

2000

# Jeannie Stringam v. Morris Myers, Erin M. Stovall, aka Erin M. Stovall, John Patrick Stovall : Brief of Appellant

Utah Court of Appeals

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C. Val Morley; Attorney for Appellee.

Terry R. Spencer; Attorney for Appellants; John Patrick Stovall, Morris Myers; Pro Se.

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IN THE UTAH COURT OF APPEALS

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JEANNIE STRINGAM,

Plaintiff and Appellee,

V.

Case No. 20000179-CA

MORRIS MYERS, ERIN M. STOVALL,  
aka ERIN M. STOVALL, JOHN  
PATRICK STOVALL,

Priority No. 15

Defendants and Appellant.

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**BRIEF OF APPELLANT**

Appeal from Final Order and Judgment entered January 31, 2000  
by the Honorable Guy R. Burningham, Judge of the Fourth  
Judicial District Court, Utah County, State of Utah

C. Val Morley - #6942  
Attorney for Plaintiff/Appellee  
110 South Main Street  
Pleasant Grove, Utah 84062  
Telephone: 801 785 5350

Morris Myers, Appellant  
Post Office Box 761  
Midvale, Utah 84047-0761  
Telephone: 801 755 2780

Terry R. Spencer  
Attorney for Erin Stovall  
140 West 9000 South, Suite 8  
Sandy, Utah 84070



John Patrick Stovall, Defendant  
1159 East Garfield Avenue  
Salt Lake City, Utah 84105



Request for Oral Argument

**FILED**

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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JEANNIE STRINGAM,

Appellee,

V.

Case No. 20000179-CA

MORRIS MYERS, ERIN M. STOVALL,  
aka ERIN M. STOVALL, JOHN  
PATRICK STOVALL,

Defendants/Appellant.

---

**OPENING BRIEF OF APPELLANT MORRIS MYERS**

1. Statement of jurisdiction: The Court has jurisdiction to hear this appeal by virtue of § 78-2a-3 (2) (j), UCA 1953, as amended (1996); the case was transferred to the Court of Appeals by Utah Supreme Court ORDER dated April 12, 2000, "pursuant to Section 78-2-2(4), Utah Code Annotated."

2. Issue and standard of review: Did the trial court commit prejudicial error in denying DEFENDANT MYERS' POST-TRIAL MOTIONS (r. 865-868, 869-872; 915-916, 917-918; 947-955, ORDER ON DEFENDANT MORRIS MYERS POST-TRIAL MOTIONS) for an order dismissing plaintiff's complaint on the grounds and for the reasons that under the facts and the law she [plaintiff] has shown no right to relief, and for plaintiff's failure to make the balloon payment of \$134,043.24, for an order that the Agreement at issue, and all rights of the plaintiff thereunder, are forfeited and that defendant Myers is entitled

to a judgment of forfeiture, as well as for restitution of the premises, eviction, damages and quiet title; and whether defendant Erin M. Stovall is entitled to any amount under her "equitable lien against the American Fork property in the sum of one-half of all proceeds received in excess of \$109,000.00, which lien should become payable upon the sale of the real property." (Exh. 54, p. 7; r. 527-533; 550-557)

Standard of review: The trial court's legal determinations are granted no deference. Standard Fed. Sav. & Loan Ass'n v. Kirkbride, 821 P.2d 1136 (Utah 1991); Threshold question of whether or not the agreement is ambiguous is a question of law. Brown v. Weis, 871 P.2d 552 (Utah App. 1994); is the agreement to be interpreted as a question of law determined by the words of the agreement, or a question of fact determined by extrinsic evidence of intent? If the language of the agreement is not ambiguous the appellate court can review, as a matter of law, the agreement under a correctness standard; if the agreement is ambiguous and the trial court makes findings of fact, appellate review is strictly limited. Copper State Leasing v. Blacker Appliance, 770 P.2d 88 (Utah 1988); A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. Cox v. Cox, 877 P.2d 1262 (Utah App. 1994).

"The Court will disturb the trial court's decision in

plaintiff's favor only if its findings are clearly erroneous (citations omitted). The clearly erroneous standard requires that if the findings are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings will be set aside (citations omitted). Questions about the legal adequacy of findings of fact and the legal accuracy of the trial court's statements present issues of law, which the appellate court reviews for correctness, according no deference to the trial court (citations omitted)." State ex rel. C.K., 996 P.2d 1059 (Utah App. 2000)

Webb v. R.O.A. General, Inc., 804 P.2d 547 (Utah App. 1991), a court asked to interpret a contract may first inquire as to whether the contract is integrated. Because this is a factual determination, review by an appellate court is limited. An integrated contract is an agreement where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. The intent of the parties will be enforced. Eie v. St. Benedict's Hosp., 638 P.2d 1190, 1194 (Utah 1981). If a contract is determined to be integrated, the parol evidence rule excludes evidence of terms in addition to those found in the agreement. If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement. Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991)

3. Statutes, rules, etc. Utah Rule of Civil Procedure 54(b),

"Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 52(a) [**Findings by the court.**] Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; . . . Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility the witness. \* \* \*

4. Statement of the case: As a preliminary matter, in regards to the appealed ADDENDUM TO FINAL ORDER AND JUDGMENT dated February 4, 2000, (r. 1021-1026) the trial court entered judgment in plaintiff's favor awarding attorney fees in an undetermined amount. [A trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3. ProMax Development v. Raile, 998 P.2d 254 (Utah 2000)] Since the February 4, 2000 ADDENDUM did not dispose of the plaintiff's claim for attorney fees, and did not contain a special finding under rule 54(b) URcIP it was in



all respects interlocutory. Plaintiff's request for attorneys fees was in all respects a "claim" for purposes of rule 54(b) and, therefore, because the ADDENDUM left the amount of attorneys fees undetermined, it did not resolve all the claims in the case and was not a final judgment. Home State Bank/National Ass'n v. Potokar, 617 N.E. 2d 1302, 1308-1310 (Ill.App. 1993). Since the ADDENDUM lacked a special finding under rule 54(b) it was not subject to enforcement and must be reversed. D'Aston v. Aston, 844 P.2d 345, 349 (Utah App. 1992).

A court is without jurisdiction to amend or vacate its judgments once final judgment has been entered. Inland Group of Companies v. Obendorff, 959 P.2d 454 (Idaho 1998)

In the case of the appealed FINAL ORDER AND JUDGMENT dated January 31, 2000 (r. 997-1018), plaintiff Stringam is in all respects the "winner." Parties not aggrieved by a judgment have no right to appeal therefrom. Poage v. Co-operative Pub. Co., 66 P.2d 1119 (Idaho 1933). Generally, a party may not appeal from a judgment in his favor. Commercial Block Realty Co. v. U.S. Fidelity Co., 28 P.2d 1081 (Utah 1934).

On April 17, 2000, appellant Myers filed with the Court his motion to dismiss appellee's cross-appeal. The Court Clerk informed appellant Myers that "the issues raised [thereby] are deferred until plenary presentation and consideration of the case." pursuant to the Court's ORDER

DENYING AND DEFERRING MOTIONS FOR SUMMARY DISPOSITION, dated and filed June 14, 2000.

Nature of the case. Stringam and Erin Stovall entered into an agreement in writing (Plaintiff's Exh. 1, r. 249-43, 392-96, 534-37, and 558-61). In a recital to the agreement the parties to the agreement declare their desire "of entering into a joint venture arrangement respecting certain real property at 98 West 500 North, American Fork, Utah,. . ." and in a further recital to the agreement state "their intentions and agreement as to the entitlement to and distribution of profits in the event of sale of said property which is the ultimate purpose of this joint venture, . . ." [para. 11 of the agreement provides, "[a]t such time as the property is sold the net proceeds of the sale shall be distributed as follows: A. To payment of the underlying trust deed indebtedness. B. The amount of the net proceeds as shall exceed \$109,000 shall be divided equally between First and Second Parties.]

