

1980

# Nixon & Nixon, Inc. v. John New & Associates, 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.

Richard Richards; Attorney for Defendant-Respondent;

L. Brent Hoggan; Attorneys for Plaintiff-Appellant;

---

## Recommended Citation

Brief of Appellant, *Nixon & Nixon, Inc. v. John New & Associates*, No. 16989 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2251](https://digitalcommons.law.byu.edu/uofu_sc2/2251)

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

-----  
NIXON & NIXON, INC., a  
Utah Corporation,

Plaintiff and  
Appellant,

vs.

Civil No. 16989

JOHN NEW & ASSOCIATES, INC.,  
a Utah Corporation,

Defendant and  
Appellee.

-----  
APPELLANT'S BRIEF  
-----

An Appeal from the judgment of the Second Judicial  
District Court in and for the County of Weber, Utah

The Honorable Calvin Gould  
-----

L. Brent Hoggan  
OLSON, HOGGAN & SORENSON  
56 West Center  
Logan, Utah 84321

Attorneys for Plaintiff-  
Appellant

Richard Richards  
3918 Riverdale Road  
Ogden, Utah 84303

Attorney for Defendant-  
Respondent

FILED

AUG 18 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

NIXON & NIXON, INC., a  
Utah Corporation,  
  
Plaintiff and  
Appellant,

vs.

JOHN NEW & ASSOCIATES, INC.,  
a Utah Corporation,  
  
Defendant and  
Appellee.

Civil No. 16989

APPELLANT'S BRIEF

An Appeal from the judgment of the Second Judicial  
District Court in and for the County of Weber, Utah

The Honorable Calvin Gould

L. Brent Hoggan  
OLSON, HOGGAN & SORENSON  
56 West Center  
Logan, Utah 84321

Attorneys for Plaintiff-  
Appellant

Richard Richards  
3918 Riverdale Road  
Ogden, Utah 84303

Attorney for Defendant-  
Respondent

## TABLE OF CONTENTS

NATURE OF THE CASE. . . . .	1
DISPOSITION IN LOWER COURT . . . . .	2
RELIEF SOUGHT . . . . .	3
STATEMENT OF FACTS . . . . .	3
ARGUMENT . . . . .	11
POINT I. THE CONTRACT BETWEEN THE PARTIES IS NOT AMBIGUOUS AND VAGUE AND THERE IS SUFFICIENT DEFINITNESS IN THE CONTRACT TO WARRANT SPECIFIC ENFORCEMENT THEREOF . . . . .	11
POINT II. CONSTRUED AS A WHOLE THE CONTRACT BETWEEN THE PARTIES REQUIRED NEW TO CONVEY A CLEAR TITLE TO NIXON BEFORE NIXON WAS OBLIGATED TO DEVELOP THE PROPERTY AND NIXON COULD NOT BE IN DEFAULT ON THE CONTRACT UNTIL IT HAD FAILED OR REFUSED TO DEVELOPE THE PROPERTY AFTER OBTAINING A CLEAR TITLE THERETO. . . . .	16
POINT III. THE TRIAL COURT ERRED IN EXERCISING ITS EQUITABLE POWERS TO VOID THE CONTRACT IN FAVOR OF NEW INASMUCH AS NEW DID NOT DO EQUITY .	17
CONCLUSION . . . . .	19

## AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Bryant vs. Deseret News Publishing Company (Utah) 233 P.2d 355 . . . . .	12
Dearborn Motors Credit Corp. vs. Neel (Kansas) 337 P.2d 992 . . . . .	13
Reed vs. Alvey (Utah) 610 P.2d 1374 . . . . .	15 & 16
Schofield vs. ZCMI (Utah) 39 P.2d 342 . . . . .	12
State Bank of Wilbur vs. Phillips (Washington) 119 P.2d 664 . . . . .	13
 <u>Treatises</u>	
17 Am. Jur. 2d Contracts Sec. 254, p. 648 . . . . .	12
17 Am. Jur. 2d Contracts Sec. 258, p. 658 . . . . .	12
17 Am. Jur. 2d Contracts Sec. 259, p. 660 . . . . .	13
17 Am. Jur. 2d Contracts Sec. 276, p. 689 . . . . .	12
27 Am. Jur. 2d Equity Sec. 131, p. 660 . . . . .	18
27 Am. Jur. 2d Equity Sec. 136, p. 666 . . . . .	18

