

1988

John M. Whiteley, Barbara Whiteley, and Elan Management, Inc. v. Sidney Seftel, and Theresa Seftel : Reply Brief

Utah Supreme Court

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SUPREME COURT OF THE STATE OF UTAH

JOHN M. WHITELEY, BARBARA
WHITELEY, and ELAN MANAGEMENT,
INC., a Utah corporation,

Plaintiffs,

vs.

SIDNEY SEFTTEL and THERESA
SEFTTEL,

Defendant.

Supreme Court No. 860162

860575

88-0248-CA

REPLY BRIEF

APPEAL BY DEFENDANTS FROM THE AMENDED JUDGMENT AND ORDER ON
MOTION FOR JUDGMENT VESTING TITLE IN LIEU OF CONVEYANCE
OF TITLE ENTERED BY THE HONORABLE JUDITH M. BILLINGS
DISTRICT COURT JUDGE IN THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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Clerk, Supreme Court, Utah

JOHN M. WHITELEY, BARBARA
WHITELEY, and ELAN MANAGEMENT,
INC., a Utah corporation,

vs.

SIDNEY SEFTEL and THERESA SEFTEL,

Defendant.

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENTS	
DECLARATIONS MADE BY THE PLAINTIFFS AND THE TITLE COMPANIES DID NOT CONSTITUTE VALID TENDERS . . .	4
THE TRIAL COURT'S CONCLUSION THAT PLAINTIFFS WERE EXCUSED FROM TENDERING MONTHLY PAYMENTS TO DEFENDANTS CONSTITUTES REVERSIBLE ERROR	10
FAILURE TO PAY THE MONTHLY INSTALLMENTS RENDERED PLAINTIFFS IN DEFAULT UNDER THE CONTRACT AND RELIEVED DEFENDANTS OF THEIR DUTY TO CONVEY	15
THE TRIAL COURTS AWARD OF ATTORNEY'S FEES TO PLAINTIFFS CONSTITUTES REVERSIBLE ERROR	18
THE TRIAL COURT'S JUDGMENT MODIFIED THE PRELIMINARY INJUNCTION AND ALLOWED DEFENDANTS ALL THEIR CONTRACT REMEDIES	22
CONCLUSION	24
ADDENDUM	26

CASES CITED

	Page
<u>Beckstead v. Smith</u> , 656 P.2d 1003 (Utah 1982)	8, 9, 17
<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985)	21
<u>Carpenter v. Riley</u> , 675 P.2d 900 (Kan. 1984)	7
<u>Faulkner v. Farnsworth</u> , 714 P.2d 1149 (Utah 1986)	17, 18
<u>Fireman's Insurance Co. v. Brown</u> , 529 P.2d 419 (Utah 1974)	16
<u>Forrel v. Reed</u> , 560 P.2d 1113 (Utah 1977)	21
<u>Owens v. Idaho First Nat. Bank</u> , 649 P.2d 1221 (Idaho App. 1982)	5
<u>Parks Enterprises v. New Century Realty</u> , 652 P.2d 918 (Utah 1982)	6
<u>Utah Farm Production Credit Ass'n v. Cox</u> , 627 P.2d 62 (Utah 1981)	18
<u>Zions Properties, Inc. v. Holt</u> , 538 P.2d 1319 (Utah 1975)	5, 7, 14

OTHER AUTHORITIES

74 Am Jur. 2d Tender §7 at 549-50 (1974)	5
--	---

STATEMENT OF FACTS

Respondents (referred to hereinafter as Plaintiffs and Whiteleys) represent in their statement of facts that the Terry and JoAnne Bowns transaction was to close in the offices of Associated Title Company at which time the total amount owing to Defendants, plus the underlying obligation, were to be paid. In support of this factual statement they cite pages 458-59 of the record. That reference is to the trial court's amended findings of fact and conclusions of law. Paragraph 17 of that document recites that the closing of the transaction was to have been conducted in the offices of Associated Title Company "at which time the unpaid loan balance owing to Western Savings & Loan was to be paid." (R. p. 258).

Thereafter paragraph 19 of that document states that Plaintiff John Whiteley telephoned Defendant Sidney Seftel and advised him that Whiteleys were prepared to pay the full amount that was then owing to Western Savings and such amount, if any, as may have been owing to Mr. and Mrs. Seftel. (R. p. 259).

Neither of these findings nor any evidence in the record supports the Respondents ascertain that the total amounts owing to the Defendants were to be paid to them by Associated Title Company at the closing of the Bowns transaction. In fact, all evidence presented at trial supports the contrary conclusion

that the Defendants were to receive nothing from Associated Title Company at the time of the closing.

For example, part of the closing settlement statement introduced at trial as Plaintiff's Exhibit No. 11 recites that upon closing Western Savings and Loan was to be paid \$44,370.01 and the Plaintiffs were to receive \$9,010.84. That document which represents the intended distribution and application of all proceed from the Bowns' sale makes absolutely no reference or provision for any payment from Associated Title Company to Defendants. (Transcript p. 74, lines 15-19).