Paragraphs 9. and 10. respectively, provide "It is agreed that time is of the essence of this agreement" and "This agreement contains the entire agreement between the parties hereto. Any provisions hereof not enforceable under the laws of the State of Utah shall not effect the validity of any other provisions hereof."

At the time of the agreement [October, 1990] Erin Stovall owned the property; Stringams occupied the property as

renters. A further recital to the agreement recites the structuring of the joint venture "contemplates the purchase by [Stringam] from [Stovall] of said property . . . ." The Agreement itself [para. 3] provides that [Stringam] agrees to pay [Erin Stovall] for the property the purchase price of \$109,000 on the following terms: \$800 each month commencing August 1, 1990, for eighty four months, and the entire balance remaining shall be due and payable on August 1, 1997; interest on principal amounts remaining from time to time unpaid shall be at the rate of 11% per annum. \* \* \*

A further recital to the Agreement states, WHEREAS, First Party [Stringam] and Second Party [Stovall] intend hereby to \* \* \* provide termination and default provisions.

Paragraph 8. of the agreement provides,

"Should First Party fail to comply with any of the terms hereof, Second Party shall give First Party written notice specifically setting forth the provisions under which First Party is in default. Should First Party fail to cure such default within 30 day [sic] after said notice, Second Party may, in addition to any other remedies afforded Second Party by law, elect any of the following remedies:

A. Second Party may be released from all obligations in law and equity to convey the property, and First Party shall at once become a tenant at will of Second Party. All payments which have been made by First Party shall be retained by Second Party as liquidated and agreed damages for breach of this agreement; \* \* \*

On August 8, 1994, Erin Stovall quit-claimed to John Patrick Stovall (Def. Exh. 60; r. 204); on August 9, 1994, John Patrick Stovall assigned the agreement, Exh. 1, to appellant Myers (Exh. 1; r. 208, 239, 392, 523, and 547). By Warranty Deed recorded April 22, 1998, John Patrick Stovall

conveyed the property to appellant Myers (Def. Exh. 61; r. 378, 522, and 546)

The Agreement contained no provision for transfer of title to Stringam; quoting the recital again, the parties intent was to "enter[] into a joint venture arrangement" respecting the real property; interpreted as the parties' intent indicates, when Stringam had made the payments required the property would become her contribution to the joint venture, a separate and distinct legal entity. Salt Lake Knee & Sports Rehabilitation, Inc. v. Salt Lake City, Kneww & Sports Medicine, 909 P.2d 266 (Utah App. 1995. U.C.A. 1953, 48-1-3.1(1,2)). Stringam materially breached the contract by wholly failing, without excuse, to make the balloon payment. (r. 1047, tr. 201-203; r. 1048, tr. 186)

Without paying the balloon payment Stringam eventually sued for specific performance and quiet title (r. 265-279, and 650-664); Myers counterclaimed for restitution, eviction, damages and quiet title (Pl. Exh. 38; r. 628-631, 641-645).

In its Final Order and Judgment (r. 997-1018) the trial court concluded as a matter of law that 1. The contract between the parties is a lease/option to buy. 2. Ms. Stringam has a right to tender payment of the final balloon payment thereby performing and fulfilling her obligation on the contract. 3. The amount of the balloon payment is determined to be \$141,547.21 as of January 1, 2000. The trial court decreed that 1. Once Ms. Stringam tendered the balloon

payment the first mortgage (Trust Deed and Note) should be satisfied and Mr. Myers shall turn over marketable title to Ms. Stringam. 2. One half of all proceeds over the amount of \$109,000 should be paid to Ms. Stovall in satisfaction of her lien/interest in the property, this amount being \$16,273.61. 3. The balance then remaining after paying the Trust Deed and Note and Ms. Stovall, should be awarded to Mr. Myers. 4. Due to the fact that the parties involved in this dispute contributed to or created their own difficulties in this matter, each party should pay their own attorneys fees and costs, with the exception that Plaintiff's offer of judgment in December of 1998 for \$150,000.00 if accepted could have avoided the necessity of trial. Therefore a portion of costs and attorney fees associated with the trial of this matter should be awarded to Plaintiff. The Court determines Ms. Stringam should receive \$12,000.00 of her costs and attorney fees, from Defendant Myers.

Stringam claims to have submitted an application and affidavit of attorney's fees requesting \$73,574.90 therefore. There was no evidence demonstrating reasonableness. Also, Stringam did not claim her costs in the manner required by rule 54(d)(2), URCiP.

5. Summary of arguments. The findings of fact of the trial judge sitting without a jury shall not be set aside unless clearly erroneous. In the instant case however, given the clear, unambiguous language contained in the Agreement,

the findings of the trial judge are against the clear weight of the evidence and contrary to the intent of the parties, and it is evident that a mistake has been made. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987).

6. Argument. Finding of Fact #1 recites that the Agreement is a lease/purchase agreement; the first recital to the Agreement declares that the parties are "desirous of entering into a joint venture arrangement respecting certain real property . . . ." The recitals to a contract are the expression of reasons for the transaction and should be considered in determining the intent of the parties as expressed in the entire document. Maddux & Sons, Inc. v. Trustees of Arizona Laborers, Teamsters and Cement Masons, Local 395 Health and Welfare Trust Fund, 610 P.2d 477 (Ariz. App. 1980)

Finding of Fact #1 further recites that pursuant to the agreement Stringam agrees to make \$800.00 monthly payments until August 1, 1997, when the balance of the trust deed was to become due. To the contrary, paragraph 3. of the Agreement, as gleaned from a natural and reasonable interpretation of the language used, provides that the balance remaining due on the \$109,000 purchase price after 84 \$800 payments "shall be due and payable on August 1, 1997."; the reference is not to the balance due on a "trust deed."

Finding of Fact #1 further states, "If Stringam was ever

unable to make the payments, she had the option to sell the property and divide the equity with Erin Stovall." The manifest meaning of the language used in the Agreement in its entirety is not susceptible of the trial court's quoted interpretation which directly conflicts with the intention of the parties as stated in the Agreement, paragraph 8 and 8A, ". . .should first party fail to comply with any of the terms [of the Agreement]. . . ."

Finding #1 further finds that "Stringam continued to make the payments (which were \$800.00 of a \$1,3038.00 (?) mortgage payment). . . ." Paragraph 3. of the agreement explicitly states ". . .the purchase price of \$109,000 on the following terms: \$800 each month commencing August 1, 1990, for eighty-four months. . . ." Such finding of the trial court is erroneous and supports the appellate court's "definite and firm conviction that a mistake has been made." In Stringam's defense, she is relying on the third "whereas" [recital] of the agreement that references her conclusion, "which were \$800.00 of a \$1,3038.00 (?) mortgage payment," [When the recitals are broader than a contract's operative clauses, the recitals cannot be used to extend or broaden the restrictions contained in the body of the agreement. Fugate v. Town of Payson, 791 P.2d 1092 (Ariz. App. 1990).]

Finding #45 recites, "Stringam filed Offer of Judgment on December 28, 1998, offering \$150,000 for which judgment could be entered. Defendant would agree to pay costs." The offer

is in the record at pp. 568-570. The finding, however, is clearly erroneous in that the actual offer at paragraph 5. thereof provides, "Defendant agrees to pay costs, including reasonable attorney's fees accrued to date." This too, would support the appellate court's definite and firm conviction that a mistake was made; the requirement of payment of attorney's fees is not authorized by rule 68(b) URCiP and in that payment of attorney's fees was included as a condition of the offer, such offer of judgment is invalid.

In the Discussion and Analysis section of the Final Order and Judgment (p. 18) the trial court quotes the wording of Erin Stovall's purported equitable lien as follows, "Plaintiff is awarded an equitable lien against the American Fork property in the sum of one-half of all proceeds received in excess of \$109,000, which lien should become payable upon the sale of the real property." Payment is expressly indexed to the time of sale, October, 1990, at which time there was \$108,200 due on the sale. Therefore, no amount is due Erin Stovall by virtue of her equitable lien.