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

NIXON & NIXON, INC., a	)	
Utah corporation,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
vs.	)	Civil No. 16989
	)	
JOHN NEW & ASSOCIATES, INC.,	)	
a Utah corporation,	)	
	)	
Defendant and	)	
Appellee.	)	

-----

APPELLANT'S BRIEF

-----

NATURE OF THE CASE

This is an action for specific performance of a written agreement dated November 20, 1978 between the Defendant, JOHN NEW AND ASSOCIATES, INC., a Utah Corporation (hereinafter in this brief referred to for purposes of convenience as New) and Plaintiff, NIXON & NIXON, INC., a Utah corporation (hereinafter in this brief referred to for purposes of convenience as Nixon), in which agreement New agreed to sell to Nixon and Nixon agreed to purchase from New certain undeveloped real property in Weber County, Utah. Nixon's Complaint was filed on June 6, 1979. (R-1).

New filed an Answer to the Complaint on July 12, 1979, generally admitting the contract, denying its duty to specifically perform the contract and alleging that New and Nixon were joint venturers in development of said property. (R-12).

DISPOSITION IN LOWER COURT

This case was tried in the District Court of Weber County, Utah, wherein it was filed, before the Honorable Calvin Gould, sitting without a jury, on February 14, 1980. At the conclusion of the trial, Judge Gould took the case under advisement. Thereafter, on February 28, 1980, Judge Gould made and entered the following Memorandum Decision:

The Court holds that the contract is so ambiguous that the rights of the defendant cannot be ascertained or enforced except at the whim or caprice of the plaintiff as to the date of filing final plats, etc. The contract is therefore unenforceable.

Plaintiff may have Judgment for amounts paid and defendant may have Judgment voiding the purported contract.

No Findings of Fact and Conclusions of Law or Judgment were entered on said Memorandum Decision within the time for appeal of a final judgment under the Utah Rules of Civil Procedure and so, to protect the record, Nixon filed a Notice of Appeal on March 28, 1980 from Judge Gould's Memorandum Decision of February 28, 1980. (R-20).

Thereafter, on June 9, 1980, Judge Gould made and entered

formal Findings of Fact and Conclusions of Law and a Judgment holding said Agreement vague and ambiguous, restoring the parties to their status before the Agreement, relieving New of any duty to convey the property to Nixon and awarding Nixon a money judgment for the principal amount theretofore paid by Nixon on the Contract in the amount of \$76,928.63 and interest thereon to the date of the Judgment in the amount of \$20,562.83. (R 34-37).

#### RELIEF SOUGHT ON APPEAL

Nixon requests that this Court reverse the Judgment entered by the Trial Court and direct the Trial Court to enter Judgment in favor of Nixon specifically enforcing and directing New to comply with the Agreement between the parties dated November 20, 1978.

#### STATEMENT OF FACTS

New was the owner of the real property subject of said Agreement of November 20, 1978 prior to the date of said Agreement. (Plaintiff's Exhibit "B"). New had mortgaged the property to Commercial Security Bank (hereinafter Bank), had defaulted on said mortgage, the Bank had foreclosed the Mortgage and had a sheriff's sale thereon. (T. 127, lines 4-24). The six-month



right of redemption from the sheriff's sale expired November 20, 1978 (T. 128, lines 26-28).

New undertook, during the six-month redemption period, to find a buyer for the property who would pay enough to redeem the property from the sheriff's sale and to enable New to realize some money from the sale. (T. 127, lines 25-27).

In pursuance of its efforts to sell the property, New came in contact with one Jerry Olson (hereinafter Olson). New told Olson he was in trouble on the property and solicited Olson's help in finding a Buyer. Olson requested a formal listing which New refused, preferring rather to give Olson a letter guaranteeing Olson a commission if he sold the property. (T. 127, lines 1-30 and 128, lines 1-12). A letter agreeing to pay a commission was given by New on October 26, 1978. (See Defendant's Exhibit "2").

