

2000

Jeannie Stringam v. Morris Myers, et al. : Brief of Appellee

Utah Court of Appeals

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**IN THE COURT OF APPEALS FOR THE
STATE OF UTAH**

450 South State, Salt Lake City, Utah 84114-0230

JEANNIE STRINGAM,

Plaintiff/Appellee/Cross-Appellant,

v.

MORRIS MYERS, et al.

Defendant/Appellant/Cross-
Appellee.

Appeal No. 20000179-CA

Case No. 970400100
(Fourth District Court, Utah County, Judge
Guy Burningham)

Priority Classification 15

BRIEF OF APPELLEE

**APPEAL FROM THE JANUARY 31, 2000, FINAL ORDER AND JUDGMENT,
AND THE FEBRUARY 4, 2000, ADDENDUM TO FINAL JUDGMENT AND
ORDER**

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FILED
Utah Court of Appeals

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Clerk of the Court

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I. PARTIES

- A. Jeannie Stringam: Plaintiff/Appellee/ Cross-Appellant.
- B. Morris Myers: Defendant/Appellant/Cross-Appellee.
- C. Erin M. Stovall: Defendant in district court action.
- D. John Patrick Stovall: Defendant in district court action.

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None

IV. JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this appeal and cross-appeal pursuant to Utah Rule of Appellate Procedure 3(a), U.C.A. §§ 78-2-2(3)(j) & (4), and U.C.A. § 78-2a-3(2)(j).

V. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. STRINGAM'S ISSUES ON APPEAL

1. Whether the district court erred in failing to bind Myers to Stringam's \$104,211.74 tender offer pursuant to U.C.A. § 78-27-3 because Myers did not provide an alternate amount at the time he objected to the tender offer. "The proper interpretation of a statute is a question of law which we review for correctness, according no deference to the [district court's] legal conclusion." State v. Redd, 1999 UT 108 ¶ 10, 385 Utah Adv. Rep. 23 (citations omitted).

This issue was properly preserved for appeal. (Rec. at 87, 109, 1018 and 1026). An issue is preserved for appeal if the issue was raised and if the district court had an opportunity to consider the issue. Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129-30 (Utah Ct. App. 1997).

2. Whether the district court erred when it reduced Stringam's award of attorney fees without a finding that Stringam's attorney fees were unreasonable. "Calculation of reasonable attorney fees is in the sound discretion of the trial court, . . . , and will not be overturned in the absence of a showing of a clear abuse of discretion. *However*, an award of attorney fees must be supported by evidence in the record." Dixie

State Bank v. Bracken, 764 P.2d 985, 94 Utah Adv. Rep. 3 (Utah 1988) (citations omitted) (emphasis added). This issue was properly reserved for appeal. (Rec. at 991 & 1048).

B. STRINGAM'S ISSUES THAT HAVE ARISEN IN THE COURSE OF THIS APPEAL

1. Whether Myers' appeal should be dismissed for lack of jurisdiction due to Myers' faulty service of his Notice of Appeal on Stringam. Lack of jurisdiction is a defense that may be raised at any time. See Kennecott Corp. v. State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991). See also Utah R. Civ. P. 12(h)(2).

2. Whether the Court should strike Myers' August 1, 2000, letter citing supplemental authority because it violates Utah Rule of Appellate Procedure 24(i).

3. Whether the Court should decline to consider Myers' Appellate Brief because it violates the content and formatting requirements of the Utah Rules of Appellate Procedure, specifically Rule 24.

C. ISSUES THAT MYERS RAISED IN HIS APPELLATE BRIEF

1. Whether the district court properly refused to grant Myers' Post-trial Motions. If the Court concludes that Myers' Post-trial Motions were made pursuant to Utah Rule of Civil Procedure 60(b), then the standard of review is abuse of discretion. Van Der Stappen v. Van Der Stappen, 815 P.2d 1335, 1337, 166 Utah Adv. Rep. 58 (Utah App. 1991). The same standard applies if the Court concludes that Myers' Motions were made under Utah Rule of Civil Procedure 59. Roundy v. Staley, 984 P.2d 404, 406,

374 Utah Adv. Rep. 15 (Utah App. 1999) (applying the abuse of discretion standard of review to the denial of plaintiff's motion for a new trial pursuant to Utah Rule of Civil Procedure 59). Myers raises this issue here for the first time since the conclusion of the district court action.

2. Whether the district court correctly determined that the agreement was ambiguous and whether the court's subsequent admission of extrinsic evidence to assist in the interpretation of the agreement was proper. "Whether an ambiguity exists in a contract is a question of law which we review for correctness." Sprouse v. Jager, 806 P.2d 219, 221-22, 153 Utah Adv. Rep. 27 (Utah App. 1991) (citing Jarman v. Reagan Outdoor Advertising Co., 794 P.2d 492, 494 (Utah App. 1990)). However, "[q]uestions of intent as determined by extrinsic evidence are questions of fact to be decided by the trier of fact and are subject to the 'clearly erroneous' standard of review." Id. (citing Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah 1990)).

3. Whether the parties' appeal from the Addendum to Final Judgment and Order is proper where the district court did not award to Stringam a sum-certain amount of attorney fees but instead awarded fees from a specific date. The standard of review here is correctness. Kennecott Corp. v. State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991).

4. Whether Stringam can appeal from the Final Order and Judgment and from the Addendum to Final Judgment and Order even though she was found to be the prevailing party in the district court action. Because this issue does not require the Court

to review a district court finding or conclusion, there is likely no applicable standard of review. However, if the Court reviews this issue, it should review conclusions of law for correctness, State v. Green, 2000 UT App 33 ¶ 5, and findings of fact for clear error, Bell v. Elder, 782 P.2d 545, 547, 121 Utah Adv. Rep. 16 (Utah App. 1989).

5. . Whether the district court erred in allowing Stringam to tender \$109,000 to the district court pursuant to U.C.A. § 78-27-4 as payment of the balloon payment. The standard of review is correctness. State v. Redd, 1999 UT 108 ¶ 10, 385 Utah Adv. Rep. 23.

IMPORTANT NOTE: Besides the five issues enumerated above, Myers has raised eight other issues in his various appellate level documents. See Myers' Docketing Statement¹, Motion to Dismiss², and Response to Stringam's Motion for Summary Disposition of All Issues³. The Court should summarily dismiss all of the other issues

¹Myers raised the following issues in his Docketing Statement: (1) Whether the trial court erred in issuing an Addendum to the Final Judgment and Order; (2) Whether the Addendum to Final Judgment and Order was entered in violation of Myers' Fifth Amendment and Fourteenth Amendment due process rights; (3) Whether Myers may raise new issues under his theory that a judgment is not final and binding until affirmed on appeal; (4) Whether the award of attorney fees to Stringam was proper; and (5) Whether the district court erred in refusing to find that Stringam breached the Agreement and in refusing to grant Myers' relief of quiet title, damages and eviction.

²Myers raised the following issues in his Motion to Dismiss: (1) Whether Stringam's cross-appeal should be dismissed because Stringam did not designate in her Docketing Statement the exact issues she was appealing; and (2) Whether Stringam can appeal from an order that her attorney prepared at the request of the district court.

³In Myers' Response to Stringam's Motion for Summary Disposition of All Issues he states that "[t]his response will, to some extent, follow the order of points seemingly raised by appellee Stringam's attorneys in their motion. Beyond that *it will more*

that Myers has raised over the course of this appeal because he failed to raise them in his Appellate Brief. Stringam raises this argument here because it is unclear whether the Court will consider all issues now. (See June 14, 2000, Order Denying and Deferring Motions for Summary Disposition, stating, “ IT IS HEREBY ORDERED . . . that the issues raised are deferred until plenary presentation and consideration of the case.”)

VI. DETERMINATIVE LAW

A. CONSTITUTIONAL PROVISIONS

None

B. STATUTES

1. U.C.A. § 78-27-3. See Addendum attached.
2. U.C.A. § 78-27-4. See Addendum attached.

C. ORDINANCES

None

D. RULES

None

VII. STATEMENT OF THE CASE

A. NATURE

This case arises out of a real estate lease/purchase agreement (“Agreement”) where

resemble an original motion to reverse.” (Rec. at Response to Summary Disposition, page 2, ¶ 3). Myers raised the following issue in his Response: Whether the trial court erred in refusing to grant Myers’ Utah R. Civ. P. 41(b) Motion to Dismiss.

Plaintiff/Appellee/Cross-Appellant Jeannie Stringam (“Stringam”) sought to exercise her option to purchase the real estate in question (“Home”) and requested that Defendant/Appellant/Cross-Appellee Morris Myers (“Myers”) provide her with a balloon payment amount on the Agreement and that he allow her to purchase the Home. Myers refused to do either, so after several offers Stringam filed suit and eventually tendered a balloon payment to Myers based on her calculations of the amount due.

