

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 : Respondents' Michael and Vaughn  
Alvey'S Brief

Utah Supreme Court

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Ronald L. Poulton; Attorney for Respondents; Randall S. Feil; Attorney for Respondents Michael Alvey and Vaughn Alvey; Grant A. Hurst; Attorneys for Appellants

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

KENNETH K. BRADFORD and  
TAMMY BRADFORD, his wife,

Plaintiffs-  
Appellants,

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, a Utah  
Limited Partnership,

Defendants-  
Respondents.

Case No. 16829

RESPONDENTS' MICHAEL AND VAUGHN ALVEY'S BRIEF

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

Honorable Dean E. Conder, Judge

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

Attorneys for Appellants

Ronald L. Poulton  
9 Exchange Place, Suite 420  
Salt Lake City, Utah 84111

Attorney for Respondent  
Michael E. Croawley

Randall S. Feil  
Thomas R. Vuksinick  
FOX, EDWARDS & GARDINER  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

Attorneys 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,

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, a Utah  
Limited Partnership,

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Respondents.

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Case No. 16829

STATEMENT OF THE CASE

Plaintiffs-Appellants, Mr. and Mrs. Kenneth Bradford, seek specific performance, or in the alternative, damages for the breach of an Earnest Money Receipt and Offer to Purchase (Exhibit 1).

DISPOSITION IN THE LOWER COURT

The court below granted judgment for the Defendants-Respondents Michael and Vaughn Alvey and Defendant-Respondent Michael E. Crowley holding that a condition precedent to the agreement becoming binding was never satisfied, a reasonable time



for performance of the contract had passed, the Bradfords failed to reasonably pursue financing, and that no evidence was introduced regarding damages at the time of breach.

### RELIEF SOUGHT ON APPEAL

The Alveys, respondents, seek to have the trial court's judgment affirmed.

### STATEMENT OF FACTS

Michael and Vaughn Alvey (hereinafter Alveys) are partners doing business as C. Howard Alvey and Sons, a general partnership. (T.110). Barney Alvey is the brother of Michael and Vaughn Alvey. (T.110). Barney Alvey is not in partnership with his brothers, but is an employee of the partnership acting as foreman of construction. (T.111). Pam Tazzer was an employee of the partnership working as a secretary in the partnership's business office. (T.43,111).

Midvalley Investment is a corporation in the business of selling real estate. (T.110). Michael Herzog is a realtor employed by Midvalley Investment. Midvalley's office is in the same building as C. Howard Alvey and Sons' office, but these are completely separate businesses, being on the first and second floors of the building, respectively. (T.42,43).

In February, 1978 the appellants telephoned Midvalley Investment and spoke with Michael Herzog concerning their desire

to purchase a house in the Shiloh subdivision in West Jordan, Utah. (T.32). A few days after the appellants had telephoned Midvalley, Herzog visited the appellants at their home. At that time the appellants signed an earnest money agreement wherein they offered to purchase a house to be constructed in the Shiloh subdivision. (T.32), Exhibit 1. At the appellants' request, Herzog presented the offer to the Alveys. (T.57,103.) The Alveys accepted the appellants' offer to purchase on or about February 22, 1978. Exhibit 1. The Earnest Money Agreement did not specify a completion date; it provided, however, that the sale was conditioned on the appellants' obtaining FHA financing. Exhibit 1.

A few days after the appellants' offer to purchase had been accepted, Herzog arranged a loan prequalification meeting with American Home Mortgage. (T.35). No formal application for a loan was made at that time and no loan commitment was ever issued by American Home Mortgage. (T.35).

The appellants did not make a formal application for an FHA loan until March 12, 1979. (T.5). Even then, this FHA loan application did not result in a commitment being issued because in March, 1979 FHA loan application policies and procedures required that the house be nearly complete before an FHA loan could be made. (T.5,14). However, if the application had been made at the time the Earnest Money Agreement was entered, in February of 1978, an FHA loan commitment good for six months could have been granted

even though the house was just in the initial stages of construction. (T.173-175). A conventional loan commitment was eventually issued in July, 1979, long after this litigation had been commenced, as a result of an application for a conventional loan application made on June 25, 1979. (T.5-6).

At no time between February, 1978 and March, 1979 did the appellants demand that the Alveys complete the house and tender performance. (T.58). In October, 1978 the appellants sold the duplex they were living in and purchased another house with the proceeds of the sale (\$15,000). (T.46,47,66,67).

About the first of April the appellants learned from Michael Alvey that the Alveys had sold the Shiloh subdivision to Michael E. Crowley, a respondent here. (T.102). The appellants called Crowley who denied that he had any legal obligation to perform on the Earnest Money Agreement. (T.53). On April 30, 1979, the appellants initiated this action.

