

1981

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

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.

MARIUS HENRY MILLS and
MAXINE MILLS,

Defendants-
Respondents.

Case No. 17528

BRIEF OF RESPONDENTS

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

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Salt Lake City, Utah 84102

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Attorneys for Plaintiffs-
Appellants

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NICK KIAHTIPES, DINO :
KIAHTIPES, and ANGELO :
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TABLE OF CONTENTS

NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	2
ARGUMENT	8
POINT I REVIEW OF EVIDENCE BY THE SUPREME COURT IN EQUITY CASES	9
POINT II FINDINGS OF FACT NOS. 1 AND 3 ARE NOT DISPUTED	10
POINT III DISPUTED FINDINGS OF FACT NOS. 4, 5, 6, AND 7 ARE SUPPORTED BY SUB- STANTIAL EVIDENCE	12
POINT IV THE TRIAL COURT'S CONCLUSION THAT THERE WAS A MUTUAL MISTAKE OF FACT IS SUPPORTED BY THE FACTS AND LAW . . .	27
POINT V THE TRIAL COURT PROPERLY DENIED SPECIFIC PERFORMANCE	29
CONCLUSION	30

CASES CITED

<u>BLT Investment Co. v. Snow</u> , 586 P. 2d 456, Utah 1978	30
<u>Del Porto v. Nicolo</u> , 27 Utah 2d 286, 495 P 2d 811	10
<u>Hatch v. Bastian</u> , 567 P 2d 1100, Utah 1978	9
<u>Jensen v. Bouwhis</u> , 577 P 2d 555, Utah 1978	30
<u>Leatham Smith-Putnam Nav. Co., v. National Union Fire Insurance Co.</u> , 96 F 2d 923	29
<u>Pitcher v. Lauritzen</u> , 18 Utah 2d 368, 423 P 2d 491	30

CONSTITUTIONAL PROVISION

<u>Article VIII</u> , Sec 9(2)	9
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OTHER AUTHORITIES

<u>17 C.J.S., Contracts</u> , Section 135, p. 867	28
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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 RESPONDENTS

NATURE OF CASE

This is a suit for specific performance of an alleged agreement for the sale of real estate, and if such relief is denied, for damages. Defendants counterclaimed for damages for the taking of crops by the plaintiffs.

DISPOSITION IN LOWER COURT

The trial court dismissed the complaint and the counterclaim with prejudice. No attorneys fees were awarded to either party.

RELIEF SOUGHT ON APPEAL

The respondents seek affirmance of the judgment.

PRELIMINARY STATEMENT

The appellants' statement of facts, pages 2 to 11 of their brief, which they say on page 10 are undisputed, are actually incomplete and misleading. The statement of facts is not accepted by the respondents.

In this brief the respondents Mills will be referred to as the "defendants" and the appellants will be referred to as the "plaintiffs". The document entitled "Agreement" dated May 10, 1977, will be referred to as "agreement", although the respondents contend that it did not become a binding obligation to sell the real and personal property described therein.

STATEMENT OF FACTS

The defendants were in financial difficulties in 1976 and 1977, and met with creditors in an effort to formulate a plan to pay their debts. Their debts are summarized as follows:

P.C.A.	\$220,000.00	(Tr. 189)
Federal Land Bank	26,000.00	(H.Mills Dep. 8)
Helper State Bank	90,000.00	(Tr. 157)
Walker Bank	60,000.00	(H.Mills Dep. 11)

See Exhibit 15A for a summary of liens against the defendants' property.

It was planned by the defendants to meet pressing obligations to their creditors, including the Production

Credit Association, herein referred to as "P.C.A.", by selling part of their lands and water rights. The property was listed with Arms Realty Company. Exhibits 4 and 5, (Tr. 25). One Jack Marsing, an agent, contacted the plaintiffs. Mr. Marsing knew of the indebtedness to P.C.A., Federal Land Bank, Helper State Bank, and Walker Bank (Tr. 53) At some time before May 10, 1977, Henry Mills met with Nick Kiahtipes and had a conversation with him about the indebtedness against the property to be sold and told him that "...we would have to get approval from all the creditors". (Tr. 213) We quote from the record:

"Q. Now, as of May 10, 1977, what information had you conveyed to Mr. Marsing -- to Mr. Kiahtipes and to Mr. Jensen concerning the nature of the debts against your premises?

"A. I didn't mention it to Mr. Jensen at the time because he was already aware of it.

"Q. What had been said, if anything, to the other people about the debts against the property?

"A. I didn't say anything to him about the debts other than --

"Q. I'm not talking about May 10th. I'm talking about prior to May 10th, what had been said to Mr. Marsing and to Mr. Kiahtipes?