Conclusion of Law #1, "[t]he contract between the parties is a lease/option to buy," is not supported by the unambiguous language of the Agreement, is contrary thereto as being in conflict with the intention of the parties as expressed and contained in said Agreement.

Conclusion of Law #2, "Ms. Stringam has a right to tender payment of the final balloon payment thereby performing and



fulfilling her obligation on the contract," is an abstract statement of a right too broadly accorded, i.e., to give Ms. Stringam a right to redeem more than two years after appellant Myers had elected and given the notices as provided in paragraph 8.A. of the agreement, whereby nonjudicial foreclosure had been accomplished. Conclusion of Law #2 should therefore be stricken as being against law and in that it unconstitutionally impugns appellant Myers' right to contract.

Conclusion of Law #3 should also be stricken for the same reasons and grounds stated above for striking Conclusion of Law #2.

Paragraph 1. of the trial court's Decree should be stricken for the reason that there is no operative provision in the Agreement requiring "marketable title" to be "turned over" to Ms. Stringam.

Paragraph 2. of the trial court's Decree should be stricken for the reason that payment of Erin Stovall's purported equitable lien is specifically indexed to the "time of sale" at which time there was less than the threshold amount due, viz., \$108,200.

Paragraph 3. of the Decree, "[t]he balance then remaining after paying the Trust Deed and Note and Ms. Stovall, should be awarded to Morris Myers," should be stricken for the reasons stated above for striking Paragraph 2. of the Decree, and, as well, from a natural and reasonable interpretation of

the entire agreement, the manifest meaning of the language used by the parties, it must be concluded that the underlying trust deed should only be paid from the proceeds of sale under paragraph 11.A.

Paragraph 4. of the trial court's Decree should be in all things stricken with the exception that the beginning two lines [to the second coma, line two] should be retained as an expression by the trial judge on the record for not awarding fees to the prevailing party as required under the provisions of subsection (1) Sec. 78-27-56 (1988) and Sec. 78-27-56 (2) (b) (1988). The balance of said paragraph 4. of the trial court's Decree amounts to an abuse of discretion on the part of the trial judge for reasons previously stated [the offer of judgment mentioned was invalid for its demand for payment of attorney's fees to date].

7. Conclusion: Quoting Justice Orme in his concurrence in Commercial Investment Corp. v. Siggard, 936 P.2d 1105, 1112 (Utah App. 1997) "Without paying the [balloon payment] into court or even tendering [\$134,043.24], the amount due, [Stringam] eventually sued for specific performance. Being in material breach of [her] obligations under the contract, without excuse and without having tendered its performance, [Stringam] simply was not entitled to specific performance of the contract. In turn, [appellant Myers was] entitled to have his title quieted against [Stringam], which had lost its rights under the contract by its long-standing material breach


and its failure to tender performance."

Appellant Myers therefore prays judgment dismissing Stringam's cross-appeal; reversing the trial court's FINAL ORDER AND JUDGMENT of January 31, 2000, and the ADDENDUM thereto dated February 4, 2000, with the exception as stated above respecting paragraph 4. of the trial Court's Decree of January 31, 2000; and that the matter be remanded to the trial court with directions to enter judgment quieting title in appellant Myers, as well as for damages in appellant Myers favor and against plaintiff Stringam as provided by law.

A copy of the Agreement sued on is appended hereto.

Respectfully submitted,

DATED July 24, 2000.

  
MORRIS MYERS, Appellant  
Post Office Box 761  
Midvale, Utah 84047  
Telephone: 801 755 2780

On July 25, 2000, two true copies each mailed  
as follows:

C. Val Morley  
110 South Main Street  
Pleasant Grove, Utah 84062

Terry R. Spencer  
140 West 9000 South, Suite 8  
Sandy, Utah 84070

John Patrick Stovall  
1159 East Garfield Avenue  
Salt Lake City, Utah 84105

  
MORRIS MYERS

## **ADDENDUM**

Addendum One, AGREEMENT sued on

Addendum Two, FINAL ORDER AND JUDGMENT, January 31, 2000

Addendum Three, ADDENDUM TO FINAL JUDGMENT AND ORDER, February  
4, 2000

## AGREEMENT

JOINT VENTURE AGREEMENT made this 1st day of August, 1990, by and between Wade and Jeanie Stringham, of 98 West 500 North, American Fork, Utah 84002, herein called First Party, and Erin M. Stovall, of 2511 South Chadwick, Salt Lake City, Utah 84106, herein called Second Party, WITNESSETH, that

WHEREAS, First and Second Parties are desirous of entering into a joint venture arrangement respecting certain real property at 98 West 500 North, American Fork, Utah, and

WHEREAS, the legal and record title to said property is in Second Party and there is presently a trust deed incumbrance (ARM) against the property in favor of American Charter, of Omaha, Nebraska, upon which there is an approximate balance due of \$105,00 with current monthly payments of \$1225; and

WHEREAS, First Party presently occupies the property and the structuring of this joint venture contemplates the purchase by First Party from Second Party of said property for \$109,000 with deferred payments of \$1038 each month commencing August 1, 1990, and continuing for eighty-four months and that on August 1, 1997, the entire balance remaining unpaid will become due and owing, payments to apply first to interest at the rate of 11% per annum and then to principal; said joint venture contemplates that First Party shall pay \$800 each month to apply against the \$1038 payment and Second Party shall pay the difference; and

WHEREAS, First Party and Second Party intend hereby to state their intentions and agreement as to the entitlement to and distribution of profits in the event of sale of said property

which is the ultimate purpose of this joint venture, and to provide termination and default provisions;

NOW, THEREFORE, First Party and Second Party agree as follows:

1. Second Party agrees to sell and First Party agrees to buy said real property;.

2. First Party to have possession as of August 1, 1990.

3. First Party agrees to pay Second Party for the property the purchase price of \$109,000 on the following terms: \$800 each month commencing August 1, 1990, for eighty-four months, and the entire balance remaining shall be due and payable on August 1, 1997; interest on principal amounts remaining from time to time unpaid shall be at the rate of 11% per annum. As aforesaid, the total monthly payment for eighty-four months is \$1038 but of that amount Second Party shall pay \$328 and shall also be responsible to pay for and maintain fire and extended insurance coverages on said property.

4. Second Party agrees to pay taxes and assessments which become due on said property.

5. First Party agrees that it will neither commit nor suffer to be committed any waste, spoil, or destruction in or upon said property, and that First Party will maintain the property in good condition.

6. The parties agree that should either party default in any of the covenants or agreements herein contained the prevailing party in litigation shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue

from enforcing or terminating this contract, or in obtaining possession of the property, or in pursuing any remedy provided hereunder or by applicable law.

7. This agreement is binding on the heirs, executors, administrators, personal representatives, successors or assigns of the respective parties hereto.

8. Should FIRST PARTY fail to comply with any of the terms hereof, SECOND PARTY shall give FIRST PARTY written notice specifically setting forth the provisions under which FIRST PARTY is in default. Should FIRST PARTY fail to cure such default within 30 day after said notice, SECOND PARTY may, in addition to any other remedies afforded SECOND PARTY by law, elect any of the following remedies:

A. SECOND PARTY may be released from all obligations in law and equity to convey the property, and FIRST PARTY shall at once become a tenant at will of SECOND PARTY. All payments which have been made by FIRST PARTY theretofore under this agreement shall be retained by SECOND PARTY as liquidated and agreed damages for breach of this agreement; provided, however, that should payments of principal exceed 20% of the purchase price plus SECOND PARTY'S accrued interest, fair rental value, and a reasonable attorney's fees, then and in that event, such excess shall be refunded to FIRST PARTY. This remedy shall be available to SECOND PARTY from and after the time FIRST PARTY shall have paid to SECOND PARTY 33 1/3% or more of the \$109,000 purchase price.

