

1990

# Jesse E. Smith, Beth M. Smith v. Salli Smith West, Ken Anderson and Charles L. Appleby, Jr. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James L. Shumate; Attorney for Plaintiff-Appellant.

Michael D. Hughes; Thompson, Hughes & Reber; Attorney for Defendant-Respondent.

---

## Recommended Citation

Brief of Appellant, *Smith v. West*, No. 900277 (Utah Court of Appeals, 1990).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/2670](https://digitalcommons.law.byu.edu/byu_ca1/2670)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF**

UTAH  
DOCUMENT  
KFJ  
50  
.A10

DOCKET NO. 900277 IN THE UTAH COURT OF APPEALS

JESSE E. SMITH, BETH M. SMITH, )

Plaintiff-Appellant, )

vs. )

SALLI SMITH WEST, KEN )

ANDERSON and CHARLES L. )

APPLEBY, JR., )

Defendant-Respondent. )

Case No. 900277-CA

Classification Priority 14-b

**BRIEF OF APPELLANT**

Appeal from a Judgment following a non jury trial in the Fifth District Court for Iron County, State of Utah, the Honorable Dean E. Conder, Senior Judge, presiding.

JAMES L. SHUMATE  
Attorney for Plaintiff-Appellant  
110 North Main, Suite H  
P.O. Box 623  
Cedar City, Utah 84720  
Telephone: (801) 586-3772

MICHAEL D. HUGHES  
THOMPSON, HUGHES & REBER  
Attorney for Defendant-Respondent  
148 East Tabernacle  
St. George, Utah 84770

**FILED**

AUG 16 1990

COURT OF APPEALS

---

IN THE UTAH COURT OF APPEALS

---

JESSE E. SMITH, BETH M. SMITH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 900277-CA
	)	
SALLI SMITH WEST, KEN	)	Classification Priority 14-b
ANDERSON and CHARLES L.	)	
APPLEBY, JR.,	)	
	)	
Defendant-Respondent.	)	

---

BRIEF OF APPELLANT

---

Appeal from a Judgment following a non jury trial in the Fifth District Court for Iron County, State of Utah, the Honorable Dean E. Conder, Senior Judge, presiding.

---

JAMES L. SHUMATE  
Attorney for Plaintiff-Appellant  
110 North Main, Suite H  
P.O. Box 623  
Cedar City, Utah 84720  
Telephone: (801) 586-3772

MICHAEL D. HUGHES  
THOMPSON, HUGHES & REBER  
Attorney for Defendant-Respondent  
148 East Tabernacle  
St. George, Utah 84770

TABLE OF CONTENTS

JURISDICTION OF THE COURT OF APPEALS . . . . .	1
NATURE OF THE PROCEEDINGS . . . . .	1
ISSUES PRESENTED ON APPEAL . . . . .	1
DETERMINATIVE STATUTES . . . . .	2
NATURE OF THE CASE . . . . .	2
COURSE OF THE PROCEEDINGS . . . . .	2
DISPOSITION AT TRIAL COURT . . . . .	2
STATEMENT OF FACTS . . . . .	3
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT	
POINT I	
THE TRIAL COURT INCORRECTLY RULED THAT THE PLAINTIFF ORALLY WAIVE OR CONVEY A VESTED RIGHT OF FIRST REFUSAL TO PURCHASE AN INTEREST IN REAL PROPERTY IN THE STATE OF UTAH . . . . .	4
POINT II	
THE DEFENDANTS CANNOT CLAIM THAT THE DOCTRINE OF MERGER EXTINGUISHED THE PLAINTIFFS' RIGHT OF FIRST REFUSAL IN THE DEED FROM THE ESTATE OF ELIAS PENN SMITH BECAUSE ALL OF THE DEFENDANTS WERE AWARE OF THE PLAINTIFFS' RIGHT IN THE PROPERTY . . . . .	6
CONCLUSION . . . . .	8
ADDENDUM . . . . .	9

## TABLE OF AUTHORITIES

### CASES

Coombs v. Ouzounian, 465 P.2d 356 (Utah, 1970) . . . . .	4, 6
Davis v. Davis, 632 P.2d 769 (Okla. App., 1981) . . . . .	7
G.G.A. v. Laventis, 773 P.2d 841 (Utah App., 1989) . . .	2, 6, 7
Guiand v. Walton, 450 P.2d 467, appeal after remand 480 P.2d 137 (Utah, 1969) . . . . .	6
Williams v. Singleton, 723 P.2d 421 (Utah, 1986) . . . . .	4, 6