"A. I said we had to get the approval of the creditors.

"Q. And what creditors had you mentioned?

"A. Well, the ones that I just mentioned before.

"Q. What are they?

"A. The Federal Land Bank, the P.C.A., and the Helper State Bank and Walker Bank."

P.C.A. insisted that it would receive all the money from the sale of the property. (Tr. 32, 55) It was understood that a provision would be put in an agreement of sale to assure that it would be acceptable to the creditors. (Tr. 213, 215) Mr. Marsing contacted Therald Jensen, A Price attorney who represented both the sellers and the buyers to draw up the contract. (Tr. 30) Nick Kiahtipes testified: "Well, we all agreed, Mr. Marsing, Mr. Mills, and myself, that Mr. Jensen, who is Mr. Mills attorney and my own, we would have Therald Jensen draw the papers up." (Tr. 74)

The agreement, Exhibit 1, dated May 10, 1977, was executed. The provisions which the defendants believe are determinative of this case are in paragraphs 3, 4, 6 and 7, which are as follows:

"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 (\$142,225.00) 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."

"6. All payments herein provided shall be made at Zions First National Bank in Price, Utah, the escrow holder herein named and said bank shall remit all proceeds directly to the Utah Farm Production Credit Association, 215 West 100 South, Salt Lake City, Utah.

"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."

Letters regarding the agreement, Exhibits 2 and 8, dated May 11, 1977, which are set out below, were sent by the Federal Land Bank and P.C.A. to Henry Mills. A similar letter, Exhibit 3, addressed to Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes bears the same date. Nick Kiahtipes denied that he got it. The original letter, Exhibit 3, was in Mr. Jensen's file and was delivered to Mr. Skeen before this case was filed. (Tr. 232, 233). The letters are as follows:

"Federal Land Bank Association of Provo
P. O. Box 198, 172 South 100 East
Provo, Utah
Telephone: 373-8640

"May 11, 1977

"Mr. M. Henry Mills
RFD #1, Box 148
Price, Utah 84501

"Dear Sir

"This letter is written confirmation of our mutual agreement made yesterday, May 10th, 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 of the monies, approximately \$192,000.00, from the sale of this and the Peperakis farm are applied to your now existing debts to the Utah Farm Production Credit Association.

"Sincerely

"Wayne W. Probst, Manager
FLBA of Provo

"UTAH FARM PRODUCTION CREDIT ASSOCIATION
215 West First South
Salt Lake City, Utah 84101
Telephone: (801) 355-6259

"May 11, 1977

"M. Henry Mills
Price, Utah 84501

"Dear Henry:

"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 (\$192,225.00 + interest accrued) paid directly to the Utah Farm Production Credit Association as outlined in Paragraphs 3, 4, and 6 of said Agreement.

"Henry, this approval of the sales agreement with the Kiahtipes in no way alters the mortgage we hold on the cattle. As a matter of fact, we are going to insist that a sufficient number of your cattle be sold within the next 60 days to bring your balance down below the \$192,225 covered by this Farm sales agreement.

"You should want to do this anyway, as there is no way you can adequately summer all your cattle in view of the severe drought conditions in the area. Mr. Johnson will call on you in the next few days to see as many of these cattle as possible.

"Very truly yours,

"Loile J. Bailey
Senior Loan Consultant

"UTAH FARM PRODUCTION CREDIT ASSOCIATION
215 West First South
Salt Lake City, Utah 84101
Telephone: (801) 355-6259

"May 11, 1977

"Nick Kiahtipes
Dino Kiahtipes
Angelo Kiahtipes
Price, Utah 84501

"Gentlemen:

"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 (\$192,225.00 + interest accrued) directly to the Utah Farm Production Credit Association as outlined in Paragraph 3, 4 and 6 of said agreement.

"Yours very truly,

"Loile J. Bailey
Senior Loan Consultant"

After becoming aware of the mortgage to the Helper State Bank, soon after the sending of the letters dated May 11, 1977, P.C.A. representatives notified Mr. Jensen that they would not agree to permit the sale of the property without a release from Helper State Bank for the reason that Helper State Bank would have a right to share in the down payment and other payments on the agreement. (Tr. 195)

Therold Jensen, who represented both the plaintiffs and defendants at the time of drafting the agreement, continued to repr

sent both of them until on or about September 20, 1977, when he told Marsing that he would no longer be able to represent either of them because a conflict of interest had arisen. (Marsing Aff. Par 9, R. 29-32)

Mr. Jensen tried to meet the problem of getting all of the proceeds of the sale to P.C.A. by (1) obtaining a loan from Farmers Home Administration to enable Mills to pay off his obligation to P.C.A. (Tr. 172, 128), and (2) by getting additional security to Helper State Bank to obtain the release of the land described in the agreement. (Tr. 130) All efforts failed, and no closing contemplated by paragraph 4 of the agreement took place. (Tr. 130) No money was paid to the Sellers, and the escrow contemplated by the agreement paragraphs 6 and 7 was never set up. (Tr. 236, 237, 244, 130)

The evidence specifically supporting the findings of fact will be discussed in the argument.

