

1981

Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes v. Marius Henry Mills and Maxine Mills : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NICK KIAHTIPES, DINO
KIAHTIPES, and ANGELO
KIAHTIPES,

Plaintiffs-
Appellants,

vs.

Case No. 17528

MARIUS HENRY MILLS and
MAXINE MILLS,

Defendants-
Respondents.

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Seventh Judicial District Court, Carbon County
Honorable Don V. Tibbs

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NATURE OF THE CASE

This is an action commenced by Plaintiffs against Defendants for specific performance of an agreement relating to real property located in Carbon County. Plaintiffs (buyers) sought specific performance from Defendants (sellers), reasonable attorneys' fees, and damages resulting from the inability to use the property for the raising of crops.

DISPOSITION IN LOWER COURT

Initially the lower court entered summary judgment in favor of the defendants and against Plaintiffs. This

Court in Case No. 15998, 599 P.2d 508 (Utah 1979) reversed and remanded the matter for trial.

A trial was held before the Honorable Don V. Tibbs, District Judge of the Sixth Judicial District Court sitting as a visiting judge, and judgment was entered by Judge Tibbs in favor of the defendants and against Plaintiffs.

The court found that the agreement entered into by the parties was only preliminary, that the two conditions precedent required for it to go into effect had not been met, that there was a mutual mistake of fact, and that specific performance was therefore not warranted. Consequently, the court entered its findings of fact and conclusions of law and judgment (R. 145-150).

RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek reversal of the trial court's judgment and an order granting specific performance to Plaintiffs together with reasonable attorneys' fees.

STATEMENT OF FACTS

The large majority of facts in this case are undisputed. Most of the factual disputes arise as to certain conversations and events which transpired after the agreement was executed. This testimony will be examined in detail in the Argument portion of this Brief. Record citations will be omitted for all uncontroverted facts.

Defendants Marius Henry Mills and Maxine Mills

own property in Carbon County located in the Miller Creek area. This property consists of the "Old Mills Farm" and the Angelo "Peperakis Farm." The total acreage of the Old Mills Farm and the Peperakis Farm is approximately 515 acres.

In addition, Defendants own other property in Duchesne County referred to as the "Nine Mile Area" Argyle Canyon Property consisting of approximately 2,600 acres. The defendants also own and maintain a steak house and lounge called the El Rancho in Price, Utah, as well as various livestock, machinery, and water stock in conjunction with their farming properties.

In the latter part of 1976 Defendants were indebted to several financial institutions for money borrowed in the operation of the businesses. At that time the Federal Land Bank, the Utah Farm Production Credit Association (hereinafter referred to as "PCA"), Helper State Bank, and Walker Bank all claimed liens on assorted parcels of real property and items of personal property.

In September of 1976 a conference was held in Provo, Utah, among the creditors to arrive at an accurate financial statement of the Mills' obligations and to agree on a concerted program to liquidate the existing obligations. It was decided that a further meeting should be held with the Mills and their attorney to discuss such a program.

On September 10, 1976, a further meeting was held in Price, Utah, among all of the creditors and with the Mills and their attorney Therald Jensen. The Mills agreed to sell all their cattle by the fall and to sell enough land and water stock to pay off the PCA obligation.

Accordingly, in November of 1976 Defendants listed their farming property with Arms Realty Company through its agent, John Marsing. Two separate listings were made-- the first was the Miller Creek and Peperakis properties (the subject matter of this lawsuit) and the second was the Argyle Nine Mile property. The Miller Creek property, however, excluded 60 acres which comprise the Mills' home-
stead, the same to be retained by Defendants.

Interest was expressed by plaintiff Nick Kiahtipes approximately three months after the initial listing and at that time the property was shown to him. Kiahtipes stated that he did not think that he could use the whole property but would contact Mills later if he wished to purchase any part of it.

Subsequently, Kiahtipes contacted Marsing and said he was interested in purchasing the Old Miller Creek and Peperakis property.

Upon learning of Kiahtipes' interest, Mills testified he told Marsing that the only way an agreement could be reached would be to get the Federal Land Bank, PCA, Helper

State Bank and Walker Bank to decide if they would accept a sale agreement. (Tr. 211). Plaintiff Nick Kiahtipes testified that he was unaware of any Helper State Bank obligation secured by the property. (Tr. 99).

After the Kiahtipes accepted the sales price for the property it was decided that Therald Jensen should draft an agreement between the parties. Jensen had represented the Mills for numerous years and had also done some legal work for the Kiahtipes. An appointment was arranged by Mr. Marsing, the real estate agent, for a meeting at which time the agreement was to be drawn.

Prior to this meeting Mr. and Mrs. Mills in the company of Mr. Marsing went to both the PCA and the Federal Land Bank to propose that PCA as first lien holder receive the entire proceeds of the sale amounting to approximately \$192,000 in partial satisfaction of the PCA obligation. Mr. Loile Bailey of the PCA and Mr. Wayne Probst of the Federal Land Bank gave their preliminary approval to such agreement but stated they would both have to see the final form of sale agreement before actual approval could be made.

