

1999

Michael Bowen and Kristen Hortin v. Teak D. Jones : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

Rule 29 Priority No. 15

MICHAEL BOWEN & KRISTEN HORTIN,)

)

)

Plaintiffs and Appellees)

)

v.)

)

TEAK D. JONES)

)

Defendant and Appellant)

)

Trial Court No: 980908407

Appellate Court No: 990640

BRIEF OF APPELLANT TEAK D. JONES

ORAL ARGUMENT AT THE DISCRETION OF THE COURT OF APPEALS

APPEAL FROM JUDGMENT OF THE SECOND DISTRICT COURT OF
WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH
HONORABLE PAMELA G. HEFFERNAN, JUDGE

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MAR 15 2000

Julia D'Alesandro
Clerk of the Court

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LIST OF ALL PARTIES

The caption of the case on appeal contains the names of all individuals who were parties to the proceeding in the trial court. These individuals are:

Appellee KRISTEN HORTIN, who was a co-plaintiff at the trial court.

Appellee MICHAEL BOWEN, who was a co-plaintiff at the trial court and who was previously married to Kristen Hortin.

Appellant TEAK D. JONES, who was the defendant at the trial court.

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JURISDICTIONAL STATEMENT

This unlawful detainer case was decided on summary judgment by the trial court. The Utah Supreme Court had original appellate jurisdiction over this matter as an appeal from an order which did not fall under the original appellate jurisdiction of the Utah Court of Appeals. Utah Code § 78-2-2(3)(j)(1996). Pursuant to Utah Code section 78-2-2(4), and Rule 42 of the Utah Rules of Appellate Procedure, the Utah Supreme Court has transferred this matter to the Court of Appeals thus conferring appellate jurisdiction on this Court under Utah Code section 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The following issues are presented to this Court as a result of the trial court's decision on motion for summary judgment that Appellant had no interest in real property where he was living and, therefore, that he was subject to removal under Utah's unlawful detainer statute¹:

1. Issue: Did the trial court err in determining by summary judgment that

¹ Transcripts of two different hearings were requested by Appellant and have been prepared for this Court. The dates of the transcripts are February 16, 1999 and May 9, 1999. At some point in the transcription process the dates were switched with the transcript of the arguments on the summary judgment motion being dated May 9, 1999, and the transcript of the trial court's decision being dated February 16, 1999. Rather than referring to these hearings by date, this brief will refer to the transcript denominated as May 9, 1999, as the Motion Hearing and the transcript denominated as February 16, 1999 as the Decision Hearing.

Appellee Michael Bowen, following his divorce from Appellee Kristen Hortin, retained an ownership interest in the real property which would allow him to interfere with the purchase of the property by Appellant from Hortin.

Factual Preservation: This issue was argued at the Motion Hearing before the trial court and preserved for appeal when counsel for Appellant argued that Appellee Hortin was awarded the marital home subject to Appellee Bowen's equity interest and that Hortin had the right to sell the home to Appellant. Record at 276, p. 7. The trial court determined at the summary judgment Decision Hearing that any transfer of the home would require Appellee Bowen's approval and that the provision of the divorce decree ordering the Appellees to sign any necessary documents to implement the terms of the decree of divorce did not require Bowen to sign a deed to sell the home. Record at 275, pp. 3, 5.

Standard of Review: Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The facts and all reasonable inferences arising from those facts are viewed in a light most favorable to the non-moving party. Entitlement to summary judgment is a question of law with no deference given to the trial court's determination of the issues presented.

Julian v. Petersen, 966 P.2d 878, 879 (Utah App. 1998).

2. Issue: Did the trial court err in determining by summary judgment that the option agreement between Jones and Hortin was not extended through Hortin and

Bowen's acquiescence and Hortin's subsequent signing of closing documents which included provision for payment of accrued rent.

Factual Preservation: At the Motion Hearing, Appellant raised the issue that his option agreement to purchase the property, although expiring by its terms prior to any closing, was extended through both the acquiescence and the bad faith acts of Bowen and Hortin. Record at 276, pp. 13-17. In announcing its decision, the trial court stated that there may be issues of fact which would need to be heard on the issue of extending the option to purchase but held that Jones' failure to make monthly payments on the property resulted in his having unclean hands and therefore was not entitled to equitable relief. Record at 275, pp. 2-4.

Standard of Review: In considering an appeal of the grant of summary judgment, the facts and all reasonable inferences from them are reviewed in a light most favorable to the losing party. The legal conclusions reached by the trial court are accorded no deference but, instead, are reviewed for correctness. Holt v. Katsanevas, 854 P.2d 575, 579 (Utah App. 1993). In cases involving equity, a reviewing court will reject the findings of a trial court if the evidence clearly preponderates against those findings or if there was a misapplication of the law. Ryan v. Earl, 618 P.2d 54, 55 (Utah 1980).

3. Issue: Assuming that Appellee Bowen's approval for the sale of the property to Appellant was not required and even if there was no extension of the option to purchase, did the trial court err by failing to find that Appellee Hortin created a new and

binding contract for the sale of property by signing closing documents including a warranty deed, or, in the alternative, does the merger doctrine apply to Appellee Hortin's actions.

Factual Preservation: At the Motion Hearing, plaintiff raised the issue that the lease and option agreements did not control ownership of the property because a warranty deed had been signed by Appellant Hortin. Record at 276, p. 29. Counsel for Appellants acknowledged that if Hortin had "signed a contract to purchase or a deed perhaps they would have some kind of a point with regard to at least her agreeing to sell . . . " Id. pp. 29-30. Because the trial court had ruled that Bowen's signature was required to sell the home, it did not decide this issue. Record at 275. pp. 4, 7-8. These issues were also raised by Jones in the fourth and fifth defenses of his answer where he claimed that title to the property should be quieted in him and that by executing the closing documents, appellee Hortin completed a contract for the sale of the property to Appellee. Record at 18.

Standard of Review: Whether a contract exists between parties is a question of law and the trial court's conclusion of law are reviewed under a correction of error standard. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992). Whether the doctrine of merger applies is a question of law that is reviewed for correctness with the reviewing court affording no particular deference to the trial court. Maynard v. Wharton, 912 P.2d 446, 449 (Utah App. 1996).

CONSTITUTIONAL OR STATUTORY PROVISIONS

The following statutory provision(s) are either determinative of the appeal or are of central importance to the issues presented on appeal:

Utah Code Ann. § 25-5-3 (1998). Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Code Ann. § 25-5-8 (1998). Right to specific performance not affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

STATEMENT OF THE CASE

This action for eviction was filed on December 10, 1998. The plaintiffs below and appellants on appeal Michael Bowen (hereinafter Bowen) and Kristen Hortin (hereinafter Hortin) alleged in their complaint that defendant and appellee Teak D. Jones (hereinafter Jones) was renting property from them, that Jones had been served with a five day notice to vacate the property and had failed to comply therewith. Bowen and Hortin sought judgment for past due rent, attorneys fees and an order of eviction. Jones answered the complaint alleging that he had the right to possess the property by virtue of a lease and option agreement to purchase the property under which he had tendered payment but which tender had been refused by Bowen. A possession bond was filed by Bowen and Hortin and Jones filed a counter possession bond.

Hortin and Bowen filed a Motion for Summary Judgment on January 15, 1999. This was supported by an affidavit signed by Bowen (hereinafter "Bowen Aff."). Jones filed an opposition memorandum and affidavit (hereinafter "Jones Aff.") on January 25, 1999. Hortin and Bowen filed their responsive memorandum on January 26, 1999. On February 16, 1999, the trial court held a Motion Hearing at which counsel for both sides appeared and made their respective arguments. Based on questions raised at that hearing, the trial court allowed the parties to file supplemental information to assist the court in making its decision. Jones filed and amended memorandum opposing summary judgment on February 18, 1999, and Hortin and Bowen filed their response to Jones' amended

opposition memorandum on February 23, 1999. On April 9, 1999, the trial court held a hearing at which the judge informed the parties she was granting Hortin and Bowen's motion for summary judgment (the Decision Hearing). Counsel for Hortin and Bowen was directed to prepare the order. The order granting the motion for summary judgment was signed on April 26, 1999.

Following the Decision Hearing several other motions immaterial to the issues presented on appeal were filed, including a request by Jones' counsel that he be allowed to withdraw. Ultimately, on May 11, 1999, the trial court allowed counsel for Jones to withdraw and directed that the writ of restitution removing Jones the property be enforced. Jones obtained new counsel who filed a motion for extension of time to file a notice of appeal on May 13, 1999. Hortin and Bowen joined together to oppose the extension of time to file an appeal, however the trial court signed an order granting that motion on July 9, 1999, and the order was entered on July 13, 1999. Jones filed his Notice of Appeal on Monday, July 19, 1999.

STATEMENT OF FACTS

1. During their marriage, Bowen and Hortin acquired a home located at 2614 North 700 East, North Ogden, Weber County, Utah. Record at 59-60, ¶ 12. The deed conveyed the home to Bowen and Hortin as joint tenants with full rights of survivorship and not as tenants in common. Record at 160.

2. Several years later, on or about July 16, 1996, Bowen and Hortin were divorced and a decree of divorce was entered in the Second Judicial District Court of Weber County, Ogden Department. The Decree of Divorce contained provisions relating to possession of the home, responsibility for debt on the home and described the financial rights as between Bowen and Hortin to the home. Record at 56-64.

3. Bowen was ordered to pay alimony to Hortin until such time as she remarried, graduated from college or acquired full time employment. However, in no event was alimony to continue beyond August 1, 2000. The timing contained in the alimony provision affected Bowen's equity interest in the home. Record at 59-60, ¶¶ 8, 12.

4. The Decree of Divorce provided that Bowen would maintain an interest in the home until it was sold or until the alimony obligation terminated. At that point, Bowen's financial interest in the home would become fixed. Bowen's interest was to be in the form of a non-interest bearing lien equal to one-half of the equity in the home as that equity was agreed upon between Hortin and Bowen or as established by an appraisal. The Decree then contains directions for when Bowen's equity interest would actually be paid to him. Record at 59-60, ¶ 12.

5. The Decree gave Hortin possession of the home and directed her to pay the mortgage loan payments as well as the balance of all home equity loans. Record at 59-60, ¶¶ 12-13.

6. On or about March 6, 1997, Hortin contracted with Jones to list the home for

sale for a six month period. Bowen did not sign the listing agreement. Record at 54 ¶ 3 (Jones Aff.).

7. During the listing period, Hortin accepted two different offers on the home without also obtaining Bowen's signature. Neither sale was completed. Record at 69, ¶ 4 (Jones Aff.).

8. On or about December 17, 1997, Hortin and Jones entered into a lease agreement and option to purchase the home. Record at 66-67.

9. Although Bowen eventually signed his name to both the lease and the option agreement, he was not a named party to either contract. The lease and option were to expire in July 1998. Record at 66-67.

10. At some point after the lease and option agreements were signed, Jones took possession of the property. Record at 71-72, ¶¶ 14-15 (Jones Aff.). Jones remained there until the trial court ordered his removal. Record at 275, p. 6.

11. Jones did not tender payment or close the transaction within the time period set forth on the face of the option agreement. Record at 37, ¶ 4 (Bowen Aff.).

12. During the period of Jones' occupation of the property, he made two payments representing approximately four months worth of rental payments. It is undisputed that Jones failed to make regular monthly rental payments. Record at 37, ¶ 4 (Bowen Aff.).

13. In May 1998, prior to the expiration of the first option agreement, Bowen obtained another document entitled, Lease and Option to Purchase with an expiration date

of August 31, 1998. Record at 37, ¶¶ 1-2 (Bowen Aff.).

14. There is a dispute as to whether this second document ever became operative between the parties and the trial court did not rely on this document or the deadlines contained therein in making its order at the Decision Hearing. Record at 275, p. 2.

15. Neither the first or second option agreements were extended in writing. Record at 37, ¶ 3 (Bowen Aff.).

16. In November 1998, after both option agreements had expired by their terms, Jones' wife, Diana Marie Harrison (hereinafter "Harrison"), who was not a party to this action in the trial court, was substituted for Jones on the closing documents. Record at 37-38, ¶ 5 (Bowen Aff.).

17. On or about November 12, 1998, Hortin signed the necessary documents to close the sale of the home. Hortin signed the documents at St. George, Washington County, Utah and then sent them to a title company in Ogden. Record at 87-95.

18. The closing documents included a warranty deed signed by Hortin and conveying the property to Harrison together with a settlement statement containing the purchase price of the home and other financial information regarding the sale of the home including an option payment to cover unpaid rent on the property equal to five months worth of rent. Record at 93, 95.

19. On August 31, 1998, Jones was delinquent in the payment of rent in an amount equal to two months worth of rent. That amount would have grown to equal five

months worth of rent at the end of November, 1998. Record at 38, ¶ 9 (Bowen Aff.).

20. Bowen did not sign the closing documents or the warranty deed transferring the property to Harrison. Record at 87-95.

21. On November 25, 1988, almost two weeks after Hortin signed the closing documents, Bowen and Hortin caused a five day notice to vacate to be delivered to the Weber County Sheriff. Record at 38, ¶ 6 (Bowen Aff.). The notice was posted on the property on or about November 30, 1998 and was mailed to Jones on or about December 1, 1998. Record at 38, ¶ 6 (Bowen Aff.).