In May, 1979 the appellants borrowed \$17,000 from one of the appellants' parents. The appellants are paying the money back at \$275 a month. (T.48,49,63). The testimony is conflicting as to whether the money was a gift or a loan. (T.48,49,62,63). The trial court believed the testimony that the \$17,000 was a loan. See Findings of Fact ¶5. The conventional loan commitment received in July, 1979, which was part of the appellants' alleged tender of payment made that month (T.50, Exhibit 10), was invalid and ineffective because the \$17,000 was a loan. (T.11).

I.

THE TRIAL COURT DID NOT ERR IN FINDING  
THAT THE FAILURE OF APPELLANTS TO OBTAIN  
FINANCING AFTER SEVENTEEN MONTHS WAS UNREASONABLE

A. This is an Action at Law Because the Appellants are not Entitled to Specific Performance

Before the court reviews the complete record and passes on the weight and sufficiency of the evidence based on the appellants' claim that this is an equitable action for specific performance, the court must determine whether the appellants would be entitled to specific performance of the Earnest Money Agreement if it were enforceable. Otherwise the appellants could have what is in reality an action in law for damages decided under the expanded scope of review reserved for equity cases. Utah's Constitution expressly provides that "...in cases at law the appeal shall be on questions of law alone...." Utah Const. Art. VIII § 9.

Assuming the earnest money agreement were enforceable, and it is not, the appellants are not entitled to specific performance because they are not now, nor were they ever able to perform their part of the contract.

It is elementary that specific performance of a contract will not be ordered unless the one who seeks to enforce it has performed his part of the contract or is able to perform and offers to do so. Fritch v. Boyle, 89 P.2d 912 (Kan. 1939).

Specific performance is properly denied where it appears that one party to the agreed exchange will not be able to perform as agreed. See Restatement of Contract §373. Even where tender is excused, specific performance will be denied when the party seeking specific performance was never able to perform. Suhre v. Busch, 120 S.W.2d 47 (Mo. 1938).

The appellants are not now ready and able to perform, nor have they ever been. The appellants made two separate applications for loans for the purpose of trying to perform on the contract. The first application did not result in a loan commitment. (T.5). Though the second application resulted in a commitment being made, the trial court found that the loan commitment was "invalid, unenforceable and of no effect." Findings of Fact ¶5.

The trial court's finding that the loan commitment that resulted from the second loan application was "invalid, unenforceable and of no effect" is fully supported by the evidence. It was the uncontradicted testimony of A. Thompson Calder, regional vice president of the lending institution that issued the loan commitment on the second application, that if the appellants had listed the \$17,000 borrowed from the parents of appellant Mr. Bradford's parents that the loan commitment would not have been issued. (T.13). Mr. Calder also testified that the appellants, having borrowed the \$17,000 for the down payment would not have qualified for a loan on the date of trial. (T.9). Mr. Calder further testified, again without contradiction, that the loan

commitment that was granted would have been invalid if the \$17,000 down payment had to be borrowed. (T.11, 13, 14). Although appellant Mr. Bradford's testimony was conflicting regarding the circumstances under which he received the \$17,000 from his parents, the trial court obviously concluded that his earlier testimony that the \$17,000 was a loan was the more credible testimony. See Finding of Fact ¶5. This court has generally left the question of a witness's credibility to the trial judge because of trial judge's advantaged position in being able to observe the demeanor of the witness. Grittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

Appellant Mr. Bradford testified as follows:

Q. Is it true you were asked in your deposition . . . [where] you were to get the money [and] from who[m] and isn't it true that you answered ["]my parents["]?

A. I guess.

Q. Is it also true that you were asked ["]was it a gift["] and you said in answer to that question ["]no["]. I guess I wouldn't call it a gift.["]

A. That's correct.

Q. Weren't you also asked ["]did you have to pay them back["] and wasn't your answer ["]yes?["]

A. I guess it was.

Q. And isn't it true that you were asked how much of it they gave you exactly and isn't it true you answered approximately \$17,000?



A. Yes.

Q. Were you also asked ["]when did you have to pay them back["] and did you answer ["]I am paying them back monthly right now?["]

A. Yes.

Q. And were you asked ["]how much["] and did you answer ["]\$275?["]

A. Yes.

Q. Isn't it true that you did not tell Mason McDuffy or their representative you had a debt to your parents in the amount of \$17,000?

A. That is true. I didn't tell them. (T. 62, 63). (Quotation marks added for clarity.)

Appellant Mr. Bradford also testified that the appellants did not have the cash to purchase the house, and that he was not ready or able to perform his obligations under the Earnest Money Agreement at anytime between October, 1978 and May, 1979. (T. 67-69).