While the real estate agent Marsing acknowledged that he was aware that there were liens by the four financial institutions, he stated that he did not know which liens went to the numerous parcels of property owned by Mills and that it was his understanding that only the Federal Land

Bank and the PCA directly concerned the property being purchased by Mr. Kiahtipes. (Tr. 56). Mr. Jensen, the attorney, stated that he prepared the agreement entirely upon the informations the parties had furnished him. (Tr. 119). He stated he had no recollection at the time he drew the agreement as to which institutions had liens upon which property. He asserted that he was only told to worry about the Federal Land Bank and the PCA in drawing the agreement. (Tr. 136-137).

A meeting was held at the office of Mr. Jensen in which the parties and Mr. Marsing attended. An agreement was subsequently prepared and the parties came back to Mr. Jensen's office on May 10 to execute the documents.

The agreement is attached herein as an appendix. The provisions which Plaintiffs believe are pertinent to this appeal are paragraphs 3, 4, 7, 8, and 14. They state the following:

3. The parties are aware of an outstanding first mortgage on the "Old Mills' Farm" held by the Federal Land Bank of Berkeley, now known as the Federal Land Bank of Sacramento, as well as a first mortgage to the Utah Farm Production Credit Association of Salt Lake City, Utah on the "Angelo Peperakis' Farm" and all of the said water rights. The sellers have orally reported this sale to both of said corporations and have received an oral indication that if this contract is executed between the sellers and buyers, that the said Federal Land Bank will thereupon release its mortgage and that the said Utah Farm Production Credit Association will in writing, agree that when and if all the proceeds payable by the buyers

herein shall be paid to and applied on the indebtedness of sellers to said Association, that it will release its mortgage upon the said real property and water right. If within thirty (30) days from the execution of this agreement the Federal Land Bank should decline to release its mortgage or if the said Utah Farm Production Credit Association should decline to execute an agreement in writing agreeing to release its mortgage upon the terms and conditions above set forth, then this sales agreement between the sellers and buyers shall have no further force or effect.

4. The said purchase price of One Hundred Ninety Two Thousand Two Hundred Twenty Five Dollars (\$192,225.00) shall be paid as follows: Fifty Thousand Dollars (\$50,000.00) thereof shall be paid upon the obtaining of the said documents from said loaning institutions (which time is herein designated as the closing date) and the balance of said purchase price, namely, One Hundred Forty Two Thousand Two Hundred Twenty Five Dollars (\$152,225.00) together with interest on the decreasing principal thereof at the rate of seven and one-half percent (7.5%) per annum reckoned from the said date of closing shall be paid in twelve (12) equal installments of principal in the sum of Eleven Thousand Eight Hundred Fifty Two and Eight Cents (\$11,852.08) plus accrued interest on the tenth (10th) day of May of each year commencing with the year 1978. Commencing with the year 1981, buyers shall have the right to pay additional sums or the entire unpaid purchase price at their option. Possession shall be given at date of closing.

7. At the time of closing sellers agree to make and execute to buyers a good and sufficient warranty deed to said real property and an assignment of said water stock and to irrevocably deliver the same in escrow at the Zions First National Bank at Price, Utah, to be held by said bank and delivered to buyers at such time as they shall have fully paid said purchase price.

8. Sellers, at their option, shall furnish either title insurance or an abstract of title on said real property. If sellers elect to furnish

an abstract of title, the last certificate of the same shall not be earlier than the date of this agreement and they agree to deliver the same to buyers for examination after which said abstract of title shall be left with said escrow holder and shall be finally delivered to buyers when they shall have fully paid such purchase price. If there are any defects in the title to said real property which render the same not marketable, sellers agree to remedy such defects at their cost and expense and within a reasonable time after being notified thereof by buyers.

14. If either of the parties employs an attorney to enforce any of the provisions of this agreement or to pursue any remedy on account of the breach thereof, the losing party agrees to pay all court costs and a reasonable attorneys' fee.

It was determined at trial that at the time the agreement was entered into the Federal Land Bank had a first mortgage on the Old Mills Ranch (one of the two parcels involved in this litigation) and a first mortgage on all of the property located in the Argyle Nine Mile Area. (Exhibit 15A).

PCA had a first mortgage on the Peperakis Farm (the second of the two parcels in this litigation) and a second mortgage on the Old Mills property.

Helper State Bank had a second mortgage of \$22,800 on the Peperakis property and on the Nine Mile property, and had a third mortgage on the Old Mills property and a third mortgage of \$19,500 on the Peperakis property (Exhibit 15A).

In summary, therefore, the Old Mills Ranch being purchased by Kiahtipes had a first mortgage by the Federal

Land Bank, a second mortgage by PCA, and a third mortgage by Helper State Bank. The other property, the Peperakis Farm, had a first mortgage by PCA and a second and third mortgage to Helper State Bank (Exhibit 15A).