ARGUMENT

The only point stated and argued by the plaintiffs is that the findings of fact and conclusions of law are not supported by substantial evidence, and as a matter of law the plaintiffs are entitled to specific performance.

The defendants will meet this argument by discussions under appropriate headings citing specifically the evidence supporting the various findings under attack. Such discussions will be preceded by a short review of cases relating to the extent of re-

pr

view by the Supreme Court in equity cases and deference to findings of the trial court in equity suits.

I

REVIEW OF EVIDENCE BY THE SUPREME COURT IN EQUITY CASES

It is argued by the plaintiffs that this being an equity case this Court may review the facts and make an independent analysis of them and that if a trial court based its ruling on a misunderstanding or misapplication of the law and a correct one may have produced a different result, the party adversely affected thereby is entitled to have the error rectified. We have no quarrel with the law referred to in the cases cited, but believe that such cases are not applicable to this case.

Article VIII, Sec 9(2) provides that, "...in equity case the appeal may be on questions of both law and fact....". This Court has many times stated the guidelines for review in equity cases. We shall cite a few. In the case of Hatch v. Bastian, 567 P 2d 1100, Utah 1978, which involved the reformation of a deed, this court stated,

"It is true, as the plaintiff argues, that inasmuch as this is a case in equity this court may review the evidence and makes its own findings of fact if it is convinced that the interests of justice so require."

"Even though we may review the evidence, the proposition is well grounded in our law that due to the advantaged position of the trial court, we indulge considerable deference to his findings and do not interfere with them unless the evidence so clearly preponderates against them that this court is convinced that a

manifest injustice has been done. On the basis of what has been said above concerning the dispute in the evidence and the burdens of proof, we are not persuaded that the findings and judgment should be overturned."

In Del Porto v. Nicolo, 27 Utah 2d 286, 495 P 2d 811,

the Court, in affirming the trial court, said:

"It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if evidence clearly preponderates against them."

It pointed out the conflict in the evidence as follows:

"From a plenitude of conflicting evidence, coming from 21 witnesses, the trial court chose to believe the defendant's version. He made findings that all of the deeds were made by Angelina while she was competent, and not under any fraud, duress or undue influence; that they were all properly delivered, and that there was no intent to create a trust for the other heirs. There is ample basis in the evidence to support those findings."

II

FINDINGS OF FACT NOS. 1 AND 3 ARE NOT DISPUTED

FINDING NO. 1:

It is stated on page 16 of the appellants' brief:

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

"1. On or about May 10, 1977, the plaintiffs entered into a preliminary agreement in writing for the sale and purchase of land located in Carbon County together with water stock for a price of \$192,225.00 to be paid as follows: \$50,000.00 upon obtaining certain documents hereinafter referred to and \$142,225.00 in twelve equal annual installments, together with interest." (Emphasis added.)

The fact that the agreement was preliminary is not disputed and supports the position taken by the defendants throughout the litigation that the contract was preliminary for the reason that it would not be effective until the Federal Land Bank mortgage had been released (within 30 days) and that the P.C.A. would agree to release provided all proceeds of the sale would be paid to P.C.A. Also, it was not consummated because of mistake in fact.

FINDING NO. 3:

This finding quotes paragraph 3 of the agreement, followed by,

"It was the intent of the parties that the agreement was to be effective only if title could be cleared so that all of the purchase money could go to the Production Credit Association."

This finding of intent is determinative of this appeal. The evidence is overwhelming and not disputed that all efforts to clear the title to the property described in the agreement failed. Mr. Jensen's testimony quoted above was that he was never able to consummate the agreement and implement its terms because the financial obligations could not be satisfied (Tr. 133) There is no evidence to the contrary.

This Court, on the first appeal reversing the Summary Judgment dated July 27, 1978, quoted from a finding supporting the summary judgment:

"The parties intended that the Sales Agreement would be effective only if the documents referred to above were obtained as provided by the agreement. When the Helper State Bank mortgage came into the picture, it became impossible to carry out the original intent of the parties."