SUMMARY OF ARGUMENT

The trial court failed to properly establish Bowen's interest in the property at the time that Hortin attempted to sell the property to Jones. Following the entry of the Bowen-Hortin divorce decree, Bowen's interest in the property was governed by the language of that decree. At the time Hortin signed the closing papers, if Bowen was no longer paying alimony, then his only interest in the home was financial and he would not have needed to sign the closing documents. On the other hand, if Bowen was still paying alimony and had an ownership interest in the property, his signature would have been required to complete the sale of the property to Jones or Jones' assignee. Because the trial court examined only the decree and did not investigate the facts surrounding whether Bowen was still paying alimony, it could not draw the legal conclusion that Jones did not have an interest in the property based on Bowen's failure to signed the closing documents or any extension to the option agreement. In addition, if Bowen acted unreasonably in withholding his signature from the closing documents, the trial court should have compelled his assistance in completing the sale of the property to Jones.

Although the written option agreement between Hortin and Jones (which had also been assented to by Bowen) had expired, the trial court should have heard additional facts as to whether Hortin and Bowen were estopped from asserting the statute of frauds as a defense to Jones' claim that he, or his assignee, had an interest in the property. Despite the fact that the option agreement expired in July, 1998, the parties continued to follow a

course of conduct suggesting that the option agreement was still being held open. The most obvious evidence of this is the signing by Hortin of closing documents in November 1998. Bowen, both by his silence and his failure to act until after the attempted closing in November 1998, should be estopped from asserting the statute of frauds. Jones changed his position in reliance on the non-written extension of the option contract. Jones also partially performed under the oral extension thus justifying a departure from the statute of frauds. The trial court essentially acknowledged that this was a factual question, however it found that Jones had failed to make monthly rental payments under his lease agreement, and therefore, that he was not entitled to equitable relief. However, the trial court's conclusion was in error because it failed to acknowledge that at the time of the attempted closing, a payment for past due rent was included in the closing documents. Jones tendered payment of the amount in question, and even though his tender was rejected, he is entitled to a factual hearing regarding his equitable claims.

The case should be remanded to the trial court to determine whether Hortin entered into a new contract to sell the property by signing a warranty deed and other closing documents in November 1998. Even if the option agreement between Jones and Hortin and assented to by Bowen had expired and was not extended, Hortin's actions in accepting the terms contained in the closing documents created a new and valid contract for the sale of the property. In the alternative, if a new contract was not created, because a warranty deed was signed by Hortin in November, 1998, the terms of the underlying

option agreement would have been merged into the warranty deed and any right on the part of Bowen and Hortin to argue that the option had expired or the lease terminated would have been extinguished. The trial court did not review these issues because Bowen had not signed the closing documents. However, the factual issue of whether Bowen unreasonably withheld his signature from the sales documents and should be required to participate in the closing was not addressed below. If Bowen's failure to participate was unreasonable, this new or merged transaction should have been recognized as valid and Jones' presence on the property could not be challenged by Hortin and Bowen.

ARGUMENT

The trial court in this matter determined on Hortin's and Bowen's motion for summary judgment that Jones had no interest in the property where Jones was residing and therefore, that he was subject to removal as a tenant at will. However, significant factual issues are present in this case which must be fully heard prior to making a ruling that Jones was not entitled to possession of the property. They include: (1) the effect of Bowen and Hortin's decree of divorce on the ability of Bowen to interfere with Jones' purchase of the real property; (2) whether Jones or his assignee was entitled to an extension of time to perform under the option contract even though there was no written extension of the option; and (3) even if the option agreement was not extended, whether Hortin's actions of signing all of the closing documents, including a warranty deed, created a new contract for the sale of the property or resulted in merger of the prior agreements with the deed. Because the key facts relating to these issues are in dispute, the case should be remanded to the trial court for further proceedings.

- I. THERE IS A MATERIAL FACTUAL DISPUTE AS TO WHAT KIND OF INTEREST BOWEN HAD IN THE PROPERTY AT THE TIME OF THE SALE, AND IF HE HAD AN OWNERSHIP INTEREST, A QUESTION AS TO WHETHER BOWEN UNREASONABLY WITHHELD HIS CONSENT TO THE SALE.

A. The Bowen-Hortin Divorce Decree Altered Bowen's Rights To The Property And Controls Bowen's Ability To Interfere With Any Sale Of The Property

Because Bowen and Hortin are divorced, their Decree of Divorce supercedes their deed as to their respective ownership interests in the property. Although Bowen and Hortin were, and still are, joint tenants of the property with full rights of survivorship, that condition is modified by the fact that Bowen and Hortin are now divorced and their respective interests in the property have been altered by their decree of divorce. For example, if either Bowen or Hortin were to die, it cannot be contended that the survivor would be entitled to receive the property by right of survivorship. See Utah Code Ann. § 75-2-804(2)(b)(1998). A court in a divorce action has the authority to make orders relating to the property, debts and obligations of the parties to the divorce. Utah Code Ann. § 30-3-5(1)(1999 Supp.). Included in this power is the ability of a trial court to award the marital home to one party or another. In this case, the trial court reviewed the decree of divorce and determined, without taking evidence on the issue, that Bowen's retained interest in the home required his approval prior to the closing between Harrison and Hortin.

The issue which requires additional factual review, is what Bowen's retained interest actually entitled him to do with regard to the sale of the marital home. There are several Utah cases which illustrate the need for a trial court to make a determination as to what interests a spouse retains prior to deciding sales contract issues. One case which

closely matched the facts at issue here is Krantz v. Holt, 819 P.2d 352 (Utah 1991). In Krantz, the purchaser had signed an earnest money sales agreement to buy property from a divorced woman. 819 P.2d at 353. The agreement required approval by the woman's ex-husband, Stephen Holt. Id. The property was titled in joint tenancy between Holt and his ex-wife, the decree of divorce had not been recorded and Holt had not deeded the property to his wife. Id. However, there was also evidence that Holt's interest had been terminated by virtue of a divorce decree. The Krantz court stated that if "Holt retained a joint interest in the property, his written consent to the property's sale would be necessary, not because of any clause in the agreement, but because the Utah statute of frauds so requires." 819 P.2d at 353. That court went on to clarify that "there would be no such requirement if, as Krantz contends, Stephen Holt retained no interest in the property pursuant to the divorce decree." Id. at 354. Under those circumstances, an oral rather than written assent to the sale would have satisfied the agreement. The Krantz court found that "the issue of whether Stephen Holt had a joint interest in the property during the relevant dates of this case is a question of fact. Because there are outstanding questions of fact regarding Holt's ex-husband's approval of the transfer, summary judgment cannot be sustained on this ground." Id. As in Krantz, the factual issues that must be resolved in this case relate to the need for appellee Bowen to approve a sale of property where, like Holt, his name appeared on the public records as a joint tenant and a divorce decree dealing with the property has been entered but not recorded and no deed

has been signed by him to Hortin.

In this case, the trial court was provided a copy of the decree of divorce for Bowen and Hortin. The language describing Bowen's interest is where the focus of any analysis should rest. The decree contains a two step process for Bowen to receive his financial interest out of the home. The first step has to do with the fixing or establishment of the amount of Bowen's interest. The decree states that at the time Bowen ceases paying alimony, the amount of his interest would be set at one half of the equity in the home. The amount of equity was to be determined by either an appraisal or by agreement between Bowen and Hortin. The second step set in the decree governs the timing of any payment to Bowen of his financial interest. The decree states that after the first step was completed, Bowen would have a non-interest bearing lien equal to the amount of his financial interest in the home. In this case the trial court took no evidence and made no factual or legal determination as to whether Bowen was still paying alimony, and even if he was, how his interest in the home would have changed depending on whether he was in the first or second step of the divorce decree's plan. Without this information, the trial court could not rule on summary judgment that Jones did not have the right to remain on the property.

The relevance of where Bowen stood in the two step process is highlighted in Booth v. Booth, 772 P.2d 771 (Utah 1986). In Booth, an ex-husband was ordered by the lower court to sign documents to accomplish the sale of the marital home. 772 P.2d at

771. The decree in that case "awarded the real property of the parties" to the ex-wife, however the ex-husband's financial interest would not become fixed until the home was actually sold. Id. Following the entry of the decree, the ex-wife placed the home on the market and received an offer lower than she had hoped for. Id. The ex-husband refused to sign the necessary documents to close the sale believing that the home was worth more than was offered. The trial court found that the ex-wife owned the property and that the ex-husband had no right to participate in the sale and ordered him to sign the sale documents. Id. The Utah Supreme Court found that the decree did not award sole ownership of the home to the ex-wife. The court found that a significant factor in deciding that the husband still had an ownership interest in the home was that the decree did "not award defendant a fixed amount which is secured by a lien on the property and made payable at the time the property is sold Because his share was dependent on the sales price eventually realized, he was vitally interested in any sale." Id. at 771-772. However the Supreme Court also noted that when the amount of a former spouses interest in a home is fixed by the trial court, "[s]uch an arrangement would be wholly consistent with full ownership in plaintiff [the ex-wife]. In such a case, defendant's only interest in a sale would be that enough money was generated to pay his fixed award." Id. at 772. Based on those facts, the Booth court concluded that the decree was "more consistent and reasonable if interpreted to mean that possession was awarded to plaintiff but ownership remained jointly with the parties." Id. In light of the fact that Hortin signed a listing

agreement with Jones and that Hortin accepted several offers on the home and that she also negotiated the terms of the option contract with Jones, there is a substantial question as to what type of interest Bowen had in the property. In fact, following the filing of the Notice of Appeal, Hortin filed additional documents in the trial court in which she claims the sole right to recover the judgment obtained against Jones because she is the possessor of the real property and has been solely responsible for the mortgage payments thereon.

The distinction made in Booth between a fixed interest and one that is subject to change is of particular relevance to this case. The two step process contained in the Bowen-Hortin decree contemplates that for so long as Bowen pays alimony, his interest in the marital home can go up or down. However, once his alimony obligation ceased, Bowen's financial interest in the home would become fixed and at that point he would be nothing more than a lien-holder awaiting payment of his share of the equity. What is fatal to the trial court's decision is its failure to determine whether Bowen was still paying alimony at the time Hortin signed the closing documents and the warranty deed in November 1998. If Bowen's interest in the home was not fixed, he had an ownership interest that would require his signature. If, on the other hand, his interest was fixed, full ownership would be in Hortin and she would be able to convey the property by her signature alone, subject to the payment of Bowen's lien interest. Because the trial court did not receive this factual information, the case must be remanded for a determination of Bowen's interest in the property and the need for him to sign any closing documents.

B. Assuming That Bowen Had The Right To Approve Or Disapprove Of A Proposed Transfer Of The Property, The Question Remains Whether He Unreasonably Withheld That Approval

If Bowen does have an ownership interest in the home requiring his signature to validate any sale, this case would still need additional review by the trial court. The reason for this is that even if Bowen's signature is required to complete the sale of the property, the trial court must also determine whether he unreasonably withheld his signature. If so, his signature may be compelled. Booth provides guidance on this point as well. In Booth, even though the appellate court found that the ex-husband had an ownership right in the home, it still affirmed the lower court's order requiring him to sign the sale documents. 722 P.2d at 772. The reason for affirmance was that even though the ex-husband had a right to participate in the sale of the property, "he did not have the right to unreasonable withhold his consent to a sale to a buyer found by plaintiff." Id. The Booth court noted that the home had been listed for a period of approximately nine months and the ex-husband had participated in decisions to decline prior offers. In addition, the ex-husband in Booth made no effort to find a buyer who would pay more nor had he shown that the terms of the sale were unreasonable or inequitable to the parties. Id.

In this case, there is a significant question of fact as to whether Bowen acted unreasonably. Based on information provided to the trial court, from the time that Hortin

signed the original listing agreement until she signed the closing documents a period of approximately twenty months passed (March 1997 to November 1998). Two prior sales had fallen through for the price identified in the divorce decree as the estimated fair market value of the home. Bowen was aware of the option agreement signed by Hortin and Jones and even added his signature to that document. Although Bowen did sign the first option agreement, the trial court did not receive evidence as to the reason why his signature was obtained. The facts as previously alleged by Jones was that this signature was obtained in order to avoid problems when closing as to the amount of the proceeds to be distributed to Bowen from the sale. In addition, using the option agreement adopted by the trial court, the option period ended in July 1998. Even using the option agreement identified in the complaint the option period ended August 31, 1998. However, Jones was not served with a five day notice to vacate until late November 1998 and the instant action was not brought until December 1998. Both of these actions occurred after the closing documents were signed by Hortin. The delay in bringing this action combined with the fact that Bowen refused to sign the closing documents which would have paid all past due rent suggests at least the possibility of unreasonableness on the part of Bowen. This factual issue should also be addressed by the trial court in determining whether Bowen could withhold his signature and terminate the sale of the home.

II HORTIN AND BOWEN'S ACTIONS CREATE A QUESTION OF FACT AS TO WHETHER JONES' OPTION TO PURCHASE WAS EXTENDED ORALLY OR THE CONTRACT WAS REMOVED FROM THE STATUTE OF FRAUDS.

There are additional disputed facts regarding whether appellant was given an extension of the option to purchase the real property. Because an option to purchase real estate is subject to the statute of frauds, ordinarily an extension of an option must also be in writing. Holt v. Katsanevas, 854 P.2d 575, 579 (Utah App. 1993), see also Utah Code Ann. § 25-5-3 (1998). However, there are exceptions to this rule, and "[w]hen an oral contract otherwise prohibited by the statute of frauds becomes enforceable because of part performance or otherwise, the Statute does not prevent the enforcement of the remaining promises." Katsanevas, 854 P.2d at 580 (internal citation and quotation marks omitted).

A. Unresolved Facts Can Be Understood To Show That Jones Changed His Position In Reliance On A Non-Written Extension To The Option Agreement

In affidavits provided to the trial court and on oral argument, Jones presented facts suggesting that he had changed his position in reliance on oral modifications to the first option agreement. A party seeking to enforce an oral modification may rely on the fact that he has changed his position in defeating the statute of frauds.