B. SECOND PARTY may bring suit and recover judgment for all delinquent installments and all reasonable costs and attorney's fees, and the use of this remedy on one or more occasions shall not prevent SECOND PARTY, at SECOND PARTY'S option, from resorting to this or any other available remedy in the case of subsequent default; or

C. SECOND PARTY may, upon written notice to FIRST PARTY, declare the entire balance and accrued interest hereunder at once due and payable and may elect to treat this agreement as a note secured by a deed of trust, without

requirement of tender of legal title to FIRST PARTY, proceed immediately to foreclosure in accordance with the laws of the State of Utah applicable to trust deeds.

9. It is agreed that time is of the essence of this agreement.

10. This agreement contains the entire agreement between the parties hereto. Any provisions hereof not enforceable under the laws of the State of Utah shall not effect the validity of any other provisions hereof.


11. At such time as the property is sold the net proceeds of the sale shall be distributed as follows:

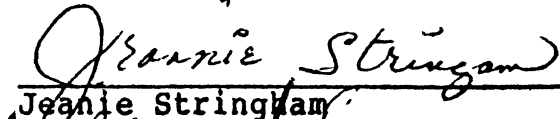
A. To payment of the underlying trust deed indebtedness.

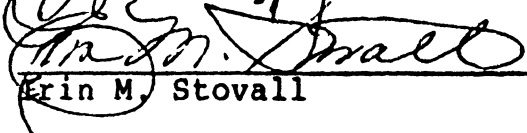
B. The amount of the net proceeds as shall exceed \$109,000 shall be divided equally between First and Second Parties.

C. The amount of equity as determined by resort to standard mortgage payback or amortization schedule (amount, \$109,000; amount of payment, \$1038; annual interest rate, 11%; payment frequency, monthly) shall be paid 77% to First Party and 23% to Second Party.

~~Deed~~  
IN WITNESS WHEREOF First and Second Parties have hereunto affixed their hands and seals the day and year first above written.

  
Wade Stringham  
10/8/90  
FIRST PARTY

  
Jeanie Stringham  
10-8-90

  
Erin M. Stovall  
SECOND PARTY



## ASSIGNMENT OF AGREEMENT

The undersigned John Patrick Stovall, the owner and holder of the within agreement, for valuable consideration receipt whereof is acknowledged by said John Patrick Stovall, assignor, hereby and by these presents, does assign and transfer the said agreement, together with the real property described therein, to Morris Myers, Post Office Box 761, Midvale, Utah 84047.

DATED August 9, 1994.

  
\_\_\_\_\_  
JOHN PATRICK STOVALL

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
CARMA R. SMITH, Clerk  
1/31/00 TK

"Trey" A.R. Dayes, III, Bar no. 7504  
C. Val Morley, Bar No. 6942  
Attorneys for the Plaintiff  
DUVAL HANSEN WITT & MORLEY, P.C.  
110 South Main Street  
Pleasant Grove, Utah 84062  
Telephone: (801) 785-5350  
Facsimile: (801) 785-0853

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

125 North 100 West, Provo, Utah 84601

|                     |   |                                 |
|---------------------|---|---------------------------------|
| STRINGAM, JEANNIE,  | ) |                                 |
|                     | ) |                                 |
| Plaintiff,          | ) | <b>FINAL ORDER AND JUDGMENT</b> |
| v.                  | ) |                                 |
|                     | ) | Case No. 9704000100             |
| MYERS, MORRIS et al | ) |                                 |
|                     | ) | Judge: Guy R. Burningham        |
| Defendants.         | ) |                                 |
|                     | ) |                                 |
|                     | ) |                                 |

This matter came on regularly for trial before the Court on May 20, 1999 and June 28, 1999. The Plaintiff appeared and was represented by counsel C. Val Morley, and "Trey" A.R. Dayes III. Defendant, Morris Myers represented himself, as did Defendant John Patrick Stovall, Erin M. Stovall was represented by counsel Terry R. Spencer. The Court thereupon heard evidence by the parties and witnesses in support of their respective positions, reviewed the file, tape of the proceedings and exhibits, and upon being advised in the premises, finds and concludes as follows:

## **FINDINGS OF FACT**

1. Complaint was filed on February 3, 1997, by Plaintiff, Jeannie Stringam. On October 8, 1990, Stringam entered into a real property lease/purchase agreement with Erin Stovall (then married to Patrick Stovall). In this agreement Stringam agreed to make \$800.00 monthly payments until August 1, 1997, when the balance of the trust deed note was to become due. If Stringam was ever unable to make the payments, she had the option to sell the property and divide the equity with Erin Stovall.

Erin Stovall later transferred her interest in the property to John Patrick Stovall in a divorce settlement, reserving one-half interest in the proceeds above \$109,000.00 from the sale of the home. John Stovall later transferred his interest to Morris Myers. Stringam continued to make the payments (which were \$800.00 of a \$1,3038.00 mortgage payment) until October 22, 1996, when Stringam's counsel mailed a letter to Myers offering to pay the outstanding balance of the trust deed note in full.

Defendant, Myers claims he is not required to allow the Plaintiff to refinance the property and that he is entitled to one-half of the equity of the property upon completion of the terms of the agreement. This is in contradiction of the agreement, which contemplated such a division only if Stringam sold the property before the end of the term of the agreement.

Stringam asked the Court for (1) Specific Performance, requiring Myers to accept the tender payment in full of the outstanding balance of the trust deed note, (2) Declaratory Judgment that Stringam may seek refinancing and pay the balance of the trust deed note without incurring any penalty, or dividing equity with Myers; (3) Quiet Title requiring Myers to cooperate in transferring

title to Stringam.

2. Myers filed Answer on February 25, 1997. He denied every allegation in the Complaint and listed three Counterclaims. He claims the parties entered into a joint venture and that he was damaged in the amount of \$100,000.00. He claims that the joint venture was formed for the purpose of selling the property to a third person and distributing the proceeds according to the terms of the agreements. He also claims that by refusing to sell the property to a third person, Stringam is violating the fiduciary relationship that exists between the parties.

3. Stringam filed Motion to Strike Answer and Counterclaim on March 5, 1997.

4. Myers, represented by Larry L. Whyte, filed a Motion to Leave to Amend answer and Counterclaim on March 20, 1997. The parties later stipulated to allow Myers to file his Amended Answer and Counterclaim.

5. Stringam filed Answer and Counterclaim on April, 29, 1997.

6. Stringam filed Motion to Allow Substitute Performance and Offer to Tender Balance into Court. Stringam asked to tender \$104,000.00 to the Court since the deadline for the payment was approaching and counsel for Myers was not authorized to sign a stipulation for substitute performance. Stringam was concerned that Myers would not honor the agreement and accept the funds, hence the tender to the Court before the deadline of August 1, 1997.

7. Myers filed Objection to Motion to Allow Substitute Performance on August 18, 1997. Myers claimed the offer to tender was vague, untimely, and not for the full amount due and

owing, but did not indicate a balance he believed was owing

8 Stringam file Response to the Objection on September 24, 1997 Stringam's offer was timely and was made to keep Myers from claiming she had defaulted on the loan Furthermore, under UCA§ 78-27-1, a written offer is deemed to be an actual production and tender of the payment if the defendant refuses to accept the offer

An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument or property

9 Oral arguments were held on October 1, 1997, before Judge Eyre, who found that Stringam had attempted to make a tender offer She was ordered to tender \$109,000 00 to the Court by October 7, 1997 Myers could petition the Court to withdraw the money to make the payments on the underlying trust deed The Defendant would be responsible for the underlying trust deed payments

10 Stringam filed Motion for Expedited Declaratory Relief Requiring Defendant to Tender Title into Court on October 16, 1999 Stringam argued that she deposited the funds into Court, but Myers did not provide any indicia that he had clear title to the property Stringam asked the Court to order title be transferred to Stringam and allow Myers to receive a trust deed in the property to protect his interest in any additional amounts the Court may determine Myers in entitled to receive

11 Myers filed Memorandum in Opposition to Motion for Expedited Declaratory Relief on

October 31, 1997. Myers claimed the amount due to him is \$134,000.00, not \$109,000.00.

