation. (R. 450) There was no evidence that at the time Mr. Herzog made any statements to the Appellants that the Respondents Alvey held any office in the corporation of Mid-Valley Investment. Nor was there any evidence of the scope of Mr. Herzog's employment with or his authority to

speak for Mid-Valley Investment or C. Howard Alvey & Sons. Further, there was no evidence of any connection between Mid-Valley Investment Corporation and C. Howard Alvey & Sons, a general partnership. The evidence did establish, however, that C. Howard Alvey & Sons was a building construction company and was not a real estate marketing company. (R. 485) Based upon the total absence of evidence of an agency relationship between Michael Herzog, an employee of Mid-Valley Investment Corporation and C. Howard Alvey & Sons, a partnership, the trial court excluded the statements on the grounds of hearsay. (R. 373-74)

On appeal, the Appellants argue that the statements of Michael Herzog were admissible under the Authorized and Adoptive Admissions exception to the hearsay rule, or the Vicarious Admissions exception to the hearsay rule. However, Appellants failed to establish the availability of either exception at trial.

In order for the statements of Michael Herzog to be admissible against the Respondents under Rule 63(8)(a), the Appellants were required to show that Mr. Herzog was authorized by C. Howard Alvey & Sons to make a statement for it concerning the subject matter of the statement. No evidence of such authorization was submitted at trial and the Appellants cited none in their brief. However, the Appellants assert that authorization can be gleaned first from the fact that all negotiations regarding the sale took place between Bradfords and Herzog and second,

that the defendant, Michael Alvey instructed Michael Herzog to assist the Appellants in obtaining financing.

The first assertion that all negotiations regarding the sale of property took place between Herzog and the Bradfords is not born out by the record. The Appellants contacted Herzog regarding the purchase of the property. Herzog, acting as the agent for the Appellants, prepared the offer with those terms and conditions he felt benefited the Appellants. (R. 373) Herzog then presented the offer to the Respondents Alvey who accepted the conditional offer to purchase and Herzog communicated acceptance of the offer to the Appellants. The Respondents produced no evidence either during or after the trial to the effect that Michael Herzog acted as the representative of C. Howard Alvey & Sons. Under these circumstances it has been recognized that the real estate agent is acting as the agent of the purchaser. Duffy v. Setchell, 38 Ill. App. 3d 146, 347 N.E. 2d 218, 221 (1976); Baskin v. Dam, 4 Conn. Cir. 702, 239 A.2d 549, 552 (1967).

The second contention, that the Respondents Alvey instructed Michael Herzog to assist the Appellants in obtaining financing, does not provide support for the contention that Herzog acted as the agent of C. Howard Alvey & Sons. The Appellants correctly point out that Respondents Alvey instructed the Bradfords to obtain financing indirectly through Michael Herzog. (Appellants' Brief at 18-19) However, the Appellants' brief fails to continue quoting from the record, although the testimony addresses the precise question of agency raised by the Appellants.

After stating that Michael Herzog was told to work with Appellants to obtain financing, the Appellants' attorney asked:

Q. Mike Herzog is your agent then, isn't he?

A. No. He's not. May I explain something? (R. 493)

That testimony was uncontradicted and was the only testimony in the record addressing the existence of an agency between C. Howard Alvey & Sons and Michael Herzog. It should be noted further that the Respondents Alvey's instruction to Mr. Herzog to assist the Appellants in obtaining financing is not evidence of an agency between the Real Estate agent and the respondents Alvey, but on the contrary, it is evidence that C. Howard Alvey & Sons, preserved the distinction between the building contractor and the Real Estate agent, who was responsible to assist the buyer in obtaining financing. (R. 476)

In order for the Appellants to rely upon Rule 63 (9), regarding Vicarious Admissions, the Appellants must first show that the declarant is unavailable as a witness and second, that the statement concerned a matter within the scope of an agency or employment of the declarant for the party. Appellants concede that no attempt was made to introduce evidence at trial to show the unavailability of Michael Herzog. (App. Brief at 22) Then the Appellants improperly argue alleged facts upon which there is no record as justification for not addressing availability. [In this connection it should be noted that Mr. Herzog was available to provide an affidavit in support of Appellants' Motion for New Trial, etc.]