It then stated:

"The court concluded there was no material issue of fact in that matter. With this we cannot agree. Did the parties intend to consider the third mortgage, that of Helper State Bank? From the terms of the contract, such cannot be determined. The existence of such an issue of fact is sufficient to prevent summary judgment, and we do not say it may be the only issue. See Wingets, Inc. v. Bitters, 28 Utah 2d 231, 500 P. 2d 1007, 1010-1011 (1972)."

(R. 89)

The admission, in effect, that Finding No. 3 is correct by not disputing it establishes that the agreement of May 10, 1977, never became effective. The suit to specifically enforce it, must therefore fail and the judgment of the trial court should be affirmed.

III

DISPUTED FINDINGS OF FACT NOS. 4, 5, 6 AND 7 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The disputed findings are quoted and discussed under sub-headings. Specific reference is made to supporting documentary evidence and testimony.

FINDING NO. 4:

"4. The parties to the agreement were clients of the same attorney and by mutual consent such attorney drafted the agreement and represented both the sellers and the buyers in the efforts herein described, to obtain the release of the Federal Land Bank mortgage and the agreement in writing from the Utah Farm Production Credit Association that when and if all the proceeds from the agreement payable by the buyers would be paid to, and applied on, the indebtedness of the sellers, it would release its mortgage upon the real property and the water right described in the agreement." (R. 146)

It is stated on page 17 of the Brief of Appellants that this finding is only partially correct. It is argued without any reference to the record that Therald Jensen represented both parties at the time the agreement was drafted, but thereafter he represented only the defendants.

The record is clear and undisputed that Mr. Jensen's efforts were, during the summer of 1977, to accomplish whatever was necessary to complete the agreement between the parties, and to carry out its terms. At some time before June 1, 1977, Mr. Jensen and Jack Marsing met with personnel of P.C.A. We quote:

"Q. Will you state, in substance, the discussions that took place at that time?

"A. I don't know that I can narrate that with any degree of accuracy except that --

"MR. MARTINEAU: Well, Your Honor --

"A. We discussed the fact that --

"MR. MARTINEAU: If it please, Your Honor, I think it's hearsay as to us. We object on the grounds that it's hearsay, Your Honor.

"THE COURT: I'm not so sure it's hearsay. Here I've got an attorney hired by two parties and he's in there doing their business.

"MR. HOWARD: Not only that, but Mr. Marsing represented that he was representing Kiahtipes.

"MR. MARTINEAU: There's no testimony as to that.

"MR. HOWARD: Yes, there is.

"MR. MARTINEAU: I disagree with that.

"MR. HOWARD: No, he said he did specifically.

"THE COURT: The objection's overruled on the basis of Mr. Jensen was at this point representing both parties and was acting for their benefit."

On July 29, 1977, Mr. Jensen met with creditors:

"Q. Now you had this meeting on July 29th of 1977; is that right?

"A. Correct.

"Q. Tell us what the substance or what the objectives of the meeting was in respect to Walker Bank and Helper State Bank, since they were both represented there?

"A. Well, it was a lengthy discussion, and each of the lending institutions --

"MR. MARTINEAU: Your Honor, we object on the grounds of hearsay. The purpose of this meeting certainly wasn't -- acting as attorney for Nick Kiahtipes or attorney for Mr. Mills.

"THE COURT: The objection's overruled on the same basis that he was acting at that point for both parties."

* * * * *

"Q. Did you ultimately tell Mr. Mills and Mr. Kiahtipes that you couldn't solve the problem?

"A. Well -- I -- Mr. Mills was -- brought the letter from the Production Credit in which he was informed of, having received the letter and I think I discussed with him that we weren't able to get the sale of that hunting area. Periodically, as I remember, I

talked with Nick. I remember talking with Nick once or twice down at the bank. I don't remember whether he asked me or I asked him there at the door and in any event I would report to Nick what I knew."

The following is quoted from the affidavit of Jack Marsing filed in this case on May 19, 1978, by the plaintiffs.

"9. On or about September 20, 1977 attorney Therald N. Jensen told me that he would no longer be able to represent Mills and Kiahtipes because a conflict of interest had arisen."

There is no evidence in the record that Mr. Jensen represented only the defendants between May 10, 1977, and September 20, 1977. On the contrary the quotations under the heading "Finding No. 6" below show clearly that he was, in good faith, working for both to complete financial arrangements so that the agreement could be put into effect and its terms carried out.

FINDING NO. 5:

"5. At the time of the execution of the agreement the Helper State Bank had mortgages upon the land described in the agreement to secure indebtedness in excess of \$40,000.00 which mortgages were duly and regularly recorded in the office of the County Recorder of Carbon County several years prior to the execution and delivery of the above-mentioned agreement."

This finding is disputed for the reason that it "... failed to note, however, that all of these mortgages were subordinate to both the Federal Land Bank and P.C.A.".