B. COURSE OF PROCEEDINGS

1. On February 3, 1997, Stringam filed a complaint against Myers seeking the following remedies: (a) specific performance in the acceptance of Stringam’s tender to pay the underlying trust deed note in its entirety (“balloon payment”); (b) declaratory judgment stating that the sale of the Home was a condition precedent to the division of proceeds exceeding \$109,000 and that Stringam was entitled to purchase the Home; and (3) that title in the Home be quieted to Stringam. (Rec. at 9).

2. Myers filed his first Answer on February 25, 1997, in which he denied every allegation and set forth three counter-claims, among which were: (1) that the Agreement was a joint venture that required the Home be sold to a third party; (2) that he had suffered \$100,000 in damages; and (3) that Stringam breached her fiduciary duty to him by refusing to sell the home to a third party. (Rec. at 16).

3. On March 5, 1997, Stringam filed her Motion to Strike Myers' Answer and Enter His Default, or in the alternative Motion for More Definite Statement and Plaintiff's Answer to Defendant's Counterclaims. (Rec. at 27).

4. On March 20, 1997, through counsel Larry Whyte, Myers filed his Motion for Leave to Amend Answer and Counterclaim. (Rec. at 32).

5. On April 29, 1997, with Stringam's consent, (Rec. at 55), Myers filed an amended Answer and Counterclaim. (Rec. at 69).

6. On April 29, 1997, Stringam answered Myers' counterclaims. (Rec. at 81).

7. On July 31, 1997, Stringam filed a Motion to Allow Substitute Performance and Offer to Tender Balance to Court, requesting: (1) that Myers accept \$104,211.74 as payment in full of the balloon payment; and (2) that the district court allow her to tender the \$104,211.74 to the court pending the outcome of the case. (Rec. at 87).

8. On August 18, 1997, Myers filed his Objection to Allow Substitute Performance, claiming that Stringam's offer was untimely and incorrect in its amount, but failing to provide an alternate amount. (Rec. at 93). On September 24, 1997, Stringam filed her Response to the Objection. (Rec. at 109).

9. On October 1, 1997, oral arguments were held before the district court at which time the court found that Stringam had attempted to tender her offer to Myers and

ordered Stringam to tender \$109,000 to the court. (Rec. at 110). The district court issued its ruling in a memorandum decision on or about October 27, 1997, (Rec. at 125), and in a November 10, 1997, Order (Rec. at 158).

10. On October 16, 1997, Stringam filed her Motion for Expedited Declaratory Relief Requiring Defendant to Tender Title into Court. (Rec. at 116).

11. On October 31, 1997, Myers filed a Memorandum in Opposition to Motion for Expedited Declaratory Relief Requiring Defendant to Tender Title into Court. (Rec. at 135).

12. On November 6, 1997, Stringam filed her Reply to Myers' Memorandum in Opposition to Motion for Expedited Declaratory Relief Requiring Defendant to Tender Title into Court, in which she stated that she would be willing to pay \$134,000 if Myers could provide good title to the Home. (Rec. at 155).

13. In a December 1, 1997, district court hearing, the district court allowed Stringam to withdraw the \$109,000 from the court, and ordered her to pay the monthly mortgage payments on the Home, i.e. \$1,038.00. (Rec at 161 & 165). On December 16, 1997, Stringam withdrew the \$109,000 from the district court. (Rec. at 166).

14. On March 10, 1998, Stringam filed a Motion to Amend Complaint and Name Additional Parties after she learned through discovery that Erin Stovall and John

Patrick Stovall possibly still had an interest in the Home. (Rec. at 201).

15. On March 13, 1998, Myers filed a Motion for Summary Judgment, claiming that Stringam had defaulted on the Agreement by not paying him the balloon payment on or before the August 31, 1997, deadline. (Rec. at 224). Stringam subsequently filed a Rule 56(f) Motion to Conduct Additional Discovery, requesting that she be allowed an extension of time to conduct further discovery before being required to oppose Myers' Motion for Summary Judgment. (Rec. at 283).

16. On March 10, 1998, Stringam filed her Amended Complaint, naming Erin Stovall and John Stovall as defendants (Rec. at 279), and on March 20, 1998, the court signed the order allowing Stringam to amend her Complaint (Rec. at 264).

17. On May 18, 1998, a Default Certificate was entered against Erin Stovall for her failure to answer the Amended Complaint (Rec. at 334), which was subsequently withdrawn because Erin Stovall filed an Answer on May 14, 1998 (Rec. at 332).

18. On March 25, 1998, Myers filed his Objection to Motion to Amend Complaint, claiming that the Stovalls had no interest in the Home. (Rec. at 281).

19. On May 4, 1998, Myers and Larry Whyte both submitted notices that Larry Whyte was withdrawing as Myers' counsel. (Rec. at 316 & 317).

20. Also on May 4, 1998, Myers submitted a Notice of Withdrawal of

Summary Judgment. (Rec. at 318).

21. On May 8, 1998, Myers filed his Answer to Stringam's Amended Complaint, claiming: (1) that Stringam forfeited her rights in the Home when she failed to make the balloon payment; and (2) that he was the only person with an ownership interest in the Home. (Rec. at 320).

22. On June 28, 1998, Myers filed yet another Answer to Amended Complaint in which he counterclaimed: (1) that title in the Home be quieted to him because Stringam did not tender the balloon payment to him; and (2) that Stringam be evicted with damages awarded to Myers for Stringam's "unlawful detainer." (Rec. at 346).

23. On July 14, 1998, Stringam filed her Objection to Filing of and Motion to Strike Myers Second Amended Answer because Myers had already answered the Amended Complaint on May 8, 1998. (Rec. at 352).

24. On July 28, 1998, Myers filed his Reply to Stringam's Objection to Filing of and Motion to Strike Myers Second Amended Answer. (Rec. at 358).

25. On September 14, 1998, John Stovall filed his Answer to Stringam's Amended Complaint. (Rec. at 369). Stringam answered John Stovall's counterclaims on October 2, 1998. (Rec. at 385).

26. On September 22, 1998, Myers and John Stovall filed their Joint Motion for

Summary Judgment. (Rec. at 373).

27. Stringam subsequently filed a Rule 56(f) Motion to Conduct Additional Discovery in Order to Supplement her Opposition to the Joint Motion for Summary Judgment. (Rec. at 391). On October 26, 1998, the district court granted Stringam's Rule 56(f) Motion, allowing Stringam until December 1, 1998, to answer the Joint Motion for Summary Judgment. (Rec. at 432).

28. In an October 7, 1998, hearing, the parties stipulated to allow Myers to amend his Answer again. (Rec. at 411 & 442)

29. However, the district court ordered that no further amendments to pleadings would be allowed unless Stringam learned that other entities owned interest in the Home. (Rec. at 411 & 442)

30. On October 16, 1998, a Notice to Submit the Joint Motion for Summary Judgment was filed. (Rec. at 423).

31. On December 1, 1998, Stringam filed a Supplemental Memo in Opposition to the Motion for Summary Judgment, stating that the nature of the Agreement was in dispute, which raised material issues of fact. (Rec. at 482).

32. On December 24, 1998, Stringam filed a Motion for Summary Judgment against Myers, stating that Myers could not assert a greater right to the Home than what

he had received from John Stovall. (Rec. at 521). Also on December 24, 1998, Stringam filed a Motion for Summary Judgment against John Stovall. (Rec. at 545).

33. On December 28, 1998, Stringam filed her Offer of Judgment, offering \$150,000. (Rec. at 570).

34. On January 25, 1999, Erin Stovall's counsel submitted a Motion to Continue the trial. (Rec. at 604). On February 4, 1999, the district court granted the motion, and set trial for April 30, 1999, and May 3, 1999. (Rec. at 609 & 615).

35. Without notice to Stringam, Myers filed an application to the court clerk for Certification of Default (Rec. at 591) for Stringam's failure to answer one of his counterclaims, raised in his fourth and final answer. Default was entered on February 3, 1999, (Rec. at 610), even though the district court had ordered that no further amendments to pleadings would be allowed (Rec. at 443).

36. On March 24, 1999, Stringam filed her Motion to Set Aside Default (Rec. at 729), stating that she was not served with notice of Myers's intent to seek default, and that it was the understanding of Stringam's counsel that no further pleadings were to be filed (Rec. at 624, 622 ¶ 11).

37. On March 24, 1999, and April 5, 1999, Stringam answered (Rec. at 733) and replied (Rec. at 741) to Myers' fourth and final Amended Answer and

Counterclaims.

38. On March 29, 1999, Myers filed his Memo in Opposition and Objection to Stringam's Motion to Set Aside Default. (Rec. at 735).

39. In a March 31, 1999, hearing, the district court granted Stringam's summary judgment motion against John Stovall, ordered Myers to calculate the amount of the balloon payment, and took all other summary judgment motions under consideration. (Rec. at 737).

40. In an April 8, 1999, letter to the district court Myers stated the amount of the balloon payment at \$135,239.83. (Rec. at 752).