On May 11, 1977, the Federal Land Bank sent a letter to Henry Mills stating "We would be willing to release from our mortgage that portion of the property which is known as the Old Mills Farm." It was conditioned upon the existing loan with the Federal Land Bank being kept current and all money of approximately \$192,000 from the Kiahtipes sale being applied to the PCA loan. (Exhibit 2). No testimony was offered to suggest that the Federal Land Bank ever refused to comply with the terms of its offer to release its lien on the Old Mills Farm.

Immediately after the May 10 agreement was signed Mr. Marsing, Henry Mills, and Maxine Mills met with Mr. Bailey of PCA and presented him a copy of the contract. At that time Mr. Bailey told the Mills that the agreement looked in order but that he would have to run it through the legal department to make sure it was properly prepared. Subsequently the legal department approved the transaction and the letter acknowledging this approval was sent to Henry Mills. The letter dated May 11, 1977, stated the following:

The Utah Farm Production Credit Association has been informed of the above AGREEMENT by a copy thereof and the Association hereby agrees with,

and approves of the terms of the AGREEMENT with full proceeds of this sale (\$192,225.00) plus interest accrued) paid directly to the Utah Farm Production Credit Association as outlined in paragraphs 3, 4 and 6 of said agreement. (Plaintiffs' Exhibit 8).

Mr. Mills acknowledged receiving both of these letters shortly after they were written. (Tr. 231, 233).

In June and August proposals were made to the Federal Housing Administration by Defendants to refinance all of the debts on all of the Mills' property. However, no plan for FHA refinancing was discussed by Plaintiffs and Defendants incident to preparation of the agreement, and the agreement did not contemplate refinancing by Mills. A letter rejecting the first proposal for refinancing was sent to the Mills on June 22, 1977. (Exhibit 9). A letter rejecting the second proposal for refinancing was sent to the Mills on August 26, 1977. (Exhibit 10).

In the meantime, Mr. Kiahtipes took possession and had begun farming the property in dispute a few days after signing of the agreement, and had actually harvested two crops of hay.

In September of 1977 Kiahtipes was, for the first time, informed by Mills that the agreement was not effective and that Kiahtipes must leave the property without harvesting the remaining crop of hay. Shortly thereafter this action was commenced.

The preceding facts are, as previously mentioned, undisputed.

The central arena of controversy in this case concerned whether the agreement had been complied with by the parties, whether Defendants were acting in good faith in subsequent attempts to put together new financial arrangements, and what conversations and events transpired after the agreement was signed. The testimony and evidence relating to these particular facets of the trial will now be discussed.

ARGUMENT

POINT

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL AND, AS A MATTER OF LAW, PLAINTIFFS ARE ENTITLED TO SPECIFIC PERFORMANCE.

Before reviewing the findings of the lower court and the evidence adduced at trial it is well to review the scope of this appeal. In equitable actions such as this suit for specific performance, this Court may review the facts and make an independent analysis of them. Creer v. Thurman, 581 P.2d 149 (Utah 1978). And while the trial judge has considerable discretion in determining whether equity and good conscience require the relief granted, it is equally true that where the trial court has based its ruling upon a misunderstanding or misapplication of the law and a correct interpretation may have produced a different result, the party adversely affected thereby is entitled to have the error rectified and a proper adjudi-

cation under correct principles of law. Ferris v. Jennings, 595 P.2d 857 (Utah 1979).

Likewise, the rules of contractual construction are also pertinent. A contract should be interpreted so as to harmonize all of its provisions. An interpretation of a written contract is ordinarily a question of law and therefore this Court need not defer to the trial court's construction but will make its own independent interpretation of the contract terms. Jones v. Hinkle, 611 P.2d 733 (Utah 1980).

The meaning and effect to be given to a contract depends upon the intent of the parties which is to be ascertained by looking at the entire contract and all of its parts in their relationship to each other. Thomas J. Peck & Sons, Inc. v. Lee Rock Products Inc., 515 P.2d 446 (Utah 1973).

Applying these principles of judicial review and contractual construction to the instant case results in the conclusion that the lower court erred in finding that the agreement entered into between the parties was not enforceable.

The defendants contended that the agreement of May 10 was merely preliminary and that it was conditioned upon obtaining an actual release of mortgage from the Federal Land Bank and an agreement by the PCA to subsequently release

its mortgage. Under Defendants' theory, after the agreement was entered into it was "discovered" by Mr. Jensen, the drafter of the agreement, that Helper State Bank had junior mortgages on the two pieces of property.

Even though both financial institutions had written letters approving the terms of the agreement, Defendants contended that the Helper State Bank lien in some fashion worked to revoke the consent of the two banks and that after subsequent meetings among the various institutions, Mr. Jensen, and Defendants, it was determined that the only way in which the Kiahtipes contract could be completed would be for a refinancing of the entire Mills estate.