In fact, although Whiteley testified that he was aware of the terms of the Uniform Real Estate Contract and aware that under those terms Defendants were to receive monthly payments from the buyers on the first of each month, (Transcript p. 97, lines 9-16), he filed a Warranty Deed governing the property and attempted to complete the sale without paying anything to Defendants. (Transcript p. 97, lines 1-8).

Plaintiffs also represented in their statement of facts that Whiteleys were ready, willing and able to pay Defendants the amount owing, if Whiteleys would have been able to determine that amount. That ascertain is contrary to the actual facts present in the record before this Court. Whiteley repeatedly testified that he was aware that monthly payments were due to

Seftels under the Uniform Real Estate contract and that those payments were not made. (Transcript, p. 78, lines 9-14).

As explained in direct testimony by Whiteley:

A. Well, I told him he wanted to make full payment and through the proceeds of a sale. And, that it was, that the sale was in process and as soon as that sale was consummated, why, he would be fully paid whatever he had coming. And we wanted to do it that way rather than make the monthly payments that I told him within a month or two we expected to have the thing closed. (Transcript p. 80, lines 1-7).

Again during cross examination, Whiteley reiterated that he was aware that monthly payments were due to Defendants and had not been paid. Specifically, he testified:

Q. And at the time that that (Bowns) transaction was to take place which, I believe, was in March you were aware something was due and owing to Mr. Seftel: Is that correct?

A. Yes, probably only the March payment, however.

Q. The March payment. And you were aware you hadn't made that March payment; is that correct?

A. Yes, and we informed the Title Company of that and Mr. Seftel.

(Transcript p. 99, lines 9-16).

Again and again in his testimony, Whiteley explained that he knew the amounts due to Defendants under the terms of the contract but chose not to pay them because of the pending

sale. see eg. (Transcript p. 108 lines 16-24; Transcript p. 114, lines 12-25).

The evidence is overwhelming that in relation to both the Bowns sale and the Beehive Title transaction, Whiteley was aware of the amount due to Defendants under the terms of the contract but chose not to pay that amount until Seftels released their interest in the property. The reason the Bowns sale did not close was that Seftels would not release their interest prior to receiving the required monthly payments and without making those payments prior to the sale Plaintiffs could not deliver clear title to the property. (Transcript p. 82, lines 18-21; Transcript p. 111, lines 18-22). Similarly, the monies held by Beehive Title were not released because Whiteleys could not deliver clear title to the property. (Transcript p. 57, lines 4-8).

Therefore, Whiteleys failure to pay the monthly amounts as they came due was the actual cause for the Bowns sale not closing and the monies not being released from Beehive Title.

ARGUMENT I

DECLARATIONS MADE BY THE PLAINTIFFS AND THE TITLE COMPANIES DID NOT CONSTITUTE VALID TENDERS

In support of the trial courts conclusion that declarations made by Plaintiffs and the two title companies

constituted a valid tender, Plaintiffs argue that a valid tender does not require the actual production of the money due and owing. Rather, they reason that a tender is sufficient if a money equivalent is offered and amounts held or to be held by an escrow agent constitute the "equivalent of cash."

Defendants do not believe that declarations of any type can constitute a valid tender of monies due and owing. Plaintiffs' argument misconstrues the concept of tender in an attempt to justify the trial court's erroneous ruling.

It is generally recognized that a mere offer to pay does not constitute a valid tender. A tender implies the physical act of offering the money or thing to be tendered. The accepted rule is that a legal tender requires an actual, present, physical offer of money or its equivalent and this presentment is not satisfied by a mere spoken offer to pay. See Owens v. Idaho First Nat. Bank, 649 P.2d 1221, 1222 (Idaho App. 1982) [quoting from 74 Am Jur. 2d Tender §7 at 549-50 (1974)].

This Court has adopted this general principal in Zions Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975) wherein it explained:

A tender requires that there be a bona fide unconditional offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent. What occurred was that plaintiff's president discussed with the defendants the prospect that payment would be made under certain conditions.

But there was no actual tender of the amounts due under the contract within the foregoing definition. . .

(footnote omitted, emphasis added)

This Court's reference to money or its equivalent in that quotation referred to the physical object tendered, to wit, cash or a check, rather than the form of the presentment. See Parks Enterprises v. New Century Realty, 652 P.2d 918, 921 (Utah 1982). If this Court were to accept the rational proposed by Plaintiffs, it would be required to eliminate the second part of the above-quoted definition of tender, i.e., the actual delivery or physical presentment of money to the party. Such a result would be in direct contradiction to the existing rule in this state and the rule of law generally accepted by all jurisdictions.

Notwithstanding the questionable nature of the Appellees' basic premise, their application of that premise to the facts of the present case is also clearly erroneous. In their argument Plaintiffs admit that Associated Title Company did not actually hold any money in escrow pending completion of the Bowns sale. Rather they explain that Associated Title Company, as a third party escrow agent, "would have held funds sufficient to make the payments". . . had the Defendants informed them of the amounts then owing.