41. In an April 12, 1999, Memorandum Decision, the court granted Stringam's Motion to Set Aside Default, and denied all other summary judgment motions. (Rec. at 749).

42. On April 23, 1999, Stringam filed a Notice of Intent to Use Prior Criminal Convictions for Impeachment Purposes. (Rec. at 757).

43. On April 30, 1999, trial was held for a full day, to be concluded in June. (Rec. at 1047).

44. On June 10, 14 & 23, 1999, Myers filed Motions to Strike and Vacate the Ruling of October 28, 1997. (Rec. at 767, 771 & 774 respectively). On July 8, 1999,

Stringam filed her Response to Myers' Motion to Strike. (Rec. at 814).

45. On June 28, 1999, the trial resumed and was completed, except that the district court allowed the parties to submit written closing arguments. (Rec. at 816 & 1048).

46. On July 2, 1999, Erin Stovall's counsel submitted Closing Arguments. (Rec at 901). On August 4, 1999, Stringam filed her response to Erin Stovall's Closing Arguments. (Rec. at 914).

47. On July 15, 1999, without submitting closing arguments, Myers filed several Post-trial Motions, arguing: (1) that Stringam's complaint should be dismissed because she had showed no right to relief; (2) that the testimony of the expert accountant should be stricken because the parties' intent was the best evidence; (3) that Stringam was in default for failure to make the balloon payment; (4) that the court should strike the evidence of Myers' convictions; and (5) that Myers' Petition for Writ of Certiorari be released to him. (Rec. at 868 & 872).

48. On July 29, 1999, Stringam filed her Opposition to Myers' Post-trial Motions. (Rec. at 906).

49. On July 19, 1999, Stringam submitted her Closing Arguments, and filed a Motion for Rule 11 Sanctions. (Not included in the district court record)

50. On August 23, 1999, Stringam's counsel submitted a Request for Ruling on all issues, including Stringam's Motion for Rule 11 Sanctions. (Rec. at 920).

51. In an August 31, 1999, Ruling, the district court denied Myers' Post-trial Motions, with the exception that the court granted Myers request that his Petition for Writ of Certiorari be released to him. (Rec. at 925). On October 29, 1999, the Ruling was entered as an Order. (Rec. at 955).

52. The court also denied Myers' Motion to Vacate the October 28, 1997, Order on September 8, 1999. (Rec. at 925 & 955).

53. On September 30, 1999, Myers filed a Notice of Appeal. (Rec. at 939). On November 10, 1999, Myers filed an Amended Notice of Appeal. (Rec. at 956). On December 14, 1999, the Utah Supreme Court held that it lacked jurisdiction over Myers' appeal. (Rec. at 980 & 979).

54. On December 16, 1999, the district court issued a Memorandum Decision regarding the issues argued at trial. (Rec. at 977). On January 31, 2000, the district court issued the Final Order and Judgment in which it memorialized its findings and conclusions. (Rec. at 1018).

55. On January 13, 2000, the parties participated in a telephone conference at which arguments regarding amendments to the Final Order and Judgment were made.

(Rec. at 991).

56. On January 14, 2000, the district court issued an Addendum to Memorandum Decision (Rec. at 993), which was memorialized on February 4, 2000, when the district court issued the Addendum to Final Judgment and Order. (Rec. at 1026).

57. On February 29, 2000, Myers filed a Notice of Appeal in which he listed the Final Order and Judgment and the Addendum to Final Judgment and Order as the orders he was appealing from. (Rec. at 1027).

58. Stringam filed a Notice of Cross-Appeal on March 8, 2000. (Rec. at 1034).

59. On March 22, 2000, Myers filed his Docketing Statement, and on or about March 27, 2000, Stringam filed her Cross-Docketing Statement.

60. On April 2, 2000, Stringam filed her Motion for Summary Disposition of All Issues.

61. On or about April 18, 2000, this case was assigned to the Utah Court of Appeals. (Rec. at 1041).

62. On or about April 17, 2000, Myers filed his Motion to Dismiss Appellee's Cross-Appeal.

63. On or about April 24, 2000, Myers filed his Motion to Withdraw

Addendum to Final Judgment and Order, Date February 4, 2000, from Pending Appeal Proceedings.

64. On or about April 27, 2000, Stringam filed her Memorandum of Points and Authorities in Opposition to Myers' Motion to Dismiss.

65. On or about May 2, 2000, Myers filed his Reply to Stringam's Memorandum of Points and Authorities in Opposition to Myers' Motion to Dismiss.

66. On May 5, 2000, Stringam filed her Memorandum of Points and Authorities in Response to Myers' Motion to Withdraw Addendum.

67. Also in May 2000 the Court issued a Motion to Dismiss for lack of jurisdiction.

68. On May 23, 2000, Stringam filed her Memorandum of Points and Authorities in Support of Appellate Jurisdiction over Stringam's Cross-Appeal.

69. On or about May 25, 2000, Myers filed his Response to Stringam's Motion for Summary Disposition of all Issues.

70. On or about June 7, 2000, Stringam filed her Motion to Dismiss Myers' Appeal for Lack of Jurisdiction.

71. Also on or about June 7, 2000, Stringam filed her Reply to Myers' Response to Stringam's Motion for Summary Disposition of All Issues.

72. On June 14, 2000, the Court issued its Order Denying and Deferring Motions for Summary Disposition.

73. Myers filed his Appellate Brief on or about July 25, 2000.

74. On or about August 1, 2000, Myers filed a Citation of Supplemental Authority.

C. TRIAL COURT DISPOSITION

The district court found that the Agreement was ambiguous, that Stringam was entitled to purchase the Home, and that the balloon payment was \$141,547.21. The court ordered that Stringam place \$141,547.21 in an escrow account, and that a title company of Stringam's choosing distribute the funds to the underlying mortgage holder first, then to Erin Stovall, and then Myers' portion was to be distributed to Stringam for payment of her attorney fees. In addition, upon the filing of an affidavit by the title company stating that the funds had been disbursed pursuant to the order, title in the Home was to be quieted to Stringam.

VIII. RELEVANT FACTS

1. On October 8, 1990, Wade and Jeannie Stringam entered into a real estate lease/purchase agreement ("Agreement") with Erin Stovall (then married to Patrick Stovall) in regards to a home located at 98 West 500 North, American Fork, Utah

(“Home”). (Rec. at 820, Exhibit No. 1, located in manilla envelope marked “Exhibits’.
See also Addendum).

2. Although Morris Myers (“Myers”) was not an original party to the Agreement, he drafted the Agreement for the parties (Rec. at 484, Admission 1), acting as a pseudo-attorney for Erin Stovall.

3. The Agreement provided that Wade and Jeannie Stringam would pay \$800.00 of the \$1,038.00 monthly mortgage payments on the Home’s underlying trust deed note until August 1, 1997, when the balance of the purchase price came due in one balloon payment. (Rec. at 820, Exhibit No. 1, located in manilla envelope marked “Exhibits’.
See also Addendum).

4. The Agreement further provided that if Wade and Jeannie Stringam were unable to pay the \$800.00 then they had the option to sell the Home prior to the August 1, 1997, deadline and divide the proceeds in excess of \$109,000 with Erin Stovall. (Id).

5. Finally, the Agreement allowed Wade and Jeannie Stringam to pay the balloon payment and purchase the Home. (Id.).

6. Sometime after 1990 Erin Stovall conveyed part of her interest in the Home to John Patrick Stovall in a divorce settlement, but reserved one-half of the interest in the potential proceeds from the sale of the Home if they exceeded \$109,000. (Rec. at 901,

Exhibit A, ¶¶ 10 - 11; and Rec. at 820, Exhibits 54 & 59, located in manilla envelope marked “Exhibit”).

7. In addition, subsequent to the Agreement Wade Stringam passed away, leaving his interest in the Home and his obligations under the Agreement to Jeannie Stringam (“Stringam”).

8. Stringam made the \$800.00 per month payments from the inception of the Agreement until the district court ordered her to make the full payment of \$1,038.00. (Rec. at 1018, 1014 ¶ 13; and Rec. at 161 & 165).

9. On August 9, 1994, John Stovall transferred his interest in the Home to Myers. (Rec. at 820, Exhibit 6, located in manilla envelope marked “Exhibits”).

10. In October 22, 1996, Stringam’s counsel mailed a letter to Myers respectfully requesting that Myers allow Stringam to purchase the Home. (Rec. at 820, Exhibit 11, located in manilla envelope marked “Exhibits”).

11. Myers refused to allow Stringam to purchase the Home. (Rec. at 820, Exhibit 13, located in manilla envelope marked “Exhibits”).

12. Stringam’s subsequent attempts to negotiate with Myers and her several offers to pay the balloon payment based on her calculations proved futile. (Rec. at 1018, 1002).

13. Because Myers refused to cooperate, Stringam worried Myers would continue to thwart her efforts to purchase the home before the August 1, 1997, deadline.