If a party has changed his position by performing an oral modification so that it would be inequitable to permit the other party to found a claim upon the original agreement as unmodified or defeat the former's claim by setting up a defense that performance was not according to the written contract, after he has induced or consented to the former going forward, the modified agreement should be held valid.

Bamberger Co. v. Certified Productions, Inc., 48 P.2d 489, 492 (1935), aff'd on rehearing, 53 P.2d 1153 (1936). In Jones' Affidavit, he contended that Bowen had interfered with the implementation of the lease and option agreement and that Hortin repeatedly agreed that Jones could have more time to make improvements to the property and complete the option agreement. Record at 71-73, ¶¶ 14-19 (Jones Aff). If these facts are found to be true, then Jones' efforts to improve the property beyond the option period of July 4, 1998, would reflect that he had altered his position in reliance on oral statements and the efforts by Bowen and Hortin to disaffirm the oral changes and require enforcement of the original contract would be inequitable.

After hearing factual evidence, if the trial court were to determine that Bowen's signature was necessary to effect a sale of the property, then his agreement would be needed to extend the option period. The case of Coombs v. Ouzounian, greatly relied on by Bowen in the trial court, stands for the proposition that when property is owned by more than one person, all owners signatures are required to extend an option contract. 465 P.2d 356, 358 (Utah 1970). However, the factual dispute in this case, as identified previously, is whether Bowen was even in a position to sign any documents with respect to the property. If Bowen's signature was not needed, then Hortin could unilaterally extend the option period. It is hard to see how Hortin could now argue that she did not agree to extend the option period when she actually signed closing documents.

B. Disputed Facts Have Not Been Resolved Regarding Whether Jones Partially Performed The Non-Written Extension To The Option Agreement

The oral extension of Jones' option will also be exempt from a statute of frauds defense if he can show partial performance under the oral extension. The statute of frauds "shall [not] be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." Utah Code Ann. § 25-5-8 (1998). This exception to the statute of frauds has been interpreted to apply when "there is 'sufficient performance on the part of [one party] exclusively referable to the alleged contract to exempt it from the effect of the statute of frauds.'" Holt v. Katsanevas, 854 P.2d 575, 580 (Utah App. 1993) (quoting Ryan v. Earl, 618 P.2d 54, 55 (Utah 1980)). According to Jones' Affidavit, he performed services and improvements on the property based on the extension of the option to purchase agreement and he also worked with a financing company well beyond the July closing date identified in the option in an effort to complete the transaction. Record at 71-73, ¶¶ 14-20 (Jones Aff.). Both of these actions would not have been undertaken for any other reason other than the extension of the option contract. The alleged facts surrounding the attempt to close the transaction plainly show that there was at least part performance of the contract extension exclusively referable to the extended option agreement thereby justifying removal of the contract from the statute of frauds.

The larger question, however, is if Bowen did have an interest in the property

requiring his signature, whether he is estopped from relying on the statute of frauds as a defense to his failure to sign the closing documents. Even Coombs recognizes that an extension of an option agreement may be enforced in the absence of a writing if estoppel is present. 465 P.2d 358. Based on the facts available to the trial court, Bowen had signed the first option and was aware of the dates contained therein. Bowen was presumptively aware of Jones' occupation and efforts on the property and Bowen's decision to remain silent until after receiving the closing documents and refusing to sign them indicates that he should not be allowed to rely on the statute of frauds to prosecute his claim.

C. The Trial Court Erred In Finding That Jones Was Not Entitled To Equitable Relief Based On Unclean Hands

The trial court recognized that Bowen's interference with the closing of the transaction may be a fact sensitive action. Decision Hearing p. 4. However, the trial court went on to hold that because Jones did not make timely rental payments he was therefore precluded from seeking equitable relief from the statute of frauds. Id. While Jones did not contest this fact, the court failed to take into account that he had tendered the back rent as part of the attempted closing. This occurred prior to the service of the five day notice to vacate and prior to his raising the defense of estoppel. The Utah Supreme Court has recognized that generally, "in a suit for specific performance of a contract for the sale of realty, the purchaser must show that he paid the purchase price, or

tendered it, to the defendant prior to the commencement of the suit." Reed v. Alvey, 610 P.2d 1374, 1379 (Utah 1980). In this case, there is evidence that this in fact occurred. In his affidavit, Bowen alleges that Jones was two months delinquent in his rent at the end of August 1998. At the time Hortin signed the closing documents, five months would have been due. Based on the contract rental rate of \$648.00 per month, the amount owed equaled \$3,240.00. The Escrow Settlement Statement provided to the trial court and signed by Hortin, shows a line for an option payment to Hortin in the amount of \$3,240.00, the exact amount of the deficiency. The trial court's failure to recognize this tender denied Jones of equitable relief that he at least arguable had a claim to. In order to rectify this error, the case should be remanded to the trial court for a determination of whether Bowen and Hortin, by their statements, actions, and silence, are estopped from asserting the statute of frauds as a defense to the extension of the first option agreement under either the theory of changed position or partial performance.

III. BECAUSE HORTIN SIGNED CLOSING DOCUMENTS, A SIGNIFICANT QUESTION OF FACT EXISTS AS TO WHETHER A NEW CONTRACT BETWEEN HERSELF AND JONES CAME INTO BEING OR WHETHER ANY PRIOR AGREEMENTS WERE MERGED INTO THE WARRANTY DEED AND WHETHER BOWEN UNREASONABLY WITHHELD HIS SIGNATURE.

Even if the facts in dispute show that Jones was not entitled to rely on the option

contract, the trial court should still have heard evidence as to whether by signing closing documents, Hortin thereby entered into a new and binding contract with Jones or his assignee for the sale and purchase of the property. If Hortin did in fact do so, and if Bowen had more than a financial interest in the property, the trial court must also determine if Bowen was justified in his refusal to accept this new contract. Bowen and Hortin have argued below that because the option expired by its terms and because they believe that Jones could not prove an extension to the option nor could he prove the elements of estoppel, that therefore, he had no right to remain on the property. However, this argument ignores the fact that a new contract may have been formed or that by signing closing documents, the option was merged with the warranty deed.

A. By Signing Closing Documents, Hortin May Have Entered Into A New Contract To Sell The Property

The deed signed by Hortin, together with the closing documents, evidence material facts that a new and binding contract for the sale of land had been entered into. A partial list of elements required to establish a contract for the sale of land is contained in Property Assistance Corp. v. Roberts, 768 P.2d 976 (Utah App. 1989). The list in Roberts includes: (1) an adequate description of the property to be sold; (2) evidence of consideration or of a purchase price; and (3) information regarding when and where settlement shall occur. Id. at 978. Other elements of a valid land contract would likely include identification of the parties to the contract, words indicating an intent to sell and

the signature of the seller. See Utah Code Ann. § 25-5-3 (1998). If these elements are found to be present in a document or related documents, then a court should determine that a valid and binding contract for the sale and purchase of property exists.

In this case, even if Jones and Hortin had not entered into a prior option agreement, the existence of these elements in subsequent documents would establish a completely separate contract for the sale of the property. The trial court did not take any evidence as to whether the closing documents signed and submitted by Hortin in this case met these elements. Its reason for not examining this issue was likely that because Bowen had not signed the documents, it was immaterial what Hortin had done or signed. However, this assumption is erroneous. The first reason that this is error is based on Bowen's interest in the property. If he had only a financial interest, as described above, he would not need to sign any of the sales documents. In addition, even if he had a more general ownership interest, he may still be compelled to sign the documents based on the unreasonableness standard of Booth. Booth, 722 P.2d 772. In affirming the requirement set by the lower court that the unreasonable spouse sign sale documents, the Booth court recognized the importance of not allowing a former spouse to hold a transaction hostage. "Plaintiff [willing spouse], too, was interested in having the property sold, and her rights, as well as those of defendant's [unreasonable spouse], must be considered." Id. Thus, even if Hortin had accepted the terms present here in November 1998 from an individual with whom she had had no prior contact, there would be a material issue of fact as to

whether a contract had been created which, assuming Bowen had an ownership interest in the property, Bowen would have been required to accept.

B. Hortin's Signature On The Closing Documents May Have Served To Merge All Prior Agreements Into The Warranty Deed

By signing a warranty deed and delivering it to the title company chosen by Jones, Hortin may have invalidated any argument that Jones was in violation of the option and lease agreement because any prior obligations under those documents were merged into the deed. Under the doctrine of merger, "upon delivery and acceptance of a deed, the provisions of the underlying contract for the conveyance are deemed extinguished or superseded by the deed." G.G.A., Inc. v. Leventis, 773 P.2d 841, 844 (Utah App. 1989). In addition, the deed itself essentially serves as a final real estate contract and "[p]arties to real estate transactions must ensure that any agreements involving conveyance of title are incorporated into the final closing document, which is usually a warranty deed." Maynard v. Wharton, 912 P.2d 446, 450-451 (Utah App. 1996). Again, in this case, the trial court did not analyze the role of the merger doctrine because Bowen had not signed the closing documents including the warranty deed. However, for the same reasons identified in the new contract argument, the trial court erred and should have conducted a factual investigation into whether any alleged problems with the option or lease agreement were merged into the final signed documents and whether Bowen should be

required to sign the closing documents.

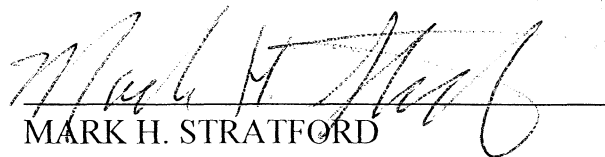
The doctrine of merger does have four exceptions which would preclude application of the doctrine. These are (1) mutual mistake in the drafting of final documents, (2) ambiguity in the final documents, (3) existence of rights collateral to the contract of sale and (4) fraud in the transaction. Id. However, each of these exceptions also require factual development before they may be invoked. Because the deed presented to the trial court did not contain any exceptions to the transfer of title, this case should be remanded for an assessment of whether the merger doctrine extinguishes any claim that Jones' or Harrison was not entitled to purchase the property because the option agreement had expired.

CONCLUSION

The rights retained by Bowen following the entry of the decree of divorce and at the time the closing documents on the home were signed are contested and require further review. Because the trial court did not determine the nature of Bowen's interest in the home by receiving facts, it is unclear whether or not his signature was required to close the sale of the home. This case should be remanded to the trial court for that determination as well as a determination of all other matters, as described above, which would follow a finding that Bowen either had or did not have an ownership interest in the home. If Bowen did an ownership interest in the home, the trial court must determine

whether the statute of frauds is inapplicable due to equitable principles, and, even if the statute of frauds did apply to void the non-written extension to the option, whether Bowen unreasonably withheld his consent to a completely new or merged transaction.

DATED this 15th day of March, 2000.

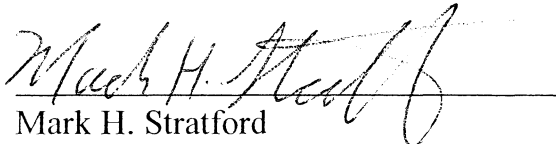

MARK H. STRATFORD
Attorney for Appellant Teak D. Jones

CERTIFICATE OF MAILING

I, Mark H. Stratford, certify that on the 15th day of March, 2000, I served a true and correct copy of the attached BRIEF OF APPELLANT TEAK D. JONES, upon the following named individuals, appellee Hortin and counsel for appellee Bowen in this matter, by mailing it by first class mail with sufficient postage prepaid to the following address:

ROGER F. BARON
Attorney for Appellee Michael Bowen
45 North 100 East
Brigham City, Utah 84302

KRISTEN HORTIN
Appellee
2614 N. 700 E.
North Ogden, Utah 84404


Mark H. Stratford
Attorney for Appellant Teak D. Jones

Addenda

Addendum A

ADDENDUM A
BOWEN AFFIDAVIT

ROGER F. BARON #0225
ATTORNEY FOR PLAINTIFFS
45 NORTH 100 EAST
BRIGHAM CITY, UT 84302
(435) 734-9464

9-15-98
JUN 15 3 31 PM '98

IN THE SECOND DISTRICT COURT, IN AND FOR
WEBER COUNTY, STATE OF UTAH

MICHAEL BOWEN & KRISTEN HORTIN, Plaintiff, vs. TEAK D. JONES, Defendant.	AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Case No. 980908407
--	---

JUN 15 1998

ON & BARON
derson
aron
at Law
First East
ity, Utah 84302
734-9464
734-9151

Plaintiff Michael Bowen, having been duly sworn on oath, hereby states as follows:

1. On or about the 5th day of May, 1998, Plaintiffs and defendant executed an agreement entitled LEASE AND OPTION TO PURCHASE as set forth in the Memorandum.
2. The term of the lease was stated to be March 1, 1998 to August 31, 1998. Said lease further provided for lease payments of \$648.00 per month and specified that time was of the essence.
3. There was never an agreement in writing between all parties to extend the lease or option.
4. The defendant failed to make all the lease payments due under the lease. Further, the defendant did not exercise his option prior to the August 31, 1998 deadline.
5. On November 25, 1998, the defendant attempted to assign his expired interest in the

lease and option to purchase to a Diana Marie Harrison as per the exhibit to the Memorandum.

6. Also on November 25, 1998, the plaintiffs mailed a 5 day notice to vacate to the Weber County Sheriff to be served on the defendant. This notice was served by the Weber County Sheriff by posting the same on the door of the residence on November 30th, 1998 and mailing a copy of the same by mailing to the defendant on December 1, 1998.

7. On December 16, 1998, the Defendant was served with the Complaint and Summons in the present matter and subsequently posted a counterbond.

8. In November of 1998, the defendant attempted to exercise his option by selling the property to a third party. As mentioned above, the defendant later assigned his interest in the lease and option to a different 3rd party. As part of that transaction, the defendant proposed to pay past lease payments (thereby admitting that he had not paid all lease payments due under the agreement.) No document accepting the attempted late exercise was ever drafted or signed and the defendant has never paid the past due payments.