Further it is argued that Stringam did not tender this amount to the Court and is now in default.

12. Stringam filed a reply to the Memo in Opposition for Expedited Declaratory Relief on November 6, 1997. Stringam paid \$109,000.00 into the Court, which was addressed by the Court. Myers never established his right to the funds and has not yet furnished proof of his ability to provide Stringam with clear title. Furthermore, the amount of the balloon payment is one of the grounds of litigation. The agreement was so unclear that it required judicial interpretation as to how to compute the balance due. Myers drafted the agreement in question. [[[Though Myers claimed that Stringam admitted \$134,000.00 was the amount owed, Stringam's position is that she admitted she would be willing to tender this amount if he would give her clear title. He has never shown he can give title, and Stringam has not agreed that this is the proper amount due.]]]

13. The parties came before the Court on December 1, 1997. Stringam was allowed to withdraw her funds from the Court. She was ordered to pay \$32.84 per day in interest from August 1, 1997 through the day she withdraws the money. Stringam was also ordered to pay the full mortgage amount of \$1,038.00. (Mr. Morley drafted the Order and changed the interest payment to \$50.00.)

14. Erin Stovall filed Motion to Quash Subpoena and Motion for Protective Order and Request for Fees on March 9, 1997. Erin moved for a protective order that her deposition not be has on the grounds that she is a resident of Salt Lake and has been subpoenaed to appear in Utah

County. She claimed this is necessary to protect her from undue burden and expense.

15. Stringam filed Motion to Amend Complaint on March 10, 1998. During the course of discovery Stringam learned that Erin and Patrick Stovall still have an interest in the property.

Erin filed a Notion of Lis Pendens on October 22, 1997.

16. Myers filed Motion for Summary Judgment on March 13, 1998. The Summary Judgment stated that Stingam had not paid the balloon payment, she had defaulted and therefore, summary judgment was appropriate for Myers. Myers claimed Stringam defaulted by not paying the funds on August 1, 1997. Myers then sent her a letter advising her she was in default and gave her 30 days to tender payment. Myers then claimed that after several letters between counsel, Stringam filed the Motion to Allow Substitute Performance and Offer to Tender Balance. In actuality, Stringam filed the Motion to Allow Substitute Performance in July, several days before the August 1 deadline. Stringam filed this Motion because she was concerned that Myers would not accept the payments she was making. In addition, Stringam asked the Court to determine what the balloon payment should be because Myers either didn't tell her, or named an amount that seemed high and couldn't be reconciled with the agreement.

17. Stringam filed Memo in Opposition to Erin Stovall's Motion to Quash Subpoena on March 16, 1998. Stringam claimed service was proper, and that since Erin conducted business in Utah County, her appearance in Utah County is proper.

18. Motion to Quash is Granted and Order is entered on March 16, 1998. She was also

awarded attorney fees and costs in the sum of \$200.00.

19. The Order on Stringam's Motion to Amend Complaint was signed on March 20, 1998.

20. Stringam file Amended Complaint on March 10, 1998 naming Erin and John Patrick Stovall.

21. Myers filed Objection to Motion and Amend Complaint on March 25, 1998. Myers claimed the Stovalls have no interest and allowing them to be added will only cause undue delay and prejudice.

22. Stringam file Rule 56(f) Motion to Conduct Additional Discovery prior to being required to file a memo in opposition to Myer's Motion for Summary Judgment. Stringam asserted that through Myers claimed he sent Notice of Default to Stringam regarding the balloon payment, neither she nor her counsel received it. Stringam pointed out there were numerous issues of material fact in dispute, including some required additional discovery.

23. On May 4, 1998, Morris Myers submitted notice that Larry Whyte would no longer be representing him and he would be representing himself.

24. Larry Whyte submits Notice of Withdraw of Counsel on May 4, 1998. Myers also filed Notice of Withdraw of Summary Judgment on May 4, 1998.

25. Myers filed Answer to Stringam's Amended Complaint on May 8, 1998. Myers denied each and every allegation and claimed Stringam forfeited any right to interest she has in the property by failing to make the balloon payment. He also claimed he is the only person with any



interest in the property.

26. A Default Certificate was entered in error on May 18, 1998, against Erin Stoval for failing to answer the Complaint.

27. Erin Stovall filed an Answer on May 14, 1998.

28. Myers filed Answer to Amended Complaint on June 28, 1998, with two Counterclaims. He sues for Quiet Title against Stringam because she hasn't yet paid the balloon payment. And he sues for eviction and damages, claiming she is unlawful detainer of the property. He also cross-claims for declaratory relief against Erin Stovall for the lis pendens action.

29. Stringam filed Objection to Filing of and Motion to Strike Myers 2<sup>nd</sup> Amended Answer on July 14, 1998. Myers had already answered the Amended Complaint on May 8, 1998. He cannot file an Amended Answer without leave of Court.

30. Myers filed Reply to the Objection to Filing of and Motion to Strike on July 28, 1998. The Order allowing the Amended Complaint was signed before there was an opportunity for hearing on the amended complaint and "therefore the same is void as in violation of the 14<sup>th</sup> Amendment Due Process right to an 'meaningful opportunity to be heard.'" Bodie v. Connecticut, 401 U.S. 371, 380 (1971). Myers then moved the Court for an order vacating the March Order. He also claims the amended Complaint is a procedural nonentity, making the Answer a nonentity as well.

31. John Patrick Stovall filed Answer to Amended Complaint on September 14, 1998.

32. Morris Myers and Patrick Stovall filed Joint Motion for Summary Judgment on September 22, 1998, contending that the balloon payment was due but was not paid, and this was a material breach.

33. The parties appeared before Judge Eyre on October 7, 1998. The parties stipulated to allow Myers to amend his answer and counterclaim, and the Court denied the Motion to Strike. Trial was set for February 9-10, 1999.

34. Stringam filed Answer to John Patrick Stovall's Counterclaims on October 2, 1998.

35. Erin Stovall filed Response to the Motion for Summary judgement on October 5, 1998. She did not object to summary judgment being entered as long as her interest is not damaged.

36. Stringam filed a Rule(f) Motion to Conduct Additional Discovery in Order to Supplement her Opposition to the Joint Motion for Summary Judgment. Myers and Stovall had not provided documents showing how and when Stovall's interest in the property was transferred to Myers. There are factual issues precluding Summary Judgment.

37. Notice to Submit on Joint Motion for Summary judgment is filed on October 16, 1998.

38. The Rule(f) Motion to Conduct Additional Discovery was Granted by the Court on October 26, 1998 in Memorandum Decision. Stringam has until December 1, 1998 to file a responsive pleading. At that time either party could file a Notice to Submit the Motion for Decision.

39. Order on Stringam's Motion to Strike Myer's Amended Answer is signed by the Court on

November 12, 1998. The parties stipulated to allow Myers to file his amended Answer. The Court agreed that this would be the final amended Answer and Counterclaim to be filed.

40. Stringam filed Supplemental Memo in Opposition to the Motion for Summary Judgment on December 1, 1998. Stringam lists several factual issues. The nature of the agreement is in dispute: (1) the text of the agreement does not reflect that it was a joint venture agreement. It was a real estate purchase agreement between Erin Stovall and the Stringams. (2) Myers has not produced an assignment from Erin Stovall. (3) Myers has produced an alleged assignment and deed from John Patrick Stovall, but there is an issue of fact as to whether or not he is the owner of the agreement or has any rights, since the divorce decree gives Erin the right to ½ of all amounts received from the home over \$109,000.00.