14. On February 3, 1997, Stringam filed a Complaint against Myers. (Rec. at 9).

15. Myers countered, claiming that the Agreement was a joint venture and that the Agreement prohibited a sale of the Home to Stringam. (Rec. at 16).

16. Subsequent to the balloon payment due date, Myers voluntarily abandoned his claim that the Agreement was a joint venture (Rec. at 1046, Page 31, Lines 2 through 15), and concentrated on his averment that Stringam had breached the Agreement by failing to pay the balloon payment and by refusing to vacate the Home.

17. On August 18, 1997, Stringam filed a Tender Offer and Motion to Allow Substitute Performance, in which Stringam tendered \$104,201.75, the amount that she calculated to be due per the Agreement, to Myers as payment in full of the balloon payment. (Rec. at 87).

18. The purpose of Stringam's tender offer and motion was to prevent Myers from claiming that Stringam had defaulted on the Agreement. (Rec. at 87, 86).

19. Myers rejected Stringam's \$104,201.75 tender offer. (Rec. at 93).

20. Over Myers' objection, the district court allowed Stringam to tender the

balloon payment to the court, but increased the amount to \$109,000 with the understanding that the actual amount of the balloon payment would have to be determined at trial. (Rec. at 1018, ¶ 9; Rec. at 125; and Rec. at 158).

21. In an August 14, 1997, letter, Myers notified Stringam that she was in default for failing to pay the balloon payment, that the balloon payment amount was \$134,618.47, and that Stringam had 30 days to cure the default. (Rec. at 820, Exhibit 23, located in manilla envelope marked “Exhibits”).

22. Subsequent to her tender of \$104,201.75, Stringam moved the district court to require Myers to tender to the court good title to the Home. (Rec. at 116).

23. Myers could not do so.

24. In December 1998, pursuant to Utah R. Civ P. 68, Stringam filed an Offer of Judgment of \$150,000 as settlement in full of the dispute. (Rec. at 570).

25. Myers again refused to accept the settlement offer.

26. On April 8, 1999, Myers sent a letter to the district court in which he stated that he had miscalculated the balloon payment, and that the actual amount was \$135,239.83. (Rec. at 820, Exhibit 42, located in manilla envelope marked “Exhibits”).

27. Trial was held on April 30, 1999, and June 28, 1999. (Rec. at 761 & 1047; and Rec. at 816 & 1048).

28. The trial court found that Stringam properly tendered her offer to Myers as of July 31, 1997, one day before the deadline. (Rec. at 110 & 125).

29. The district court also found the Agreement to be uncertain and ambiguous. (Rec. at 1018).

30. At trial, expert testimony was presented to explain the number of different sums for the balloon payment that could be derived from the terms of the Agreement. (Rec. at 1047, Pages 100 through 128).

31. The expert calculated and submitted three different possible balloon payment amounts as of April 1999; \$102,193.08, \$143,910.78, and \$109,000. (Rec. at 820, Exhibits 51, 52 & 53 respectively, located in manilla envelope marked “Exhibits”).

32. The expert also submitted analysis of the Agreement’s payment split (Rec. at 820, Exhibit 48, located in manilla envelope marked “Exhibits”) and profit split (Rec. at 820, Exhibit 48, located in manilla envelope marked “Exhibits”), and a comparison of the amortization schedules (Rec. at 820, Exhibit 50, located in manilla envelope marked “Exhibits”).

33. Furthermore, the trial court found that:

Stringam attempted numerous times 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...Myers cannot

frustrate an attempt by Stringam to perform.

(Rec. at 1018, 1002).

34. Additionally, at trial Stringam offered evidence of Myers' convictions for embezzlement and conveying property to defraud creditors. (Rec. at 820, Exhibits 43 & 44, located in manilla envelope marked "Exhibits").

35. Stringam filed a Notice of Intent to Use Prior Criminal Convictions for Impeachment Purposes prior to trial, to which Myers did not respond or oppose. (Rec. at 757).

36. The district court concluded that, due to the negative amortization of the interest to the Agreement, the balloon payment was \$134,043.24 as of August 1, 1997, and that Stringam's payoff as of January 1, 2000 was \$141,547.21. (Rec. at 1018, 1000).

37. The Court found that the prevailing party in the litigation was Stringam and that under the terms of Paragraph Six of the Agreement, Stringam had a right to attorney fees. (Rec. at 1018, 999).

38. The district court declined to bind Myers to Stringam's original tender of \$104,211.75. (Rec. at 993-2).

39. All of the parties except Myers submitted closing arguments.

40. On July 14, 1999, Myers submitted his Post-Trial Motions in which he argued that: (a) the expert should not have been allowed to testify because the Agreement was not ambiguous; (b) the balloon payment was late and Stringam forfeited her rights to the Home; (c) evidence of his convictions were improperly admitted; and (d) his substantive due process rights were violated because he was prevented from taking possession of the Home. (Rec. at 868 & 872).

41. Based on the district court's award of attorney fees to Stringam, her counsel submitted an application and affidavit of attorney fees requesting \$73,574.90. (Rec. at 938).

42. Initially the district court only awarded \$12,000.00 to Stringam for the attorney fees she incurred. (Rec. at 1018, 999).

43. However, after a subsequent telephone conference in chambers (Rec. at 991 & 993), the Court awarded to Stringam attorney fees from December 21, 1998 (approximately \$42,531.41), the date that Stringam extended to Myers her \$150,000.00 offer of judgment. (Rec. at 1026).

44. The district court's ruling on attorney fees reduced Stringam's award of attorney fees by \$31,043.49. (Rec. at 1026, 1024).

45. The district court never made a ruling regarding whether Stringam's

\$73,574.90 in attorney fees was unreasonable.

46. Throughout the proceedings, Myers constantly argued that Stringam failed to make the balloon payment and was therefore in default.

47. When Myers filed his Notice of Appeal, there was no Certificate of Mailing accompanying the Notice. (Rec. at 1027).

- a. Myers' modus operandi is to insert his certificate of service directly under the signature line on documents filed with the Court. See Myers' Docketing Statement; Motion to Dismiss Appellee's Cross-Appeal; Motion to Withdraw Addendum to Final Judgment and Order Dated February 4, 2000, From Pending Appeal Proceedings; Reply to Stringam's Memo of Points and Authorities in Opposition to Appellant's Motion to Dismiss; and Appellate Brief). Every pleading that Myers has filed with the Court and served on Stringam's counsel to date in this appeal, with the exception of the Notice of Appeal, has had the certificate of service on the same page of, and directly under the signature line.
- b. Additionally, there are three work days between February 29, 2000, the day Myers filed his Notice, and March 3, 2000, the day that

Stringam's counsel received Myers' Notice.

IX. SUMMARY OF THE ARGUMENT

The Court should reverse the district court's conclusion that Myers is not bound by Stringam's initial \$104,211.74 tender of the balloon payment pursuant to U.C.A. § 78-27-4 because Myers failed to provide an alternate amount of the balloon payment. In addition, the Court should reverse the district court's arbitrary reduction of Stringam's attorney fee award because: (1) the district court reduced the fees without making a finding of unreasonableness; and (2) because the district court based its reduction on the mistaken belief that it could limit the award to fees incurred after Myers rejected Stringam's offer of judgment. Furthermore, the Court should strike Myers' Citation of Supplemental Authority, filed on or about August 1, 2000, because it violates Utah Rule of Appellate Procedure 24(i). Finally, the Court should either decline to consider the issues raised by Myers in his Appellate Brief because his brief does not comply with the content and formatting requirements of the Utah Rules of Appellate Procedure or the Court should dismiss Myers' appeal for lack of jurisdiction because his service of his Notice of Appeal on Stringam was defective.

If the Court decides to consider the merits of Myers' appeal, Stringam respectfully requests that the Court order as follows: (1) that the district court's denial of Myers' Post-

Trial Motions was within the discretion of the district court; (2) that the district court correctly concluded that the Agreement was ambiguous and did not err in its admission of extrinsic evidence to interpret the Agreement; (3) that the Addendum to Final Judgment and Order was a final judgment despite the fact that the district court did not award a sum-certain attorney fee award to Stringam; (4) that Stringam may appeal from the Final Order and Judgment and Addendum to Final Judgment and Order even though she was found to be the prevailing party at the district court level; and (5) that the district court correctly allowed Stringam to tender the approximated balloon payment to the court and correctly found that Stringam did not default on the Agreement by not paying the balloon payment to Myers on the August 1, 1997, deadline.

X. ARGUMENT

A. STRINGAM'S ISSUES ON APPEAL

1. The Court Should Reverse the District Court and Hold That Myers Is Bound by Stringam's \$104,000 Tender.

Myers should be bound to the amount of Stringam's original tender of \$104,211.74 because Myers failed to provide an alternate balloon payment amount. The trial court erred when it altered the amount of the balloon payment due under the Agreement, changing it from \$104,211.74 to \$141,547.21. (Rec. at 1018, 1000). The Court should review the district court's interpretation and application of U.C.A. § 78-27-

3 for correctness, without deference to the district court's conclusions. State v. Redd, 1999 UT 108 ¶ 10, 385 Utah Adv. Rep. 23.