The point argued (R. 17) in support of the dispute is entirely without merit. As indicated in the finding No. 5, the Helper State Bank mortgages were recorded several years prior to

the execution and delivery of the Mills-Kiahtipes agreement and had to be recognized in any distribution of funds paid on the sales agreement to avoid imminent foreclosure and also to carry out the obligation of Mills to clear the title. As indicated above, Mills told Kiahtipes that to sell he had to get approval from all creditors. (Tr. 213, 215.)

FINDING NO. 6:

"6. Soon after the execution by the parties of the 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 right to receive part of the purchase money as consideration for the partial release of its mortgage lien or to accept other security for its indebtedness. 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 obtain refinancing of all of the sellers' indebtedness to make effective and to close the said preliminary agreement. That 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." (R. 147)

The plaintiffs argue that this finding is contrary to and not supported by the evidence for the reasons:

(1) No effort was made to have Helper State Bank release its second and third mortgages, but the sole effort was to refinance all of the defendants' obligations through F.H.A;

(2) Since Helper State Bank had only a second and third mortgage, the P.C.A. mortgage was in excess of \$200,000.00 and the purchase price was less than \$200,000.00, it was not necessary to refinance all of the sellers' indebtedness.

Excerpts from the testimony of Mr. Jensen and Mr. Litizzette are quoted in support of (1) above. The testimony of Mr. Jensen, Mr. Naylor, Mr. Marsing to the effect that the efforts of all were to complete and carry out the agreement is ignored. We shall quote and make specific reference to substantial evidence to the effect that Mr. Jensen's efforts were to obtain the necessary releases to complete and carry out the agreement.

A short time after May 10th, Mr. Jensen and Mr. Marsing went to Salt Lake and met with personnel of P.C.A. to clear up the title problem created by the Helper State Bank mortgage. (Tr. 122 - 124)

"Q. Tell us in substance what was said.

"A. Well, we were discussing -- I can't give you the details but we were discussing what might be done to satisfy the Helper State Bank, to see if we could get some money released to them for some piece of land or some piece of land, or get some piece of land released, and I remember talking about getting P.C.A. to release a small portion of land that we might sell or words to this effect.

"Q. Had you learned, prior to going up there, that Helper State Bank was threatening foreclosure?

"A. Yes, I think I had been told that." (Tr. 126)

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"Q. As a result of that initial meeting, did you make other efforts subsequently to resolve the problem?

"A. Yes. I went with Henry Mills to Farmers Home Administration here in Price to see if we could get some financial from Farmers Home Administration, that is, sufficient financing help to pay off all of these bills and put the debt in one institution.

"Q. Were you able to obtain that loan?

"A. No, I went with Henry Mills twice to the Production Credit Association and we put in two applications and had two rejections and the last one was probably late in August or September of that year of '77.

"Q. Do you recall having a meeting at your office with Mr. Litizette and Mr. Holdaway and Mr. Anderson and Mr. Bunnell, I believe he was -- Boyd Bunnell, and Mr. Mills and Mr. Naylor on July 29th of 1977?

"A. Yes, I do.

"Q. What was the substance of that meeting?

"A. Well, that was another meeting with all the lending institutions I think in the nature of a conference to get together to see what, if anything, could be devised to take care of this indebtedness of Henry Mills and let him go through with the sale of his property." (Tr. 127 - 128).

- - - - -

"Q. What additional efforts did you make then to culminate, if possible, the agreement of May 10th of 1977?

"A. Well, Jack Marsing and I had several conversations and there was one avenue we pursued, at least Jack did and kept me informed about it and that was endeavoring to sell maybe a parcel of land, of the range land, to some people that were desirous of getting something for a hunting set up.

"Q. Would that have required a release of that land from Federal Land Bank or the Production Credit?

"A. Yes, I think it would have done.

"Q. In other words you'd have to go back and negotiate something more with them; would you not?

"A. If I'm not mistaken, I think they had mortgages on all of that property." (Tr. 131)

On cross-examination, Mr. Jensen further discussed his efforts to put the sale contract into effect.

"Q. And at that time you were concerned about Mr. Mills' overall picture?

"A. Well, at that time I was trying to get this contract on stream and that's what I was trying to do then.

"Q. Weren't you trying to refinance the whole thing for Mr. Mills?

"A. Yes, at the suggestion of Production Credit, and, in fact, they made the suggestion. It wasn't even my suggestion; that suggestion came from the lending institutions because they said, "Why don't you go and see if you can't get some loan and pay us all off?" That's how that arose, a second meeting with the -- but to answer your question I didn't have an ongoing assignment from September of 1976 to try to work out Henry Mills' problems, no.