Furthermore, even if the contract had been repudiated, the appellants are not entitled to specific performance. A seller's repudiation of a contract does not excuse a purchaser who seeks specific performance of the contract from pleading and proving that he is ready, willing, and able to perform his obligations under the contract. Gaffi v. Burns, 563 P.2d 726 (Ore. 1977). The court in Gaffi, supra, rejected the buyer's contention that where the buyer had failed to show at trial that they were "ready and able" to perform under the contract that specific performance should be granted conditioned on payment of the contract price within a specified time.



B. The Trial Court's Judgment Must be Sustained  
If Supported by Substantial Evidence

The appellants' action is not an action in equity, but an action at law for damages. Accordingly, the court's review of the evidence is limited to determining whether it is sufficient to sustain the judgment. Penman v. Emico Corp., 114 Utah 16, 196 P.2d 984 (1948). Jackson v. Jackson, 113 Utah 249, 192 P.2d 397 (1948).

In cases at law the court "will not redetermine facts found by the fact finder in the lower court . . . if in the light most favorable to the respondent the evidence is sufficient to sustain such findings." Gibbons & Reed Co. v. Guthrie, 123 Utah 172, 256 P.2d 706 (1953). The evidence is sufficient to sustain a judgment if there is substantial evidence from which reasonable minds would believe facts which will support the judgment. Land v. Phillips Petroleum Co., 10 Utah 2d 376, 351 P.2d 952 (1960). The evidence may be substantial enough to support the judgment even though it is less than a preponderance of the evidence. See Marker v. Finch, 322 F.Supp. 905 (D. Del. 1971).

However, even were this an equitable action this court has recognized that it should not reverse a case just because it may have decided the matter differently on the facts. See Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972). There is a presumption that the trial court's findings and judgment are correct even in equity cases. Id. In McBride v. McBride, 581 P.2d 996, 997 (Utah 1978), this court said that:

While it is the responsibility of this court to review the evidence in equity cases, it will not disturb the findings of fact made below unless they appear to be clearly erroneous and against the weight of the evidence. In conducting our review of the evidence we are mindful of the advantaged position of the trial judge who sees and hears the witnesses and we are constrained to give due deference to his decisions by reason thereof. (footnote omitted).

This court has specifically held that in actions for specific performance the evidence is reviewed in the light most favorable to the findings and that the findings will not be disturbed unless the evidence clearly preponderates against them. Cook v. Gardner, 14 Utah 2d 193, 381 P.2d 78 (1963).

C. The Trial Court's Judgment is Supported by the Preponderance of the Evidence.

The law is not in dispute in this case. Before a binding, enforceable contract ever comes into existence all conditions precedent to performance must be satisfied. Where, as here, the Earnest Money Agreement does not specify the time in which the financing must be obtained or the time in which the parties must perform, the law will imply that a reasonable time was contemplated in each instance. Commercial Security Bank v. Johnson, 10 Utah 342, 173 P.2d 277 (1946). The law also implies in cases like this where the agreement for the sale of real property is expressly made subject to the buyer obtaining financing the buyer makes a promise implied in law to use reasonable diligence to procure such

financing. Sorenson v. Connelly, 536 P.2d 328 (Colo. 1975); Anaheim Co. v. Holcombe, 426 P.2d 713 (Ore. 1967); "Sufficiency of Real Estate Buyer's Efforts to Secure Financing Upon Which Sale is Contingent," 78 A.L.R. 3d 880.

1. Because the Appellants Have Failed to Urge Error As To Alternative Findings Which Justify the Judgment Below, That Judgment Must Be Affirmed

The following issues were raised at trial: (1) did the appellants obtain FHA financing so as to satisfy the condition precedent to either parties obligation to perform; (2) did the appellants obtain financing within a reasonable time after the contract was entered; and (3) did the appellants use reasonable diligence in obtaining financing. At trial all these issues were decided against the appellants. Findings of Fact ¶10; Conclusions of law ¶¶2,4. If the answers to any of the above questions is in the negative the trial court's judgment must be affirmed. The appellants choose only to raise and argue the last question. Appellants' Docketing System ¶5; Appellants Brief. Where a question is not urged in the printed brief on appeal, the question is deemed to have been decided properly below. Reid v. Anderson, 116 Utah 465, 211 P.2d 206 (1949). If the trial court's judgment may be sustained on grounds not urged on appeal the trial court's judgment must be affirmed without considering the errors urged on appeal. Id. Accordingly, judgment for the Alveys must be affirmed. In any event, the trial court's findings on all the

issues are supported by the preponderance of the evidence and judgment must be affirmed on appeal.