Defendants' theory then continues that efforts were made to obtain FHA financing but that they were rejected. Consequently it was necessary to abandon the contract since FHA would not refinance the entire Mills' indebtedness and PCA would not then agree to any arrangement that worsened its position.

Defendants contended that Plaintiffs, through the realtor Jack Marsing and the attorney drawing the contract, Therald Jensen, were made aware of these problems throughout the summer, including the claim that the Helper State Bank lien was an obstacle preventing closing of the transaction.

The lower court accepted this theory that Defendants presented as is evidenced by the Findings of Fact and Con-

clusions of Law entered by the lower court. (R. 145-149). The court concluded that the conditions of the agreement were not met, that the transaction did not become a binding and final contract of sale, and that there was a mutual mistake of fact as to the existence of the Helper State Bank mortgage and the clearing of the transaction with creditors who had liens upon the land. Consequently no specific performance was justified. (R. 148).

Plaintiffs' theory of the events is considerably different. Plaintiffs contend that after the May 10 agreement had been entered into, without question both the PCA and the Federal Land Bank gave written approval in the clearest terms to the transaction as required by paragraph 3 of the agreement. The Federal Land Bank did not decline to release its mortgage as required by paragraph 3 of the agreement. On the contrary, it agreed so to do but no closing was yet scheduled for the instrument of release to be delivered. Likewise, the PCA agreed, in language substantially identical to the contract requirement, to release its interests if the proceeds of sale were turned over to it.

Plaintiffs assert that the reason the transaction did not close was that they were never notified that PCA had approved the transaction, and in fact were misinformed by Mr. Mills throughout the summer that he was awaiting

PCA's approval and that until it came Mills' hands were tied. Plaintiffs further contend that any efforts made throughout the summer by Mr. Jensen, the drafter of the instrument, and Mr. Mills, was solely to refinance the entire debt structure of the Mills estate and was not for the purpose of completing the Kiahtipes-Mills contract. In fact, within 24 hours of the May 10, 1977 contract signing both PCA and Federal Land Bank had issued letters of approval to the defendants, and all that then remained to consummate the transaction according to its terms was to schedule a closing. Both lenders, however, refused to consent to new and different arrangements proposed by Mills, and negotiated by Therald Jensen, throughout the summer.

Plaintiffs contended at trial that the Federal Land Bank and PCA never revoked their approval of these transactions based upon the terms of the agreement, but only balked at terms in which extraneous negotiations were being attempted to refinance all of the Mills property. In other words, the attempt to refinance with FHA had nothing to do with completing the agreement but was something which Mills desired to do in order to avoid further pressure from other creditors.

It was the position of Plaintiffs that the Helper State Bank liens were well known to Mills prior to the time of the agreement. There was no evidence that Kiahtipes, Marsing,

or Jensen were aware as to which liens went with which properties; Jensen and Marsing both relied upon Mills in describing the terms of the agreement. Additionally, since the Helper State Bank liens were behind PCA and the Federal Land Bank, the bank simply had no equity in those properties.

If there was a Helper State Bank lien upon the property which was not specifically included in paragraph 3, Plaintiffs claim it was the obligation of Defendants to clear such lien pursuant to paragraph 8 of the agreement; in any event, Plaintiffs should have had the option to accept the property with the liens still existing on them. Put another way, Defendants should not be able to avoid the contract by reason of a condition the Defendants caused themselves, but Plaintiffs should have the right to nevertheless accept the contract (and property) subject to the condition.

Appellants believe that the easiest way to illustrate the errors of the lower court is to contrast the lower court findings with the evidence contained in the record. In this manner a meaningful comparison can be made to determine if substantial evidence exists to support the lower court finding.

Appellants do not dispute Findings 1, 2 or 3 of the lower court findings. (R. 145-146). For example, there is

no doubt that over \$200,000 was owed to the Utah Farm Production Credit Association and \$20,000 was owed to the Federal Land Bank of Sacramento at the time of the execution of the agreement.

Finding 4 is partially correct. Therald Jensen represented both parties at the time the agreement was drafted. Thereafter however, he worked entirely with defendant Mills in attempting to arrange a new deal, i.e., refinancing of the entire Mills estate which included numerous parcels of land not contained in the Kiahtipes-Mills agreement. It cannot be said, therefore, that Jensen continued as Kiahtipes' attorney after the initial drafting had been completed.

Finding No. 5 states that the Helper State Bank had mortgages in excess of \$40,000 upon the land described in the agreement. The findings failed to note, however, that all of these mortgages were subordinate to both the Federal Land Bank and PCA.

Finding No. 6 states the following:

Soon after the execution by the parties of said preliminary agreement, a title report was obtained which disclosed the Helper State Bank mortgages and the said attorney representing both sellers and buyers participated in several meetings with creditors of the defendants in efforts to obtain an agreement from Helper State Bank to waive its rights to receive part of the purchase money as consideration for the partial release of its mortgage lien or to accept other securities for its indebtedness.