9. The defendant was in default on rent as of the last day of the lease in the amount of \$ 1296 MS ~~1948~~. The defendant has paid no rent since that date and the plaintiffs are entitled to a reasonable amount for rent in the amount specified in the contract to the present date of \$ 3240.

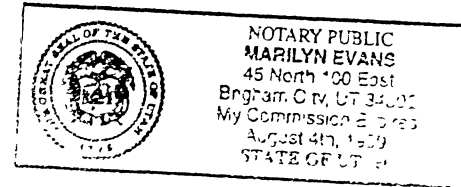
Dated this 15th day of Jan, 1999


MICHAEL BOWEN
PLAINTIFF

ROSON & BARON
underson
Baron
rs at Law
h First East
City, Utah 84302
5) 734-9464
5) 734 9151

SUBSCRIBED AND SWORN to before me this 15th day of January, 1999.

Marilyn Evans
NOTARY PUBLIC



CERTIFICATE OF ~~MAILING~~ Delivery

I hereby certify that I ~~mailed~~ delivered a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT this 15th day of January, 1999 postage prepaid to the following:

CHAD B. MCKAY
ATTORNEY AT LAW
2650 WASHINGTON BLVD., SUITE 101
OGDEN, UT 84401

JOHN & BARON
Person
Iron
Law
First East
City, Utah 84302
34 9464
34 9151

[Signature]
SECRETARY

Addendum B

ADDENDUM B
JONES AFFIDAVIT

CHAD B. McKAY #5515
Attorney for Defendant
2650 Washington Blvd., Suite 101
Ogden, UT 84401
Telephone: (801) 621-6021

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

MICHAEL BOWEN & KRISTEN HORTIN

Plaintiff,

vs.

TEAK D. JONES,

Defendant.

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Case No: 980908407

Judge:

STATE OF UTAH)
)ss:
COUNTY OF WEBER)

TEAK D. JONES, being first duly sworn, deposes upon his oath and states as follows:

1. I am the Defendant in the above entitled action and that all statements contained in this affidavit are true and correct to the best of my knowledge.
2. I assert that the facts surrounding this case are as follows:
3. On or about March 6, 1997, acting as agent for Plaintiff, Kristen Hortin, I listed the subject property for sale as part of another listing with a St. George property.
(See Exhibit A)
4. Over the course of the next several months, there were two accepted offers on the subject property for the sales price of \$135,000, both of which failed. On both offers Plaintiff, Kristen Hortin, signed as the seller.

5. Plaintiff, Kristen Hortin, has authorization granted to her by her Decree of Divorce to be the only person authorized to sell the home. Plaintiff, Michael Bowen was ordered in the parties Decree of Divorce to execute and deliver all documents necessary to effect a property transfer. (See Exhibit B)
6. The first and original lease option was signed by Plaintiff, Kristen Hortin, in December of 1997, which gave a lease period from January of 1998 until July of 1998, with an option to purchase granted by the seller. (See Exhibit C) Plaintiff, Michael Bowen, signed and delivered the original agreement in mid to late February.
7. Plaintiff, Kristen Hortin, was attempting to purchase a new town home in St. George, Utah. The builder was holding the town home for her and required the sale or lease of the subject property in order for her to qualify for financing.
8. Said listing contract expired with the failure of the previously mentioned sales. However, I offered to purchase the property under a lease with option to purchase arrangement. The option price would be approximately equivalent to the amount Plaintiff, Kristen Hortin, would have received net after commissions and closing costs from the prior mentioned sales.
9. Thus, Plaintiff, Kristen Hortin, could now complete the financing for the purchase of her new town home, and I, having now worked on it for six months, might salvage an amount equivalent to a commission upon resale of the property. Also, now with the property vacated, some of the needed repairs that had hampered our previous marketing efforts could be accomplished.
10. In about mid November of 1997, it was agreed between Plaintiff, Kristen Hortin,

and myself that we would execute the afore mentioned lease option agreement, and that I would take immediate possession to begin the needed repairs and marketing of the property. Thus, giving me a head start of 1½ months prior to any payment obligation.

11. It was also agreed that Plaintiff, Kristen Hortin, would secure the signatures of her ex-husband, Michael Bowen, on the lease option agreement. The signature of Michael Bowen was not legally necessary, but was for the purpose of insuring his cooperation, as he had twice previously threatened to stop her in her efforts to sell the property. Further, his signature would establish an agreement on the value of the subject property as specified in the parties Decree of Divorce, which would protect Plaintiff, Kristen Hortin, from being later damaged by an appraisal, done after repairs were completed, in higher than the selling price.
12. As part of the original lease option agreement, there was a proposal to improve the property, which I agreed to and attempted to begin by hiring a workman and advancing him cash for the necessary materials.
13. I later learned that Plaintiff, Michael Bowen, the ex-husband of the legal seller, Plaintiff, Kristen Hortin, had expelled the repair man that I hired to make improvements on the subject property. Having had my workman ran off and having not received final signed copies of the agreement back, I moved on to other commitments.
14. Then approximately late February, I finally received back the original agreement signed by all parties. I reiterated to Plaintiff, Kristen Hortin, that now that time has passed, we would need to extend our agreement and that the monies I had set

aside for repairs and payments had been used elsewhere, and I would need to remake those arrangements. Plaintiff, Kristen Hortin expressed that she still wanted me to go ahead with the property and that she understood additional time would be needed.

15. Thus, May of 1998, was the first time that I had accessibility to the property. Therefore, in effect by our actions, we had moved forward the lease option to May even though it was dated back in December.

16. I made two months payments in April totaling \$1380. I then made another two months payments on June 17 totaling \$1300. Thus, by our actions, we had begun the deal that was originally scheduled to start January in May due to Michael Bowen's actions. I was more than willing to abide by the original agreement in January when it was signed, but, Plaintiff, Michael Bowen, interfered by expelling my repairman, removing my Realtor's sign and lockbox, and not conveying cooperation by acceptance until mid to late February.

17. When I tried to go in and make the improvements the second time as requested by Plaintiff, Kristen Hortin, once again the meddling ex-spouse, Michael Bowen, stepped in and stated that he was going to keep my money even though he had no legal standing either to consent to or to object to the agreement. (See Exhibit B - The Decree of Divorce)

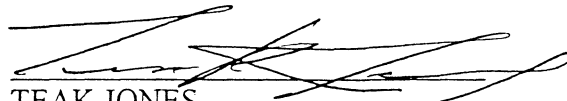
18. Once again Plaintiff, Kristen Hortin, stated that she wanted me to follow through with the original agreement. Therefore, I started making the rental payments and began making the improvements on the property as requested by Plaintiff, Kristen Hortin.

19. Plaintiff, Kristen Hortin, continued to reaffirm with me on a regular basis, up until November of 1998 when she actually closed with me and complied with her intent to sell the property to me, as the only authorized person to make that deal.
20. The delay in closing was due to the financier's inability to get the loan closed timely. Plaintiff, Kristen Hortin actually signed the closing documents in November.
21. At the time of the November closing, the lender stated, in order for him to close the loan and obtain financing for me, he needed to establish a paper trail of our agreement.
22. It was at that time, not in May of 1998, but rather in November of 1998, that the lender presented the second lease document, upon which the Plaintiffs exclusively rely. Even though said document is dated in May, it was not signed by me until November.
23. Said document was never negotiated by me, there was never a meeting of the minds, we had never come to accord as to what the terms would be. It was simply presented to me, strictly and solely, as a requirement for me to be able to close the loan.
24. Said document was signed at closing, in November of 1998, for the sole purpose of leaving a "paper trail" so that the lender could check the box on his lender form stating that he had obtained that information. Said document is null and void and fraudulent and it was signed for a different purpose than Plaintiffs are now alleging. There was no meeting of the minds as it was signed strictly for financing purposes. Further, It was never agreed upon as a binding agreement

between us.

25. Further affiant sayth not.

DATED this 25 day of January, 19 99.


TEAK JONES
Defendant

SUBSCRIBED AND SWORN to before me this 25 day of January, 1999.


NOTARY PUBLIC



NOTARY PUBLIC
RICHARD PORTUGAL
403 West 2525 North
Sunsst, UT 84015
My Commission Expires
December 12, 2001
STATE OF UTAH

Addendum C

ADDENDUM C
SELECTED PORTIONS OF DIVORCE DECREE

insurance coverage. Neither parent shall contract for nor incur any obligation for orthodontic work or elective surgery for the child, or any type of psychological counseling or evaluation for a child without the prior agreement or consent of the other parent in writing. The non-custodial parent will have the right in advance to have a say in the selection of doctors and procedures for any and all orthodontic, surgery procedures or psychological counseling.

The parent ordered to maintain insurance shall provide verification of coverage to the other parent upon initial enrollment of the dependent children, and thereafter on or before January 2 of each calendar year. The parent shall notify the other parent of any change of insurance carrier, or benefits within thirty (30) calendar days of the date he first knew or should have known of the change

8. ALIMONY. The defendant shall pay to the plaintiff the amount of \$630.00 per month for alimony beginning August 1, 1995 until such time as the Plaintiff remarries, graduates from college or acquires full time employment, but not to exceed five years from the date August 1, 1995 or August 1, 2000.

These payments are taxable to the payee and deductible to the payor.

9. SOCIAL SECURITY BENEFITS. Plaintiff is awarded those Social Security Benefits she is entitled to as a spouse of the Defendant for over ten (10) years.

10. PERSONAL PROPERTY OF PLAINTIFF. Plaintiff is awarded those items of personal property currently in her possession, together with her personal belongings and effects.

11. PERSONAL PROPERTY OF DEFENDANT. Defendant is awarded those items of personal property currently in his possession, together with his personal belongings and effects.

12. REAL PROPERTY. Plaintiff is awarded possession of the residential home and

real property located at 2614 North 700 East, North Ogden, Utah, 84414 A legal description of the property is attached as Exhibit A.

as per attorney
split bottom line

The home has an approximate appraised value of \$135,000.00, and a mortgage balance of \$65,000.00. The parties agree that the Defendant shall maintain an interest in the home until such time as the home is sold or alimony ceases as set forth in Paragraph 13 above. At such time the home will be valued by the parties, by appraisal or otherwise as agreed. Defendant shall be awarded a non-interest bearing lien in the sum equal to one-half the equity in the home at the time of appraisal which shall be paid to the defendant upon the occurrence of any one of the following conditions:

- (a) Plaintiff's remarriage;
- (b) Plaintiff's death;
- (c) Sale of the home;
- (d) Six (6) months after the eighteenth birthday of the youngest child of the parties, or July 10, 2008;
- (e) If the Plaintiff shall co-habitat with a member of the opposite sex; or
- (f) Cessation of the use of the home as the primary residence.

13. DEBTS OF PLAINTIFF. The plaintiff shall assume and discharge the following debts: Balance of \$700.00 due Weber State Credit Union on the station wagon; Key Bank, Home Equity Loan, balance \$1,000.00; Bank One, Home Equity, balance \$350.00; Pete Christensen, DDS, dentist bill, balance \$210.00; those debts incurred since the parties' separation of July 15, 1995, and to indemnify, defend and hold the defendant harmless therefrom.

Plaintiff shall also assume responsibility for the mortgage loan payment on the marital

residence and acknowledges and agrees that alimony, in part, received pursuant to the Stipulation and Property Settlement Agreement and this Decree shall be used for making timely mortgage payments.

14. DEBTS OF DEFENDANT. The defendant shall assume and discharge the following debts, those debts he has incurred since the parties' separation of July 15, 1995, and to indemnify, defend and hold the plaintiff harmless therefrom.

15 NOTICE OF DEBTS The parties shall provide a certified copy of the Final Decree of Divorce to all creditors of the parties pursuant to the Utah Code Ann §§ 30-3-5(1)(c) and 15-4-6 5, and do any follow-up necessary to effectuate these statutes. With respect to either party who is not ordered to make payments under U.C.A. §§ 30-3-5 and 30-4-3 on the joint obligations, no negative credit report under U C A § 70C-7-107 and no report of the debtor's repayment practices or credit history under Chapter 14, Title 7, Credit Information Exchange, may be made regarding the joint obligation after the creditor is served notice of the Court's order as required under U C.A. § 15-4-6 5(2), unless the creditor has made a demand on the joint obligor not ordered to pay the debt for payment because of the failure to make payments by the joint obligor ordered to make the payments

16 COBRA. The defendant shall assist the plaintiff in obtaining medical benefits for the plaintiff through defendant's place of employment for a divorced spouse, as provided by Title X of the Consolidated Omnibus Budget Reconciliation Act (COBRA) 1985. The plaintiff is responsible for payment of the insurance premiums for such coverage. All expenses not covered by insurance shall be the sole responsibility of the plaintiff for payment. The defendant is further required to make available to plaintiff all necessary forms and documents to effectuate the same

for submission to the appropriate agencies.

17. LIFE INSURANCE. The defendant shall maintain a life insurance policy listing the minor children as beneficiaries, in an amount sufficient to cover child support in the event of the defendant's death, as long as it is available through his place of employment, with the provision that should the defendant remarry and have additional children, those children can be listed as co-beneficiaries in equal amounts.

18. TAX RETURN. The plaintiff and defendant shall file a joint tax return for the tax year 1995.

19. INCOME TAX DEDUCTIONS. Defendant is awarded the minor children for income tax deduction purposes so long as he is paying child support. However, the defendant can only claim the minor children for income tax deduction purposes if he is current in his child support payments for the year in which he is claiming the deductions. The plaintiff will waive her rights therein if all provisions are met, and sign the necessary annual waiver with the Internal Revenue Service, Form 8332.