2. The Trial Court's Finding That The Appellants Failed to Satisfy the Condition Precedent to Performance is Supported by a Preponderance of the Evidence.

The performance of the Earnest Money Agreement by either the appellants or the Alveys was conditioned on the appellants obtaining FHA financing. Exhibit 1. The appellant did apply for FHA financing but no FHA loan commitment was ever issued. (T.5). The appellants did obtain a conventional loan commitment. This, however, did not satisfy the condition precedent which required FHA financing. Moreover, as already discussed, the court properly found that this conventional loan commitment to be invalid, unenforceable and of no effect. Therefore, the appellants failed to satisfy a condition precedent essential to the formation of an enforceable contract, and there is no contract to be breached or enforced.

3. The Trial Court's Finding That a Reasonable Time for Performance of the Contract had Passed is Supported by the Preponderance of the Evidence.

A reasonable time for performance of a contract is determined by ascertaining the intention of the parties' as determined from the facts and circumstances at the time the

contract was entered. See Stewart v. Cunningham, 548 P.2d 740, 745 (Kans. 1976); Martins v. Franklin, 462 P.2d 853 (Ariz. 1969). At the time the contract was entered it seems obvious that neither party intended to be bound by the earnest money agreement after the lapse of seventeen months. Normally a house can be built in about three months. (T.155). At the inception of the contract the appellants did not expect to be bound by the contract if the Alveys had failed to perform after seventeen months had elapsed. Moreover, at today's rates of inflation no builder would intend to be bound by a seventeen month old contract price. Since the condition precedent to performance was not satisfied within a reasonable time for performing the contract, and since neither party to the contract performed within a reasonable time, the contract expired and both parties are excused from performing. See Gullory Corp. v. Dussin Investment Co., 536 P.2d 501 (Ore. 1975).

4. The Trial Court's Finding That the Appellants Failed to Use Reasonable Diligence in Obtaining Financing is Supported by the Preponderance of the Evidence.

The trial court's findings that a reasonable time had passed for performance of the contract, and that the appellants failed to use reasonable diligence in obtaining financing are supported by the preponderance of the evidence as demonstrated by the record and the judgment below should be affirmed.



The record shows that: at the time the Earnest Money Agreement was entered FHA financing was available to the appellants (T. 21-23, 173-175); the appellants never made an application for an FHA loan, or any loan, until almost thirteen months after the Earnest Money Agreement had been executed; (T. 21-23. 173-175); that during the delay in making application for an FHA loan in satisfaction of the condition precedent to performance on the contract, FHA loan procedures were changed so that the appellants could no longer obtain an FHA loan prior to one hundred percent completion of the house (T.5, 14, 21); the appellants never did receive an FHA loan (T.14); the usual practice in the housing trade is for the buyer to obtain financing before the home is completed (T.184); the usual practice in the housing trade is for buyers to make written application for a loan a few days after the earnest money agreement is executed (T.181); the uncontradicted testimony of a builder, a real estate broker, and a mortgage lender was that a reasonable time for a buyer to obtain financing would not exceed ninety days from the date of the earnest money agreement (T.147, 181, 184); and finally, the appellants did not obtain a conventional loan commitment until seventeen months after the Earnest Money Agreement was entered and then that financing commitment was invalid. Courts have held delays of less than twelve and ten months in the exercise of option agreements unreasonable. Mossir v. Cyrus, 119 P. 485 (Ore. 1911); Stone v. Harmon, 19 N.W. 8 (Minn. 1894).

Also relevant on the issue of reasonable diligence, are the burdens placed on the Alveys by the appellants' delay in obtaining financing. As was testified to by Michael Alvey, his company had begun the house in question on a speculation basis, using limited speculation funds. (T.133). Until financing was obtained by the appellants, the Alveys had to count this house as one of their speculation houses and could not begin in its place another speculation house with speculation financing. (T.132). The Alveys understood, in accord with the usual practice, that they did not have to complete the home until the appellants had obtained financing (T.144). If the Alveys completed the home before they were assured that the appellants had financing, they would have risked creating serious cash flow problems and being left with a custom home that was unmarketable because it may not have conformed to normal buyer preferences in housing. (T.104,141).

The appellants place great emphasis on the reason for their failure to obtain financing as was their responsibility under the Earnest Money Agreement. The reason given is, in short, that they were aware that the house was not yet completed. The fact that the house was not completed is not justification for the delay given the sound general practice in the housing trade that the buyer obtain financing prior to completion to alleviate the great risks born by the builder if he completes the house prior to the time the buyer has obtained financing, and the sale fails. Furthermore, under the FHA loan procedure in effect at the time the



Earnest Money Agreement was entered, and under conventional loan procedures then and now, a loan commitment can be obtained prior to completion of the house that will remain good during the time it normally takes to complete the home. (T.15, 142, 175). Therefore, the court should imply a duty on the buyers part to obtain financing before the house is completed where obtaining financing is a condition precedent to performance for the protection of the builder. This results in no prejudice to the buyer whatsoever.

