

1980

# Judy Baxter v. Thomas C. Stubbs, Frank Morton and Squaw Peak Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Thomas W. Seiler; Attorney for Appellant; Matt Biljanic; Attorney for Respondent

---

## Recommended Citation

Brief of Appellant, *Baxter v. Stubbs*, No. 16842 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2074](https://digitalcommons.law.byu.edu/uofu_sc2/2074)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE  
STATE OF UTAH

JUDY BAXTER,

Plaintiff-Respondent :

vs. :

Civil No. 52,265

No. 16842

THOMAS C. STUBBS, FRANK  
HORTON and SQUAW BEAK, INC.,

Defendants-Appellants.

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT AS ENTERED BY  
THE FOURTH JUDICIAL DISTRICT COURT, IN AND  
FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE  
J. ROBERT BULLOCK, JUDGE, PRESIDING

THOMAS W. SEILER  
GROW, WATSON & SEILER

1325 South 800 East  
Suite 310  
Orem, Utah 84057

Attorney for Appellant

MATEJ BILJANIC

7355 South 900 East  
Midvale, Utah 84047

Attorney for Respondent

FILED

FEB -4 1980

Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION OF CASE . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
POINT I . . . . .	4
POINT II . . . . .	7
POINT III . . . . .	9
POINT IV . . . . .	10
CONCLUSION . . . . .	11



### STATEMENT OF THE NATURE OF THE CASE

The Plaintiff, Judy Baxter, brought the action for the purpose of causing a dissolution of an alleged partnership. Defendants deny any such partnership did, or should, exist and counterclaim for damages resulting from the Plaintiff's continued use of real property deeded to the Defendant Squaw Peak, Inc. by the Plaintiff and Warburton Investment.

### DISPOSITION OF CASE

The trial court awarded the Plaintiff a twenty-five percent (25%) limited interest in the business to be conducted on the premises by the Defendants, including all the assets of the business. The Plaintiff was also awarded the use of a red brick home located on the premises.

### RELIEF SOUGHT ON APPEAL

Without specifically ruling on the admissibility of Plaintiff's Exhibits 1, 2 and 4, the trial court based its disposition of the case largely on these documents and the testimony of the Plaintiff in connection with these exhibits. The Defendants made repeated objections to the admissibility of these exhibits, and the testimony associated with them,

basing the objections upon the Statute of Frauds, the Doctrine of Merger, Parole Evidence and lack of consideration. The Defendants seek to have this Court hold that these Exhibits and the accompanying testimony are inadmissible, and direct the lower court to enter a finding that the Plaintiff has no interest in the real property conveyed by Plaintiff and another to Squaw Peak, Inc., nor in any other business assets of Squaw Peak, Inc.

#### STATEMENT OF FACTS

The Plaintiff acquired the realty in question on July 1, 1977 for \$150,000. Transcript of Trial, page 7. In January of 1978, the building on the premises, known as the Riverbend Lounge, burned down. The Plaintiff recovered \$65,000 in insurance proceeds which went directly to reduce the principal of the indebtedness, leaving \$65,000 still owing. Transcript of Trial, page 8. In order for the structure to ever be rebuilt, construction had to commence within one year from the fire; however, the Plaintiff was unable to obtain sufficient financing to provide for the structure to be rebuilt. Transcript of Trial, pages 8 and 9.

The Plaintiff received three (3) offers to purchase the property, all of them generated by the Defendant, Tom Stubbs. Transcript of Trial, page 9. Apparently, no other

parties were interested in the property.

On November 1, 1978, the Plaintiff and Warburton Investment, a partnership, executed a Warranty Deed (Plaintiff's Exhibit No. 3) as Grantors, which conveyed the property to the Defendant Squaw Peak, Inc. Transcript of Trial, pages 14 and 66. The Warranty Deed was then escrowed with Wasatch Bank until Squaw Peak, Inc. acquired a S.B.A. loan. The closing on the S.B.A. loan, and the final disbursements to the Plaintiff, took place on April 3, 1979. Transcript of Trial, pages 14 and 67, also, Plaintiff's Exhibit No. 3. The Warranty Deed (Plaintiff's Exhibit No. 3) is subject to certain easements and restruictions [sic] of record and requires the Grantee, the Defendant Squaw Peak, Inc., to pay the 1978 taxes. Plaintiff's Exhibit No. 3.