No Buyer had been found for the property by New, Olson or anyone else by a date two (2) days before the redemption period expired. (Testimony of John New, T. 130, lines 18-23). When Olson informed New that the parties he had been negotiating with would not buy the property, Olson told New that Nixon would buy the property. (Testimony of John New, T. 130, lines 24-30). Nixon subsequently offered to purchase the property for \$130,000.00 of which approximately \$76,000.00 would be used to redeem the property from sheriff's sale and the balance of \$54,000.00 of which would be paid to New "...at a later date." (Testimony of John

New, T. 133, lines 3-15).

Nixon and New then met on November 20, 1978, the date on which the redemption period expired, in the office of New's attorney, Donald C. Hughes, Jr. (hereinafter Hughes). Nixon was not represented by legal counsel at this meeting. (Testimony of Jack Nixon, T. 61, lines 4-15 and T. 62, lines 1-6). The parties there and then proceeded to negotiate the terms of the contract. (Testimony of Jack Nixon, T. 62, lines 10-13). One of Nixon's principal concerns was obtaining a clear title to the property. (Testimony of Jack Nixon, T. 62, lines 14-17).

At this meeting, Hughes gave Nixon a copy of a preliminary title report on the property. A copy of the title report was introduced into evidence as Plaintiff's Exhibit "B". The title report showed numerous judgment liens against the property (See Plaintiff's Exhibit "B") The parties went over the report one item at a time and Hughes and New assured Nixon on each item that the various judgments and liens had either been paid or provision made for removing them from the title to the property and penciled notations made in the left hand margins as to the disposition of each item. (Testimony of Nixon T. 63, lines 13-17). At the trial New's counsel asked what Nixon intended to show by Plaintiff's Exhibit "B" and the penciled notations in the margin of Schedule B thereunder. To this inquiry, Nixon's attorney replied:

"We intend to show that they had represented the

title to the property was either clear or could be made clear, and that they would give us a clear, unencumbered and marketable title to the property. That was their representation."

Whereupon New's attorney stated: "There is no dispute about that. (Testimony of Nixon T. 64, line 29).

The negotiations and drafting were done under pressure of the 5:00 p.m. deadline for redemption and the contract which is the subject of this dispute was finally signed just in time for Nixon, New and Hughes to go to the sheriff's office and redeem the property with money paid by Nixon just ahead of the 5:00 p.m. redemption deadline. (Testimony of Jack Nixon, T. 69, lines 1-19)

The contract between the parties was introduced as Plaintiff Exhibit "A" at the trial. The contract provides for a purchase price of \$130,000.00 of which \$76,928.73 was to be paid down and was in fact paid to redeem the property from sheriff's sale. In paragraph 2, the contract provides that:

2. Buyer shall convey to Seller title to the described property, free and clear of all liens and shall provide for Buyer a policy of title insurance, insuring the title of Buyer.

New's counsel stipulated at the trial that this paragraph contained a scrivener's error and should, in fact, have said "Seller shall convey to Buyer..." (T. 42, lines 16-29).

The contract then provided, among other things as follows:

3. Buyer shall use best efforts to prepare a subdivision plat and proceed with engineering and development of the property at a commercially reasonable speed.

4. Six months from the filing of the final plat, Buyer shall pay to Seller the difference between the redemption price paid initially and One Hundred and Thirty Thousand Dollars (\$130,000.00).

9. Buyer shall execute a note in favor of Seller consistent with the terms of this agreement. In the event, Buyer has not paid the Seller the amounts due and payable hereunder within four years from the filing of final plat, the note shall be in default and Seller may proceed according to law.