## II.

### THE EXCLUSION OF THE HEARSAY STATEMENTS OF MR. HERZOG IS NOT REVERSIBLE ERROR

- A. The Trial Court's Exclusion of Testimony  
Is not Reversible Err Because the Appellants  
Failed to Make the Required Offer of Proof

Rule 5 of the Utah Rules of Evidence expressly provides  
that:

A verdict or finding shall not be set aside,  
nor shall the judgment or decision based  
thereon be reversed, by reason of the erroneous  
exclusion of evidence unless (a) it appears of  
record that the proponent of the evidence  
either made known the substance of the evidence  
in a form and by a method approved by the  
judge, or indicated the substance of the  
expected evidence by questions indicating the  
desired answers, and (b) the court which passes  
upon the effect of the error or errors is of  
the opinion that the excluded evidence would  
probably have had a substantial influence in  
bringing about a different verdict or finding.  
(Emphasis added.)

The appellants fail to satisfy any of the requirements of Rule 5 with respect to the testimony they claim was excluded by error.

From an examination of the record, anyone can see that the appellants never made known the substance of the excluded evidence by either method approved by the judge or by questions indicating desired answers. (T.32-33, 35). The transcript shows that Mr. Bradford was asked:

Q. Were the terms of that earnest money receipt discussed at the time with Mr. Herzog?

A. Yes, it was.

Q. And referring to line 21 of that agreement, will you read that?

A. Says subject to buyer obtaining financing, FHA.

Q. How did that come to be placed in the agreement?

A. Mike Herzog told us that. ... (T.32-33).

At that point an objection was made and sustained. No proffer of the substance of the testimonies was made, nor did the appellant seek to have the hearsay statement admitted for other than the truth of the matter asserted.

Subsequently, Mr. Bradford was asked:

Q. Did you ever get a loan commitment form from American Home Mortgage?

A. No, we did not.

Q. Why not?

A. We were told at the pre-qualification . . . (T.35).

At this point an objection was made and sustained. No proffer of the substance of the hearsay statements were made, nor did the appellants seek to have the hearsay statements admitted for other than the truth of the matter asserted. The record in this instance does not even disclose who had made the hearsay statements. Also, the statement is properly excluded for lack of foundation.

The appellants assert that in this situation proffer of the substance of the evidence was unnecessary notwithstanding the explicit requirement of Rule 5 of the Utah Rules of Evidence. The appellant cites In re Young's Estate, 33 Utah 382, 94 P. 731 (1908) as support for their position. Initially it should be noted that in re Young's Estate was decided before Utah's adoption of Rule 5 of the Utah Rules of Evidence. The court in In re Young's Estate, supra, subscribed to the general rule that adequate proffers of proof are required before an error based on the improper exclusion of evidence can be appealed. The court, however, in that case found an exception to the general rule on the narrow ground that an adequate offer of proof could not have been made under the circumstances. The exception to the proffer rule found in In re Young's Estate is certainly not applicable here.

The appellant also cites several cases from other jurisdictions for the proposition that "[a]n offer of proof is

unnecessary where the nature of the error is otherwise clear." Appellants' Brief p. 23. These cases are irrelevant because Rule 5 of the Utah Rules of Evidence is controlling and determinative. See also Downey State Bank v. Mayor-Blakeney Corp., 578 P.2d 1286 (Utah 1978). Furthermore, as is discussed below, the evidence does not show that the realtor, Herzog, was Alvey's agent for purposes of the statements made by Herzog that are claimed to have been excluded by error. Hence, it was not, and is not, clear that the excluded hearsay statements were improperly excluded, and an offer of proof is required before such an alleged error can be reviewed on appeal even under the rule the appellants advocate.

In Denver Decorators, Inc. v. Twin Teepee Lodge, Inc. 431 P.2d 8 (Colo. 1967), the appellant there had sought at trial to question a witness on a conversation which the witness had had with a realtor. The testimony was objected to and excluded on the ground that there was an insufficient showing of agency relationship between the realtor and the respondent. No offer of proof was made. The court on appeal concluded that:

In this particular circumstance, there having been made no offer of proof, we would not be justified in reversing judgment even if the trial court committed technical error in excluding this line of testimony. Id. at 10.