Ignoring the "would have held" nature of this statement the Plaintiffs ask this Court to conclude that the amounts "held

by the escrow agents were sufficient to constitute the requisite 'equivalent to cash'. If Associated held no monies in escrow, a fact which is conceded by Plaintiffs, then the Plaintiff lacked the ability to immediately perform their offer. Yet, to constitute a valid tender the party making the tender must have the ability to effectuate immediate performance and that ability must be unfettered by conditional limitations. See Carpenter v. Riley, 675 P.2d 900, 904 (Kan. 1984). As this Court stated in Zions Properties, Inc. v. Holt, 538 P.2d at 1322; "There must be a bona fide, unconditional offer of payment coupled with the actual production of the money."

Because the monies were either not in the possession of Associated Title Company or if held could not be released prior to Defendants' release of their interest in the property, the Plaintiffs could not immediately perform their offer even if such an offer was made. Similarly because the release of monies held by Beehive Title Company was conditioned upon the prior release of Defendants' interest, the Plaintiffs had no ability to immediately perform the offer of payment relating to that money. (Transcript, p. 57, lines 1-14).

However, Plaintiffs argue that Defendants' contention that the alleged tenders were conditional cannot stand because Plaintiffs were prepared to perform in full, if Defendants were

willing to live up to their contractual obligations. Yet Plaintiffs do not contest the fact that their offer of payment was conditioned upon the prior or simultaneous release by Defendants of their interest in the real property. This release therefore must be considered as constituting a condition to the Plaintiffs' payment of the monies due.

In Beckstead v. Smith, 656 P.2d 1003 (Utah 1982) this Court was asked to interpret identical terms in a Uniform Real Estate Contract concerning a seller's duty to convey title to the purchaser and held that under paragraph 19 of that and every similar Uniform Real Estate Contract, the seller's performance of conveyance is conditioned upon and not concurrent with the Buyer's performance of payment. Id. 656 P.2d at 1004. That holding is clear and the respective responsibilities and duties of parties under the type of contract present in this case is equally clear. The seller is not required to convey his interest in the property until all payments presently due under the contract have been made.

There is no question that in the present case that monthly payments due to Defendants under the contract had not been paid when Plaintiffs informed Defendants that if they would release their interest those payments would be made. Such a

statement, even if it could constitute a presentment of monies must be viewed as conditional and therefore not a valid tender.

In an effort to distinguish this Court's decision in Beckstead and get around the conditional nature of their tender, Plaintiffs argue that the oral declarations or offers of willingness to proceed found in the present case constituted a valid tender of performance which forced the Defendants to tender their performance. The obvious error in this reasoning is the elimination of the requirement that the Plaintiffs have the ability of performing immediately.

Under the present facts and the conditional nature of the alleged escrow accounts, Plaintiffs could not perform upon their offer of payment until the Defendants released their interest. Therefore, notwithstanding the alleged offer to pay, the Plaintiffs could not present the money due to Defendants until after the Defendants conveyed their interest.

This result is a stand-off. Plaintiffs can not deliver on their offer to pay until Defendants perform and Defendants are not required to perform until Plaintiffs deliver the money to them. This is the essence of a conditional tender and both the law of tender and this Court's decision in Beckstead require the Plaintiffs, as buyers, to eliminate the stalemate by unconditionally presenting the money to the sellers. Failing

that unconditional act the Defendant have no obligation to perform by conveying the property.

Therefore, because Plaintiffs did not present the actual money or its equivalent to Defendants, and offer unconditionally to immediately pay it over to them, no valid tender of the monthly payments due to Defendants was made by Plaintiffs.

The Plaintiffs also argue that notwithstanding the validity or invalidity of the tender, the Defendants' failure to contest the trial court's conclusion that Whiteleys were excused from making a valid tender requires this Court affirm the lower court's ruling. The Defendants strongly contest the trial court's conclusion of law that Plaintiffs were excused from making a valid tender and presented their arguments against that conclusion in the following argument and in Argument II of Appellants' Brief.

ARGUMENT II

THE TRIAL COURT'S CONCLUSION THAT PLAINTIFFS WERE EXCUSED FROM TENDERING MONTHLY PAYMENTS TO DEFENDANTS CONSTITUTES REVERSIBLE ERROR

In point 2 of their argument, Plaintiffs attempt to refute the Defendants' ascertains that certain findings of fact entered by the trial court were not supported by substantial evidence.

The critical factual issues contested by the Defendants are the role played by Associated Title and the Plaintiffs knowledge of amounts due and owing to Defendants. In its first argument, Plaintiffs conceded that Associated Title "would have held funds" but in fact never actually received funds from any parties in relation to the Bowns' sale.

However, contrary to their earlier argument, Plaintiffs state in point 2 that Exhibit 11 indicates that \$53,961.00 was held by Associated Title Company at the critical time. Exhibit 11 and the other evidence submitted at trial simply does not support that allegation.