At such time as plaintiff becomes gainfully employed, the parties agree that the tax deductions shall be split between the parties with defendant claiming the oldest and youngest child and plaintiff claiming the middle child as dependents.

If the physical custody of one or more of the children changes, the parties agree to revisit the issues of child support and tax deductions.

20. TAXES. Each of the parties is responsible for and liable for any tax implications for those properties acquired through this Stipulation and Property Settlement Agreement.

21. TRANSFER OF PROPERTY. Each party or their heirs or assigns shall

immediately deliver all personal property awarded to the other party in their possession, and execute and deliver all documents and titles necessary to effect a property transfer as ordered in the Decree of Divorce to be entered herein.

22. PLAINTIFF'S MAIDEN NAME. Plaintiff's maiden name of Hortin shall be restored to her upon entry of the Decree of Divorce.

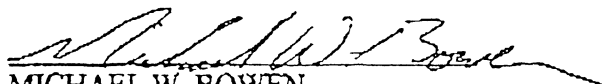
23 ATTORNEY'S FEES Defendant shall pay attorney's fees in the total amount of \$600.00, and all costs incurred for this action.

DATED this 16 day of July, 1996

BY THE COURT:


DISTRICT COURT JUDGE

Approved As to Form:


MICHAEL W. BOWEN
Defendant

Addendum D

ADDENDUM D
OPTION AGREEMENT AND SELECTED CLOSING DOCUMENTS

OPTION

In consideration of \$ TEN Dollars and other good & valuable Consideration
Kristen Hartin of Washington County, State of UTAH.
 Optionor... grants to TEAK D. JONES and for his assigns
 Optionee... the option to purchase the hereinafter described property for the purchase price of \$ 125,500
 to be exercised by giving written notice thereof to Optionor... at Washington, State of UTAH, at any time on or before JULY 1st
1998, at 5:00 o'clock P. M. If this Option is exercised, then after receiving written notice thereof
 Optionor... will furnish Optionee... with an abstract of title brought up to the date of exercise of the Option and
 a policy of title insurance in the amount of the purchase price and, upon payment of the purchase price due
 will deliver to Optionee... a good and sufficient Warranty deed conveying marketable fee simple
 title to the hereinafter described property, free and clear of all encumbrances except as herein mentioned. The
 consideration paid for this Option shall be credited on the purchase price.

DESCRIPTION OF PROPERTY

2614 N. 700 E
N Ogden, UTAH
TAX ID# 18-013-0006 Weber County

ENCUMBRANCES

None

Dated at _____ this _____
 day of _____, 19____

Kristen Hartin
Michael Jones
 Optionor

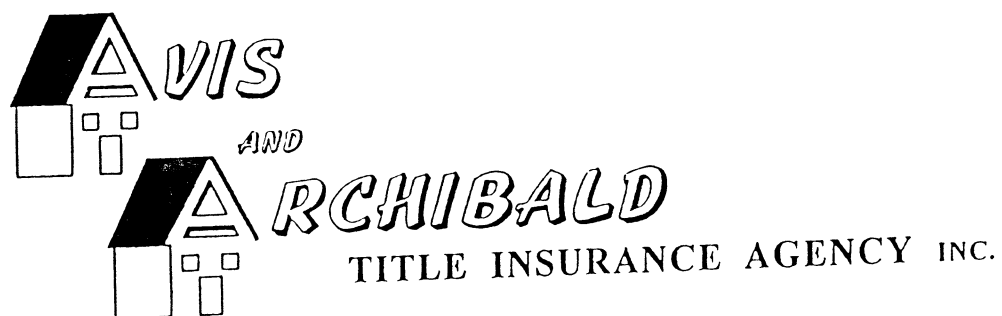
STATE OF UTAH
 COUNTY OF Washington } ss.

On the 17th day of December, 1997, personally appeared before
Kristen Hartin and _____, the
 notors of the above and foregoing instrument, who duly acknowledged to me that they executed the same.

NOTARY PUBLIC
 REBECCA HILL
 640 SOUTH 100 EAST
 ENTERPRISE, UT 84301
 My Commission Expires 4/30/99

Rebecca Hill
 Notary Public
 Residing at Enterprise, Utah

782-9149
C2K



ESCROW SETTLEMENT STATEMENT
SELLER'S COPY

FILE NO 2-12792A
ESCROW NO 2-12792A
DATED 11/12/98
FORWARDED TO 11/13/98

BUYER DIANA HARRISON
SELLER MICHAEL W BOWEN AND KRISTEN H BOWEN
BROKER
PROPERTY ADDRESS 2614 NORTH 700 EAST, OGDEN, UT 84414
SELLERS MAILING ADDRESS , OGDEN, UT
TYPE OF TRANSACTION

PURCHASE PRICE	\$	125 500 00
OPTION PAYMENT	\$	3 240 00
LATE FEES	\$	100 00
TOTAL PURCHASE PRICE AND CREDITS DUE SELLER	\$	128,840 00

LESS CREDITS TO BUYER

TAXES ASSUMED 01/01/98 TO 11/13/98 @ \$ 1,024 12	\$	885 64
TITLE INSURANCE PAID BY BUYER	\$	696 00
TOTAL CREDITS TO BUYERS	\$	1,582 64

NET EQUITY BEFORE EXPENSES.....\$ 127,257 36

EXPENSES OF THE SELLER

PAYOFF LOAN TO COUNTRYWIDE	\$	61,016 95
PAYOFF 2nd LOAN TO ADAMS	\$	20,205 29
CLOSING FEE TO AVIS & APCHIBALD TITLE INS AGENCY INC	\$	95 00
TOTAL EXPENSES FOR SELLER ...	\$	81 317 24

NET DUE TO SELLER . . . \$ 45,940 12

THE UNDERSIGNED BY THE SIGNING OF THIS DOCUMENT HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE SAME AND AGREE TO
BE LIABLE FOR AND HOLD TITLE COMPANY HARMLESS FROM ANY ADDITIONAL CHARGES RELATING TO THE ABOVE REFERENCED PROPERTY
NOT DISCLOSED IN THIS STATEMENT BY ANY LIENHOLDER BE IT MORTGAGE PAYOFFS OR ASSUMPTION FIGURES TAXES AND/OR
OTHER SIMILAR ASSESSMENTS

CLOSING OFFICER


SELLERS

NORTH OGDEN, UT

WARRANTY DEED

2-12792A

MICHAEL W. BOWEN AND KRISTEN H. BOWEN,

GRANTORS

of OGDEN, County of WEBER, State of UT,
hereby CONVEYS AND WARRANTS TO

DIANA HARRISON

GRANTEE

of , NORTH OGDEN, UT
for the sum of Ten dollars and other good and valuable consideration.

The following tract of land in WEBER County, State of Utah, to-wit:

18-013-0006

THE NORTH 85 FEET OF LOT 3, BLOCK 14, PLAT A, NORTH OGDEN SURVEY
WEBER COUNTY, UTAH

Subject to easements restrictions and rights of way
appearing of record or enforceable in law and equity and 1998
taxes and thereafter.

WITNESS the hands of said Grantors this 12th day of November, 1998

Kristen H. Bowen

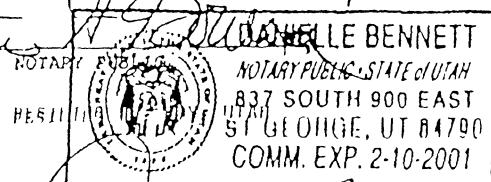
MICHAEL W. BOWEN

KRISTEN H. BOWEN

STATE OF UTAH)
 :SS
COUNTY OF WEBER)

ON THE 12th DAY OF NOVEMBER , A D 1998, PERSONALLY
APPEARED BEFORE ME MICHAEL W. BOWEN AND KRISTEN H. BOWEN,
THE SIGNER(S) OF THE
WITHIN INSTRUMENT, WHO DULY ACKNOWLEDGED TO ME THAT THEY
EXECUTED THE SAME.

MY COMMISSION EXPIRES: 12/31/99



Danielle Bennett

Addendum E

ADDENDUM E
ORAL ARGUMENT HEARING TRANSCRIPT

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

MICHAEL BOWEN & KRISTIN HORTIN,	:	Case No. 980908407
	:	
Plaintiff,	:	
	:	
v	:	
	:	
TEAK D. JONES,	:	
	:	
Defendant.	:	

DECISION HEARING HELD MAY 9, 1999

BEFORE

THE HONORABLE PAMELA G. HEFFERNAN

COPY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
652 Jefferson Cove
Sandy, Utah 84070
801-567-1157

APPEARANCES

For the Plaintiff:

ROGER F. BARON
BUNDERSON & BARON
45 North 100 East
Brigham City, Utah 84302

For the Defendant:

CHAD B. MCKAY
ATTORNEY AT LAW
2350 Washington Blvd
Ogden, Utah 84401

* * *

1 April 9, 1999

2 HONORABLE PAMELA G. HEFFERNAN PRESIDING

3 P R O C E E D I N G S

4 THE COURT: All right. This is in the matter
5 of Bowen versus Jones, number 980908407. It's the
6 plaintiff's motion for summary judgment. Just to let you
7 know I had, I was gone the last part of last week and we
8 had checked to see if there was anything on the calendar
9 and they said there wasn't. So I didn't get this file to
10 review until just this morning and I had other matters. I
11 have, you know, given it a cursory review. I understand
12 the basic issues. I'm not really sure I understand the
13 whole factual scenario. That's the only thing I'm a
14 little, not totally clear about. Apparently, it's fairly
15 complicated about what happened when. It was a fairly
16 complicated set of facts forth in the memorandum in
17 opposition. And I'd just say, I haven't really digested
18 that completely. I understand there was a lease and option
19 to purchase. There may have been more than one. The
20 contention is that it expired or something and I guess that
21 the other contention is that it was not an arm's length
22 kind of agreement where it was a valid agreement and --

23 MR. BARON: Yeah, but the second lease it was an
24 arm's length agreement.

25 THE COURT: So there were two?

1 MR. BARON: Right. The first lease, I don't
2 think there is any dispute that all the parties agreed on
3 that. The second lease, the defendant is alleging anyway,
4 that he only signed that later on as for a lender or
5 something.

6 THE COURT: Okay. The first lease also had an
7 option to purchase?

8 MR. BARON: Yes.

9 THE COURT: And that was signed by the defendant?

10 MR. BARON: Yes.

11 THE COURT: And when did that expire?

12 MR. BARON: I believe that was in July of last
13 year.

14 THE COURT: July of '98?

15 MR. BARON: Right. It expired earlier than the
16 second option that he is saying that -

17 THE COURT: And it's your contention that the
18 option was never perfected?

19 MR. BARON: Well, it was never exercised.

20 THE COURT: Never exercised?

21 MR. BARON: Yes. Your Honor, I do have one case
22 that I found after I submitted my last reply. I have given
23 counsel a copy of it. If I may approach the bench, I do
24 have a copy for the Court.

25 THE COURT: Okay. Thank you.

1 Having said that then, I'll let you, you know,
2 present what you have to present but -

3 MR. BARON: Thank you, your Honor. It is rather
4 a complex situation. What we had was a home here in Ogden
5 that been owned by a husband and wife who then divorced.
6 The husband and wife did sign an option agreement with the
7 defendant in about, I believe it was December of '97, an
8 option with, a lease with an option is what it was. In
9 1998, I was made aware of the situation, reviewed that, was
10 not really happy with how clear it was worded and so I
11 redid it and gave it to the parties and that was signed by
12 all the parties although the defendant is now saying that
13 that wasn't signed by him until later and he claims it was
14 just an accommodation but it was a lease and it was an
15 option. The first option did expire I believe in July of
16 last year, the second one the end of August.

17 It's undisputed in the facts that the defendant
18 did nothing to exercise his option on either lease prior to
19 the expiration. It's also undisputed on the facts that the
20 defendant has not paid all the money that is due under the
21 lease. That as a matter of fact he has been living in that
22 residence for approximately the last six or eight months
23 rent free and not having made any lease payments.

24 Following the expiration of the option, the
25 defendant continued to live there for some period of time

1 and about October or November of last year he attempted to
2 exercise his option by finding a buyer and essentially
3 wanted to have the buyer purchase it and then use some of
4 that money to pay his last or his behind lease payments.
5 It's rather curious because at the same time that he was
6 doing this he actually assigned his option to a third party
7 and the third party was supposed to go ahead and sell the
8 premises and I suppose pay the lease payments. But
9 there's, in the record, a copy of that assignment which is
10 interesting because the defendant now appears he is living
11 in the home and yet he's assigned any interest he has in
12 the lease and option. Of course, the lease and the option
13 had expired months previous.

14 THE COURT: When was that assignment attempted to
15 be made?

16 MR. BARON: The assignment was later. It was at
17 the same time he attempted to exercise the option in around
18 November of last year. And there is a copy in the file of
19 the assignment.

20 THE COURT: Okay. There probably is and I just
21 didn't have all the bullets in line so.

22 MR. MCKAY: November, what was that date?

23 MR. BARON: November 11th. Okay. And so the
24 defendant appears here living in the premise having
25 assigned his right to the option and lease, his main

1 contention, I believe, is that he tried to exercise the
2 option that one of the two persons whose name appears on
3 the title, Kristen Hortin, he alleges assigned, signed some
4 document having to do with the sale of the property. I
5 have never seen a copy of that document. I don't know of
6 any allegation that there was ever anything signed
7 extending the option. The case that I presented to the
8 Court is Coombs versus--and I'm not sure how to pronounce
9 this--Ozmiun, covers a couple of things that I think are at
10 least relevant to this case. One is that it makes clear
11 that options are covered by the statute of frauds. Any
12 extension of that option would have had to be in writing
13 signed by the parties. We have nothing like that. There
14 is not even any allegation that there ever was anything
15 like that. And so there could not have been an extension
16 to the option.