Subsequent to the redemption, Jack and Ezra Nixon appeared with Hughes and John New on two occasions in Judge Hyde's Court in Ogden to settle an issue relative to one of the liens on the property. (Testimony of Jack Nixon, T. 70, lines 11-30 and 71, lines 1-15). Immediately following the second court hearing the Nixons, New and Hughes had the following conversation:

Q. Did you have a conversation with Mr. New and Mr. Hughes then following that?

A. Yeah, we talked right here on this floor for a little bit, and we headed back over to Hughes' office. And I said now what do we need to do to get this thing wrapped up? And in fact, we stopped for the light right here on the corner of Kiesel, I guess it is Kiesel, anyway this little short street right here north of the courthouse, and we were talking there, John and I and dad. And John and I said then--I said Don, now what do we need to do now to get the deed and title policy on this property. And he said well, he says, I have got to file the redemption

certificate. And he said I have got to get the title company now to give us--issue us a new policy of title insurance showing these liens are cleaned up on it. And I asked him how long that would be. And he again assured me that it would be shortly forthcoming, within 30 days or so. And I said well, get that note typed up for John, and let's get it signed and get this thing put to bed. And he said I will do it. (T. 71, lines 18-30 and 72, lines 1-7).

In fact, Hughes never prepared and submitted a note to Nixon as provided in paragraph 9 of the agreement, although Nixon was at all times ready, willing and able to sign the note. (Testimony of Nixon T. 69, lines 27-30 and 70, lines 1-10). Nor did New ever tender to Nixon a clear title and title insurance policy to Nixon. (Testimony of John New, T. 74, lines 26-30 and 75, lines 1-5).

Following the signing of the contract, Nixon took some preliminary steps to develop the property even though clear title to the property had not passed to it. These included hiring two landscape designers in January, 1979 (T. 75, lines 11-21), hiring an engineer in March (T. 76, lines 6-22), preparation of subdivision sketches and soil tests (T. 76, lines 23-27) and going to the property twice with the engineer (T. 77, lines 11-27).

In May of 1979, Nixon discovered that New was proceeding to subdivide the property subject of said contract as though New

was still the owner thereof. (T. 77, lines 28-30 and T. 78, lines 1-5).

When Jack Nixon contacted John New to see why he was doing this, John New replied "...that's my property..." and "... I am going to develop it..." (T. 80, lines 11 and 12). Jack Nixon then stated he had purchased the property and made a down payment to which John New replied "...I am going to consider it a loan." (T. 80, lines 26 and 27).

Jack Nixon thereupon caused a title search of the property to be made which disclosed that title to the property was in New and that the title was encumbered by a mortgage, a mechanics lien, a Federal Tax lien, numerous judgment liens and a possible boundary conflict. A copy of this title report is a part of the record as Plaintiff's Exhibit "F". On June 4, 1980, Nixon filed a lis pendens against the property (Plaintiff's Exhibit "G") and on June 6, 1980 filed an action for specific performance of the contract.

The case was tried to Judge Calvin Gould on February 14, 1980 and on February 22, 1980 Judge Gould gave a written Memorandum Decision (R. 19). The Memorandum Decision did not direct the preparation of Findings of Fact or a Judgment and Decree and so Nixon, in order to protect its record, treated the Judgment as a final judgment and appealed therefrom.

Thereafter New's attorney prepared proposed Findings of Fact



and Conclusions of Law and a proposed Judgment. Nixon made written objection thereto and filed a copy of said objection with Judge Gould (R 28-30). On June 4, 1980, counsel for both parties appeared before Judge Gould on his order and reviewed the proposed Findings of Fact and Conclusions of Law and Judgment and Decree and Judge Gould thereupon, on June 9, 1980, made Findings of Fact and Conclusions of Law and a Judgment and Decree. (R 34-37).

In fact two Judgments were entered by Judge Gould. The first Judgment follows the Findings of Fact and Conclusions of Law as a part of the same document as the Finding of Fact and Conclusions of Law. (R-36)

The second Judgment is the one prepared by Mr. Richards, New's attorney, in April, 1980. While the two Judgments vary slightly they both have the effect of declaring the contract void for ambiguity.

After the Findings of Fact and Conclusions of Law and Judgments were entered, Nixon moved this Court to augment the record on appeal to include said Findings of Fact and Conclusions of Law and Judgments and to treat Nixon's appeal from the Trial Court's Memorandum Decision as an appeal from both the Trial Court's Memorandum Decision of February 28, 1980 and from its Judgments of June 9, 1980. This motion was granted and an order entered thereon.