(R. 147).

The only testimony concerning the alleged effort to have Helper State Bank release its second and third mortgages was given by Mr. Jensen, the attorney, and Mr. Stan Litizetti, an attorney for Helper State Bank. Mr. Jensen stated the following:

Q. (By Mr. Martineau) Now, was Helper State Bank asked to release a lien on the Kiahtipes property and that is the property that was being sold to Kiahtipes?

A. I don't recall that.

Q. Do you recall them being asked to release a lien on the mountain land, that is, the range land, in connection with this refinancing arrangement that was being proposed and discussed.

A. Well, at these meetings, I don't think they were asked that. They might have been; I don't remember that, but I don't think that was the object of the meetings was to come out and ask and come out and point the finger at them and say, "Now you release this one." There was a discussion as to what might be done, see.

Q. Okay. It was a discussion of how Mr. Mills might be best preserved; is that right?

A. Well, I don't know whether it was Mr. Mills' position but there was a discussion as to how these lending institutions could get their money.

(Tr. 145-146).

Mr. Litizetti, the attorney for Helper State Bank, testified that two meetings were held with Mr. Jensen and various other creditors in the summer of 1977. When asked

about the purpose of these meetings, however, his testimony revealed that the purpose was not to complete the Kiahtipes-Mills contract but was rather to find a way to refinance all of Mills' estate.

Q. (By Mr. Martineau) Stan, you didn't understand there was a potential sale between Kiahtipes and Mr. Mills at these meetings?

A. At the time of the meeting in Therald's office?

Q. Yes.

A. No.

Q. You mentioned two meetings in Therald's office. At the second one you didn't understand that at all?

A. I did not understand that at all.

Q. Let me ask you this: Was Helper State Bank, to your knowledge, ever asked to release that mortgage with respect to the property that was being sold to Mr. Kiahtipes?

A. Not to my knowledge.

Q. Did they ever ask Helper State Bank to release a lot of other properties in connection with this refinancing?

A. Prior to that meeting?

Q. Yes.

A. Not to my knowledge.

Q. Did they at that meeting?

A. My notes do not disclose anything other than the whole agreement being to refinance with Farmers Home Administration.

Q. Take everyone out?

A. That's what my notes say, yes.

Q. But not with regard to the Kiahtipes-Mills transaction?

A. No. I don't remember any relative releases as against Production Credit, Federal Land Bank, with the Helper State Bank.

(Tr. 160-161).

This testimony clearly shows that no effort was made by Defendants or their attorney to release the Helper State Bank's second and third mortgages but that sole efforts were made to obtain a refinancing of all of the debts to all of the banks through the FHA. Such an effort was hardly in the best interest of Plaintiffs as to the completion of their contract dealing with only a small part of the total Mills Estate, and to bind Kiahtipes to the acts of Therald Jensen in attempting a refinancing would work an injustice.

Finding No. 6 contained further erroneous statements:

Such attorney also met with representatives of the Federal Land Bank and Production Credit Association to obtain partial releases of land to be substituted as security for the Helper State Bank indebtedness. Said attorney also made an effort to refinance all of the sellers' indebtedness to make effective and to close the said preliminary agreement. All of the efforts hereinabove referred to were in good faith for the purpose of meeting the conditions of the above-quoted paragraph 3 of the agreement.

This finding is supported by neither logic nor the evidence. It is clear from the court's own finding No. 2 that Defendants owed Utah Farm Production Credit Association in excess of \$200,000 which was secured by mortgages on the

land involved in the Kiahtipes sale. Since the proceeds of the sale were to be less than \$200,000 the Helper State Bank lien as a second and third mortgage on the two parcels of property would have had no effect upon PCA receiving the proceeds. It clearly was not necessary to refinance all of the sellers' indebtedness in order to close the Kiahtipes deal.

While admittedly Mr. Jensen characterized his efforts for refinancing as essential to consummate the Kiahtipes-Mills contract, it was only so because Mr. Jensen had ignored that contract and was attempting to fulfill it as a part of the larger refinancing package. The testimony of all of the other officers of the bank relating to the purposes of the summer meetings pointed to refinancing, not completion of the original agreement.

Mr. Litizetti, the attorney for Helper State Bank, testified that the Kiahtipes loan was not mentioned during the meetings and that he was not even aware that Kiahtipes was intending on purchasing any of the property. (Tr. 160-161). He stated that none of the bankers were willing to release anything without a totally agreed upon liquidation of all debts. He stated that the bankers would not give up their various positions as to all of the properties owned by Mills and therefore the only answer was to seek refinancing from the FHA. The Kiahtipes deal was never considered in

that meeting. (Tr. 159-160).

Gerald Naylor, the office manager of PCA, stated that Jensen wished PCA to give up its first mortgage on 60 acres of the Mills homestead plus all the range. He stated that Jensen wanted to do this so that Helper State Bank could have a mortgage on it. He replied that PCA was not in favor of any type of arrangement that would put it in a worse position than it was already in. (Tr. 183).