17 The second thing that covers, this case was an
18 interesting factual case and somewhat similar to what we
19 have here. It involved a husband and wife that had given
20 an option to a third party, it came time for the option to
21 expire and one of the, I can't remember if it was the
22 husband or wife, but one of them signed actually an
23 extension and said I'm going to give you an extension on
24 the option. The other, once again it was the husband or
25 wife, did not sign the extension agreement. The Court held

1 that the assignment was not valid and that both parties did
2 not sign it. And here we have an ex-husband and wife and
3 neither party signed an extension. Clearly subject to the
4 statutes of frauds but even if Kristen Hortin had signed an
5 extension, that doesn't extend the option in that the
6 parties, all the parties to the option of the lease did not
7 sign.

8 So, your Honor, my clients are very frustrated.
9 They've had this man living in the home rent free for all
10 this time and they would like the Court to issue summary
11 judgment, order him out of the home. If the Court sees an
12 issue on past rent, we've alleged that. We've covered it
13 in our affidavit. Certainly we could handle that at a
14 later hearing. We don't think there is any issue with
15 regard to that and it can be determined under the affidavit
16 and the facts alleged. So we would ask that we be granted
17 summary judgment, that we have an Order of the Sheriff to
18 move the defendant from the premises. Thank you.

19 THE COURT: Go ahead.

20 MR. MCKAY: Thank you, your Honor. Good morning.

21 THE COURT: Good morning.

22 MR. MCKAY: I think it's important that the Court
23 understand all of the facts here. Counsel has made some
24 representations and some of that is true, but I guess to
25 make a legal decision I think the Court needs to understand

1 everything that has happened. This is a husband and wife,
2 both of them are the plaintiffs. Divorced, I don't know
3 when but prior to this time and the wife was given all the
4 interest in the marital property subject to a lien by the
5 husband for equity. So she, therefore, had all of the
6 right to sell the property. My client is a real estate
7 agent. He, I don't know if he's a broker or an agent, but
8 anyway, he does real estate work and he had arranged for
9 this woman to receive a condo to buy, purchase a
10 condominium in St. George. Okay, one of the plaintiffs. I
11 think her name is Kristen Hortin. And when, as part of
12 this deal she needed to sell her home. The home that is
13 this particular home that my client is now living there.
14 So, he was accommodating her. To make this deal work in
15 St. George, he had to help her sell her home here and so
16 the home was listed and had two potential purchasers. Both
17 of those deals fell through because the property wasn't
18 quite up to standard to sell. So, my client said fine, I
19 will buy the property or I'll rent the property and buy it
20 and I'll fix it up and then we'll sell it and we'll go
21 ahead and finish all these deals including your one in St.
22 George. And that's the December agreement and it was a
23 lease with the option to purchase.

24 Mr. Bowen, another one of the plaintiffs, the ex-
25 spouse, we'll call him the meddling spouse in this case.

1 He came in and basically ran my client's repair person off.
2 The person that he had hired to go in and fix the place up
3 so that they could get it ready to sell. So, my client
4 goes to Kristen Hortin and says, Hey, you know, are you
5 going to have your ex do this or are you going to have me
6 do this because we're both not going to do it. It just
7 isn't going to work that way. You know, if I'm going to do
8 it, fine. I'll do it. If he's going to do it. I'll just
9 back away. I've got other things to do.

10 So, after a month or two finally she decides
11 yeah, no, I definitely want you to go ahead and do it and
12 I'll get him out of it. So, at that point my client says
13 okay, this is definitely a go. Yes, it's a go. So, they
14 basically begin the document rather than in December they
15 started in the spring time. I believe it was about March,
16 April or May.

17 Help me, Teak.

18 It was April or May. So, my client at that time
19 makes two rental payments which would carry him through
20 until an August date which, and then he moves in and he
21 starts to really try to get this place up to speed. He
22 contacts a potential buyer. He works everything out and
23 he's in constant contact with Kristen. Okay, not with Mr.
24 Bowen, the meddling spouse. He's in constant contact with
25 the person that he believes to be the only person with

1 authority to sell this house. This constant contact is
2 going up through November 11. Okay? He has financing
3 arranged.

4 THE COURT: Now what was this arrangement that, I
5 guess, we've got the written option from December. Did --

6 MR. MCKAY: Right. And it is supposed to expire
7 in August is my understanding. The first agreement, okay.
8 And then he's got financing arranged and everything is a go
9 and they're scheduled to close and the buyer, the new buyer
10 comes in the the new buyer signs all the closing document.

11 Kristen Hortin -

12 THE COURT: And when was that again?

13 MR. MCKAY: November 11th, I believe.

14 THE COURT: Okay, this is in November.

15 MR. MCKAY: Yes, it was attached, counsel said he
16 didn't get a copy of it. We attached it as an exhibit.

17 THE COURT: Yeah, I'm sure that it's in here. I
18 just want to make sure I'm following you.

19 MR. MCKAY: If there is something afterwards, you
20 can tell me.

21 And Kristen Hortin, one of the plaintiffs,
22 actually comes in at that date and signs all the closing
23 documents.

24 THE COURT: For the sale to this new buyer.

25 MR. MCKAY: Right, right. And as part of the

1 financing, and this is where all of this gets muddled.
2 Okay. To that point everybody is moving along, even the
3 ex-spouse, Mr. Bowen, is getting involved. And he says is
4 it still going to close, is it still going to close, is it
5 still going to close? Okay. He's following everything
6 along. Doesn't object once. Everything is going smoothly.
7 Then at that point in order to close and get all the
8 financing worked out, the title, is he a title guy or is he
9 a finance guy?

10 MR. JONES: A finance.

11 MR. MCKAY: The finance guy says we need to make
12 a paper trail so this thing is going to work on the
13 financing. At that point, clear in November, is when my
14 client is presented with this second lease option. Okay.
15 The second lease option actually expired by its terms two
16 months prior to the date that he even signed it. So
17 there's a big question as to meeting of the minds and what
18 that purpose of that document was.

19 Now, counsel wants the Court to rely solely on
20 the face of that document but clearly any document signed
21 and any document that has expired two months prior to the
22 date of the signing and I don't think they're disputing
23 that he signed it that date, has got to be fraudulent on
24 its face and null and void. Anyway, so in order to leave a
25 paper trail he signs this second document so that he can

1 get financing and close, you know, within a week. As part
2 of that same agreement, as part of the closing on the
3 document and as part of the a, everything that needs to
4 happen so the financing can be completed.

5 THE COURT: Financing for this third person
6 that's buying it?

7 MR. MCKAY: Right. My client has to assign his
8 right because of his financial situation, he has to assign
9 his right to a third person. This third person is actually
10 his wife, okay? That's the assignment that counsel is
11 talking about. He assigns it to her because she is in a
12 better financial condition to complete the financing. I
13 mean he is working extremely hard to make this deal work
14 for all the parties. And everybody is in agreement with it
15 except for Mr. Bowen. Everybody has signed it except for
16 Mr. Bowen. And at that point on the closing, the finance
17 person comes in and says, Mr. Bowen, you need to sign these
18 papers, okay, because he has some lien interest and he's
19 going to be, he has to agree to the amount that he is to
20 receive out of the equity. He doesn't sign. Okay.
21 That's, that's the point that he gets together with his
22 attorney or with the lender, the financier and they
23 basically conspire and say, Hey, we can cut him out of this
24 deal altogether. We know who the buyer is. I haven't
25 signed so the deal doesn't go through. We'll just evict

1 him and we'll take all the profits from this. And we
2 allege that that's exactly what they're trying to do. And
3 my client, he receives most of this information back from
4 the buyer. And the buyer is saying, Well, Teak, how come
5 you're not in this deal anymore, you know. You're the one
6 I've been dealing with, we've been doing all this all
7 along. How come suddenly you're out of it and this new,
8 this guy wants to just deal directly with me?

9 THE COURT: What, they wanted to cut him out of
10 his sales commission?

11 MR. MCKAY: Yeah. Exactly. My client and this
12 third party is actually his wife. She's, you know, and
13 they did that strictly because he needed the clean credit
14 to do the financing. We feel like the whole thing is a
15 scam basically to cheat him out of a sales commission. And
16 we wanted to make sure we were clear here before we go and
17 file all of our, but we believe there have been several
18 violations of law and we intend to pursue those. Number
19 one, against Mr. Bowen for meddling and we indicated that
20 in our documents, for interfering with business interests
21 when he had no right to do so. And number two, against
22 this lender who we believe has also violated the law.

23 But as far as a summary judgment motion or
24 anything in that vane we just feel it would be
25 inappropriate. There are so many complicated facts here

1 that we haven't had time today to explain to the Court and
2 that we would put on by testimony.

3 And, by the way, my client is here and is
4 prepared to testify if this Court wishes him to do so to
5 clarify anything or just so that we can have something on
6 the record under sworn.

7 THE COURT: Let me just make sure I understand.
8 So there was lease with option to purchase signed in
9 December of '97.

10 MR. MCKAY: Yes.

11 THE COURT: Expired probably in July or August.

12 MR. MCKAY: Right. And it didn't even begin, I
13 guess it was on paper but the terms of it didn't start
14 until several months after the time that they were supposed
15 to start.

16 THE COURT: But, but did it expire in August?

17 MR. MCKAY: Yes. But I guess one of the points
18 that's important for the Court to understand is had he had
19 from December until July or August to prepare the property
20 for sale, then he could have done that within that period
21 of time. But because Mr. Bowen, unclean hands doctrine,
22 comes in and chases this person off and there is this much
23 confusion, he lost several months of time there to prepare
24 this property. And that's why it went, instead of July or
25 August, it kicked over into October, November before he

1 could have everything completed and finish the sale.

2 THE COURT: But from August on, it is your
3 contention that there was no actual written lease with
4 option to purchase. Is that --

5 MR. MCKAY: Well, and that, thank you, your
6 Honor, for reminding me about the statute of frauds. What
7 I want to know or want the Court to a, I guess our defense
8 to the statute of frauds argument that counsel made is that
9 there is case law. I didn't bring the cases today because
10 I didn't know that counsel was going to present these
11 arguments today. But there is case law that allows an
12 exception to the statute of frauds if there are enough, and
13 it can be notes, it can be scratches on paper, it can be
14 documents. If there are enough of those to establish the
15 terms of an extension, then the extension would apply.
16 We're saying that because Kristen Hortin actually signed
17 closing documents and although, even though she verbally
18 agreed to everything up until that point and actually by
19 her actions confirmed the extension period and even signed
20 closing documents, that those written document would create
21 the extension that would be the exception to the statute of
22 fraud.

23 MR. JONES: You have the actual closing date was
24 vague because of a seven and a half month deal was now cut
25 to a three month deal.

1 MR. MCKAY: Right, that explains it.

2 MR. JONES: And (inaudible) if I can't get it

3 done then and there's verbal --

4 THE COURT: Well, let me just hear from him. And

5 I understand you may want to talk with him but it's not

6 going to help me to have you --

7 MR. MCKAY: Right.

8 THE COURT: I just need it presented to me.

9 MR. JONES: (Inaudible) responsible for those

10 closing --

11 MR. MCKAY: And there are other things. It's not

12 just that, you know, he ran this person off. There are a

13 lot of other problems that the plaintiff has created here.

14 You know, even getting the police involved with meddling

15 with the property and such. We feel like, you know, he's

16 still trying to be the controlling spouse even though there

17 is a divorce. The decree of divorce gives her all rights

18 to sell the property and do whatever. All he gets is

19 whatever his portion of the equity is. And that is really

20 is the problem here. That's why we're in Court today id

21 because he has done that. We would ask this Court to deny

22 that and allow us to finalize. We'll be asking the Court

23 in the near future to allow, to actually hold him as the or

24 his assignee as the true buyer. Maybe there's a third

25 party, a necessary third party that isn't here.

1 THE COURT: Okay. What is it, is it a rent owing
2 from your point of view for a period of time while he's
3 been in the house but it hasn't been sold, do you know?

4 MR. MCKAY: It's true that my client was paid, he
5 paid the initial payments. He made two double payments.
6 And at the closing time in November, they proffered the
7 balance and that amount was refused and then they brought
8 this action for eviction. So the money was proffered but
9 they refused it. And then they or he did, I should say,
10 out of greed or for whatever other reason controlling an
11 ex-spouse has meddled in this whole thing.

12 THE COURT: Is there some reason no lease with
13 option to buy was entered into when the other one expired--

14 MR. MCKAY: I think what happened is and maybe
15 it's because of all the verbal representations. Everything
16 was going perfectly fine and, you know, the woman, Kristen,
17 was basically saying, yeah, I know my ex-spouse meddled and
18 so you couldn't do it and so, yeah, we're going to go
19 ahead. And everything was moving along fine and everything
20 is going fine until, you know, even up until the signing of
21 all the documents and then the ex-spouse jumps in and
22 crashes the whole deal or gets greedy about taking his
23 portion. I don't know that, yeah, you know, when we have
24 questions standing in our documents and I suppose they
25 have, too, as well, as far as that's concerned and maybe

1 there are some necessary third parties that need to be here
2 but we're asking the Court to deny their request. Thank
3 you.

4 THE COURT: All right. Do you want to respond to
5 that then?

6 MR. BARON: Your Honor, frankly, as I mentioned
7 in my reply a lot of what the defendant brings up is just
8 plain malarkey. Mr. Bowen never did interfere with
9 anything but even if you consider all that, it really has
10 nothing to do with the essential facts of this case. As
11 counsel was talking, I turned through my file, I see the
12 copy of the option and the lease signed in December. Even
13 if we completely ignore the one that I prepared in May, if
14 we throw out that one, it expired July 1st of 1998. There
15 is no allegation that he exercised the option. There is no
16 allegation that he prepared any type of an extension on
17 that option. It expired. The accompanying lease expired
18 July 1st of 1998. The defendant has paid no rent since
19 that time and has been living in the property.