ARGUMENT

POINT 1. THE CONTRACT BETWEEN THE PARTIES IS NOT AMBIGUOUS AND VAGUE AND THERE IS SUFFICIENT DEFINITNESS IN THE CONTRACT TO WARRANT SPECIFIC ENFORCEMENT THEREOF.

The provision of the contract which the trial Court apparently found to be vague and ambiguous was paragraph 3 which provides:

3. Buyer shall use best efforts to prepare a subdivision Plat and proceed with engineering and development of the property at a commercially reasonable speed. (Plaintiff's Exhibit "C").

Because this provision did not specify a time by which Nixon would prepare a subdivision plat and because the contract did not require Nixon to pay New money until six months after the subdivision plat was filed the Court concluded that Nixon could forestall paying New indefinitely, simply by not filing a subdivision plat. From this the Trial Court concluded, "The contract is so ambiguous that the rights of the Defendant cannot be ascertained or enforced except at the whim or caprice of the Plaintiff, and to enforce the contract as the Plaintiff now requests would be to deprive the Defendant of any equity he may have had in the property. (Conclusions of Law, R-36).

The following foundational principles are relevant to this case:

1. "It is fundamental that doubtful language in a contract should be interpreted most strongly against the party



who has selected that language, especially where he seeks to use such language to defeat the contract or its operation...also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it, or whose attorney drew or prepared it. (17 Am. Jur. 2d on Contracts, Section 276 P. 689-90). See also Bryant vs. Deseret News Publishing Company (Utah) 233 P.2d 355.

The contract in question in this case was drawn and prepared by New's attorney (Testimony of New, T. 150, lines 24-28. Testimony of Hughes, T. 116, lines 25-30).

2. "...if a contract is capable of a construction which will make it valid, legal, effective, and enforceable, it will be given that construction if the contract is ambiguous or uncertain. A construction which renders the contract valid is preferred to one which renders it invalid, and it will not be construed so as to be invalid unless that construction is required by the terms of the agreement in the light of the surrounding circumstances." (17 Am. Jur. 2d on Contracts, Section 254, pg. 648-650). See also Schofield vs. ZCMI (Utah) 39 P.2d 342.
3. "A contract being construed is to be considered as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract.... Moreover, the entire agreement is to be considered, to determine the meaning of each part. ...All clauses and provisions of the contract should, if possible, be so construed as to harmonize with one another, and all the language of a contract should be construed so as to subserve, and not subvert, the general intention of the parties. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Where a contract as a whole discloses a given intention and certain words or clauses would, if taken literally, defeat the intention, they will be interpreted if possible, so as to be consistent with the general intent." (17 Am. Jur. 2d on Contracts, Section 258, pg. 658-660).

"It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, must be given meaning, and force and effect, it that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. So far as reasonably possible, effect will be given to

all the language and to every word, expression, phrase, and clause of the agreement. A construction will not be given to one part of a contract which will annul another part, unless such a result is fairly inescapable... (17 Am. Jur. 2d on Contracts, Section 259, pg. 660-662).

The generally accepted definition of ambiguity in a contract is:

...an uncertainty of meaning in the terms of a written instrument. It means wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful import. State Bank of Wilbur vs. Phillips (Washington) 119 P.2d, 664).

Ambiguity in a written instrument does not appear until application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which of two or more meanings is the proper meaning. Dearborn Motors Credit Corp. vs. Neel, (Kansas) 337 P.2d 992.

Taken as a whole the contract in this case is not ambiguous. It clearly expresses a purchase price of \$130,000.00 (paragraph 4) and a down payment of \$76,928.73 (paragraph 1). Because there were liens against the property which had to be cleared before the property could be developed the parties established by the contract a framework by which the property could be developed and, as developed, New could be paid. Thus the contract first provides that New would convey to Nixon a clear title to the property and a title insurance policy. Hughes testified in answer to Mr. Hoggan's question "...you wouldn't expect anyone to proceed with development of the property and the expenditure of a large sum of money until he had clear title to it, would you?" as follows:

No, I think he would want assurance of his return. (T. 125 lines 24-28).