Appellants, again relying on authority from other jurisdictions for support, argue that the proffer was excused because a proffer of evidence is unnecessary where the court excludes an entire class of evidence. Appellants' Brief p. 23. Rule 5 of the

Utah Rules of Evidence makes the applicability of this principle in Utah questionable at best. In any event, the appellants have misapplied the rule in this instance. The trial judge in this case did not make a sweeping ruling in this case excluding all evidence on a theory or issue as was the case in Costa v. Regents of University of California, 254 P.2d 85 (Cal.App. 1953) and Lawlers v. Calaway, 147 P.2d 604 (Cal. 1944). The trial judge in this instance excluded testimony based on specific questions and specific objections. The appellants were free after the rulings excluding the testimony to admit any evidence they had on any relevant issue in the case, including the agency issue, so long as the evidence was not excluded by some rule of evidence.

Moreover, where, as here, the testimony is excluded on hearsay grounds and the proponent of the testimony fails to argue at trial the theory that the evidence was offered to show state of mind rather than for the truth of the matter asserted, he may not on appeal claim that it was error to exclude the evidence on that theory. See Northern State Construction Co. v. Robbins, 457 P.2d 187 (Wash. 1969).

B. The Excluded Testimony was not Admissible On the Theory that Herzog was the Alveys' Agent or that he was Authorized to Speak For the Alveys

1. Herzog was not the Alveys' agent Merely because they listed their Property for sale with him

The fact that the Alveys were officers in Midvalley is irrelevant for purposes of determining whether Midvalley and Herzog were actual agents for the Alveys because no evidence was introduced to show that Midvalley was the Alveys' alter ego. An agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a corresponding manifestation of consent by one person that another shall act on his behalf and under his control. State v. Superior Court, In and For Pinia County, 586 P.2d 1313 (Ariz. 1978); Moss v. Vadman, 463 P.2d 159 (Wash. 1969). Whether one is the agent of another depends upon the right of control by one over the other. Fox v. Lavender, 89 Utah 115, 56 P.2d 1049 (1936). There is no evidence in the record showing that the Alveys, in their capacity as sellers, had the right to control Herzog's actions or the methods by which he obtained purchasers for the Alveys' property. Furthermore, there is no evidence that either the Alveys or Herzog made the manifestations of consent necessary to the creation of an agency relationship.

The appellants' contend that the existence of a seller-realtor relationship between the Alveys and Midvalley is sufficient



to make the realtor, Mr. Herzog, the agent of the seller, the Alveys, for purposes of making representations. None of the cases relied upon by the appellants, however, directly support this position.

A real estate broker does not have general authority to act for the seller. Martin v. Vincent, 593 P.2d 45 (Mont. 1979). A real estate broker is ordinarily an independent contractor authorized only to find a purchaser. Stiles v. Edwards, 53 S.E.2d 697 (Ga. App. 1949); aff'd, 58 S.E.2d 260; see Friedman v. New York Telephone Co., 176 N.E. 543 (N.Y. 1931). In the absence of an express agency granting a real estate agent greater authority, the authority implied from the listing of property with a real estate agent is that of a special agent with limited powers. Stevenson v. Thrush, 219 P.2d 977 (Wash. 1977). A real estate agent has no authority to make representations on behalf of a seller in the absence of a showing of actual authority. Stevenson, supra; Stiles, supra.

Contrary to the appellants' assertions, the original Earnest Money Agreement was not entered into with the realtor acting on behalf of the Alveys. The realtor, Herzog, prepared the earnest money agreement in the form of an offer. The offer was signed by the appellants and at their request presented to the Alveys. (T.57). The Earnest Money Agreement was not a contract until the Alveys had accepted the appellants' offer. Exhibit 1. The record shows that Herzog was acting as the appellants' agent



when he prepared the offer and submitted it to the Alveys for their acceptance. (T.57, 103). Appellant Mr. Bradford testified as follows:

Q. (By Mr. Feil) Did you ask him to present this earnest money offer on your behalf to the Alveys?

A. Yes.

Q. And do you know if he presented the offer to the Alveys on your behalf?

A. As far as I know he did, yes.

Q. And brought it back to you saying he had done what you asked him to do?

A. Yes.

Q. And the offer had been accepted?

A. Yes.

(T.57).

Appellant Mrs. Bradford testified as follows:

Q. Mrs. Bradford, is it true that Mike Herzog acted as your agent, who actually prepared the Earnest Money for you; that's Plaintiff's Exhibit 1?

A. Yes.

Moreover, whatever implied special agency existed between the Alveys and Herzog ended when the contract was accepted by the Alveys because a realtor's authority is limited to finding a purchaser. The testimony that the appellants' claim was improperly excluded related to conversations had after the Earnest Money Agreement had been accepted, and after any agency relation that may

have existed between the Alveys and the realtor, Herzog, had come to an end. (T.35). Appellants' Brief p 3. Where, as here, the realtor has no authority to make the sale binding, the appellants were bound to know the extent of the realtors authority. Friedman, supra.