A second factual issue related to the balloon payment amount. Stringam claims she owes \$109,000.00, Myers claims \$134,000.00. The language in the contract is ambiguous. Neither Stovall nor Myers were parties to the agreement. There is no evidence that Erin transferred her interest to Patrick Stovall. Furthermore, any statement from Myers regarding the parties' original intent are not admissible because he was not present. Finally, even Patrick Stovall cannot provide a payoff amount. He did admit that Myers drafted the original agreement, so any ambiguities should be construed against Myers.

The final factual issue concerns the balloon payment. In spite of Myers' claims that

Stringam defaulted, she did tender the funds to the Court and she asked to do this several days before it was necessary.

41. Stringam filed Motions to Compel against Patrick Stovall and Myers on December 21, 1998. The motion against Myers specifically targets paragraph 14 of his allegation that he has been responsible for the payment of \$238.00 of the mortgage. Stringam asks that judgment by default be entered against Myers and that he be prohibited from introducing evidence regarding paragraph 14 unless he responds to the interrogatories within 10 days of the Order.

42. Myers filed Memo in Opposition to the Motion to Compel on December 22, 1998. Myers claimed that Stringam has conducted discovery in a manner to harass, inconvenience and injure Myers. He rests on the argument that Stringam is in default and has not paid the balloon payment that is owed.

43. Stringam filed Motion for Summary Judgment against Morris Myers on December 24, 1998. Stringam argued that Myers may not assert greater right than was granted to him by Patrick Stovall. Myers claims he received his right to the property from Patrick Stovall. Thus any right he had to the property is no greater than the right Patrick Stovall had. Stringam asks for Summary Judgment that Myer's right is no greater than the right granted by Patrick Stovall.

44. Stringam filed Motion for Summary Judgment against John Patrick Stovall on December 24, 1998. Stringam argues that any interest Mr. Stovall has was assigned to Myers.

45. Stringam filed Offer of Judgment on December 28, 1998, offering \$150,000 for which

judgment could be entered. Defendant would agree to pay costs.

46. Myers filed Memo in Opposition to the Motion to Compel on December 18, 1998. He relies on the argument that Stringam failed to pay the balloon payment and is in default. He also argues contract law, i.e. that a court may not rewrite a term of a contract by interpretation when the meaning is clear. He claims the agreement concerning the balloon payment was clear and unambiguous.

47. Stringam files Replies to Myers' and Stovall's Opposition to the Motions to Compel. Myers complains that the requests are abusive, harassing and inconvenient, nevertheless Stringam has made only one request for interrogatories that was calculated to discover admissible evidence. The objection is without sufficient grounds. The request are proper. Stringam questions what legal right Myers has to the property in question, what other reasons Myers is alleging the he has in support of his counterclaim and what evidence he has that he has been making the mortgage payments.

48. Counsel for Erin Stovall filed Motion to Continue on January 25, 1999, asking that the dates be continued because he is a Utah State Senator and cannot prepare or attend pre-trial conferences for the trial. The Court later granted the Motion and charged that the trial dates to April 4, 1999.

49. Myers filed Application to the Clerk for Certification of Default pursuant to Rule 55 (d), claiming Stringam failed to reply to his Counterclaims.

50. Myers' Certificate of Default was entered on February 2, 1999.

51. Stringam filed Request for Ruling on her Motions for Summary Judgment against Myers and Stovall and Motions to Compel against Myers and Stovall.

52. Stringam filed Motion to Set Aside Default on March 24, 1999. Stringam argued that when Myers fourth amended answer was filed, she had asked in her objection that she would be relieved of any obligation to answer the pleading, since the issues had already been answered before. The understanding of Laramie Merritt, who was in oral arguments, was that Stringam was not to file additional pleadings after the amended answer. Furthermore, the allegations in the counterclaim have been answered. In addition, Rule 5(a)(1) requires every paper, motion, notice, etc. be served on all parties. Myers was not relieved of that duty until "after the entry of default." Myers should have served Stringam. Stringam has shown more than good cause for setting the entry of default aside.

53. Stringam filed Answer to the Amended Answer and Counterclaim on March 24, 1999. Myers filed Memo in Opposition and Objection to the Motion to Set Aside Default on March 29, 1999. Myers argued there is no showing of just cause for opening the default nor reasonable excuse for Plaintiff's failure to reply to his counterclaim. He argued further that Stringam had not tendered the balloon payment, not substantially complied with the agreement.

54. The parties appeared before the Court on March 31, 1999. Plaintiff's Motion for Summary Judgement concerning Mr. Stovall was granted. Summary Judgement concerning Mr.

Myers, and Mr. Myers Motion for Summary Judgement were taken under advisement.

55. The Court entered a Memorandum Decision on April 12, 1999, where Plaintiff's Motion to Set Aside was granted. The summary Judgement concerning Mr. Myers, and Mr. Meyers Motion for Summary Judgement were denied.

56. Stringam filed a Notice of Intent to Use Prior Criminal Convictions for Impeachment Purposes on April 23, 1999.

57. Myers filed a Motion to Strike and Vacate the Ruling of October 28, 1997, on June 23, 1999, claiming that he was denied due process. Myers argued the discrepancy between the \$109,000 determined by the court, and \$134,000 the alleged correct figure, amounted to the Court rewriting the terms of the agreement.

Stringam filed a Memorandum in Opposition to Myer's Motion to Strike, on July 8, 1999. Stringham asserted that Myers' due process rights were not violated because he did have notice, and order was not in error.

58. The case came before the Court for trial on June 28, 1999. Counsel for Erin M. Stovall submitted Closing Arguments on July 2, 1999. Counsel for Jeannie Stringham submitted Closing Arguments and Motion for Rule 11 Sanctions on July 19, 1999. Myers never submitted Closing Arguments.

59. Myers submitted his Post-trial Motions and supporting memorandum on July 15, 1999. Myers asserts that Plaintiff's complaint should be dismissed because she has shown no right to

relief. Further Myers moves the court for an order striking the testimony of Plaintiff's expert (accountant), claiming that the parties intent is the best evidence to establish the terms of the contract, and that the contract is not ambiguous. Myers further moves the Court for an order that said contract and all rights of the plaintiff thereunder, are forfeited since she didn't make the balloon payment. Myers asks that the evidence and testimony as to his embezzlement conviction be stricken, as it illustrates no criminal conduct or mortal turpitude, while being prejudicial. Finally Myers asks for an order releasing the copy of Petition for Writ of Certiorari to him. Plaintiff's Memorandum in Opposition to Myers' Post-trial Motions was filed July 29, 1999. Myers' Reply was submitted on August 10, 1999.

60. Plaintiff's response to Erin M. Stovall's Closing Arguments were filed on August 4, 1999.

61. Plaintiff's Counsel submitted a Request for Ruling on August 23, 1999.

The Court entered a Ruling as to Myers Post-trial Motions on September 8, 1999. The Court denied Myers' Motion to Dismiss the claim as unsupported. The Court denied Myers' request for an Order striking the testimony of Plaintiff's expert witness. The Court also refused to find that Plaintiff's rights has been forfeited under the contract. Furthermore, the Court denied Defendant's Motions to find that Plaintiff did not tender the balloon payment, and motion to strike the evidence as to his embezzlement convictions. The Court granted Myers' request for the Petition for Writ of Certiorari to be released to himself. Finally the Court denied the Defendant's Motion to Vacate the Order of October 28, 1997. Myers still filed no Closing Arguments a



requested by the Court, but has appealed rulings on motions, rather than waiting for final ruling and judgement.

## DISCUSSION & ANALYSIS

At issue in this case is whether the agreement entered into between the parties constituted a joint venture or a lease/option to buy. Testimony was presented at trial that Ms. Stringam, and Ms. Stovall, believed the agreement to be a lease/option to buy. Mr. Myers and Mr. Stovall assert that the agreement was a joint venture. Mr. Myers drafted the agreement and therefore, according to case law ambiguities should be construed against Mr. Myers. *Trolley Square Assoc. v. Nelson* 886 P 2d 61 (Utah Ct. App. 1994). The fact that ambiguities are interpreted against the drafter's interests, supports the position that this contract is a lease/option to buy.