Concerning Plaintiffs knowledge of what was due and owing to Defendants, Whiteley testified at numerous times throughout the trial that he was aware that monthly payments were due under the terms of the Uniform Real Estate Contract and that they had not been paid. (Transcript p. 106, lines 15-21). Whiteley's testimony on that issue is clear and uncontradicted:

Q. Now, was there any time in March or April that you were not aware that the March and April payments were due?

A. Again, we knew they were due. We thought we were paying them and every thing else.

(Transcript p. 108, lines 16-20).

*

*

*

Q. Did you know at that time what was due to Mr. Seftel?

A. Yes.

(Transcript p. 111-112, lines 25-2).

In relation to the amount due and owing to Western Savings and Loan, Whiteley testified:

Q. Did you every have any communication directly with Western Savings relative to the account balance what was owing?

A. Yes, I had called there a time or two and got the payoff figures so I would be aware of what was owed them.

(Transcript p. 84, liens 12-23).

Plaintiffs knew exactly what was owed to that lender and they knew what was owed to Defendants under the express terms of the Uniform Real Estate Contract.¹ Under the terms of that contract, if the Plaintiffs had been current in their monthly payments then all payments due under the contract would have been made and Defendants would have been required to convey the property pursuant to the combined provisions of paragraph 8 and 19 of the contract.

The Plaintiffs, by their own admissions, testified they knew the amounts due and owing. By paying those amounts due to Defendants, Plaintiffs could have required the Defendants to convey the property. However, the Plaintiffs voluntarily chose

¹Whiteley testified that there was never a time from March 1985 until September 1985 when he did not know what was due and owing to Western Savings. (Transcript p. 113 lines 16-25).

not to make the payments when due, but rather decided to wait until the property was sold to pay Defendants. (Transcript p. 80, lines 1-7). Whiteley testified that he understood monies were due and owing under the contract and he knew the amount of that obligation but decided to withhold payment of those amounts until the proposed sale closed. (Transcript p. 108, lines 5-24).

The Plaintiffs allegations that the Defendants failure to provide information to them frustrated the sales and excused their failure to tender the amounts due to Defendants is simply a smoke screen which is intended to divert attention away from the actual fact that with knowledge of the amounts due and owing Plaintiffs decided to withhold payment pending the completion of a sale of the property.

The reason the proposed sales did not close was not the fact that Plaintiffs lacked knowledge of what was due and owing but rather the fact that Defendant would not release their interest in the property until they were paid. Because, Plaintiffs were unable to deliver clear title to the property they could not close the transaction. (Transcript p. 111, lines 20-22). That failure had nothing to do with the alleged refusal of Defendants to provide them with information concerning what was due under the contract.²

²Plaintiffs' exhibit 11, which contained a hand written note contained in the files of Associated Title Company

The trial court's findings to the contrary and its conclusion that Defendants' failure to provide this information excused Plaintiffs from making a valid tender are not supported by substantive evidence and should be reversed on appeal.

In discussing the concept of the implied covenant of good faith, which should prevent either party from impeding the others performance of his obligations, this Court has explained that this principle must have practical application. It is not, as this Court has previously stated, every minor failure, which could otherwise be remedied, which will justify non-performance. See Zions Properties, Inc. v. Holt, 538 P.2d at 1321.

The failure or refusal to tell a party to a contract something that he admittedly knows is not the kind of failure which will justify non-performance. The trial court's reliance on the alleged failure of Defendants to provide information as a basis for excusing the necessity of the Plaintiffs tendering

²continued

indicates that Sidney Seftel had in fact informed Associated in April of 1985 that two payments were due and owing to him under the contract in the amount of \$486.00 each. At trial, Mr. Blake Heiner testified that the note was the kind of document that would normally appear in the file in response to a telephone conversation regarding the information contained thereon. (Transcript p. 70, lines 21-25). That evidence establishes that Associated Title Company as well as Plaintiffs were aware of the exact amount owed to Defendants prior to the scheduled closing of the Bowns sale.

monthly payments constitutes clear error which should be reversed on appeal.

ARGUMENT III

FAILURE TO PAY THE MONTHLY INSTALLMENTS RENDERED PLAINTIFFS IN DEFAULT UNDER THE CONTRACT AND RELIEVED DEFENDANTS OF THEIR DUTY TO CONVEY

In their third argument, Plaintiffs contend they were not in default under the terms of the Uniform Real Estate Contract although they had failed to make the required monthly payments.

The Plaintiffs' argument confuses the concept of default with that of termination or forfeiture. Under the express provisions of paragraph 16, of the contract, the Seller is required to give written notice to the buyer before being released from his obligations under the contract and terminating the contract pursuant to subparagraph A, of paragraph 16. However no such notice is required before a seller can enforce his right to payment of monthly installments under subparagraph B.

Thus, if the Buyer is delinquent in his payments the Seller can bring an action to recover those payments without sending written notice to the buyer. If the buyer fails or refuses to make the payments required by the contract when due,

he is in default under the terms of the contract. See Fireman's Insurance Co. v. Brown, 529 P.2d 419 (Utah 1974).