Section 78-27-3 of the Utah Code states:

The person to whom a tender is made *must, at the time*, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, *if the objection is to the amount of money*, the 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*.

U.C.A. § 78-27-3 (emphasis added). See also First Sec. Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1081-82 (Utah 1983) (citations omitted). Thus, a person to whom a tender is made must, at the time, specify the objections to it, or the objections are waived. Id.

Here the district court incorrectly applied U.C.A. § 78-27-3 because Myers should be bound to Stringam's first offer. Stringam attempted numerous times to try to ascertain from Myers the amount of the balloon payment. She even made a \$150,000 offer of judgment to Myers. (Rec. at 570). Myers continually avoided Stringam and refused to let her perform her obligations under the Agreement. (Rec. at 1018, 1002). Stringam finally resorted to filing a complaint and later an offer to tender the balloon payment to the court pending the outcome of the case; both pleadings were filed before the August 1,

1997, balloon payment deadline. (Rec. at 9 & 87).

Stringam's original tender amount was \$104,211.74. (Rec. at 87). An accountant calculated this amount for Stringam. The court increased the amount to \$109,000, and then allowed Stringam to tender the amount to the court. (Rec. at 125 & 158). Myers did not then, nor for some time thereafter provide an alternate amount. Instead Myers continually alleged that the Agreement spoke for itself. When Myers attempted to provide a balloon payment amount he was unable to come up with one amount and submitted several different amounts. (Rec. at 820, Exhibits 23 & 42, located in manilla envelope marked "Exhibits"). Even though Myers failed to provide an alternate balloon payment amount as required by U.C.A. § 78-27-3, the district court, in its Final Order and Judgment, ordered that Stringam pay a balloon payment of \$141,547.21. (Rec. at 1018, 999). The district court, therefore, incorrectly applied the statute, and the Court should reverse the district court and hold that Myers is bound by Stringam's \$104,211.74 tender.

There are also policy reasons for reversing the district court on this matter. First, the statute was created to address this exact situation; the statute prevents one party to a contract from drawing out the completion of the contract by refusing to accept or counter a tender. The statute should be allowed to fulfill its purpose. Second, the district court

would not bind Myers to Stringam's first tender because Stringam did tender the correct amount initially. This was unfair – it took an entire trial to determine the amount of the balloon payment. Stringam should not be penalized by having to pay more for the Home simply because Myers refused to provide an alternate balloon payment amount.

2. The Court Should Reverse the District Court's Arbitrary Reduction of Stringam's Attorney Fee Award.

The Court should reverse the district court's arbitrary reduction of Stringam's attorney fees award because the district court reduced the fees without making a finding of unreasonableness. While, the award of attorney fees to Stringam was proper, the district court's reduction of the amount of the award was improper. The standard of review here is abuse of discretion; *however*, the award must be supported by the evidence. Dixie State Bank v. Bracken, 764 P.2d 985, 988, 94 Utah Adv. Rep. 3 (Utah 1988).

The reduction in Stringam's attorney fees award here is not supported by the evidence. In Dixie State Bank v. Bracken, the Utah State Supreme Court stated:

[T]he trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard. However, once the trial court makes that determination in the exercise of its sound discretion, it commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled.

Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988) (emphasis added). Here the court found that Stringam was the prevailing party in the litigation and that Stringam was entitled to attorney fees. (Rec. at 1018, 999). Stringam's counsel subsequently filed an affidavit requesting \$73,574.90 in fees and costs; which is the amount that Stringam had incurred over the four-year dispute. (Rec. at 938). In the Final Order and Judgment the district court awarded \$12,000.00 in attorney fees to Stringam. (Rec. at 1018, 999). After protest by Stringam, the court held a subsequent hearing at which it awarded Stringam her fees and costs incurred from December 21, 1998, which is the date that Stringam extended to Myers her \$150,000.00 judgment offer. (Rec. at 991 & 1026, 1024). There was no finding of unreasonableness for either award, and the second award of approximately \$42,531.41 was considerably less than the fees that Stringam should have received.

Furthermore, the date restriction imposed by the district court was also an arbitrary limitation of Stringam's attorney fee award and was based on the misunderstanding that an offer of judgment could be used as a basis from which to award attorney fees. (Rec. at 1026). For instance, Utah Rule of Civil Procedure 68, governing an award of costs where a party rejects a judgment offer and subsequently receives less than the offer in the proceedings, does not support the district court's reduction of Stringam's attorney fees.

See Cox v. Cox, 877 P.2d 1262, 1270 (Utah App. 1994) (refusing to award attorney fees pursuant to Rule 68(b) because Rule 68(b) applies only to costs). The date of Stringam's offer of judgment should not be used as a basis for denying attorney fees.

Thus, without making a finding of unreasonableness, the district court arbitrarily reduced the award of attorney fees that Stringam was entitled to. Stringam was, therefore, required to pay more than \$30,000 in attorney fees that should have been paid by Myers pursuant to the Agreement. The trial court committed legal error when it arbitrarily reduced the fee without a finding of unreasonableness. The Court should, therefore, increase the attorney fees award to \$73,574.90.

B. ISSUES THAT HAVE ARISEN IN THE COURSE OF THIS APPEAL

1. The Court Should Dismiss Myers Appeal for Lack of Jurisdiction Because Myers' Service of His Notice on Stringam Was Faulty.

The Court should dismiss Myers' appeal because Myers' service of his Notice of Appeal on Stringam was defective; Myers filed his Notice of Appeal with the Court on February 29, 2000, and subsequently waited a few days to mail the Notice to Stringam. (Rec. at 1027). In addition, Myers did not include a certificate of service with his notice of appeal. (Rec. at 1027). The Court, therefore, lacks jurisdiction over Myer's appeal.

Utah Rule of Appellate Procedure 3, which sets out the procedures to be followed

for an appeal as of right, states that “[t]he party taking the appeal *shall* give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order” Utah R. App. P. 3(e) (emphasis added). Utah Rule of Appellate Procedure 21 further enumerates the steps that an appellant must take to serve opposing parties, stating:

Copies of all papers filed with the appellate court *shall, at or before the time of filing*, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, A copy of any paper required by these rules to be served on a party shall be filed with the court *and accompanied by a proof of service*.

Utah R. App. P. 21(b) (emphasis added).

Here, based on the above rules, service of Myers’ Notice of Appeal was not proper. Myers did not mail his Notice of Appeal to Stringam on or before the day that he filed it. Instead, Myers signed his Notice on February 28, 2000, filed the Notice on February 29, 2000, and mailed the Notice on March 1st or 2nd. Without a certificate of service it is impossible to know exactly when Myers mailed the Notice, but Stringam’s counsel received the Notice on Friday, March 3, 2000. It is unlikely that the Notice took two or three days to go from Midvale to Pleasant Grove.

In addition, Myers failed to include a certificate of service to verify when he actually mailed the Notice. Whether out of intent to prejudice Stringam or through

inadvertence, Myers' violation of the procedural rules deprives this Court of jurisdiction. See Jensen v. Intermountain Power Agency, 977 P.2d 474, 476 (Utah 1999) (stating that appellant's failure to specify a specific summary judgment in his notice of appeal deprived the appellate court of jurisdiction over issues arising from that summary judgment because appellee was prejudiced by not receiving notice and because "rule 3(d)'s requirement is jurisdictional."). See also Yost v. State, 640 P.2d 1044, 1048 (Utah 1981) (holding that the court lacked jurisdiction over a party who participated in the district court action but was not given notice of the appeal).

2. Myers' Citation of Supplemental Authority Is Improper and Should Be Stricken.

Myers' August 1, 2000, Citation of Supplemental Authority regarding joint venture law is improperly before the Court, and should be stricken. Utah Rule of Appellate Procedure 24(i) states in relevant part that:

[w]hen *pertinent and significant authorities* come to the attention of a party after that party's brief has been filed, or after oral arguments but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. . . . [B]ut the letter shall *without argument* state the reasons for the supplemental citations.

Utah R. App. P. 24(i) (emphasis added).

There is nothing pertinent or significant in the authorities that Myers cites in his Citation of Supplemental Authority. In fact, Myers is now directly addressing the "joint

venture” issue for the first time since the conclusion of the district court proceedings. This is an issue that he abandoned at the district court level. (See Rec. at 1046, Page 31, Lines 2 through 15). Myers’ failure to raise this issue before now is prejudicial to Stringam’s interest, and violates her due process rights. See e.g. Jensen v. Intermountain, 977 P.2d 474 (Utah 1999). Furthermore, the quotes from B.A. Mortgage & International Realty v. American National Bank, 706 F. Supp. 1364 (N.D. Ill. 1989), are not supplemental to any arguments presented by Myers in his Appellate Brief. It appears inherent in Rule 24(i) that a citation to supplemental authority must in some way supplement the appellate brief. See generally Utah R. Civ. P. 24(i).