Naylor specifically stated in his testimony that at no time prior to September of 1977 was he asked to approve the Kiahtipes transaction. Instead, PCA was asked to give up property such as the homestead interest which was not even included in the Mills-Kiahtipes agreement. Naylor stated unequivocally that if all of the proceeds of the contract went directly to PCA that he would still approve the sale on behalf of PCA. (Tr. 196-197).

Finally, Mr. Loile Bailey who was the predecessor of Mr. Naylor stated that at the time he left the employment with PCA it was his understanding that PCA had approved the sale and it was just waiting for the paperwork to be completed. (Tr. 273). He further stated that at the time he allowed additional credit to Mills on the property he was aware of the Helper State Bank loan and at the time he approved the PCA package in his letter of May 11 he was also aware of the Helper State Bank interest. He stated

that this did not affect his decision in approving the transaction. (Tr. 280). The evidence requires a finding that Defendants and their attorney, Therald Jensen, did not act in good faith in attempting to complete the Kiahtipes-Mills contract according to its terms but rather attempted a new way to solve the overall Mills problems. It was clearly in Mills' sole interest to attempt this refinancing of the entire estate and had nothing whatsoever to do with the property being sold to Kiahtipes.

Finding No. 7 is also an incorrect statement of the legal requirement mandated by paragraph 3 of the agreement. Finding No. 7 states the following:

No release of the Federal Land Bank mortgage was obtained as required by said paragraph 3 or at all and no unconditional agreement for release was obtained from the Production Credit Association; that the letters, exhibits numbered 2 and 3 did not meet the requirements of the above quoted paragraph 3; that all efforts to close the transaction for the sale of the land and the water stock by obtaining the documents from the loaning institutions as provided by the above-quoted paragraph 3 failed and no payments were made by the buyers to the sellers on the purchase price. No escrow arrangement was made at Zions First National Bank in Price or with any other bank or escrow holder and no deed and no endorsed certificates of stock were deposited with any escrow holder.

(R. 147-148).

This finding is clearly erroneous. It has been Plaintiffs' position throughout this lawsuit that the agreement is not ambiguous and does not require judicial

construction. Instead, it only remains to examine the language of paragraph 3 and the subsequent action taken by the lending institutions. Paragraph 3 of the agreement basically boils down to the following pertinent language:

If within 30 days from the execution of this Agreement the Federal Land Bank should decline to release its mortgage or if the said Utah Farm Production Credit Association should decline to execute an agreement in writing agreeing to release its mortgage upon the terms and conditions above set forth, then this sales agreement between the sellers and buyers shall have no further force or effect. (Emphasis added). (Exhibit 1)

The Federal Land Bank did not decline to release its mortgage. The letter written to Mr. Mills dated May 11, 1977, by Wayne Probst, Manager of the Federal Land Bank, stated the following:

This letter is written in confirmation of our mutual agreement made yesterday, May 10, in our office, that we would be willing to release from our mortgage that portion of the property which is known as the "Old Mills Farm." This Agreement to make the release at some future time, will have to comply with the then existing partial release policy of the bank. The release is contingent upon our loan being kept current and that all the monies, approximately \$192,000 from the sale of this and the Peperakis farm are applied to your now existing debt to the Utah Farm Production Credit Association. (Emphasis added). (Exhibit 2).

Naturally, the mortgage itself was never actually released since the escrow account had not been set up and since no money had been paid over to PCA as required by

the Federal Land Bank. Defendants maintained that the actual release of mortgage was required in order to meet the requirements of paragraph 3. However, a reading of the entire agreement shows that the bank would not release its mortgage until the establishment of the escrow account pursuant to paragraphs 6 and 7 and that the mortgage release would be placed into that account along with the various other documents from PCA. It is an unreasonable interpretation of the contract to have expected the Federal Land Bank to give up its security interest in the property without being assured that PCA was going to receive the proceeds of an arms-length sale. There is no evidence in the record to show that the Federal Land Bank ever repudiated this agreement to release its mortgage at the appropriate time.

Likewise, PCA executed an agreement in writing agreeing to release its mortgage. In a letter dated May 11, 1977 to Mr. Mills from Loile Bailey the following statements were made:

Reference is made to that certain agreement entered into on the 10th day of May, 1977, by and between M. Henry Mills and Maxine Mills, his wife, sellers and Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes, buyers.

The Utah Farm Production Credit Association has been informed of the above agreement by a copy thereof and the Association hereby agrees with, and approves of the terms of the agreement, with full proceeds of this sale (\$192,225 plus interest accrued) paid directly to the Utah Farm Production Credit Association as outlined in para-

graphs 3, 4 and 6 of said agreement. (Exhibit 8).

As before, the defendants did not show that this agreement relating to the specific transaction referred to in the agreement had been rescinded or repudiated by PCA and, in fact, the testimony of Mr. Naylor, the successor of Mr. Bailey, indicated that such transaction as outlined in the original agreement would be honored. (Tr. 196-197).