The Appellants claim that because they were unable to establish an agency between Michael Herzog and C. Howard Alvey & Sons, they were relieved of the obligation to address the issue of availability of Michael Herzog. No authority is cited for this position, on the contrary, Rule 63 (9) provides that the exception is only available where the Judge makes a finding as to the availability of the witness. Therefore even if the court were to assume that an agency had been established beyond doubt, the fact remains that the Appellants offered no evidence as to the unavailability of the witness as required by Rule 63(9). The error Appellants claim resulted from their failure to proffer the testimony for a non-hearsay purpose. The Appellants cannot urge, on appeal, a new ground for admissibility. URE 5; Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286, 1288 (Utah 1978); Taliaferro v. Crola, 313 P.2d 136, 138 (Cal. 1957); Cochran v. Harrison Memorial Hospital, 254 P.2d 752, 757 (Wash. 1953).

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO AMEND THE COMPLAINT WHERE THE AMENDMENT WAS IMPROPER UNDER URCP 15(b) AND WHERE THE EVIDENCE AT TRIAL FAILED TO ESTABLISH THE ISSUE SOUGHT TO BE INTRODUCED BY THE AMENDMENT.

After the trial, the Appellants attempted to introduce the issue of equitable estoppel by way of an amendment to the complaint. (R. 173-74) The purpose of the amendment was to

attempt to have the Respondents estopped from denying the validity of the Earnest Money Agreement. (R. 175, 178) Denial of the motion by the trial court was proper on two grounds.

First, the amendment was not proper under the first sentence of URCP 15(b). That sentence provides for amendment of the pleadings only where an issue not raised by the pleadings is tried by the express or implied consent of the parties. Contrary to the Appellants' contention, the issue of estoppel was never tried by the implied consent of the parties.

The Appellants assert that the issue of estoppel was tried by implied consent because evidence relevant to an estoppel was introduced without objection. (Appellants' Brief at 25) This assertion is an incorrect generalization of Rule 15(b) and a misunderstanding of the purpose behind Rule 15(b).

The purpose of Rule 15(b) is to bring the pleadings in line with issues actually tried and the rule does not permit amendment of the pleadings to include collateral issues which, after trial, may find incidental support in the record. Monroe v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969).

Where evidence relevant to an issue in the case is also submitted as evidence of an issue not embraced by the pleadings, the court will not find implied consent to trial of the new issue unless, at the time of the submission, counsel indicates that the evidence is to go to both the issue in the pleading and to the issue outside the pleading. Wright & Miller, 6 Federal Practice and Procedures §1493 (1971). In Cook v. City

of Price, Carbon County, Utah, 566 F.2d 699 (10th Cir. 1977):

When evidence claimed to show trial of an issue by consent pursuant to Rule 15(b), is relevant to a separate issue already in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete. This rule obtains because an opponent must be given a fair chance to plan his defense to meet pleaded allegations (Citations omitted)

The Appellants argue that testifying to their conversations with the construction foreman and the office secretary without objection from the Respondents Alvey, constituted implied consent to trial of the issue of estoppel by Respondents Alvey.

This Court has recognized that when a trial is to the bench, rather than to a jury, rulings on the evidence need not be scrutinized too critically. Super Tire Market, Inc. v. Rollins, 18 Utah 2d 122, 417 P. 2d, 132 (1966). Additionally, this Court has held that a judgment should not be reversed in the absence of error which is substantial and prejudicial in the sense that there would be a reasonable likelihood of a different result in the absence of such error. URCP 61; URE 5; Arnovitz v. Tella, 27 Utah 2d 261, 264, 495 P.2d 310, 312 (1972). The Appellants claim prejudicial error because they were prevented from testifying that Michael Herzog told them they need not seek financing until the house was completed. The Appellants claim that this is prejudicial in that, regardless of the truth of Mr. Herzog's statements, the mere fact that

he made the statement would be a substantial factor in determining the reasonableness of the Appellants' conduct and would have, in all likelihood assured a different decision by the trial court. (Appellants' Brief at 24)

However, this prejudice alleged by the Appellants was not a result of the trial court's exclusion of Mr. Herzog's statements as hearsay. The testimony was objected to by the Respondents and excluded by the trial court only as hearsay. No objection was made to the testimony insofar as it was relevant to the issue of reasonableness of the Appellants' conduct. [It should be noted that the statements of Barney Alvey and Pam Tazzer were excluded on the ground of hearsay as to the Respondents Micro Investment and Michael Crowley.] (R. 385)