The Plaintiff has received a total of \$170,000 for the real property; \$65,000 from insurance proceeds; \$40,000 by check when the Warranty Deed was placed in escrow with Wasatch Bank; and \$65,000 when Warranty Deed was delivered by the escrow agent to Squaw Peak, Inc. on April 3, 1979. Transcript of Trial, pages 14, 31, 33, 41, 42, 59 and 67. The Warranty Deed was recorded with the Utah County Recorder's Office on April 4, 1979. Plaintiff's Exhibit No. 3.

The proceeding facts include all the evidence, pertinent to this appeal, which the Appellants and Defendants

believe to have been admissible. Some of the above-described facts may also be inadmissible. In addition to the proceeding facts, the trial court heard the facts described below.

An Earnest Money Receipt and Offer to Purchase (Plaintiff's Exhibit No. 1) was jointly prepared and executed by the Defendant Tom Stubbs and the Plaintiff on September 5, 1978 as the initial contract concerning the conveyance of the property by the Plaintiff to the Defendants. Transcript of Trial, page 9. Subsequent to the execution of the Earnest Money Receipt and Offer to Purchase, the Defendant Tom Stubbs and the Plaintiff executed Plaintiff's Exhibit No. 2, purporting to create an interest in the Defendants' business and business assets (restaurant). Transcript of Trial, page 12. There is no evidence of consideration for Plaintiff's Exhibit No. 2.

The trial court also believed it was important that the Defendant Tom Stubbs had previously made another offer on the property for \$140,000.

#### POINT I

Plaintiff's Exhibits 1, 2 and 4 are merged in Warranty Deed.

The doctrine of merger, which this Court recognizes, is applicable when the acts to be per-

## POINT II

### The Earnest Money Receipt Does Not Survive The Execution And Delivery Of The Warranty Deed

The Earnest Money Receipt and Offer to Purchase, Plaintiff's Exhibits No. 1 and 4, states:

It is understood and agreed that the terms written in this receipt constitute the entire preliminary contract....It is further agreed that the execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

Interpreting these exact provisions, this Court was held:

The delivery and acceptance of a deed, executed pursuant to the provisions of a precedent contract for the sale of real property, may merge rights conferred by the contract into it. Stipulations in the prior contract, of which conveyance is not a performance, are superseded by the deed if the parties intended to surrender them. These principals are founded upon the privilege which parties always possess to change their contract obligations by further agreement prior to performance.

Plaintiff also clearly demonstrated a lack of intention to perpetuate the option by subsequently affixing this signature on the closing documents and accepting them and the deed of conveyance without equivocation. Bowen v. Olsen, 576, P.2d 862, 864 (Utah, 1978) emphasis added.

In the case currently before the Court, the Plaintiff (seller) executed and caused the deed to be delivered without any reservation of any interest in the property, even though certain reservations were noted in the face of



the deed, notably one which required grantee to pay all of 1978 taxes, even though the Plaintiff's Deed was not executed until November 1978 nor delivered until April 1979. The terms of Plaintiff's Exhibits No. 1 and 4 would have required a proration of the taxes; however, this protection for the Defendants was removed by the Plaintiff when she drafted the Warranty Deed.

In Kelsey v. Hansen, 18 Utah 2d 226, 419 P.2d 198 (1966), this Court also addressed the abrogation clause in the Earnest Money Receipt and Offer to Purchase. In that opinion, the Court held a merger of the Earnest Money Receipt and Offer to Purchase did indeed occur. This Court found:

We have difficulty seeing why a warranty deed to Hansen [Buyer] should not abrogate the preliminary, loosely drawn and almost incoherent Earnest Money Receipt, and thus merge what really amounted only to signed notes of a contemplated future transaction for a deed, voluntarily executed subject to and actually recorded under conceded recording procedures, which was accomplished and sanctioned by legislative authority. Kelsey v. Hansen, supra, pp. 198-199.

In Kelsey v. Hansen, supra, p. 199, this Court pointed out, "There might be cases that could cut through such a case, in equity, for fraud, mistake and the like..." but such was not the case there, nor is the instant case such a case.