Likewise, the language of the contract supports the position that the contract is a lease/option to buy. "Second party agrees to sell and First Party agrees to buy said real property". This language taken on its face seems to indicate a lease/option to buy. Finally, Ms. Stovall who has no interest in the interpretation of the agreement, also believed the contract to be a lease/option to buy. The language of the contract, and the intention and actions of the parties, establish that the agreement was to lease/option to buy.

Being a lease/option to buy contract, Ms. Stringam has the right to purchase the property herself by paying the balloon payment. The Court finds Ms. Stringam is not in default for failing

to make the balloon payment. Ms. Stringam attempted numerous times to try to ascertain the amount required for the balloon payment. Ms. Stringam went further and made offers to Defendant Myers for the balloon payment. Myers continually avoided the Plaintiff and refused to let her perform her obligation under the agreement. According to Utah Code Ann. § 78-27-1;

An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.

Myers cannot frustrate an attempt by Stringam to perform and then fault her for failing to perform. Forfeiture is a harsh remedy and should not be imposed where Defendant's own acts caused delays. Plaintiff began well ahead of the due date to ascertain the balloon amount, therefore Ms. Stringam has the right to make balloon and perform on the contract.

The balloon payment amount has been the subject of much controversy. Defendant has made assertions that the calculation for the balloon payment was one that anyone could do. Defendant testified he failed to give them a sum for the balloon payment and stated "...Well, I thought you could compute it yourself". Trial transcript June 28, 1999 pg 49 line 14. Contrary to Mr. Myers' testimony it appears that even he himself had difficulty determining the sum. The numbers quoted in documents submitted to the court, varied with at least four differing sums named. The Court has established that the sum is ambiguous and evidence and expert testimony regarding the calculation was proper. The calculation for the balloon payment is further complicated by the nature of the agreement, that of a lease/option to buy with negative

amortization. Jude Eyre determined the payment to be a minimum of \$109,000 in the order on October 28, 1997. Mr. Myers asserts that taking into account the negative amortization, the true payment is \$134,618.57. Plaintiff argues the balloon payment should be set at \$104,211.75. Plaintiff supports this assertion under Utah Code Ann. § 78-27-3, which requires that if an objection "... is to the amount of money, terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards". Plaintiff contends that since Ms. Stringam made a valid legal tender offer of \$104,211.75, and that Mr. Myers failed to specify the amount of money required in his objection. Since he did not specify the amount Plaintiff argues he is bound by the amount of Plaintiff's tender offer.

Regarding Ms. Stovall's interest in the property, the Court earlier ruled through summary judgment that the interest Mr. Stovall had in the property was assigned to Morris Myers. However through the divorce decree of Mr. and Mrs. Stovall, Mrs. Stovall retained an interest in the property constituting ½ of all proceeds received for the property over \$109,000. "...Plaintiff is awarded an equitable lien against the American Fork property in the sum of one-half of all proceeds received in excess of \$109,000, which lien should become payable upon the sale of the real property". Therefore if the amount of the balloon payment is over \$109,000 there is the issue of whether Mrs. Stovall has an interest in ½ of those proceeds. Mr. Myers has asserted that the amount of the balloon payment should be \$134,618.57. Mr. Myers asserts that Ms. Stovall has

no interest in the amount of the proceeds received above \$109,000, in that the true selling amount is \$109,000, and the amount above that equal to \$134,618.57 is simply the interest resulting from the negative amortization. It is consistent that any amount over the selling price due to interest accrued as a result of the negative amortization, still constitutes proceeds of the sale. Therefore Ms. Stovall is entitled to ½ of the balloon payment amount over \$109,000.

Plaintiff's expert witness, an accountant offered another sum computed from his understanding of the contract terms and the added another element of the negative amortization. Based on his interpretation, the Court determines the balloon payment to be \$134,043.24, as of August 1, 1997. Plaintiff continued to pay \$800.00 per month until December 1997, when she began paying \$ 1038.00 per month. Plaintiff's pay off as of January 1, 2000 is \$141,547.21 under the agreement \$32,547.21 represents proceeds in excess of \$109,000, one half of these proceeds should be awarded to Ms. Stovall, or \$16,273.61. The first mortgage (trust deed and note) should be satisfied first from the \$141,547.21, then Ms. Stovall's award of \$ 16,273.61, and the balance remaining should be awarded to Morris Myers.

### **CONCLUSIONS OF LAW**

1. The contract between the parties is a lease/option to buy.
2. Ms. Stringam has a right to tender payment of the final balloon payment thereby performing and fulfilling her obligation on the contract.

3. The amount of the balloon payment is determined to be \$141,547.21, as of January 1, 2000.

THE COURT HEREBY DECREES AS FOLLOWS:

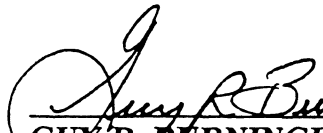
1. Once Ms. Stringam has tendered the balloon payment the first mortgage (Trust Deed and Note) should be satisfied and Mr. Myers shall turn over marketable title to Ms. Stringam.

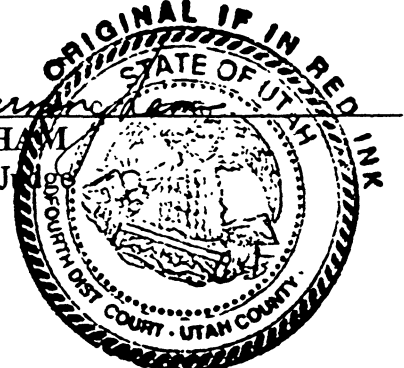
2. One-half of all proceeds over the amount of \$109,000 should be paid to Ms. Stovall in satisfaction of her lien/interest in the property, this amount being \$16,273.61.

3. The balance then remaining after paying the Trust Deed and Note and Ms. Stovall, should be awarded to Morris Myers.

4. Due to the fact that the parties involved in this dispute contributed to or created their own difficulties in this matter, each party should pay their own attorneys fees and costs, with the exception that Plaintiff's offer of judgment in December of 1998 for \$150,000.00 if accepted could have avoided the necessity of trial. Therefore a portion of costs and attorney fees associated with the trial of this matter should be awarded to Plaintiff. The Court determines Ms. Stringam should receive \$12,000.00 of her costs and attorney fees, from Defendant Myers.

DATED at Provo, Utah Jan 31, 2000.

  
GUY R. BURNINGHAM  
Fourth District Court Judge



**NOTICE OF INTENT TO SUBMIT FOR SIGNATURE**

**To: Terry R. Spencer, Morris Myers, John Patrick Stovall  
Attorney for Defendant, Defendants Pro Se**

Please take notice that the undersigned attorney for respondent will submit the above and foregoing FINAL JUDGMENT AND ORDER to the for signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 6<sup>th</sup> day of January, 2000.

DUVAL HANSEN WITT & MORLEY, P.C.

  
\_\_\_\_\_  
"TREY" A. R. DAYES III  
Attorney for Plaintiff

## MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing FINAL JUDGMENT AND ORDER, postage prepaid by first-class mail, on this 12<sup>th</sup> day of January, 2000, to the following:

Terry R. Spencer  
Attorney at Law  
140 West 9000 South, Suite 8  
Sandy, Utah 84070

Morris Myers  
P.O. Box 761  
Midvale, Utah 84047

John Patrick Stovall  
1159 East Garfield Avenue  
Salt Lake City, Utah 84105

  
DUVAL HANSEN WITT & MORLEY, P.C.

C Val Morley, Bar No. 6942  
"Trey" A.R. Dayes III, Bar No. 7504  
**DUVAL HANSEN WITT & MORLEY, P.C.**  
Attorneys for Jeannie Stringam  
110 South Main Street  
Pleasant Grove, Utah 84062  
Telephone: (801) 785-5350  
Facsimile: (801) 785-0853

2-4-00

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

*125 North 100 West, Provo, Utah 84601*

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**JEANNIE STRINGAM,**

Plaintiff,

vs.