"Q. Did you after the meeting you had with them following the May 10th '77 contract?

"A. Yes, then I was trying to do everything I could to get the problem solved so that we could go through with this deal. That's what I was doing.

"Q. Well, you were trying to get his problem solved so that he could go ahead with his business too; weren't you?

"A. Well, that wasn't my immediate problem. My immediate problem was working out this contract.

"Q. Well, at that time when you met with these people after the contract was signed --

"A. Yes.

"Q. You became quite familiar with his business structure and the liens that were on his property?

"A. Yes, in fact, I had found out about it after the contract.

"Q. Yes, after the contract, but that was around June 1st, I believe you said?

"A. Yes, or maybe prior to that, I don't know. It was shortly after because I figured I was going to help them, make them, get Henry to get this thing wound up as well as draw up the escrow agreement, I began to get ready to draft the papers. That's what I done." (Tr. 141 - 142)

It is abundantly clear from the foregoing that Mr.

Jensen on behalf of both the sellers and the buyers was trying to work out a plan to enable the parties to meet the conditions in the May 10th agreement so that the agreement would be in effect. There is nothing to support the absurd argument that Mr. Jensen was acting only for Mr. Mills in an effort to refinance his whole operation without regard to the contract. It will be noted from the quotations from the cross examination that plaintiffs' counsel was trying unsuccessfully to elicit testimony to support this argument.

Mr. Naylor, manager for P.C.A., in his deposition stated:

"Q. What was the next event that you recall that involved Mills or Kiahtipes?

"A. On 7/1/77.

"Q. I'm sorry. 7/1?

"A. Yes.

"Q. Okay.

"A. Mr. Jensen called and asked if we would give up the first mortgage on 60 acres on Mills homestead plus the range.

"Q. Did he say why he wanted that?

"A. So that Helper State Bank could have the mortgage on it.

"Q. And did he say anything else?

"A. No.

"Q. What was your response?

"A. I indicated to him that we were not in favor of that type of an arrangement, that we did not intend putting ourselves in a poorer position than we were already in, and they was to get together and discuss it, and he was supposed to get back to me." (Tr. 183)

Mr. Naylor recalled a meeting on July 29, 1977, attended by representatives of the creditors, Mr. Jensen, and Henry Mills. We quote:

"Q. What was discussed then?

"A. Okay. The sale to Kiahtipes was discussed. And I indicated we were not willing to give up any security unless there was some plan that they could come up with to help Henry liquidate the loan.

"Q. When you refer to security, specifically what security were you referring to?

"A. Talking about that 60 acres and any and all range lands that had a mortgage on.

"Q. Okay. You weren't willing to give up that security unless what?

"A. Unless there was some type of a plan for Henry to be able to pay it out.

"Q. Such as what?

"A. Not such as anything. They would have to figure that out.

"Q. Is that for Henry to pay out their indebtedness, or your indebtedness?

"A. Their indebtedness.

"Q. So you wanted everyone else to have a plan for them to be paid off before you would release?

"A. No. We wanted to make sure that if we released our property that we just didn't go right back in and start foreclosure. And we had to buy them back out to get the same position we had to start with.

"Q. So, you didn't want to put yourself in a worse position, in other words?

"A. That's right. And at that particular time we discussed going back to Farmers Home Administration and applying for a loan, another loan.

"Q. Anything else.

"A. And we agreed at that particular time -- let's see. Stated we would be receptive to releasing some of the down payment funds on the Kiahtipes property to pay some of the bills of Henry to show repayment on his loan.

"Q. I'm not sure I understand that. You would release some of the down payment on the Kiahtipes sale if Henry, from other funds, could show a method of paying off Helper State Bank?

"A. No. Could show a method of paying the P.C.A. If we was going to receive the funds on the Kiahtipes property, we was to get the down payment. And to take care of other creditors we was willing to release part of that down payment if we could get a loan from FHA to pay off Helper State Bank and Walker Bank so that they wouldn't come down on him and we would be the only creditor left." (Tr. 184 - 186.)

The testimony of Mr. Marsing and Nick Kiahtipes is consistent with the testimony of Mr. Jensen that he was trying to work out a plan which would make the agreement effective. (Tr. 66 - 68, 78, and 79.)

Another attack on finding No. 6 is that "...Since the proceeds of the sale were to be less than \$200,000.00, the Helper State Bank lien as a second and third mortgage on the two parcels of property would have had no effect upon P.C.A. receiving the

proceeds. It clearly was not necessary to refinance all of the sellers' indebtedness in order to close the Kiahtipes deal." The only reason for inserting paragraph 3 in the agreement was to protect the sellers against disaster resulting from foreclosure by P.C.A. and the other creditors. The record is clear that P.C.A. and Helper State Bank were ready to foreclose. (Tr. 219, 220).