If a party fails to make payments as required by the contract he is thereby in default in his performance and the condition of default exists. When that condition exists, the seller has a choice of remedies under paragraph 16 of the Uniform Real Estate Contract. In order to exercise two of the three available remedies the seller must give written notice of the default to the buyer and an opportunity to cure that condition. However, the act of giving notice does not create the buyers default. Rather, it merely conditions the remedies available to the seller following that default.³

At the time the buyer becomes delinquent in his payments, he loses certain rights under the express terms of the contract. These rights are lost or suspended whether or not the seller gives him written notice of that default. Specifically,

³The Plaintiffs admit they were delinquent or in default under the payment term of the contract but argue that the delinquency was occasioned by the tactics of the Defendants who had failed to pursue their contract remedies. This argument makes no sense. The Defendants had no affirmative obligation to pursue their remedies under paragraph 16 of the Uniform Real Estate Contract. Their failure to give Plaintiffs written notice of the default could occasion or cause Plaintiffs' failure to make the monthly payments due under the contract. In fact, on two prior occasions, Defendants initiated actions to recover delinquent payments from the Plaintiffs.

under paragraph 19 the seller is relieved from his obligation to convey the property if he has not received the payments required to be paid by the buyer at the time and in the manner provided by the contract. See Beckstead v. Smith, 656 P.2d at 1004.

In their present argument, Plaintiffs admit they were delinquent or in default. However they reason that Defendants' failure to provide them with written notice of this admitted default meant that they retained all their rights under the Uniform Real Estate Contract. This argument and the trial court's decision on this issue ignores the fact that the obligation to convey found in paragraph 8 of the contract is conditioned by the provisions of paragraph 19.⁴ cf Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986).

Under the terms of paragraph 19, Defendants were not required to convey title to Plaintiffs until the monthly payments were brought current by the Plaintiffs. During the trial, Whiteley admitted that at no time were they current in the payment of the monthly installments. Therefore, based on that admission and the express terms of the contract the Defendants could not be in breach of their obligation to convey title under paragraph 8 of the contract.

⁴The trial court concluded as a matter of law that Defendants breached the express covenant found in paragraph 8 of the Uniform Real Estate Contract by refusing to deliver title to the property to Plaintiffs.

The question of what if any notice of default Defendants gave to Plaintiffs is totally immaterial to the resolution of this case and the determination of the parties rights under the Uniform Real Estate Contract. The trial court's conclusion of law that Plaintiffs were not in default is unsupported by substantive evidence and contrary to the admissions of Plaintiffs that that they were in fact in default. The trial court's conclusions that Defendants were in breach of an express provisions of the contract by failing to convey the property to the Plaintiffs and that Plaintiffs were not in default are clearly erroneous and should be reversed on appeal.

ARGUMENT IV

THE TRIAL COURTS AWARD OF ATTORNEY'S FEES TO PLAINTIFFS CONSTITUTES REVERSIBLE ERROR

In point 5 of their Brief, Plaintiffs argue that the trial court's award of attorney's fees was proper. In Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986), this court expressed the rule of law followed in this jurisdiction that an award of attorney fees is improper when it is not based on the express terms contained in the parties agreement. Under Utah law, a party is entitled only to those fees resulting from its principal cause of action for which there is a contractual obligation for attorneys fees. Utah Farm Production Credit Ass'n v. Cox, 627 P.2d 62, 66 (Utah 1981).

The Plaintiffs' complaint in the present case sought an award of damages from Defendants on theories of negligence, breach of implied covenant of good faith and fair dealing, breach of contract, and punitive damages. The Plaintiffs' complaint did not seek to enforce the contract or require the Defendants to convey title but rather sought to recover damages against the Defendants and enjoin them from terminating the contract.

Based on the Plaintiffs' Complaint and the evidence presented at trial, the trial court found that Defendants had caused Plaintiffs no damages from the alleged breach of the Uniform Real Estate Contract. However, going outside the pleadings and acting pursuant to the authority vested in it by Rule 54(c) Utah Rules of Civil Procedure, the trial court ordered Defendants to convey the property in question to Plaintiffs upon their payment of the delinquent monthly installments.

Notwithstanding the fact that the Plaintiffs were unable to prove that Defendants actions damaged them and that the Plaintiffs did not seek conveyance of the property in their complaint or subsequent pleadings, the trial court granted their request for attorney fees. And, although the trial court granted Defendants the relief requested by them in their counterclaim, to wit, payment of the delinquent installments,

that court refused to award Defendants their attorney fees or even present their counterclaim.

There was absolutely no evidence presented at trial nor could any have been presented that Defendants would not have conveyed the property in question to Plaintiffs if the monthly payments had been made.

It is inconceivable that the trial court would require Defendants to pay Plaintiffs' attorney's fees incurred in the prosecution of a complaint that Plaintiffs could not recover damages under while at the same time deny Defendants their attorney fees incurred in enforcing the contract. Not only is this contrary to this Court's prior decisions it is also inconsistent with the express terms of the Uniform Real Estate Contract in question.