The fact that PCA would not agree to give up its mortgage on the land not involved in this sale, or substitute Helper State Bank in its place as to land involved in the sale so that Defendants could refinance the entire structure of their indebtedness, does not in any way affect the conditions as outlined in paragraph 3 of the agreement. Plaintiffs did not agree that refinancing was a condition to their purchase and therefore cannot be held accountable for Defendants' unsuccessful efforts to obtain this goal.

The record shows unequivocally that the terms as outlined in paragraph 3 of the agreement were immediately and precisely met by the banking institutions. The only reason that a closing did not occur was the failure by Defendants to notify Plaintiffs that PCA had given its written approval and because of Defendants' subsequent assertion that no PCA approval could be obtained.

Even Mr. Marsing, Defendants' own real estate agent, was never told of the PCA approval letter of May 11. He

stated he had never seen the letter from Mr. Bailey, Exhibit 3, until after the lawsuit was filed. (Tr. 36). He stated that when he talked to Mills on several occasions and asked him what was holding up the deal Mills indicated that PCA had not given its approval and that he could not force their hand. He said, "My hands are tied. I can't force the issue." (Tr. 42).

Nick Kiahtipes, the plaintiff in this case, stated that he never received a letter written by Mr. Bailey to him concerning the approval of the PCA. (Exhibit 3). He stated that he never saw this letter until after the lawsuit was filed and a copy was obtained by his counsel. (Tr. 79). In fact, the original document was obtained from Defendants' own legal files.

Kiahtipes was told in September by Mills to leave the premises and not to cut the third crop of hay since PCA would not accept the contract. Kiahtipes stated that Mills also said he had changed his mind about selling and the deal was off. (Tr. 81).

Mills stated that to his knowledge a release by PCA was never obtained. (Tr. 219). He admitted telling Kiahtipes to get off his land because PCA would not give a release. (Tr. 222). He also admitted receiving the letter from Mr. Bailey of May 11 notifying him of PCA's approval. (Tr. 231).

Essentially, as a matter of law, both the Federal Land Bank and the PCA were willing to release their liens upon the property after the appropriate escrows and payments had been made. The 30-day requirement of paragraph 3 related only to notification by the two organizations as to whether they were willing to release their liens. There is nothing contained in the agreement stating when the closing was to occur. Thus, the 30-day time limit related only to extinguishing the two conditions precedent, namely, the approval by PCA and the Federal Land Bank to release their interests. After they had so agreed the closing could have occurred any time as provided for in paragraph 8.

A review of the evidence shows that the Helper State Bank lien existing upon the property subject to sale had no effect whatsoever upon this transaction. Since the sale to Kiahtipes was clearly an arms-length transaction and no contention is made that the purchase price was not a fair value for the property, it is clear that the Helper State Bank second and third mortgages on the Peperakis property and its third mortgage on the Old Mill property would never have come into effect and Helper State Bank would have received nothing as a junior mortgagor. The use of the Helper State Bank lien as an excuse was solely for the purpose of avoiding the sale and in attempting to arrange

a refinancing of all of the debts owed by Mills to the various institutions.

In addition, if the Helper State Bank liens were in fact a problem it was for Kiahtipes, not Mills, to elect what remedy should be pursued. In other words, since the Helper State Bank lien was not listed as a condition precedent in the agreement it merely amounted to a title defect and under the provisions of paragraph 8 the sellers were obligated to remedy such defects at their own cost and expense within a reasonable time after being notified.

If Kiahtipes wished to take the property with the Helper State Bank lien still in effect it was his privilege to do so. The purpose of clearing title is obviously for the buyer and not for the seller. This Court in Eliason v. Watts, 615 P.2d 427 (Utah 1980), recognized this principle as follows:

The failure to obtain a permit does not deprive defendant of any valuable right. The provision was added to the contract by plaintiffs, and the condition was clearly for their benefit in putting the property to its desired use. It was the plaintiffs who were entitled to demand the benefit of that condition, and if they choose to waive the condition it was within their power to do so. Id. at 430.

Also, as stated by this Court in Huck v. Hayes, 560 P.2d 1124 (Utah 1977), "It is fundamental that a party to a contract should obtain no advantage from the fact that

he is himself unable to perform." The Huck case also notes that a buyer is not obligated to pay or tender money or property until such time as the seller produces good title and that the furnishing of such title "was a condition precedent to his right to demand payment from the purchaser." Id. at 1126.

The Huck case is also similar as to the motivations which Mills in this case had in failing to close the transaction. In Huck this Court stated:

The evidence justified the view taken by the trial court that the negotiations between the parties indicated an ongoing intent to carry out the contract as soon as the hereinabove mentioned title difficulties had been remedied; and that the defendant, for reasons of his own, had apparently changed his mind and attempted to assert deficiencies for which he was himself responsible to avoid going through with the deal. Id. at 1126.