The idea that Helper State Bank had no interest in the down payment for the sale of land on which it had a second and third mortgage is beside the point. Its mortgages were in default and it could start to foreclose them if no payment was made from the proceeds of the sale. The effect of its relative priority would not be important until foreclosure was under way. The intent and purpose of paragraph 3 to protect against immediate foreclosure would be defeated unless some money was paid to Helper State Bank.

Finding No. 6 is fully supported by the evidence.

FINDING NO. 7:

"7. 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.

The plaintiffs argue that Finding No. 7 is an incorrect statement of the requirements of paragraph 3 of the Agreement. This finding simply states that: (1) no release of the Federal Land Bank mortgage was obtained; (2) no unconditional agreement to release was obtained from P.C.A.; (3) that the letters, Exhibits 2 and 3, did not meet the requirements of paragraph 3; (4) all efforts to close the transaction failed; (5) no payment was made on the purchase price; and (6) no escrow arrangement was set up.

(1)

The trial court properly held that the letter dated May 11, 1977, by the Federal Land Bank to Mr. Mills did not constitute a release of mortgage. It is merely a statement that the bank would be willing to release at some future time upon compliance with the bank's partial release policy, upon keeping the loan current. "...and that all monies, approximately \$192,000.00 from the sale of this and the Peperakis farm are applied to your now existing debt to the Utah Farm Production Credit Association."

It is obvious that the letter is not a release of mortgage and that it is conditional. The attorney for the contracting parties did not consider it to be a release. He met with creditors several times in May, June, July, and August 1977, in an effort to meet the conditions.

(2) (3) (4)(5) (6)

The letter dated May 11, 1977, from P.C.A. to Mills, Exhibit 3, indicates that it "...agrees with, and approves of the terms of the Agreement, with full proceeds of the 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."

As indicated in the last sentence of Finding of Fact No. 3, which, as shown above, is not disputed by the plaintiffs, it was the intent of the parties that the agreement was to be effective only if title could be cleared so that all of the purchase money could go to P.C.A. The record is clear that Helper State Bank would foreclose if all the money would go to P.C.A. and P.C.A. would foreclose unless it got all of the money from the sale. This is the obvious reason why no unconditional release was delivered, why the down payment was not made, why no escrow was set up and why the preliminary contract did not become a final contract. (Tr. 219, 220)

The arguments of plaintiffs about the failure of defendants to notify the plaintiffs of the approval by P.C.A., on pages 26 and 27 of their brief, being the reason that the closing did not occur is misleading and contrary to the evidence. A letter identical to Exhibit 3, which is numbered Exhibit 8 and dated May 11, 1977, was mailed to Nick Kiahtipes. He denied that he received it, but it appeared in Mr. Jensen's file. (Tr. 232 - 233) Mr. Jensen was his attorney and it is hard to believe that it could

have gotten into the file without delivery by Mr. Kiahtipes. He obviously forgot about it.

There is no support in the record for the rash statement that the closing of the contract was held up only because Mr. Kiahtipes did not know of the conditional approval by P.C.A. Equally rash and unsupported is the statement on page 28 of the Brief of Appellant that ".... the Helper State Bank lien existing upon the property subject to sale had no effect whatsoever upon this transaction."

All of the evidence regarding activities of counsel for both parties and of creditors quoted from and cited above shows clearly that the sellers would not sell and complete the contract without protection of themselves and the buyers against imminent foreclosure. The cases cited by the plaintiffs, pages 29 - 32 of their brief, are not in point because no contract, referred to, contained a provision similar to paragraph 3 of the Agreement involved in this case.

Finding No. 7 is supported by the undisputed finding of intent and the great preponderance of the evidence. The plaintiffs' argument consisting of speculative theorizing on the abstract is entirely without merit.

IV

THE TRIAL COURT'S CONCLUSION
THAT THERE WAS A MUTUAL MISTAKE OF FACT
IS SUPPORTED BY THE FACTS AND LAW

CONCLUSION OF LAW No. 2 states:

"2. 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."

This conclusion is attacked on the ground that it is based upon (1) erroneous findings of fact, (2) that only Mills was aware of the lien of the Helper State Bank, (App. br. pp. 31, 32), (3) that the mistake issue was not raised until after Mills decided not to sell, and (4) "...the Helper State Bank didn't have any equity in the properties anyway."