Under a fair interpretation of all provisions of the contract and construing the contract so as to give validity to all of its provisions, the contract is not ambiguous. The provisions the trial court found to be ambiguous are not of duplicitous meaning. Taken in the context of the entire contract they simply require Nixon to begin and proceed with development of the property after New has tendered clear marketable title to Nixon. The Trial Court in effect, ignored the provisions of the contract requiring New to give a clear title, leap-frogged these provisions, took the provisions requiring Nixon to develop the property out of the context of the contract and, standing thereon alone, declared those provisions vague and ambiguous.

Had the Trial Court applied the rules of construction requiring all provisions of the contract to be construed together and favoring an interpretation which validated instead of invalidated the contract, the seeming ambiguity would not have existed. The contract, considered as a whole, shows an orderly manner in which the parties were to accomplish their purposes, i.e. first clear the title, then begin to develop the property and if, in the course of development unforeseen obstacles arose, adjust the Sellers equity by an amount necessary to solve the unforeseen difficulties. If the contract was not as artfully drafted as would be desired it must be remembered that it was drafted under intense time pressure by New's attorney and if there is any question of ambiguity that question should be resolved against New and in favor of preserving the parties' bargain, not nullifying it.

Nixon submits that this Court's recent decision in Reed vs. Alvey (April 21, 1980) 610 P.2d 1374 is dispositive of the issue raised by this appeal.

In the Reed case, one Lambert as agent for Alvey, procured an earnest money offer and a \$500.00 deposit from Reed to purchase one of 4 four-plex units which Alvey proposed to construct on lots at the intersection of Hillview Drive and Ninth East in Salt Lake City, Utah. Alvey signed the earnest money agreement and endorsed the \$500.00 deposit to Lambert as payment on his commission. There were delays in construction of the unit and when Reed couldn't make contact with Alvey, he filed suit for specific performance of the earnest money agreement.

The Trial Court held the agreement vague and ambiguous and declined to order specific performance. The provisions apparently relied on by the Trail Court were that the description was uncertain, the specific unit the Plaintiff was to purchase was not identified and the manner for payment stated "terms to be arranged."

This Court stated as follows:

Before specific performance will be employed by the courts to enforce a contract the terms of the agreement must be reasonably certain so the parties know what is required of them, and definite enough that the courts can delineate the intent of the contracting parties.

The Court then went on to hold that the description, though "...concededly vague and incomplete on its face...defines the subject matter in question in sufficient detail to support specific performance." (Ibid. p. 1377)

On the issue of which lot the Plaintiff had purchased, the Court found the dealings of the parties had sufficiently established the identity of the lot purchased by Plaintiff. The Court

also found that the provision "terms to be arranged" allowed the Plaintiff to pay in full upon performance by the Defendant.

Finally, where it appeared that the Defendant had encumbered the property title, this Court stated:

Specific performance of the contract requires the removal of this encumbrance prior to the Plaintiff taking possession of the property. This can be accomplished either by a reduction in the purchase price, in the amount of the encumbrance, or payment of the total price after Defendants remove the encumbrance. (Ibid. p. 1380)

If the Court on the facts in Reed vs. Alvey can decree specific performance, certainly it can and should in the case at bar find sufficient definiteness from all the terms of the contract and the dealings of the parties to specifically enforce the parties' contract.

POINT II. CONSTRUED AS A WHOLE THE CONTRACT BETWEEN THE PARTIES REQUIRED NEW TO CONVEY A CLEAR TITLE TO NIXON BEFORE NIXON WAS OBLIGATED TO DEVELOPE THE PROPERTY AND NIXON COULD NOT BE IN DEFAULT ON THE CONTRACT UNTIL IT HAD FAILED OR REFUSED TO DEVELOPE THE PROPERTY AFTER OBTAINING A CLEAR TITLE THERETO.

It is an undisputed fact that New did not have clear title to the property when the contract was entered into. The title report, Plaintiff's Exhibit "B", shows numerous mortgages and liens against the property.

It is an undisputed fact that the liens were to be removed by New and that New would give Nixon a clear title to the property. Certainly it was not Nixon's duty to clear the title. Hughes acknowledged that development should not be expected to proceed until the title was cleared (T. 125, lines 24-28), and that it was his duty to clear the title (T. 117, lines 1-29). The title report



dated May 23, 1979 (Plaintiff's Exhibit "F") shows the title was never cleared and New testified he had never tendered clear title to the property to Nixon (T. 150, lines 16-18).