20 THE COURT: What about her actions at the time of
21 the closing in terms of signing off? Is that inconsistent
22 with the contention that there was no interest in the
23 property?

24 MR. BARON: I think, your Honor, I think what had
25 happened is the defendant did continue to live there and

1 there was an attempt by the defendant to obtain both the
2 parties agreement to sell the property to a third person.
3 And once again he assigned any interest in the lease and
4 option prior to that time. And I have seen no
5 documentation on this. They're alleging that Kristen
6 signed some things but even if she did, all that would mean
7 is that he was trying to get her to sell the property and
8 she at least signed some initial document to ready it for
9 sale. I don't know, that may have happened, but the sale
10 fell through. Clearly the option was long gone at that
11 point.

12 THE COURT: Why did the sale fall through?
13 Because Mr. Bowen's--

14 MR. BARON: The sale fell through, your Honor,
15 because the property was worth some \$30-40,000 more than
16 what the option purchase price was and that's what they
17 wanted to pay Kristen and Michael was the option amount.
18 The property had increased in value and was worth
19 substantially more and they had no desire to sell it to
20 anybody.

21 THE COURT: So Kristen Hortin signed off on it
22 though.

23 MR. BARON: I don't know.

24 MR. MCKAY: Yes.

25 MR. BARON: We've heard allegations to that.

1 THE COURT: And Mr. Bowen needed to sign because
2 he was a lien holder of some kind.

3 MR. BARON: Well, and that's another one of
4 those. It's an unusual divorce decree. Counsel's provided
5 a copy to the Court. But what it says is that the parties
6 would be divorced. That Mr. Bowen would "retain an
7 interest in the property". The equity was not determined
8 at the time of the divorce as is normal but was to be
9 determined later and there was several time periods at
10 which that would be determined. One of which would be the
11 sale of property or they would go out and have an appraisal
12 but he was still on the title all this time without any
13 kind of a lien. He was just a record owner of the property
14 and so clearly his signature would be required on any sale
15 of the property. And he didn't sign anything.

16 And once again, under the statute of frauds and
17 under that case that I submitted they both would have had
18 to sign to be able to consummate the sale. And once again,
19 Mr. Jones has no interest today as he stands before you in
20 this property. He assigned it. He says it's his wife. If
21 we read the assignment that the Court has a copy of, let me
22 turn to it. It's a Dianna Marie Harrison.

23 MR. MCKAY: That's his wife.

24 MR. BARON: Why she has a different last name, I
25 don't know. But that's who he's assigned it to, she is not

1 living there. Mr. Jones is living there. I don't know who
2 or where she is but clearly she's not involved in this
3 matter. We just want Mr. Jones out of the house. She
4 received an assignment of what was left of the option to
5 purchase which is frankly nothing but Mr. Jones has no
6 interest in that property at this point.

7 THE COURT: Well, did he do any work on the
8 property to upgrade it?

9 MR. BARON: He alleges that he did. My client
10 has gone by and looked and he said he can't see that he's
11 done much of anything to the property. But once again
12 under the case law if a tenant does some work on the
13 property or a person who's got an option and they don't
14 exercise that option or if they don't make their lease
15 payments, hey, they take the risk of losing whatever
16 they've put into the property. And that's what happened in
17 this case. If he has, in fact, like I say my client has
18 gone by and has witnessed or looked for any improvements
19 and informs me, anyway, that he can't really see that was
20 alleged to be done was done. So -

21 THE COURT: At least they're claiming they have
22 and that's -

23 MR. BARON: They're claiming they have -

24 THE COURT: - (over talking) -

25 MR. BARON: - but I think the answer to that is

1 that if he had it should have exercised his option and he
2 would have got the benefit of that or he should have made
3 his lease payments. It's, yeah, it's undisputed. He
4 hasn't made his lease payments. It's undisputed he didn't
5 extent the option. The only thing that he can try and rely
6 on is that some time months later one of the owners of the
7 property may have signed some documents indicating a
8 willingness to sell at that point but they both didn't
9 sign. And that certainly doesn't revive the option.
10 That's a separate matter. The option had already expired.
11 She's free to sell or not to sell at that point. She
12 changed her mind and decided not to sell.

13 I would point out to the Court that under the
14 statutes in Utah and the case law on a motion for summary
15 judgment, you review the affidavits to see if there is
16 sufficient undisputed facts to award a judgment and I think
17 that under the affidavit it's clearly there are. Counsel
18 has mentioned a lot of matters that are not in the
19 affidavit some of which I've heard for the first time
20 today. But certainly that's not something that the Court
21 should be considering at this time.

22 THE COURT: Okay. I need to go back and look at
23 the scenario again and if you have something to submit on
24 the statute of frauds argument which were just raised, I'd
25 appreciate getting that. But I'm going to have to take it

1 under advisement. It's not as -

2 MR. MCKAY: May I respond briefly?

3 THE COURT: Well, ordinarily he gets the last
4 word but frankly if it's going to help me I just as soon
5 hear it all so -

6 MR. MCKAY: She did sign off on the property and
7 all of that should be attached as an exhibit and if the
8 Court doesn't have the exhibit we will--and we argued all
9 these points in our memorandum. We attached documents. I
10 don't know if counsel hasn't received any or if he just
11 hasn't read it.

12 THE COURT: Who was the title holder?

13 MR. MCKAY: She was.

14 THE COURT: Did he have, this Mr. Bowen, did he
15 have any other than his -

16 MR. MCKAY: The decree of divorce granted the
17 property to her.

18 MR. BARON: His name was still on the deed.

19 MR. MCKAY: Well, yeah, she was going to sell
20 it. Why should she go through the cost of taking him off?

21 THE COURT: All right.

22 MR. MCKAY: And refinancing, but -

23 THE COURT: At any rate he was still on the
24 title, right?

25 MR. MCKAY: Apparently so. But I think the main

1 reason why he had to sign off is to protect her so that he
2 couldn't claim that, you know, she sold the property for
3 less than it was worth or, you know, for some other reason.
4 It was to protect her so that he couldn't later come back
5 and try to get more. I mean this is a divorce after all.
6 Try to get more money out of the deal and I'm sure the
7 Court has seen that happen more than once.

8 THE COURT: But I guess, let me just, if he had
9 an interest though in the amount of the sale, if it
10 determines how much equity he is getting, I don't know that
11 I've got that in here or not. I don't know if I have
12 enough to make it -

13 MR. MCKAY: Could I help you with the decree?

14 THE COURT: No, I just want to hear from -

15 MR. MCKAY: We attached a copy of the decree. I
16 guess the Court could read that. Hopefully that will
17 clarify that. I haven't seen any liens or anything else.
18 It just grants him an interest in it. And I haven't even
19 seen title so I don't know if that's even the case and I
20 don't know that anybody has presented that.

21 We also think, feel that the Court should know
22 that, you know, and they've admitted to the increase in the
23 value, we say that that's largely due to what my client has
24 done to improve the value of the property.

25 THE COURT: Okay. Let me just get at exactly

1 what the defense theory on how this option though was
2 revived in some way. You're saying that there is some
3 writing by her at the closing that would indicate that
4 there was at least an extension?

5 MR. MCKAY: Exactly.

6 MR. BARON: Your Honor, I've looked in my file.
7 I can't find the document anywhere.

8 MR. MCKAY: I've got a copy of it and I'm certain
9 that we attached that as an exhibit but if not, we can
10 provide that to everyone. We have that she actually signed
11 the transfer documents. We do have the documents, it was
12 like a (inaudible) or something.

13 Did you keep that?

14 (Inaudible)

15 MR. MCKAY: Apparently, it's in the evidence file
16 at my office. I didn't bring the whole thing today. I can
17 provide that to, a copy to counsel and the Court.

18 THE COURT: Yeah, if there's some writing because
19 apparent, I mean, there is a problem apparently with the
20 statute of frauds if there isn't some kind of evidence of a
21 writing other than fraud. And you're not saying there was
22 fraud in the, in the -

23 MR. BARON: I'm saying that the whole signing -

24 THE COURT: - December '97 document?

25 MR. BARON: - document was fraud. But not in

1 December, no. But December -

2 THE COURT: But that's the one he's relying to -

3 MR. MCKAY: No, they actually in their original
4 complaint never even mentioned that. They only mentioned
5 the second document. I was the one that brought up the
6 first document in my response.

7 THE COURT: Right. But that's the one that he's
8 relying on. Because he's not saying there was any -

9 MR. BARON: On today, is that right. You were
10 relying on the first one or the second one?

11 MR. MCKAY: It doesn't matter to me. Either or
12 both of them.

13 THE COURT: He's not relying on either one of
14 them. He's saying there wasn't an option. So, I'm -

15 MR. BARON: I'm saying either option expired.

16 THE COURT: I guess it's the defense's position
17 that there was, that there was some kind of an extension of
18 an option which gave him some kind of rights on this
19 property.

20 MR. MCKAY: Exactly.

21 THE COURT: And so if that's the case, since he's
22 claiming that the one in November was some kind of a bogus
23 transaction, then he's relying on the one from December of
24 '97. That expired, in fact, both of them expired. There's
25 got to be an extension on one of them to have revived his

1 right. I guess I'm trying to find out what right he's
2 claiming, on what basis he's claiming his right to the
3 option. You know, there is no written option at that
4 point. The question is was there, was there some kind of
5 extension and, if so, what supports that contention. If
6 there is some document that supports it.

7 MR. MCKAY: Yeah, we'll present that to the
8 Court. We do have those documents and we will present
9 them. I thought they were attached as an exhibit.

10 THE COURT: Okay, well, -

11 MR. MCKAY: But maybe they too (inaudible) to
12 provide that.

13 THE COURT: - maybe you can present that with
14 your statute of frauds.

15 MR. MCKAY: You know, and as far as the
16 assignment goes, and I don't know how counsel can claim
17 that he assigned something that counsel claims he didn't
18 own. I mean counsel claims he didn't own anything so how
19 can he assign anything? You know, I don't know how he can
20 claim it both ways. Yeah, he owned it so he could assign
21 it but it didn't own it so he couldn't assign it.

22 THE COURT: Okay. I assume the assignment
23 documents are in here.

24 MR. BARON: They are.

25 THE COURT: If he assigned something that he

1 didn't have any right to then it doesn't matter, it
2 doesn't, it doesn't mean that their contention is invalid
3 it just means that he didn't have right to make any
4 assignment.

5 MR. BARON: No, I guess it just goes to -

6 THE COURT: She wanted to sell it to the wife,
7 his wife, that's I guess between her and the wife, his
8 wife. Whether he has a claim in it somehow. I guess I'm
9 just trying to establish what his interest is in the
10 property and it needs to be established by some kind of
11 writing apparently and -

12 MR. MCKAY: What, how, I guess I need to get a
13 feel from the Court whether they want us, whether your
14 Honor would like us to present some evidence regarding the
15 other issue about the unclean hands doctrine. It seems
16 like we almost have to have an evidentiary hearing just on
17 that. I mean if the parties enter into an agreement and
18 one of the parties, the spouse in this case, the husband,
19 meddles and makes it impossible for him to comply with the
20 terms of the agreement by chasing off his workers and
21 trying to do the work himself, you know, I don't know how,
22 that, that seems to me in and of itself by his actions he
23 has made the, it impossible for my client to complete the
24 terms of the contract timely. I mean, it was basically six
25 to eight months to complete and if he blocks the first

1 three months of that by his actions and running the guy
2 off, you know, my client needs to have that extra time
3 still to finish. Even if the terms of the contract say
4 you've got to finish by August or July, you know, and he
5 makes it impossible for the first three months.

6 THE COURT: Maybe I don't, was this really
7 intended to be an option to find a buyer for this property
8 or an option to actually purchase it because he's never,
9 apparently never intended to purchase the property.

10 MR. MCKAY: No, he did have a buyer, he did
11 intend to purchase it but he had some personal
12 circumstances that required him to actually move. You
13 know, he and his wife had a disagreement, they were
14 legally, I guess not legally, but they were separated
15 during all of the fiasco. That also took place and so he
16 needed a place to live on a temporary basis. So, that's
17 part that this Court hasn't heard yet and I don't think
18 anyone is alleging, I'm not sure that it's, you know,
19 except that the Court felt that it was important to
20 address. That's why we haven't -

21 THE COURT: Why didn't he, why didn't he exercise
22 his option to purchase it then?

23 MR. MCKAY: Because he still felt like, I mean,
24 it was tied to two or three other deals and she had

1 continued to say, yeah, it's going to go, it's going to go,
2 it's going to go, and then he needed this additional time
3 to complete the financing. And he thought, right, he
4 probably should have gotten written, signed agreement.

5 MR. JONES: I have her understanding when we
6 preceded to closing that she signed. I didn't need any
7 interim documents. I had the closing documents at this
8 point, both the lease and options are dead in view points
9 anyway.