2. The Alveys made no representations that would justify a finding of agency by estoppel.

Appellants argue that Herzog was Alveys' agent by application of the doctrine of agency by estoppel. The acts creating an agency by estoppel must be performed by the principal with knowledge or a reasonable ground for believing that the other party will rely thereon and change his position for the worst. Phoenix Western Holding Corp. v. Gleeson, 500 P.2d 320 (Ariz. 1972). The statements or acts of the alleged agent will not establish an agency by estoppel. Rivett v. Nelson, 322 P.2d 515 (Cal. 1958).

None of the facts upon which the appellants rely to show agency by estoppel are statements or acts made by the Alveys. The appellants repeatedly testified that they had no contact with the Alveys, so no statements by them could have lead appellants to believe that Herzog was acting as their agent. (T.64, 82, 105).

The core of the appellants' agency by estoppel argument is that the Alveys were officers of Midvalley Investment. That fact alone is not sufficient to establish an agency by estoppel.

Moreover, while the appellants knew at the time of trial that the Alveys were officers of Midvalley, there is no evidence in the record that at the time Herzog made representations to the Alveys that they knew the Alveys had anything at all to do with Midvalley Investment. (T.34). It is unlikely that they knew the Alveys were officers in Midvalley at that time because Herzog's statements were made only a few days after the Earnest Money Agreement was signed (T.34) and before the appellants had even been to the offices of Midvalley. (T.36).

The fact that the Alveys' office was in the same building as that of Midvalley is insignificant for two reasons: (1) the offices were on different floors and clearly separate, and (2) the appellants' first visit to the building was after the Herzog's statements as to financing had been made. (T.43). The doctrine of agency by estoppel should not be applied to statements made by the purported agent before the alleged representations or acts establishing agency by estoppel have occurred. Also, significant as to whether the appellants were lead to believe that Herzog was the Alveys' agent is their testimony indicating that at the time the offer was made and accepted they believed that Herzog was acting for them and not the Alveys. (T.57, 103).

3. The excluded testimony is not admissible under Rule 63 of the Utah Rules of Evidence

The excluded testimony is inadmissible under either Rule 63(8)(a) or Rule 63(9)(a) of the Utah Rules of Evidence because, as discussed above, the statements made by Herzog were not authorized by the Alveys nor was Herzog the Alveys' agent. The appellants repeatedly rely upon the fact that the Alveys never had personal contact with the Bradfords as support for their position that Herzog acted for the Alveys in advising the appellants with regard to financing. The Earnest Money Agreement defined the respective obligations of the parties. The Alveys' only obligation was constructing the house. The Alveys never needed to contact the appellants regarding the mechanics of obtaining financing, either personally or through Herzog, because it was the appellants' responsibility and duty to obtain financing. Therefore, it does not follow that because the Alveys never personally contacted the appellants regarding the financing arrangements that Herzog must have acted for the Alveys.

Rule 63 (9)(a) is inapplicable for the additional reason that the judge did not find that Herzog was unavailable as a witness and no evidence was introduced showing that he was unavailable. If the appellants had produced evidence of unavailability at trial the Alveys could have countered it with evidence showing that Herzog was available. The showing of unavailability was not made unnecessary by the judge's ruling that Herzog was not the Alveys'

agent. The rule expressly requires that the judge find the hearsay declarant unavailable as a witness before the hearsay exception is applicable.

The evidence is inadmissible to show the appellants' state of mind because their state of mind as induced by Herzog is not relevant on the issue of failure to use due diligence to obtain financing with respect to the Alveys. The appellants owed the Alveys a duty to use due diligence in obtaining financing. The representations of Herzog, made on his own and not for the Alveys, do not affect that duty. Furthermore, the exclusion of the testimony is harmless error because the weight of the evidence, even with the admission of the excluded testimony, still favors a finding that the appellants failed to use reasonable diligence in obtaining financing.

### III.

#### THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTION FOR LEAVE TO AMEND.

##### A. Evidence Admitted Without Objection That Is Relevant to Another Issue in the Case, Cannot be Used to Show that an Unpleaded Issue Was Tried by Implied Consent