It is an undisputed fact that immediately prior to the date this suit was commenced, to-wit: on May 23, 1979, the title to the property was still heavily encumbered by liens and mortgages and that most of these liens and mortgages were the same ones that were against the property when the parties entered into the contract. (Compare the title report dated July 28, 1978, Plaintiff's Exhibit "B" with the title report dated May 23, 1979, Plaintiff's Exhibit "F".)

The trial court ignored these facts in construing the contract. In effect the court released New from its obligation to convey a clear title, took one or two provisions of the contract out of context and concluded that the contract was ambiguous since it placed no time limit on Nixon developing the property. In fact, until Nixon had clear title to the property it was under no obligation to proceed with development and even though Hughes admitted it would be unreasonable to expect Nixon to proceed with development until it had clear title to the property.

In addition, the Court ignored the fact that Nixon had done considerable work toward beginning development of the property even though it had not yet received clear title to the property. (See page 8 of this brief and the reference to the Transcript there cited.)

POINT III. THE TRIAL COURT ERRED IN EXERCISING ITS EQUITABLE POWERS TO VOID THE CONTRACT IN FAVOR OF NEW INASMUCH AS NEW DID NOT DO EQUITY.

It is important to weigh and consider the following:

1. It was Nixon who had invested \$76,928.73 in the property New's equity, assuming all of it would go into New's pocket and none of it would go to pay liens against the property, was approximately \$54,000.00. Nixon stood to lose more than New in the deal if development of the property was delayed and Nixon's potential loss was hard cash. New's loss was of a potential equity which he would never even had a chance of realizing had Nixon not contracted with New. New testified in cross examination as follows:

Q. (By Hoggan) Now what would have happened it 5:00 o'clock had rolled around on November 20, 1978, and you hadn't had \$77,000.00?

A. It would have become Commercial Security's property, or whoever bid on it.

Q. And what would you have gotten out of it?

A. Nothing.

Q. Did you have \$77,000.00 at 5:00 o'clock on November 20, 1978 of your own money?

A. No. (T. 148, lines 18-27)

2. This is a case in equity. Two fundamental maxims of equity are: "He who seeks equity must do equity" (27 Am. Jur. 2d on Equity, Section 131, P. 660) and "He who comes into equity must come with clean hands." (27 Am. Jur. 2d on Equity, Section 136, P. 666).

New is in violation of both maxims. New cannot ask the Court to exercise its equitable powers to in effect rescind its contract.

with Nixon when New has not itself performed the contract by tendering clear title to the property. New took all of the benefits of the contract by accepting a down payment which enabled him to escape loss of the property and his equity therein altogether by redeeming the property. It is inequitable conduct on his part, after having had the benefit of the contract, to now repudiate it.

Nor can New be said to have clean hands. New took matters into his own hands without seeking judicial assistance. He made himself the judge of the contract by repudiating it and proceeding to develop a property he had sold and received almost \$77,000.00 on. Nixon found out about New's action, not from New, but from its independent sources of information.

#### CONCLUSION

The contract of the parties, construed as a whole, is not ambiguous. It can and should be construed to give it validity rather than invalidity. To the extent the contract could be considered ambiguous, it should have the ambiguity construed against New, since his attorney prepared it. The court, in exercise of its equitable powers should not penalize Nixon and reward New. Nixon has done nothing in derogation of the contract, but stands ready and willing to perform the contract. New, by contrast, has done nothing to perform the contract. The Court should specifically enforce the contract by requiring New to clear the title to the property, convey clear title thereto to Nixon by Warranty Deed and to provide Nixon with a policy of title insurance on the property



Respectfully submitted,  
OLSON, HOGGAN & SÖRENSON

/s/ L. Brent Hoggan  
L. Brent Hoggan  
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy for the foregoing Appellant's Brief to Defendant's attorney, Richard Richards, 3918 Riverdale Road, Ogden, Utah 84303, postage prepaid in Logan, Utah, this 15th day of August, 1980.

/s/ L. Brent Hoggan  
L. Brent Hoggan