**MORRIS MYERS, ERIN M. STOVALL,  
aka ERIN M. BISNER STOVALL, JOHN  
PATRICK STOVALL,**

Defendants.

**ADDENDUM TO FINAL JUDGMENT  
AND ORDER**

Case No. 970400100

Judge: Guy R. Burningham

After discussion in chambers with counsel C. Val Morley on behalf of the Plaintiff, Terry R. Spencer on behalf of Erin Stovall appearing via telephone, and Defendant Morris Myers pro se appearing via telephone, for purposes of clarification the Court adds and clarifies its Findings, and Final Judgment and Order as follows:

1. The ambiguity created by the negative amortization terms of the contract at issue, left the Court with the responsibility to determine the correct amount of the final balloon payment. Plaintiff argued that the balloon payment amount should be set at \$104,211.74 citing Utah Code



Ann. § 78-27-3, which requires that if an objection "...is to the amount of money, terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards." Plaintiff asserts that since Ms. Stringam made a valid legal tender offer of \$ 104,211.74 , and Mr. Myers failed to specify the amount of money required in his objection, he is bound by the amount of Plaintiff's tender offer.

When this matter came before the Court, Mr. Myers claimed that Ms. Stringam didn't make the balloon payment and therefore made no tender. The Court finds that Ms. Stringam attempted to tender payment by the deadline specified in the contract and the Court gives Ms. Stringam the benefit of her proffered tender and its timeliness. Furthermore although Mr. Myers objected to the tender, he failed to specify the nature of his objection. Mr. Myers objection to the tender failed to state an amount, said amount being in dispute. Therefore the Court finds that Mr. Myers is precluded from objecting to the propriety of the tender because he failed to specify the amount necessary to make tender sufficient.

However, the amount of the tender was inadequate, with Ms. Stringam offering tender of an amount clearly insufficient. There is no waiver where a full tender is not made. Therefore, Mr. Myers is precluded under Utah Code Ann. § 78-27-3 from making the claim that Ms. Stringam made no tender, but Ms. Stringam is precluded from binding Mr. Myers to the tendered amount where that amount and her fulfillment of the contract is in dispute.

2. The Court finds the prevailing party in this litigation has a right to attorneys fees

pursuant to paragraph six of the Agreement (Exhibit A) between the parties which states in pertinent part:

The parties agree that should either party default in any of the covenants or agreements herein contained the prevailing party in litigation shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this contract or in obtaining possession of the property in pursuing any remedy provided hereunder or by applicable law.

3. The Court finds that the Plaintiff is the prevailing party in this litigation and therefore has a right to attorneys fees and costs from December 21, 1998, the date Plaintiff extended to Myers her offer of judgment.

#### **FINAL JUDGMENT ADDENDUM**

It is hereby ORDERED ADJUDGED and DECREED as follows:

1. The amount of the Balloon payment shall remain \$ 141,547.21.
2. Plaintiff is awarded attorneys fees from December 21, 1998.
3. Within 30 days of the entry of this order, Plaintiff shall pay \$ 141,547.21 to the "Title Company" of her choosing with instructions to the Title Company to disburse the \$ 141,547.21 as follows:
  - a. To Terry R. Spencer in trust for Erin Stovall in the amount of \$ 16,273.61.
  - b. To the underlying mortgage holder on the property, payment in full of the underlying mortgage as per lender's payoff amount.
  - c. Duval Hansen Witt & Morley, P.C. in trust for Plaintiff, attorneys fees from December 21, 1998.
  - d. To Morris Myers the remainder of funds.

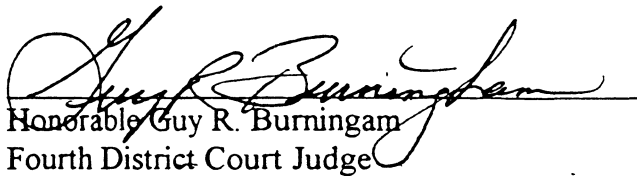
4. After payment of \$ 141,547.21 to the Title Company, disbursement of funds by the Title Company, and the filing with the Court of an Affidavit by the Title Company stating that funds have been distributed according to this order, title to the property at 98 West 500 North American Fork, Utah also know as:

COM. SW COR BLK 52, Plat A, American Fork City SR; N 110 Ft; E 138 FT; S 110 FT; W 138 FT to BEG ,

shall be quieted in Plaintiff, Jeannie Stringam

5. And it is further ordered that Plaintiff's judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise, or still owed after disbursement of funds, as shall be established by affidavit.

DATED: FEB 4, 2000

  
Honorable Guy R. Burningham  
Fourth District Court Judge

**NOTICE OF INTENT TO SUBMIT FOR SIGNATURE**

To: Terry R. Spencer, Morris Myers, John Patrick Stovall  
Attorney for Defendant, Defendant Pro Se

PLEASE TAKE NOTICE that the undersigned attorney for the Plaintiff will submit the above and foregoing **ADDENDUM TO FINAL JUDGMENT AND ORDER** to the Court for signature upon the expiration of five (5) day from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED 1/29/00.

DUVAL HANSEN WITT & MORLEY, P.C.

  
"TREY" A.R. DAYES III  
Attorney for Plaintiff

**CERTIFICATE OF MAILING**

I certify that on 1/20/00 I caused a true and correct copy of this

**ADDENDUM TO FINAL JUDGMENT AND ORDER**, to be mailed via first class to:

Terry R. Spencer  
Attorney at Law  
140 West 9000 South, Suite 8  
Sandy, Utah 84070

Morris Myers  
P.O. Box 761  
Midvale, Utah 84047

John Patrick Stovall  
1159 East Garfield Avenue  
Salt Lake City, Utah 84105

  
DUVAL HANSEN WITT & MORLEY, P.C.

FILED

August 1, 2000

AUG 03 2000

Utah Court of Appeals  
450 South State Street  
P.O. Box 140230  
Salt Lake City, Utah 84114-0230

COURT OF APPEALS

RE: Stringam v. Myers,  
Case No. 20000179-CA, citation of supplemental authority,  
Utah R.App.P. 24(i)

From the case of BA Mortg. & Intern. Realty v. American Nat. Bank,  
706 F. Supp. 1364 (N.D. Ill. 1989), the following should be  
included after the first paragraph under the heading Nature of the  
Case, Brief of Appellant, p. 6, [BA Mortg., 706 F.Supp, page 1371],

"A joint venture is an association of two or more persons to carry out a single enterprise for profit. . . . The relationship between joint venturers, like that existing between partners, is fiduciary in character and imposes upon the participants an obligation of loyalty and good faith in their dealings with each other with respect to the enterprise. . . . The relationship is governed by the legal principles to partnerships.

". . . [T]he attributes that determine the existence of the jural relationship [are],

"(1) an express or implied agreement to carry on some enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) a joint interest as shown by the contribution of property, financial resources, effort, skill or knowledge by each joint venturer; (4) some degree of joint proprietorship or mutual right to exercise control over the enterprise; and (5) provision for the joint sharing of profits and losses.

\* \* \*

"The existence of a joint venture may be inferred from facts and circumstances showing such an enterprise was in fact entered into . . . and the intent of the parties is the most significant element.

"Whether or not a joint venture exists is a question for the trier of fact as he is in the best position to judge the credibility of the witness.

"In this instance it is unnecessary to go beyond "the most significant element": the intent of the parties. Here the

[Agreement] specifically provides []: "'Whereas, First and Second Parties are desirous of entering into a joint venture arrangement respecting certain real property at 98 West 500 North, American Fork, Utah, . . .'"

The case [citation] is submitted because it contains definitional terms relevant to the case before the Court.

Yours very truly,

  
MORRIS MYERS

cc: Morley  
Spencer

Enc: Seven