Rule 15(b) of Utah's Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties they shall be treated as if they had been raised in the pleadings. The appellants'

equitable estoppel claim does not fall within this rule. The Alveys did not expressly consent to try the issue of equitable estoppel, and the issue was not tried by implied consent of the parties. The issue of equitable estoppel was not tried at all. Though some evidence introduced relevant to other issues in the case may have also been relevant to the issue of equitable estoppel, the introduction of that evidence without objection did not raise the issue of equitable estoppel so that it could be considered to have been tried by the implied consent of the parties. National Farmers Union Property and Casualty Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249 (1958). In Thompson, supra, certain evidence relating to the value of a building, was admitted without objection at trial because it was relevant to the pleaded issue of insurable interest. On the pleadings there was no value issue. The appellant there argued that even though the pleadings did not raise the issue of value, the trial court could properly pass on that issue under Rule 15(b). In holding that it would have been improper for the trial court to pass on the issue of value because the issue had not been tried by the implied consent of the parties, the court said:

Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. Id. at 253



Stated simply, the appellants' motion to amend the pleadings to conform to the proof was properly denied because the introduction of evidence relevant to issues already in the case may not be used to show implied consent to trial of a new issue in the absence of a clear indication that the evidence was introduced in an attempt to raise a new issue. Thompson, supra; International Harvester Credit v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977) (applying Rule 15(b) of the Federal Rules of Civil Procedure which is nearly identical to Utah's Rule 15(b)).

- B. Whatever the Alveys' Intent was Prior to March, 1979, they were Free to Cancel the Agreement in April, 1979

The doctrine of equitable estoppel is of no aid to the petitioners in this case. The doctrine of equitable estoppel does not apply to breach of promise as to future conduct. Elliot v. Whitmore, 23 Utah 343, 65 P. 70 (1901); Hosner v. Skelly, 164 P.2d 573 (Cal. 1945). Therefore, even if the Alveys would have been estopped from canceling the contract on satisfaction of the condition precedent (FHA financing) through March, 1979, they would not be estopped from canceling the contract in April when no confirmation of financing had been made and the appellants' application for financing had actually been rejected.

No matter what the Alveys' intentions were in March, 1979, or what the appellants believed them to be, the Alveys were free to cancel the contract prior to satisfaction of the condition precedent, notwithstanding the doctrine of equitable estoppel.



"The intent of a party, however positive and fixed, concerning his future conduct with respect to such a matter, is necessarily uncertain as to its fulfillment, and must depend upon contingencies and be subject to change and modifications by subsequent events and circumstances." Hosner, supra at 577 (quoting 21 CJS p. 1142.)

Also, the reasonableness of the appellants' reliance on the representations of lower level employees (Barney Alvey and Pam Tazzer) and a realtor as to the validity of the contract with the Alveys is certainly questionable.

#### IV.

THE TRIAL COURT'S JUDGMENT MUST BE  
AFFIRMED BECAUSE THE APPELLANTS FAILED  
TO INTRODUCE ANY EVIDENCE ON DAMAGES AT  
THE TIME OF BREACH

As previously discussed, the only remedy available to the appellants is damages. However, the appellants never introduced any evidence on the value of the house at the time of breach -- about April 1, 1979. The expert testimony as to house's value was all with respect to its value on or after August 11, 1979. (T.88, 91). The trial court specifically found that the appellants failed to present any evidence regarding the value of the house at the time of breach. Findings of Fact ¶12. The measure of damages in a contract action is the difference between the contract price and the fair market value of the property at the time of breach. Hardinger v. Till, 96 P.2d 262 (Wash. 1939). The appellants have failed to establish, or even introduce evidence, essential to their

recovery in this case. See Woodhouse v. Powles, 86 P. 1063 (Wash. 1906). Therefore, even if all the other issues were decided in the appellants' favor, they would not be entitled to judgment.

## V.

### CONCLUSION

The trial court's judgment should be affirmed for all or any of the following reasons: (1) the record provides substantial support for the trial court's finding that the appellants failed to use reasonable diligence in obtaining financing; (2) the record supports the trial court's finding that a reasonable time had passed for performance of the contract when in April, 1979 respondent Crowley told the appellants that the Earnest Money Agreement was not binding; and (3) the record shows that the appellants failed to satisfy a condition precedent to performance on the contract so no enforceable contract even existed.

In addition, the appellants failed to introduce evidence at trial proving their damages, as was their burden, having failed to establish an essential element of their case at trial, they are not entitled to have the judgment reversed on appeal. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted this <sup>13th</sup>~~12th~~ day of May, 1980.

FOX, EDWARDS & GARDINER

*Thomas R. Vuksinick*  
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Thomas R. Vuksinick  
Attorney for the Defendants-  
Appellants Michael and Vaughn  
Alvey

CERTIFICATE OF DELIVERY

I certify that I caused two copies each of the foregoing Brief to be delivered to Grant A. Hurst, attorney for the appellants, 68 South Main, Fifth Floor, Salt Lake City, Utah; and to Ronald L. Poulton, 9 Exchange Place, Suite 420, Salt Lake City, Utah, this 13 day of May, 1980.

Annette Gardiner