Under the express terms of that contract, the buyer and seller each agree that should they default in any of the covenants or agreements contained herein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing the agreement, or in obtaining possession of the premises covered thereby, or in pursuing any remedy provided thereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

As drafted and prosecuted, the Plaintiffs complaint was not directed at enforcing the agreement, obtaining possession of the property, or pursuing a remedy provided by the contract or the statutes of the State of Utah. Therefore, any award of attorney's fees to Plaintiffs was improper because it was not based on the terms contained in the contract and should be set aside on appeal.

In addition, the testimony presented at trial by Plaintiffs in support of the award of attorney's fees did not differentiate between work done in furtherance of their alleged enforcement of the contract and attorneys fees expended in the prosecution of their damage claims or the defense of Defendants' counterclaim.

An award of attorney's fees must be made on the basis of a finding of fact supported by evidence and an appropriate conclusion of law. Cabrera v. Cottrell, 694 P.2d 622, 624 (Utah 1985). The evidence presented must not only address the total of the fees claimed, it must also establish the contractual basis for the award and detail the relationship between the contractual basis and the fees expended or incurred. See Forrel v. Reed, 560 P.2d 1113, 1116 (Utah 1977).

In the present case the only evidence adduced by Plaintiffs in support of the trial court's award of attorney's

fees related to the amount thereof. Therefore in addition to the other arguments presented by Defendants, the total absence of any evidence connecting the fees awarded to the contract requires that the award of attorney's fees be set aside.

ARGUMENT V

THE TRIAL COURT'S JUDGMENT MODIFIED THE PRELIMINARY INJUNCTION AND ALLOWED DEFENDANTS ALL THEIR CONTRACT REMEDIES

In point 7, Plaintiffs argue that the trial court's granting of their motion for judgment vesting title in lieu of conveyance was proper because that court's initial injunction was in force pending the outcome of this appeal and the payments due under the contract had not been in default for 30 days at the time of the notice.

The Defendants contend that the trial court's judgment must be read in conjunction with the preliminary injunction entered at the initiation of the case. In its judgment, the trial court ordered the Plaintiffs to make payment to Defendants of all delinquent amount within 15 days of the entry of the judgment. Defendants contend that at a minimum that order modified the earlier injunction and allowed the Plaintiffs an additional 15 days from the entry of judgment to make the payment.

Previously in their arguments, Plaintiff have contended that the trial court's judgment "was an order enforcing the

contract." Thus, they must agree that following the entry of judgment the contract was in full force and effect. The Plaintiffs have also admitted in their arguments presented in this appeal that they were delinquent or in default of the monthly installment payments. It is obvious that their admitted delinquency had existed for a period longer than 30 days when the judgment was entered. Therefore their argument that paragraph 16 limited Defendants' right to give them notice of default is unfounded.

If the trial court intended the injunction to extend without modification until the appeal was over or time for appeal had run as argued by Plaintiffs, the imposition of the 15 day limitation would have been mere surplusage. Why would the trial court order the Plaintiffs to pay the monies within 15 days of entry of the judgment if it did not intend to thereby modify its prior injunction? The Plaintiffs' argument that the trial court's prior injunction controlled its later judgment simply ignores the reality of the proceedings and the obvious intent of the trial court.

Following Plaintiffs failure to make the payments required by the trial court in the required period of time, the Defendants should have been allowed to enforce all remedies available under the Uniform Real Estate Contract. The trial courts granting of Plaintiffs motion for judgment vesting title

in lieu of conveyance was improperly granted and should be set aside on appeal.

CONCLUSION

The Courts award of attorney's fees to Plaintiff should be set aside and the case remanded for determination of the rights of the parties following the Plaintiffs failure to fulfill the terms of the judgment and pay the past due installments within 15 days of entry of the Judgment. In addition the trial court's dismissal of Defendants' counterclaim should be set aside and the Defendants' claims including their claim to an award of attorney's fees remanded for trial on the merits.

Dated this 16th day of July, 1987.

A handwritten signature in black ink, appearing to read "Daniel W. Jackson", is written over a horizontal line.

Daniel W. Jackson
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The Walker Center, Suite 560
175 South Main Street
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 1987, I mailed a true and correct copy of the foregoing document, postage prepaid, addressed to the following individuals:

Gary Weston
NIELSON & SENIOR
36 South State Street, Suite 1100
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be "Gary Weston", written over a horizontal line.

ADDENDUM

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOHN M. WHITELEY, BARBARA)
WHITELEY, ELAN MANAGEMENT, INC.,)
a Utah Corporation,)

Plaintiffs,)

vs)

EDNEY SEFTEL and THERSA)
SEFTEL,)

Defendants.)

C O M P L A I N T

Civil NO. C85-6571

Judge Billings

Plaintiffs complain of defendants and allege as follows:

JURISDICTION AND VENUE

1. Plaintiffs, John M. Whiteley and Barbara Whiteley, are residents of Salt Lake County, State of Utah.
2. Plaintiff, Elan Management Inc., is a Utah Corporation with principal offices in Salt Lake City, Salt Lake County, State of Utah.
3. The real property which is the subject of this suit is located in Salt Lake County, Utah, and is more particularly described as follows:

COMMENCING 577.5 feet North and 208.6 feet East of the Southwest corner of the Southeast Quarter of Section 27, Township 1 South, Range 1 East, Salt Lake Base & Meridian, and running thence South 236.4 feet; thence East 77 feet; thence North 236.4 feet; thence West 77 feet to the place of beginning.