Since there is no evidence to justify how the Helper State liens could have possibly precluded PCA or the Federal Land Bank from agreeing to the releases of its mortgage it must be assumed that the claim of the lien was a "red herring" for the purpose of allowing Mills the opportunity to seek another solution to his problems. Furthermore, that excuse appears to have first been used after the PCA excuse failed for lack of factual basis. Mr. Marsing, the real estate agent retained by Mills, stated that in a conversation he had with Mrs. Mills in September of 1977

she stated that the deal wasn't going to go through since the Mills had found another avenue of money. She said they could now sell the water stock for more than the total sales price of the listing and yet still be able to retain their land. (Tr. 39). This testimony was corroborated by Mr. Naylor, the officer at PCA, who stated that in September Mills told him he wanted to sell his water stock and keep the ranch and not sell it to Kiahtipes. (Tr. 188).

Thus, not only did Defendants fail to inform Plaintiffs of the PCA approval which is required before any condition precedent can be relied upon, Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976), but also the Mills failed to act in good faith with regard to the agreement and failed to cooperate so that the agreement could be performed. Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980); Ferris v. Jennings, 595 P.2d 857 (Utah 1979).

The conclusions of law entered by the trial court were erroneous since they were based upon erroneous factual assumptions as contained in the Findings of Fact. However, Conclusion of Law No. 2 also stated:

There was a mutual mistake of fact as to the existence of the Helper State Bank mortgage and the clearing of the transaction with creditors who had liens upon the land and water stock described in the preliminary agreement.

(R. 148).

It is fundamental that evidence to sustain mutual mistake of fact must be clear, definite and convincing. Eliason v. Johnson, 523 P.2d 647 (Utah 1967). The only possible mistake of fact which could be referred to in this Conclusion is the failure of the parties to include the Helper State Bank in the agreement. However, the evidence is clear that only Mills at the time of the agreement was aware of the obligations each financial institution had upon the various parcels of land. Neither Jensen, Marsing, nor Kiahtipes were aware of the breakdown, nor particularly cared if it didn't affect the sale. If any mistake was made, therefore, in omitting the Helper State Bank lien from the conditions it was made entirely by Mr. Mills. Such "mistake" was not raised until after Mills decided not to sell, was not attempted to be rectified in good faith, and amounted to an immaterial matter since the Helper State Bank didn't have any equity in the properties anyway.

Even if it were assumed for purposes of argument that Kiahtipes was aware of the Helper State Bank liens this still did not create a mutual mistake. In fact, it would show that the parties were aware of the lien but specifically excluded it from the agreement as a condition precedent. Thus, such knowledge would show not mutual mistake of fact, but an exclusion of the Helper State Bank lien as an element

upon which the agreement was conditioned. The finding of "mutual mistake" by the trial court is therefore unsupported by the findings previously entered by the court and by any evidence in the record itself.

CONCLUSION

The instant case demonstrates the classic example of an instance where a seller enters into a deal with a buyer, and subsequently changes his mind because of a new profit opportunity and attempts to avoid the transaction. Here, the agreement was clear that only PCA and the Federal Land Bank had to approve the releasing of mortgages upon receipt by PCA of all the proceeds of sale. The approvals were in fact agreed to and only awaited a vehicle to implement them, i.e., an escrow or closing of some kind to consummate the sale.

Defendants failed to notify Plaintiffs, or even their own real estate agent, of the approvals and attempted a new course of action to refinance the entire Mills estate and debt structure. Mills, together with his attorney, Jensen, pursued throughout the summer a course that ignored the contract but attempted to solve larger problems of Mills without reference to the original Kiahtipes transaction. The testimony of the bank attorney was that Helper State Bank was never asked to release its liens upon the Kiahtipes-Mills property; on the contrary, that PCA and the Federal

Land Bank were asked to release their respective interests in property which was not even involved in the Kiahtipes-Mills sale.

As the refinancing effort became fruitless, Defendants then discovered they could sell their water stock which had risen greatly in value and still retain their land. At that time, they evicted Kiahtipes from the property using the excuse that PCA would not cooperate.

While the true motives of Defendants in refusing to perform can only be inferred from the facts, it is the only logical assumption based upon the various positions of the institutions and the parcels of land which they encumbered. There is no showing in the record whatsoever that the Helper State Bank liens could have had any effect upon the sale to Kiahtipes since the market value of the property would not even satisfy the prior liens of PCA and the Federal Land Bank, thereby precluding Helper State Bank from being able to assert any type of interest.

For the foregoing reasons, therefore, this Court, as a court of equity, should carefully review the evidence in this case and should reverse the decision of the lower court, enter judgment in favor of Plaintiffs, and award attorneys' fees to Plaintiffs based upon the evidence adduced at trial for the efforts required to enforce the agreement.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellants, first class postage prepaid to E. J. Skeen, Skeen & Skeen, 536 East 4th South, Salt Lake City, Utah 84102.

Rocky Adams