Additionally, Myers raises an argument in his Citation of Supplemental Authority, which Rule 24(i) prohibits. On the second page of the Myers’ Citation of Supplemental Authority Myers cites to the Agreement, and applies the quotes from B.A. Mortgage to the Agreement. This application of law to the facts is an improper argument. The Court should strike Myers’ Citation of Supplemental Authority and refuse to consider the issues raised therein.

3. The Court Should Decline to Address Myers’s Issues.

The Court should decline to address the issues raised in Myers’ Appellate Brief because his brief does not comply with the content and formatting requirements of the

Utah Rules of Appellate Procedure. He does not provide a complete statement of the proceedings or of the facts, does not provide cogent statements of the issues and standards of reviews, nor does he provide any sound arguments. Instead, Myers haphazardly cites cases and statutes that provide only general statements of law. The Court may decline to consider the Myers' arguments because of Myers' noncompliance. See MacKay v. Hardy, 973 P.2d 941, 949 (Utah 1998) (declining to address issues not presented in compliance with Utah Rule of Appellate Procedure 24); and State v. Shepherd, 1999 UT App 305, 989 P.2d 503, 510 ("Defendant's brief fails to cite relevant legal authority or provide any meaningful analysis 'This court has routinely declined to consider arguments which are not adequately briefed on appeal.' (citation omitted). Because the briefing on this issue is inadequate, we decline to consider the merits."). See also State v. Price, 827 P.2d 247 (Utah App. 1992).

C. STRINGAM'S RESPONSE TO THE ISSUES RAISED IN MYERS' APPELLATE BRIEF.

1. The District Court Properly Denied Myers' Post-trial Motions.

The Court should not consider this issue because it is not properly before the Court; Myers is now raising this issue for the first time since the conclusion of the district court proceedings. See Knight v. Ebert (Matter of Estate of Justheim), 824 P.2d 432, 436-37, 175 Utah Adv. Rep. 38 (Utah App. 1991) (declining to address an issue raised by

the appellant in an amended appellate brief where the issue was not raised in the appellant's docketing statement or primary appellate brief). See also Jensen v. Intermountain, 1999 UT 10 ¶¶ 5-9, 977 P.2d 474 (declining to address an issue not raised by the appellant in his notice of appeal). Furthermore, the Court should not allow Stringam's interests to be prejudiced by allowing Myers' to raise issues whenever he pleases despite failure to raise the issue in his Notice of Appeal. See Jensen v. Intermountain, 977 P.2d 474 (Utah 1999).

Myers' Notice of Appeal states that he is appealing from the Final Judgment and Order and the Addendum to Final Order and Judgment. The denial of Myers' Post-trial motions occurred on September 8, 1999, is not listed in his Notice of Appeal, and is not part of the Final Order and Judgment or Addendum to Final Judgment and Order. However, if the Court decides to consider this issue, the standard of review should be abuse of discretion. See Van Der Stappen v. Van Der Stappen, 815 P.2d 1335, 1336, 166 Utah Adv. Rep. 58 (Utah App. 1991). See also Roundy v. Staley, 984 P.2d 404, 406, 374 Utah Adv. Rep. 15 (Utah App. 1999).

The district court did not abuse its discretion when it denied Myers' Post-Trial Motions. The court provided sufficient legal and factual bases for its conclusions. Myers' Post-trial Motions requested, among other things: (1) that Stringam's complaint

be dismissed because she failed to show her right to relief; (2) that the expert's testimony be stricken because it violated the best evidence rule; (3) that the court find Stringam to be in default of the Agreement; and (4) that the evidence of Myers' convictions be stricken because they were not indicative of moral turpitude. (Rec. at 868 & 872). In its September 2, 1999, ruling, the district court denied Myers' Post-Trial Motions. (Rec. at 925). In that ruling the district court found as follows: (1) Stringam proved her right to relief because she showed that her tender of the balloon payment to the court was proper pursuant to U.C.A. § 78-27-1 as a substitute for payment to Myers and because she showed that the parties were bound by the Agreement; (2) the admission of the accountant's expert testimony was proper because it was used to assist the trier-of-fact and because the testimony was not used to prove the contents of the Agreement; (3) Stringam's tender of the balloon payment to the court was proper and, therefore, Stringam did not default on the Agreement; and (4) that the admission of Myers' convictions was proper because "embezzlement is a felony involving honesty, which illustrates moral turpitude," and because Myers did not object when Stringam gave notice of her intent to use his convictions for impeachment purposes. (Rec. at 925 through 929).

The district court was well within its discretion in denying Myers' Post-Trial Motions, and the court should affirm the district court in this matter.

2. The District Court Correctly Determined That the Agreement Is Ambiguous And, Therefore, Properly Admitted Extrinsic Evidence to Interpret the Agreement.

The district court properly found that the Agreement is ambiguous. The standard of review that the Court should apply to the district court's finding of ambiguity is correctness. Sprouse v. Jager, 806 P.2d 219, 222, 153 Utah Adv. Rep. 27 (Utah App. 1991).

The Agreement is ambiguous. An ambiguity exists where the language "is reasonably capable of being understood in more than one sense." Dixon v. Pro Image, Inc., 987 P.2d 48, 52 (Utah 1999) (citations omitted). Prior to and during the district court proceedings in the trial court, the nature of the Agreement was at issue. While Stringam consistently asserted that the Agreement was a lease containing an option to buy, Myers at first asserted that the agreement was a joint venture (Rec. at 16), but later abandoned his joint venture argument and agreed that the Agreement was a lease/purchase agreement. (Rec. at 1046, Page 31, Lines 2-15). The trial court appropriately looked first to the plain language of the Agreement. The Agreement contains my ambiguities, including the following statements. The first line of the Agreement contains the words "Joint Venture Agreement" in capital letters. (Rec. at 820, Exhibit 1, located in manilla envelope marked "Exhibits"). The second paragraph of the Agreement again calls the Agreement a joint venture. (Id.). However, the fourth

paragraph of the Agreement states in pertinent part that “this joint venture contemplates the purchase by First Party [Stringam] from Second Party [Erin Stovall] of said property for \$109,000” (Id.). Again, on the second page, paragraph number 1, the Agreement states that “Second party [Erin Stovall] agrees to sell and First Party [Stringam] agrees to buy said real property.” (Id.). Finally, on page four, paragraph number 11, the Agreement describes the distribution of the proceeds in excess of \$109,000 if the Home is sold. (Id.). The Court stated in its December 16, 1999, Memorandum Decision, regarding the language on page two, paragraph number 1, that “[t]his language taken on its face seems to indicate a lease/option to buy.” (Rec. at 977).

After looking to the four corners of the Agreement and determining that the Agreement is ambiguous, the district court properly looked to the parties’ intent. The standard here should be clear error. Sprouse v. Jager, 806 P.2d 219, 221-22, 153 Utah Adv. Rep. 27 (Utah App. 1991) (citations omitted).

Both Stringam and Erin Stovall, the only two original parties to the Agreement , testified that the Agreement was a lease/purchase agreement. “Only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the [Agreement] as a whole” should the court resort to evidence beyond the four corners of the agreement. Anderson v. Gardner, 647 P.2d 3, 4 (Utah 1982). After reviewing the

extrinsic evidence, the court supported its analysis of the Agreement by stating that “[t]he language of the contract, and the intention and actions of the parties, establish that the agreement was a lease/option to buy.” (Rec. at 1018, 1003).

Because Myers drafted the Agreement, the Agreement’s ambiguities should be construed against Myers’ interests. Trolley Square Assoc. v. Nelson, 886 P.2d 61 (Utah App. 1994). Not only was there an ambiguity regarding the nature of the Agreement, but the amount of the balloon payment was also ambiguous. Myers’ drafting of the Agreement created ambiguity as to whether the Agreement contemplated negative amortization—meaning that the principal of the loan grew instead of decreased; the Agreement makes it unclear whether interest payments begin with the first or second payment. Not only did the possibility of negative amortization in the lease make it nearly impossible for Stringam to determine the balloon payment amount, it also confused Myers and the district court. Myers himself produced different balloon payment amounts. (Rec. at 820, Exhibits 23 & 42, located in manilla envelope marked “Exhibits”). The trial court stated in its Final Order and Judgment, signed January 31, 2000, that:

The balloon payment amount has been the subject of much controversy. . . . 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 or the balloon payment is further complicated by the nature of the agreement, that of a lease/option to buy with negative amortization.

(Rec. at 1018, 1002).