GENERAL ALLEGATIONS

4. On or about January 8, 1981 plaintiffs entered into a Uniform Real Estate Contract to sell the subject property to one, Randy D. Call, with notice of the contractual agreement being recorded in the office of the Salt Lake County Recorder on January 9, 1981 in Book 5199 at Page 1234 (see copy of the Uniform Real Estate Contract attached hereto and hereby made a part of this complaint).

5. Pursuant to the aforesaid Uniform Real Estate Contract the defendants had no remaining equity in the subject property since the balance due defendants under the contract was equal to an underlying trust deed note obligation to Western Savings and Loan Company (see paragraphs 3 and 6 of the Uniform Real Estate Contract).

6. By successive assignments of contract, the interest of Randy D. Call in the subject property was conveyed to James H. Deans, from James H. Deans to plaintiff Barbara Whiteley, and from plaintiff Barbara Whiteley to plaintiff Elan Management, Inc.

7. That during the month of March 1985, plaintiff Barbara Whiteley had an offer from a prospective buyer of the subject property, and attempted individually, through her husband, plaintiff John M. Whiteley, and through Associated Title Company, to obtain payoff figures from defendants and defendants' legal counsel in order to consummate a sale, which defendants would not and did not provide.

8. That pursuant to paragraph 8 of the Uniform Real Estate

Contract attached hereto, the buyer, i.e. plaintiffs by assignment of contract, are entitled to a conveyance of the subject property subject to loans and mortgages "When the principal due ... has been reduced to the amount of any such loans and mortgages...

9. That upon demand by plaintiff Barbara Whitely, deeds through successive contract buyers were recorded in the office of the Salt Lake County Recorder.

10. That on or about May 1, 1985 defendants caused a Complaint to be filed in this Court against Randy D. Call and defendant John M. Whiteley dba Key Properties, alleging that the deed conveying defendants' interest in the subject property to Randy D. Call was violative of the Uniform Real Estate Contract between defendants and Call, and that a subsequent transfer to plaintiff John M. Whiteley creates a cloud on the legal title. This cause of action is still before the Court, and defendants have not pursued it further.

11. That commencing in August of 1985 and continuing through the present date, plaintiffs, individually, and by and through Beehive Title Company, and plaintiffs' attorneys have attempted to obtain a payoff figure from defendants in order to pay the outstanding indebtedness to the underlying mortgagee on the subject property, as well as any amounts which defendants may have paid the mortgagee.

12. That on September 11, 1985 plaintiff John M. Whiteley and Randy D. Call received in the regular mail a letter dated August 28, 1985 and mailed on September 9, 1985 purporting to be a

Notice of Default, which Notice was legally defective in that it did not comply with the notice requirements of Utah Code Annotated.

13. That plaintiffs did cause to be placed in escrow with Beehive Title Company sums in excess of amounts necessary to pay off any verified payments made by defendants on behalf of the present fee owner, defendant Elan Management, Inc., or its predecessors in interest and to pay off the underlying indebtedness on the subject property with Western Savings and Loan.

14. That defendant, John M. Whiteley, and Beehive Title Company notified defendants' attorneys that there were sufficient monies in escrow to pay all amounts due and owing under the contract, but that to this date defendants' attorneys have not yet notified Beehive Title Company of amounts due and owing.

15. That although repeated requests for payoff figures had been made of defendants and defendants' attorneys, no such figures were given to Randy D. Call or these plaintiffs until September 23, 1985 on which date a Notice to Quit and Notice of Forfeiture were served upon plaintiff Barbara Whiteley, the Notice of Forfeiture for the first time giving these plaintiffs notice of the amount of the alleged delinquency.

16. That these defendants were notified through their attorneys of the urgency in paying off all amounts due under the contract because of a contemplated resale, and therefore should be held liable for the damage proximately caused by

defendants' actions, which whether negligent or intentional, have resulted in damage to these plaintiffs.

17. Plaintiffs have incurred legal fees and costs in connection with the prosecution of this action, which should be paid by defendants.

FIRST CLAIM FOR RELIEF

Negligence of Defendants

18. Plaintiff reallege and incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 17 above.

19. Defendants owed plaintiffs, as successors in interest to Randy D. Call, a duty to conclude the transaction contemplated in the referenced Uniform Real Estate Contract in a proper and conventional manner, with due care.

20. Defendants were negligent and breached the duty owed to plaintiff by failing to conclude the contemplated transaction in a proper and conventional manner, with due care.

21. As a direct and proximate result of the negligence of defendants, plaintiffs, individually and jointly, have been damaged in an amount to be shown at trial, but in any event not less than \$100,000.00.