### POINT III

#### Plaintiff's Exhibit No. 2 Lacks Consideration

The testimony of the Plaintiff, and the representations made at trial by counsel for the Plaintiff, is that Plaintiff's Exhibit No. 2, referred to by the Plaintiff as the Addendum to the Earnest Money Receipt and Offer to Purchase, was executed by the Plaintiff and the Defendant Tom Stubbs subsequent to the execution of the Earnest Money Receipt and Offer to Purchase (Plaintiff's Exhibits No. 1 and 4) which "constitute the entire preliminary contract." Transcript of Trial, page 12. On its face, Exhibit No. 2 retains additional rights in the property, in favor of the Plaintiff, after conveyance by Plaintiff than does Plaintiff's Exhibit No. 1. There is no consideration, however, flowing from the Plaintiff to any of the Defendants as a result of Plaintiff's Exhibit No. 2. Without this consideration, Plaintiff's Exhibit No. 2 cannot be enforceable, even if one assumes that it survives the doctrine of merger. In addition, the Earnest Money Receipt and Offer to Purchase, Plaintiff's Exhibits 1 and 4, purports to be the final preliminary modification must clearly set forth that the modification alters the original agreement. This is not the case.

#### POINT IV

##### Plaintiff Received Bargained For Consideration

The testimony of the Plaintiff was that she was to receive a twenty-five percent (25%) interest in the new restaurant. In exchange for this interest the Defendants would be required to pay the Plaintiff only \$40,000 of the agreed \$105,000 sales price. The Plaintiff testified, "That's why they [the Defendants] didn't pay me [the Plaintiff] the full \$105,000." That \$65,000 was to be part of twenty-five percent (25%) interest in the new restaurant. Transcript of Trial, page 12. The Plaintiff later testified that the full \$105,000 was paid by the Defendants by paying the Plaintiff \$40,000 and relieving the Plaintiff of a \$65,000 obligation to Wasatch Bank. Transcript of Trial, page 31. The testimony of the Plaintiff is, therefore, that, if the Defendants did not pay the full \$105,000 purchase price, she was to receive a twenty-five percent (25%) interest in the restaurant business. However, she was paid the full purchase price.

Furthermore, the Plaintiff made a \$20,000 profit on the property, which she held for approximately twenty-two (22) months, even though the major structure on the premises was destroyed by fire during that period and the

Plaintiff failed to have adequate insurance on the structure to rebuild it. If this Court allows the Plaintiff to retain a twenty-five percent (25%) interest in the property, she will have, by her testimony, made an additional \$100,000 profit on the sale. Transcript of Trial, page 23. If the Plaintiff's figures are accurate, and a twenty-five percent (25%) interest in the property gives her \$100,000 equity position in the property, the property is worth approximately \$400,000 as bare ground. Knowing this, the Plaintiff nevertheless sold the property for \$105,000. The reason the Plaintiff sold the property for \$105,000 is because that is all it was worth as bare ground. The \$100,000 equity she referred to is only something she has imagined.

#### CONCLUSION

The Plaintiff sold the Defendants real property at \$105,000. All prior agreements were merged in the Warranty Deed. To the extent this Court determines they have not merged, the Plaintiff testified that she was to receive a twenty-five percent (25%) interest only if she was paid only \$40,000. In fact, the Plaintiff received the full \$105,000 purchase price.

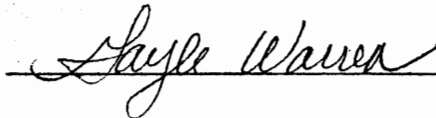
Plaintiff's Exhibit No. 2, in addition to being merged in the Warranty Deed, lacks consideration sufficient

to make it a binding contract.

The Defendants ask that all right, title and interest of the Plaintiff in the property be extinguished in favor of the Defendant Squaw Peak, Inc.

MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the Brief of Appellant Thomas C. Stubbs, Frank Horton and Squaw Peak, Inc. to Matt Biljanic, Attorney for Respondent, 7355 South 900 East, Midvale, Utah 84047, postage prepaid, this 4th day of February, 1980.

\_\_\_\_\_