The grounds will be briefly discussed in order. Item (1) is adequately covered above and the evidence supporting the trial court's findings will not be repeated here. (2) There is testimony in the record that during the negotiation of the May 10th agreement, Mr. Marsing and Mr. Kiahtipes were told about the Helper State Bank mortgage and that foreclosure was threatened. (Tr. 211, 213, 215, 219, 237). With respect to item (3), the issue of mistake of fact was pleaded in the amended answer. (R. 115). Mr. Jensen testified that he did not know of the involvement of Helper State Bank until he got the title report soon after May 10th. His efforts to avoid the problem and to correct the mistake are discussed above with appropriate reference to the record.

Item (4) that Helper State Bank "....didn't have any equity in the properties anyway", is a wild and rash statement without any support in the record. There is no evidence whatever as to the value of the various lands, farm machinery, equipment, homes, livestock, and water stock subject to mortgages to the Federal Land Bank, P.C.A., Helper State Bank and Walker Bank. The evidence is clear that land involved in the Kiahtipes agreement was mortgaged to Helper State Bank. See Exhibit 15A and the Agreement, Exhibit 1. If the Helper State Bank was not involved, it is hard to believe that Mr. Jensen would meet with creditors many times in Salt Lake and Price during the summer of 1977 to solve a problem that was not there!

As stated above, Mr. Jensen testified that he did not know of the Helper State Bank mortgage until after he had drafted the Agreement for both parties. (Tr. 122). The parties relied on the Agreement prepared by their lawyer, and although the defendants knew of the Helper State mortgage, they did not realize the significance of the omission. The failure to include a reference to that mortgage forced the parties into a new area which had not been negotiated between them.

The law is well settled that a mistake may prevent an Agreement being formed. We quote from 17 C.J.S., Contracts. Section 135, p. 867:

"Where parties assume to contract and there is a mistake with reference to any material part of the subject matter there is no contract, because of the want of mutual assent necessary to create one."

It has been held that concealment of material facts, even though unintentional, creates a mistake of fact that prevents the consumation of an agreement by the meeting of the minds on agreed facts.

Leatham Smith-Putnam Nav. Co., v. National Union
Fire Insurance Co., 96 F 2d 923.

The mistake of fact as to the existence of the Helper State Bank mortgage is another reason why the Agreement remained preliminary and did not become effective.

V

THE TRIAL COURT PROPERLY DENIED
SPECIFIC PERFORMANCE

Another reason for affirming the judgment of the trial court is that the Agreement, dated May 10, 1977, was not one which could be specifically enforced because unsettled matters remained. There can be no question but that the intent of the parties was that all of the money received from the sale of the property was to go to P.C.A. to avoid a mortgage foreclosure. When it was discovered that Helper State Bank had second and third mortgages on some of the land covered by the contract and that foreclosure was imminent, it became evident to all concerned that the Agreement for sale could not become effective without obtaining a release or subordination of the Helper State mortgages or without refinancing the indebtedness of the respondents. Something remained to be done which was not covered by the contract.

This Court has held in several cases that the denial of specific performance is proper where there remains unsettled matters not covered by the contract.

Jensen v. Bouwhis, 577 P 2d 555, Utah 1978

BLT Investment Co. v. Snow, 586 P 2d 456, Utah 1978

Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P 2d 491.

The unsettled matter was the lien of Helper State Bank, which, of course, would prevent the payment of all of the proceeds of the sale to P.C.A. and would, unless satisfied, result in a foreclosure by Helper State Bank. These matters were not covered by the Agreement and on this ground alone the trial court properly denied specific performance.

CONCLUSION

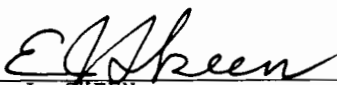
The evidence fully supports the findings of fact of the trial court that it was the intent of the parties that the Agreement would be effective only if title could be cleared so that all of the purchase money could go to the Production Credit Association and that no release of the Federal Land Bank mortgage was obtained and no unconditional agreement for release was obtained from the Production Credit Association as required by paragraph 3 of the Agreement. There was a mutual mistake of fact as to the existence of the Helper State Bank mortgages. The trial court properly denied specific performance of the Agreement

and dismissed the Complaint. The judgment of the trial court should be affirmed.

Respectfully submitted,

SKEEN AND SKEEN

By:


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Respondents.

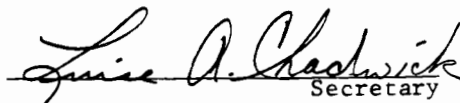
MAILING CERTIFICATE

I hereby certify that a copy of the foregoing BRIEF OF RESPONDENTS was mailed to Plaintiffs'-Appellants' attorneys, postage prepaid, addressed as follows:

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on this 10th day of August, 1981.


Secretary