In Myers' Appellate Brief he haphazardly cites cases regarding contract ambiguities and contract interpretation without making cogent arguments. This approach is typical for Myers, and it is probably fair to assume that he is arguing that the Agreement was not ambiguous. Myers cites to several cases, providing a general statement of contract law from each but never providing analysis in the manner of applying those cases to the case at bar. Even if Myers were to provide analysis from the cases that he cites, they do not support his position⁴. For this and the previously stated

⁴Myers cites the following cases in support of his contract ambiguity position: Copper State Leasing v. Blacker Appliance, 770 P.2d 88 (Utah 1988) (holding that the trial court's grant of summary judgment was improper because the consideration was sufficient to sustain the parties' lease contract); Cox v. Cox, 877 P.2d 1262 (Utah App. 1994) (interpreting a warranty deed for the purpose of asset distribution in a divorce proceeding); State ex rel. C.K., 2000 UT App 11, 996 P.2d 1059 (regarding the termination of parental rights by the state); Webb v. R.O.A. General, Inc., 804 P.2d 547 (Utah App. 1991) (affirming the district court's refusal to admit parol evidence to interpret an integrated employment contract); Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981) (affirming the district court's admission of parol evidence for the purpose of interpreting a performance contract where the contract was an "interim agreement"); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991) (reversing and remanding a summary judgment for plaintiff where the summary judgment regarded the intent of the parties in the assignment of an executory land sale contract); Western Kane County Special Serv. Dis. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987) (regarding

reasons, the Court should affirm the district court's conclusion that the Agreement was ambiguous.

3. The Addendum to Final Judgment and Order Is a Final Order and Stringam's Appeal Therefrom Is Proper Even Though the District Court Did Not Enter a Sum-Certain Attorney Fees Award

The Court should hold that the Addendum to the Final Judgment and Order is final and that Stringam's appeal from the Addendum is proper. The court should apply a correctness standard here to determine whether the Addendum to Final Judgment and Order is a final judgment. Kennecott Corp. v. State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991).

The Addendum is a final judgment because the Addendum, in conjunction with the original Order, granted the relief that Stringam sought by determining the amount of the balloon payment and providing a method for Stringam to receive clear title to the Home. See Utah R. Civ. P. 54(c)(1) ("every final judgment shall grant the relief to which

the plaintiff's contention that roads crossing the defendant's land were public roads and, therefore, did not require acquisition by eminent domain); Maddux & Sons, Inc. v. Trustees of Ariz. Laborers, 610 P.2d 477 (Ariz. App. 1980) (affirming the district court's grant of summary judgment to the plaintiff/appellee in regards to a labor contract where the defendant/appellant was clearly bound by the contract); and Fugate v. Town of Payson, 791 P.2d 1092 (Ariz. App. 1990) (affirming the district court's grant of summary judgment where it found that an easement was only a utility easement despite conflicting statements regarding the extent of the easement in the contract recitals and operative clauses).

the party in whose favor it is rendered is entitled”). Additionally, the Addendum ended the controversy between the parties. See Salt Lake City Corp., v. Layton, 600 P.2d 538, 539 (Utah 1979) (“A judgment is final when it ends the controversy between the parties litigant.”). As a final judgment, Stringam had the right to appeal the Addendum. See Utah R. App. P. 3.

Here Myers alleges that because of the district court’s failure to award a sum-certain amount of attorney fees, the Addendum is not a final order. Myers relies on Promax Development Corp. v. Raile, 2000 UT 4, 998 P.2d 254, 386 Utah Adv. Rep. 27, to support this argument. However, ProMax does not support Myers’ argument. In ProMax the issue was whether the order appealed from was final before the amount of attorney fees was determined. In its determination, this Court states:

We therefore hold that, in the interest of judicial economy, 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, 2000 UT 4 ¶15. The amount of fees is provided when a court provides a date from which to calculate those fees and is just as valid as when a court states a sum-certain. The Court in ProMax never stated that a sum-certain amount must be provided. Myers has offered no reason to distinguish between the two situations, and it appears to be a distinction without a difference.

Here, the trial court determined that attorney fees were awardable from December 21, 1998. This finding gave Myers the opportunity to appeal the award and amount of

the attorney fees, thereby fulfilling the policy goal of the ProMax decision. See Promax, 2000 UT 4 ¶15 (citing the policy arguments in Meadowbrook, LLC v. Flower, 959 P.2d 115, 119 (Utah 1998)).

In addition to ProMax, Myers cites several cases in support of his averment, on Page 5 of his Brief, that Stringam cannot appeal from the Addendum to Final Judgment and Order. However, Myers provides very little analysis, and (not surprisingly) the cases that Myers cites are either not applicable or simply provide general statements of law⁵.

4. Stringam May Appeal from the Final Order and Judgment and from the Addendum to Final Judgment and Order Even Though Stringam Was Found to Be the Prevailing Party.

The Court should not consider this issue, raised on Page 5 of Myers' Appellate Brief, because Myers is raising it for the first time in his Appellate Brief. See Knight v. Ebert (Matter of Estate of Justheim), 824 P.2d 432, 436-37, 175 Utah Adv. Rep. 38 (Utah App. 1991) (declining to address an issue raised by the appellant in an amended appellate brief where the issue was not raised in the appellant's docketing statement or primary appellate brief). See also Jensen v. Intermountain, 1999 UT 10 ¶¶ 5-9, 977 P.2d 474 (declining to address an issue not raised by the appellant in his notice of appeal).

⁵See Home State Bank/National Ass'n v. Potokar, 617 N.E.2d 1302 (Ill. App. 1993) (holding that an order granting attorney fees but failing to specify an amount was an interlocutory order); D'Aston v. Aston, 844 P.2d 345 (Utah App. 1992) (regarding the possession and ownership of property found in a divorce decree to belong to the husband where the property was in the possession of his son); Inland Group of Companies v. Obendorff, 959 P.2d 454 (Idaho 1998) (affirming the district court's refusal to award attorney fees to the special master for failure to pay part of the special master's fees because the special master was not a "party" to the dispute).

If the Court decides to consider this issue, it should conclude that Stringam's appeal is proper despite the fact that she was found to be the prevailing party below. Because this issue was not addressed in the district court, there is nothing for the Court to review. However, if the Court decides to consider the issue, it should hold that Stringam may appeal even though she was found to be the prevailing party below.

In his brief, Myers cites two cases, each supporting the general statement that a party cannot appeal from a judgment in that party's favor. However, (not surprisingly) neither is applicable here. In Poage v. Co-Operative Pub. Co., 66 P.2d 1119 (Idaho 1937), an Idaho state statute governed who could appeal a judgment. Additionally, the parties in Poage who sought to appeal the judgment did not show how they were injured by the judgment. Similarly, in Commercial Block Realty Co. v. United States Fidelity and Guaranty Co., the court stated that "[n]ot only must one be a party to a judgment before he can appeal, but the judgment must be adverse to his interests." Commercial Block Realty Co. v. United States Fidelity and Guaranty Co., 28 P.2d 1081, 1082 (Utah 1934). The cases cited by Myers do not support the proposition that the prevailing party cannot appeal, but instead show that a party cannot appeal a judgment in her favor; e.g. a defendant cannot appeal the dismissal of the complaint against her. See Commercial Block Realty Co. v. United States Fidelity and Guaranty Co., 28 P.2d 1081, 1082 (Utah 1934).

Here Stringam's counsel drafted the Final Judgment and Order and Addendum to Final Order and Judgment so that they conformed with the district court's findings and

conclusions. Furthermore, despite the fact that her attorney drafted the orders, Stringam's interests were adversely affected by the Final Order and Judgment and the Addendum to Final Judgment and Order because she was required to pay more than her tender of \$104,211.74 for the balloon payment, and because she was required to pay more than \$30,000 in attorney fees that Myers should have been required to pay. The Court should conclude that Stringam's appeal is proper.

5. The District Court Properly Allowed Stringam to Tender the Balloon Payment to the Court During the Pendency of the Action.

The Court should hold that the district court properly allowed Stringam to tender the balloon payment into the court pending the outcome of the dispute. The applicable statute here is U.C.A. § 78-27-4, and the standard of review is correctness. State v. Redd, 1999 UT 108 ¶ 10, 992 P.2d 986, 385 Utah Adv. Rep. 23.

The district court acted in accordance with the law when it granted Stringam's Tender Offer and Motion to Allow Substitute Performance, allowing Stringam to tender the balloon payment into the court instead of to Myers – particularly because Myers could not show that he had the ability to tender clear title to the Home. Furthermore, Stringam's tender to the court was proper pursuant to U.C.A. § 78-27-4.

Here Myers alleges, as he continuously alleged in the district court, that Stringam did not tender the full amount to him by the deadline, that she materially breached the Agreement, and that he is entitled to relief. However, Stringam filed suit initially seeking a determination of the balloon payment amount, and seeking to compel Myers to allow

her to tender the balloon payment. (Rec. at 6). The trial court estimated the amount due at \$109,000 and required Stringam to tender it to the court as performance until the actual amount due was determined. (Rec. at 158). It is asinine for Myers to continue to claim that the payment should have been tendered to him where it took an entire trial to determine the amount that Stringam actually owed, and where the amount that Myers would actually receive was also at issue.