22. Plaintiffs are entitled to a judgment against defendants awarding damages in an amount to be shown at trial, but in any event not less than \$100,000.00.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF

Breach of Contract

23. Plaintiffs reallege and incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 17 above.

24. Plaintiffs allege that at all times material hereto they have stood ready, willing and able to perform under the terms of the Uniform Real Estate Contract.

25. Plaintiffs allege that defendants' actions as heretofore stated constitute a breach of their contractual obligations such as entitle plaintiffs to recover for actual and consequential damages as may be proved at trial.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF

Breach of Implied Covenant of Good Faith and Fair Dealing

26. Plaintiffs reallege and incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 17 above.

27. Defendants impliedly covenanted with plaintiffs' predecessor in interest, Randy D. Call, to deal fairly and perform all obligations arising under the within described Uniform Real Estate Contract in good faith.

28. Defendants' actions constitute a breach of their implied covenant of good and faith and fair dealing running to these plaintiffs under the Uniform Real Estate Contract.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF

Estoppel

25. Plaintiffs reallege and incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 17 above.

26. Defendants' actions as above alleged, whether by themselves or through their attorneys, are such as should preclude defendants from asserting a right to the detriment or prejudice of these plaintiffs.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

Punitive Damages

27. Plaintiffs reallege and incorporate herein by reference as though fully set forth the allegations of paragraphs 1 through 17 above.

28. Because the acts of defendants, individually and/or by and through their attorneys, were willful, wanton, and malicious, plaintiffs are entitled to be awarded punitive damages against defendants in an amount not less than three times the actual damages suffered by plaintiff, which trebled amount is estimated, on information and belief, to be not less than \$300,000.00.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

FIFTH CLAIM FOR RELIEF
Injunctive Relief

29. Plaintiffs reallege and incorporate by reference as though fully set forth herein the allegations of paragraphs 1 through 17 above.

30. Defendants have commenced legal action to declare a forfeiture under paragraph 16a of the subject Uniform Real Estate Contract; and will proceed to dispossess plaintiffs to plaintiffs' immediate and irreparable injury and damage of plaintiffs who have no plain, speedy or adequate remedy at law unless said defendants are restrained from taking said action.

31. Plaintiffs are entitled to a temporary restraining order preliminary injunction during the pendency of this action restraining and enjoining defendants from continuing any action against plaintiff from enforcing the forfeiture and/or forfeiture provisions of paragraph 16a of the aforesaid Uniform Real Estate Contract. Plaintiffs are further entitled, at the conclusion of this action, to a permanent injunction restraining and enjoining said defendants from the commencement or continuation of any action against plaintiffs to collect under the aforesaid Uniform Real Estate Contract.

WHEREFORE, plaintiffs pray for relief and demand judgment against defendants, and each of them, as follows:

1. On plaintiffs' FIRST CLAIM FOR RELIEF:

a. For judgment in favor of plaintiffs and against defendants in an amount to be determined at trial, but not less than \$100,000.00.

b. For reasonable attorneys' fees, as determined by the Court.

2. On plaintiffs' SECOND CLAIM FOR RELIEF:

a. For judgment in favor of plaintiffs and against defendants in an amount to be determined at trial.

b. For reasonable attorneys' fees, as determined by the Court.

3. On plaintiffs' THIRD CLAIM FOR RELIEF:

a. For an Order of the Court precluding defendants from asserting a right to the detriment or prejudice of these plaintiffs.

b. For reasonable attorneys' fees, as determined by the Court.

4. On plaintiffs' FOURTH CLAIM FOR RELIEF:

a. For judgment in favor of plaintiffs and against defendants by way of punitive and exemplary damages in a total amount not less than three times the amount of actual damages suffered by plaintiffs and which total amount of said punitive damages are estimated to be \$300,000.00.

b. For reasonable attorneys' fees, as determined by the Court.

5. On plaintiffs' FIFTH CLAIM FOR RELIEF:

a. For a temporary restraining order and/or a preliminary injunction during the pendency of this action and a permanent injunction to be issued at the conclusion hereof, restraining and enjoining the defendant from commencement or

continuation of an action against plaintiffs and this or any other Court are not out of the fact that we obliged her to.

b. for respondent's attorney's fees, as determined by the court.

6. On all of plaintiffs' CLAIMS, on which:

7. For each:

b. For each other religions may be found just and proper in the premise.

Done this 27th day of September, 1934.

John L. Whiteley, Plaintiff

Chrysomela, *Chrysomela*,
Chrysomela Whiteley, Plate III

CLAW JAW AGENT, INC., Plaintiff
vs.
EATON CORPORATION, Defendant

John M. Whitely, President

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DATE OF DEATH :
COUNTRY OF BIRTH (STATE)

John M. Whiteley, individually and on behalf of Elton Management, Inc., and Barbara Whiteley have read the foregoing complaint and know the contents thereof and the same to be true except as to matters stated on information and belief and as to such matters, they believe them to be true.

John, M. Whiteley

Barbara Whiteley

ATTORNEYS who acted to before at this 32nd day of
October, 1880.

1. General

Residing at: Salt Lake County, Utah