The statements of Barney Alvey and Pam Tazzer were in fact submitted, not as evidence of estoppel, but as evidence relevant to the central issue of the case, which was the reasonableness of the Appellants' delay in obtaining financing. Nowhere is this more clearly demonstrated than in the Appellants' brief at pages 11 through 13 wherein the same statements are cited as evidence of the reasonableness of the Appellants' conduct. The evidence was never proffered for the purpose of showing estoppel. Therefore, under the established rules governing the application of URCP 15(b), the trial court correctly ruled that the issue of estoppel had not been tried by the implied consent of the parties.

The second reason the trial court correctly denied Appellants' Motion to Amend the Complaint was because the element of equitable estoppel had not been established by the Appellants. As noted by the Appellants, equitable estoppel arises when (1) a party by its actions or representations, induces the other party to believe certain facts to exist, (2) that such other party, acting with reasonable prudence and diligence, relies upon the acts or representations, and (3) that the party relying on the representation or acts will suffer injustice if the other party is permitted to deny such facts. (Appellants' Brief at 26).

The Appellants allege that the Respondents should not be permitted to deny the validity of the Earnest Money Agreement because of the representations made by Barney Alvey and Pam Tazzer regarding the construction of the home. However, the Appellants admitted that they had never been instructed by the Respondents Alvey, to deal with either Pam Tazzer or Barney Alvey regarding construction of the home. (R. 415, 448) The Appellants were aware that the Earnest Money Agreement was not fully binding until they had obtained financing. (R. 375, 406) The Appellants never directly communicated with either of the general partners of C. Howard Alvey & Sons regarding any aspect of either the construction of the home or the validity of the Earnest Money Agreement. (R. 404, 415) Finally, it

was not until months after the suit was commenced that Appellants obtained financing. (R. 345, 346, 389)

These facts confirm that, notwithstanding the imputation of the representations of Barney Alvey and Pam Tazzer to the Respondents Alvey, the Appellants failed to act with reasonable prudence and diligence as to their obligations under the Earnest Money Agreement. As the trial court noted in Finding of Fact No. 11, the Respondents Alvey did nothing to prevent, hinder or otherwise impair the Appellants from obtaining financing within a reasonable time as required under the terms of the Earnest Money Agreement. (R. 227)

Finally, the Appellants cannot show that they suffered injustice by the Respondents' denial of the validity of the Earnest Money Agreement. As the trial court recognized, the central issue upon which the outcome of the case rested, was whether or not the Appellants took steps to obtain financing within a reasonable time. (R. 503-04) Based upon the substantial evidence submitted at trial, the lower court concluded that the Appellants failed to use reasonable diligence as required by law and therefore would suffer no injustice by the Respondents' denial of the validity of the contract. Hawaiian Ocean View Estates v. Yates, 564 P.2d 436, 442 (Hawaii 1977); Newton v. Hornblower, Inc., 582 P.2d 1136, 1144 (Kansas 1978); Citing 28 Am Jur 2d, Estoppel and Waiver §78-80 (1966).

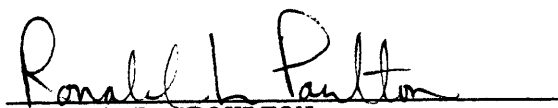
CONCLUSION

The trial court record reflects substantial evidence upon which the trial judge based his ruling that the Appellants' failed to pursue financing for the home with reasonable diligence as was required of them by law.

Exclusion of the testimony of Michael Herzog was proper in view of the fact that the Appellants failed to establish admissibility under an exception to the hearsay rule and never proffered the testimony for a non-hearsay purpose.

Finally, denial of the Appellants' Motion to Amend the Complaint after trial was proper in view of the fact that the issue of estoppel sought to be introduced by amendment was not tried by the implied consent of the parties nor had the Appellants established that they attempted to perform their obligations under the contract with reasonable diligence.

RESPECTFULLY submitted this 12th day of May, 1980


RONALD L. POULTON
Attorney for Defendants-
Respondents Michael E. Crowley
and Micro Investments