Myers cites the concurrence in Commercial Investment Corp. v. Siggard, as supporting his arguments. See Commercial Investment Corp. v. Siggard, 936 P.2d 1105, 314 Utah Adv. Rep. 41 (Utah App. 1997). However, Judge Orme's concurrence impliedly supports the steps taken by Stringam and rejects Myers' contention. See Commercial Investment Corp. v. Siggard, 936 P.2d 1105, 1112, 314 Utah Adv. Rep. 41 (Utah App. 1997) (stating that because the buyer did not tender the interest payments to the seller or into the court the buyer had materially breached his contract and was not entitled to specific performance). The Court should conclude that the district court properly allowed Stringam to tender the balloon payment to the court.

XI. CONCLUSION

For the foregoing reasons Stringam respectfully requests that the Court order the following relief:

1. Reverse the district court's incorrect application of U.C.A. § 78-27-3 and require Myers to accept Stringam's original tender of \$104, 211.74;
2. Reverse the district court's arbitrary reduction of attorney fees to Stringam

and remand for a determination of reasonableness by the district court;

3. Strike Myers' Citation of Supplemental Authority.

4. Dismiss Myers' appeal for lack of jurisdiction or Decline to consider

Myers' arguments;

5. Affirm the district court's denial of Myers' Post-trial Motions;

6. Affirm the district court's conclusion that the Agreement is ambiguous and the district court's admission of extrinsic evidence to interpret the Agreement;

7. Hold that the Addendum to Final Judgment and Order was a final judgment and that Stringam's appeal from the Addendum was proper;

8. Hold that Stringam's appeal is proper even though Stringam was found to be the prevailing party; and

9. Affirm the district court's decision to allow Stringam to tender the \$109,000 balloon payment to the district court.

Date: September 29, 2000 .

DUVAL HANSEN WITT & MORLEY, P.C.



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**IN THE COURT OF APPEALS FOR THE
STATE OF UTAH**

450 South State, Salt Lake City, Utah 84114-0230

JEANNIE STRINGAM,

Plaintiff/Appellee/Cross-Appellant,

v.

MORRIS MYERS, et al.

Defendant/Appellant/Cross-
Appellee.

**ADDENDUM TO BRIEF OF
APPELLEE**

Case No. 20000179-CA

This addendum contains the following documents:

EXHIBIT A: Final Judgment and Order;

EXHIBIT B: Addendum to Final Order and Judgment; and

EXHIBIT C: Real Estate Purchase Contract.

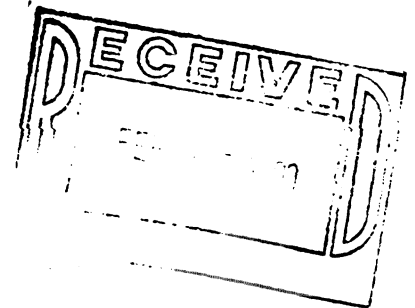
EXHIBIT D: U.C.A. § 78-27-3

EXHIBIT E: U.C.A. § 78-27-4.

EXHIBIT A

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CAROL B. SMITH, Clerk
1/31/00

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

125 North 100 West, Provo, Utah 84601

STRINGAM, JEANNIE,)	
)	
Plaintiff,)	FINAL ORDER AND JUDGMENT
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 is 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 Motion of Lis Pendens on October 22, 1997.

16. Myers filed Motion for Summary Judgment on March 13, 1998. The Summary Judgment stated that Stringam 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, 19998 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 the 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 2nd 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 14th 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 judgment 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. Stringham 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 tp 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 Nqte 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 judgement 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.

/S/ GUY R. BURNINGHAM
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 6th 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 6th 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.

EXHIBIT B

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

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

125 North 100 West, Provo, Utah 84601

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.

/S/ GUY R. BURNINGHAM

Honorable Guy R. Burningam
Fourth District Court Judge

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

To: Terry R. Spencer, Mórriis 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.

EXHIBIT C

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, 199 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 expense 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.

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

 10/8/90
Wade Stringham
FIRST PARTY

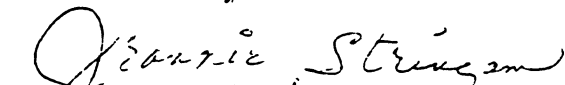
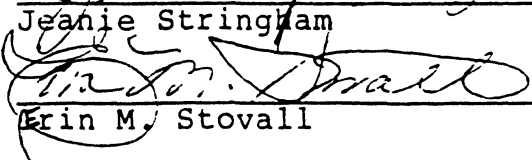
 10-8-90
Jeanie Stringham

Erin M. Stovall
SECOND PARTY

EXHIBIT D

78-27-3. Objection to tender - Must be specified or deemed waived.

The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the 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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-27-3.

NOTES TO DECISIONS

Analysis

Conditions.

Interest.

Tender.

- By check.
- By mail.

Conditions.

A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon. *Sieverts v. White*, 2 Utah 2d 351, 273 P.2d 974 (1954).

Interest.

If tender is made of full face of account, and no demand for interest is made, interest, at least for the purposes of a tender, is waived. *Hirsh v. Ogden Furn. & Carpet Co.*, 48 Utah 434, 160 P. 283 (1916).

Tender.

- By check.

Where a tender is made by check, the person to whom it is tendered must specify his objections or he will be deemed to have waived all objections, except such as he insists upon when tender is made. *Hirsh v. Ogden Furn. & Carpet Co.*, 48 Utah 434, 160 P. 283 (1916). See also *Ulibarri v. Christenson*, 2 Utah 2d 367, 275 P.2d 170 (1954).

A check for the amount due, presented within time and when no exception is taken to the form of the tender, is a valid and legal tender of the amount due, but only when there are adequate funds in the account of the drawer to pay such check upon presentation in due course. *Sieverts v. White*, 2 Utah 2d 351, 273 P.2d 974 (1954).

Plaintiff did not make a valid tender because it failed to fulfill a condition of the cashier's check, and the defendant need not have objected to the tender of the check to prevail. *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792 (Utah Ct. App. 1997).

- By mail.

Tender of check by mail is good tender in absence of special objections. *Hirsh v. Ogden Furn. & Carpet Co.*, 48 Utah 434, 160 P. 283 (1916).

COLLATERAL REFERENCES

Am. Jur. 2d. - 74 Am. Jur. 2d Tender § 10.

C.J.S. - 86 C.J.S. Tender §§ 12, 17, 26, 34, 38, 43.

EXHIBIT E

78-27-4. Money deposited in court.

(1) (a) Any person depositing money in court, to be held in trust, shall pay it to the court clerk.

(b) The clerk shall deposit the money in a court trust fund or with the county treasurer or city recorder to be held subject to the order of the court.

(2) The Judicial Council shall adopt rules governing the maintenance of court trust funds and the disposition of interest earnings on those trust funds.

(3) (a) Any interest earned on trust funds that is not required to accrue to the litigants by Judicial Council rule or court order shall be deposited in a restricted account.

(b) The Legislature shall appropriate funds from that restricted account to the Judicial Council to:

- (i) offset costs to the courts for collection and maintenance of court trust funds; and
- (ii) provide accounting and auditing of all court revenue and trust accounts.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-27-4; L. 1990, ch. 61, § 2.

Cross-References. - Court may order deposit upon motion, Rules of Civil Procedure, Rule 67.

Defendant's deposit of tendered amount, Rules of Civil Procedure, Rule 68(a).

Distribution of trust funds in district courts, Rule 6-201, Rules of Judicial Administration.

NOTES TO DECISIONS

Substantial compliance.

Defendant corporation and its officers, who deposited corporate check with clerk and arranged for check to be honored if presented in due course substantially complied with court order made under this section, even though plaintiff instead of clerk was named as payee and corporation became insolvent thereby causing check to be dishonored. *Sweeney v. Happy Valley, Inc.*, 24 Utah 2d 386, 472 P.2d 941 (1969).

COLLATERAL REFERENCES

Am. Jur. 2d. - 23 Am. Jur. 2d Deposits in Court §§ 9 to 12.

C.J.S. - 26A C.J.S. Deposits in Court §§ 5 to 7.

A.L.R. - Funds deposited in court as subject of garnishment, 1 A.L.R.3d 936.

Appealability of order directing payment of money into court, 15 A.L.R.3d 568.

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**IN THE COURT OF APPEALS FOR THE
STATE OF UTAH**

450 South State, Salt Lake City, Utah 84114-0230

JEANNIE STRINGAM,

Plaintiff/Appellee/Cross-Appellant,

v.

MORRIS MYERS, et al.

Defendant/Appellant/Cross-
Appellee.

CERTIFICATE OF SERVICE

Case No. 20000179-CA

I certify that on 9-29-00, 2000, I caused a true and correct
copy of this BRIEF OF APPELLEE, to be served by:

X mailing it by first class mail to:
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