10 MR. MCKAY: I guess whatever it took to get to
11 the closing, they made it there.

12 THE COURT: Well, let me see the closing.
13 documents and how that ties in.

14 MR. BARON: Okay. It's been hard for me to just
15 sit here and listen. But just once again, the alleged
16 interference with the workmen occurred a year ago, either
17 in January or February of last year. How that could put
18 him behind from July 1st clear to November, no clue. Once
19 again we allege that didn't even happen but what he's
20 alleging is just a bunch of smoke screen. It's just a
21 bunch of things that mean nothing with regard to the
22 essential facts of the case. I'd be very interested to see
23 what Kristen had signed. If she signed a contract to
24 purchase or a deed perhaps they would have some kind of a

1 point with regard to at least her agreeing to sell but once
2 again, when the original document was signed, Mr. Jones
3 felt like Mr. Bowen had an interest and he had him sign the
4 lease and the option on both of those lease and options.
5 So, apparently he believed he had an interest and yet he's
6 relying on one party to sell the property somehow. And
7 what he's going to do is he's got someone lined up there.
8 He wants to sell it to my clients for one price and him
9 take the profit. Now he's calling us bad guys simply
10 because we didn't let him exercise his expired option and
11 we want it to either sell it or (inaudible).

12 Your Honor, I'm very frustrated with this but I
13 have no problem with counsel providing copies of whatever
14 they have as far as the closing documents. I have seen
15 them prior to today but I think that based on the
16 affidavits and what's been submitted that we certainly are
17 entitled to summary judgment.

18 THE COURT: Okay. Well, I'll take a look at
19 what's been presented.

20 MR. MCKAY: Would the Court consider my client
21 testifying?

22 THE COURT: No. That wouldn't be appropriate
23 today. It's by affidavit and that, it's not an evidentiary
24 hearing today so, -

25 MR. MCKAY: Thank you, your Honor.

1 THE COURT: And it's based on the law, you know,
2 and you can submit it in an affidavit form. I'll allow you
3 to supplement though as to the statute of frauds argument.

4 MR. MCKAY: Thank you, your Honor.

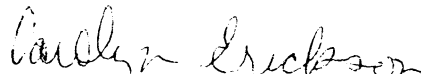
5 MR. BARON: Thank you, your Honor.

6 (Whereupon the hearing was concluded.)
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CERTIFICATE

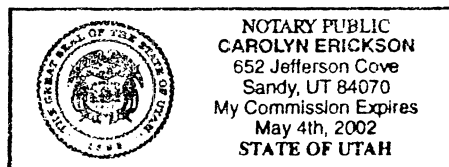
I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Pamela Heffernan was transcribed by me from videotapes and is a full, true, and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 4th day of October, 1999 in
Sandy, Utah.



Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Addendum F

ADDENDUM F
DECISION HEARING

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

MICHAEL BOWEN & KRISTIN HORTIN,	:	Case No. 980908407
	:	
Plaintiff,	:	
	:	
v	:	
	:	
TEAK D JONES,	:	
	:	
Defendant.	:	

HEARING HELD FEBRUARY 16, 1999

BEFORE

THE HONORABLE PAMELA G. HEFFERNAN

COPY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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* * *

1 February 16, 1999

2 HONORABLE PAMELA G. HEFFERNAN PRESIDING

3 P R O C E E D I N G S

4 THE COURT: After spending some considerable time
5 on this case, I thought this might be the best way to
6 approach getting the decision out. I worked on it last
7 week and realized that probably in preparing the written
8 decision I was having to put a lot of background
9 information in. That probably won't be necessary for me to
10 just give you my decision. I understand that there will be
11 findings necessary.

12 First of all, I'll state that I am going to grant
13 the motion for summary judgment. And I'll explain why and
14 give you my findings in connection with that. I also want
15 you to know that I had a law clerk, our law clerk working
16 on this at least two different occasions. This has turned
17 out to be a fairly complicated situation although--and let
18 me tell you the other problem I'm having with this is that
19 although this is the plaintiff's motion for summary
20 judgment, in assessing with the factual issues, it almost
21 essentially decides issues on the other side when there is
22 no counterclaim pending. And I understand that that's the
23 consequence of it. I just don't see anyway around it. In
24 order for me to get to the point to say that whether there
25 are or aren't issues of fact, I have to make that

1 determination.

2 At any rate, first of all, I want to address it
3 in this context. Looking at the issue regarding the
4 expiration of the option. My understanding of the position
5 of the parties is that it's the first option that was
6 entered into that's at issue, the first written option that
7 was signed by both the plaintiffs. The second option,
8 taking the position and taking all inferences in favor of
9 the defendant, the second option was signed at the closing
10 or the attempted closing on the sale of the property and it
11 was essentially considered a bogus kind of transaction.
12 So, I basically disregarded the second option as being of
13 any real value in this case. That's essentially how it was
14 presented to me and that's basically taking it with all
15 inferences in favor of the defense.

16 Clearly by its terms, the written option, the
17 first option, has expired. It expired before the attempted
18 closing on the property. There's no question that it was
19 expired. The question, I guess, then becomes whether there
20 was some kind of an extension given by Kristen Horton, an
21 oral extension. And I suppose that may be a disputed
22 factual issue to the extent that it is a material issue.
23 The problem with it is that the law is clear that Michael
24 Bowen, the joint owner of the property, is required under
25 the statute of frauds to enter into any kind of a written

1 extension on the option, it having expired.

2 Going back over the divorce decree, it is clear
3 to me from the divorce decree that Michael Bowen continued
4 to have an interest in the property. The divorce decree
5 essentially states exactly that. The plaintiff in this
6 case, Kristen Horton, was awarded a possessory interest but
7 it also states in the divorce decree that the parties agree
8 that the defendant shall maintain an interest in the home.

9 The term interest goes far beyond just some kind
10 of a lien or some kind of ultimate wish to get some value
11 out of it. It, interest in a, a property interest in a
12 piece of property has legal significance. The divorce
13 decree specifically maintains that he has an interest in
14 the home. Having an interest in the home, therefore,
15 requires that if there is any transfer of the property or
16 extensions on options, those types of things, has to have
17 his approval. And it's undisputed that he did not act in
18 any way that would approve the extension on the option. I
19 had the clerk go through, make sure that there were no
20 allegations to that affect and my understanding is he did
21 not make any oral agreement to extend the option.

22 On the other hand, Kristen Hortin did clearly.
23 And that's, but that's neither here nor there. She cannot
24 bind him. There is no husband and wife exception to the
25 statute of frauds. Part performance by one, even if I were

1 to assume that her behavior by appearing at the closing and
2 signing certain closing documents was partial performance
3 and therefore requires that any kind of oral extension be
4 enforced, the problem with that is that it still requires
5 Michael Bowen to participate in that and that's a matter of
6 law.

7 The other issue that was raised was whether by
8 some of his behavior, Michael Bowen should be estopped from
9 asserting some kind of a claim that his assent is required
10 for this transaction to go through. That ordinarily would
11 be a fact sensitive issue also. However, even if you
12 assume all facts favorable to the defense in this case that
13 Michael Bowen interfered and caused some problems with
14 exercising the option in a timely way, it also requires
15 that, on the other side that there be performance on the
16 option or the extension. And the problem with that is the
17 option was also tied to the lease which required rental
18 payments and it's undisputed in the case that the defendant
19 in this case did not make timely rental payments. And,
20 therefore, under theories of equity, a party cannot come
21 and ask for equity from the Court if they have not complied
22 with all terms of the agreement assuming it was enforceable
23 in equity. And those are my reasons.

24 I want to just add also about the divorce decree,
25 I recognize that there was some reliance on the section

1 that stated that the parties were to cooperate in signing
2 off on all titles and those types of things. Paragraph 21
3 of the Divorce Decree states that each party or their heir
4 assigned shall immediately deliver all personal property
5 awarded to the other party in their possession and execute
6 and deliver all documents and titles necessary to affect a
7 property transfer as ordered in the decree of divorce to be
8 entered herein. The problem with the reliance on that is
9 that that paragraph relates to the property transfer as
10 ordered by the decree of divorce. The decree of divorce
11 did not order that the property be sold and it didn't
12 order, and it doesn't identify who it was that was supposed
13 to actually sell the property. The plaintiff in that case,
14 Kristen Hortin, had a possessory interest, both parties
15 maintained an interest in the home. The paragraph relating
16 to the transfer of documents relates to whatever other
17 property was transferred back and forth. I don't know if
18 they involves cars, those would be types of things like
19 that. Titles to vehicles. It specifically says shall
20 deliver all documents and titles necessary to affect a
21 property transfer as ordered in the Decree of Divorce. I
22 don't see anything in the decree that orders that the home
23 be sold or that gives Kristen Hortin the sole
24 responsibility to sell it. I think it is significant in
25 this case, also, that the defendant in this case is a

1 realtor and I guess I think that some of the case law makes
2 the point where there were attorneys involved in
3 transaction. I think with real estate, when someone has
4 some expertise in real estate, a certain level of knowledge
5 can be imputed to them. It should have been fairly
6 apparent that Mr. Bowen needed to participate and sign off
7 on these things. The fact that he didn't is fatal to the
8 transaction. Therefore, I'm going to grant the motion for
9 summary judgment.

10 And since we're here on it. I don't know, I'm
11 going to ask plaintiff in this case to, plaintiff's counsel
12 to prepare the findings of fact and conclusions.

13 MR. BARON: I will, your Honor.

14 THE COURT: You can get a copy of this tape if it
15 will be helpful to you.

16 MR. BARON: Very good.

17 THE COURT: And in terms of answering any
18 questions about the other.

19 As far as other issues relating to the unlawful
20 detainer, the back rent that's due, those types of things.
21 I don't know where we stand and I haven't sat down to try
22 to figure out what it might be. I realize some substantial
23 time has past. Is Mr. Jones still in the property?

24 MR. MCKAY: Yes.

25 MR. BARON: He is, he's still there.

1 THE COURT: Okay. Well, -

2 MR. BARON: I'll just compute that, your Honor.

3 THE COURT: All right. Do you want to just
4 compute it and run it past Mr. McKay and then see if you
5 can't agree on what that is.

6 MR. BARON: Very good.

7 THE COURT: And submit the documents approved as
8 to form so I can go ahead and just get them signed.

9 MR. BARON: Thank you, your Honor.

10 MR. MCKAY: Just to make sure I understand.
11 Could you address the unlawful detainer portion?

12 THE COURT: Well, because he's basically, the
13 conclusion is the option is expired. He does not have an
14 interest in this property. Now, I will say this as an
15 aside, frankly. This does not address this issue about
16 whether he has any claim against Kristen Hortin for any of
17 the reliance that he had on things that she may have done
18 and said to him. I'm just saying as a matter of law, he's
19 not, he can't force the sale and make Mr. Bowen go through
20 with it. Unfortunately, anything that Kristen Hortin may
21 have done, if, in fact, that's found to have happened, if
22 she, in fact, did not act in a fair and honest way dealing
23 with Mr. Jones, he may have a claim against her, you know.
24 This doesn't preclude anything like that. But it's just
25 that this wasn't a part of this action. I'm just saying as

1 a matter of law when you have to look at joint owners of
2 property, there is certain legal requirements before the
3 Court can recognize that there has been a transfer and
4 that's with the Statute of Frauds.

5 MR. BARON: One question I would have for counsel
6 is, is Mr. Jones going to move out on his own or we need
7 the sheriff involved?

8 MR. MCKAY: We haven't talked about that.

9 THE COURT: Maybe you can talk about it now
10 before you all leave and work that out together. I don't
11 know that you, obviously you're entitled to it. And when I
12 get the documents, I'll sign them.

13 MR. BARON: Are we clear on that they're, not
14 only is this Court ruling that the option expired but that
15 he is also in unlawful detainer?

16 THE COURT: I'm granting the motion for summary
17 judgment but I had to, frankly, normally I wouldn't have
18 dealt with all the issues about the option except that were
19 raised in defense. Therefore, I felt like I had to. If I
20 didn't, you know, if there weren't factual issues relating
21 to those defenses. The primary issues, I'm granting the
22 motion for summary judgment on the unlawful detainer
23 finding that he is currently in a position of being a
24 renter rather than having an interest in the property. And
25 therefore I'll grant the unlawful detainer that he's

1 holding over without having paid the rent. That's
2 undisputed.

3 MR. MCKAY: What about attorney's fees?

4 THE COURT: Pardon me?

5 MR. MCKAY: Attorney's fees?

6 MR. BARON: We had asked for attorney's fees,
7 your Honor.

8 THE COURT: And what, I believe -

9 MR. MCKAY: So did we.

10 THE COURT: What - pardon me?

11 MR. MCKAY: I'm just saying both sides asked for
12 attorneys' fees.

13 THE COURT: Yeah, I guess what I'm asking, what
14 is the basis for attorneys' fees? If it's the agreement, I
15 think the agreement expired.

16 MR. BARON: That's true, I would just as soon
17 you'd cite pay your own attorney's fees. We would ask for
18 any out of pocket costs that we've expended.

19 THE COURT: Okay. As the prevailing party you
20 are entitled to costs and if you're willing to just back
21 off from the attorney's fees issues then.

22 MR. BARON: Well, I think you're right. I think
23 the option has expired and that would have had the
24 attorney's fees in it.

25 THE COURT: The option lease, right. Now, I may

1 not have stated all the findings as articulately as I
2 should have so I would appreciate it if you would make
3 sure, you know, that everything is included that should be
4 in terms of purposes of perfecting an appeal on all of
5 that.

6 Okay. Thank you, Mr. Baron.

7 MR. MCKAY: Thank you, your Honor.

8 MR. BARON: Thank you.

9 (Whereupon the hearing was concluded.)

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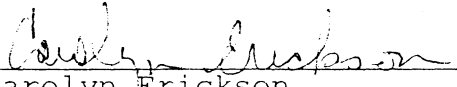
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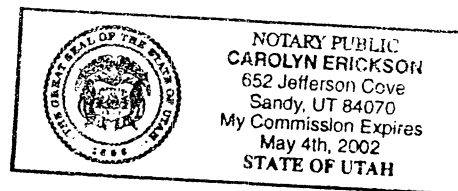
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Pamela Heffernan was transcribed by me from videotapes and is a full, true, and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 4th day of October, 1999 in
Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Addendum G