### STATUTES AND RULES

25-5-3, Utah Code Annotated, 1953, as amended . . . . .	2, 4
Rule 42, Utah Rules of Appellate Procedure . . . . .	1

---

IN THE UTAH COURT OF APPEALS

---

JESSE E. SMITH, BETH M. SMITH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 900277-CA
	)	
SALLI SMITH WEST, KEN	)	Classification Priority 14-b
ANDERSON and CHARLES L.	)	
APPLEBY, JR.,	)	
	)	
Defendant-Respondent.	)	

---

JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by Rule 42 of the Utah Rules of Appellate Procedure, for the reason that this case was initially filed with the Supreme Court of the State of Utah and transferred to the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment of the Honorable Dean E. Conder, Senior Judge, sitting in the Fifth District Court for Washington County, finding no cause of action on a claim for specific performance of a right of first refusal on the sale of an interest in real property in the State of Utah.

ISSUES PRESENTED ON APPEAL

The issue presented by the appeal is whether or not an oral telephone conversation may effectively waive a right of

first refusal held by multiple parties in a piece of real property located within the State of Utah when there is no compliance with the Statute of Frauds, 25-5-3, Utah Code Annotated, 1953, as amended.

#### DETERMINATIVE STATUTES OR RULES

The statute that is believed to be determinative in this matter is 25-5-3, Utah Code Annotated, 1953, as amended. A case which may also be of assistance is G.G.A. v. Laventis, 773 P.2d 841 (Utah App., 1989). This case is reproduced in total as part of the addendum to this brief.

#### NATURE OF THE CASE

This case was brought to seek specific performance of a right of first refusal when the Defendant, Salli Smith West, sold her one-third interest in the Pah Tempe Hot Springs property located between Hurricane and LaVerkin, Utah, to the Defendants, Ken Anderson and Charles L. Appleby, Jr.

#### COURSE OF THE PROCEEDINGS

This matter was tried before the court without a jury on April 21, 1989. The court entered its Findings of Fact and Conclusions of Law and Judgment, and this appeal was brought thereafter.

#### DISPOSITION AT TRIAL COURT

At the trial court level, the Plaintiffs' Complaint to enforce the Plaintiffs' right of first refusal to purchase Defendant Salli Smith West's interest in the property was dismissed with prejudice and the title in the Pah Tempe Hot

Springs property held by Salli Smith West was ordered vested in the Defendants, Kenneth R. Anderson and Charles L. Appleby, Jr.

#### STATEMENT OF FACTS

In the settlement of the estate of Elias Penn Smith, the Plaintiffs, Jesse Smith, Genevieve Smith, Beth M. Smith, and the Defendant, Salli Smith West, received title to the property known as the Pah Tempe Hot Springs located just north of Hurricane, Utah, and south of LaVerkin, Utah. (T.9, Plaintiffs' Exhibit No. 1, included in the addendum to this brief.) Each of the recipients of the property from the estate of Elias Penn Smith also stipulated that they would have a right of first refusal should any of the other recipients of the property desire to sell their interest in the property. Beginning on October 12, 1985, Salli Smith West gave written notice that she was interested in selling her one-third interest in the Pah Tempe property. (See Defendants' Exhibit No. 10, T.12.) On September 4, 1986, Charles Appleby went to Santa Fe, New Mexico, the home of Salli Smith West, and modified and extended a July 23, 1986, option to purchase the property by drafting an additional option to purchase dated September 4, 1986. (T.131-133.) On or about September 25, 1986, Salli Smith West telephoned Jesse Smith to inform him of her intention to sell the Pah Tempe property to Mr. Appleby and Mr. Anderson, the co-defendants. (T.73 and 74.) On or about September 29, 1986, the Plaintiff, Jesse Smith, did send a letter to Salli Smith West asking for a copy of the



Anderson and Appleby offer to purchase. (See Plaintiffs' Exhibit 4, a copy of which is attached to this brief in the Addendum.) (T.35) On or about October 2, 1986, Salli Smith West completed the transfer from herself to the Defendants Anderson and Appleby. (Plaintiffs' Exhibit No. 7, T.68)

#### SUMMARY OF ARGUMENT

The telephone conversation of September 25, 1986, between Salli Smith West and Jesse Smith could not convey the interest of the Plaintiffs, which was a right of first refusal in the property in violation of the statute of frauds.

The defendants cannot claim the doctrine of merger to extinguish the right of first refusal in the deed from the estate of Elias Penn Smith for the reason that all of the Defendants were fully aware of the right of first refusal in the Plaintiffs.

#### ARGUMENT

##### POINT ONE

THE TRIAL COURT INCORRECTLY RULED THAT THE PLAINTIFF COULD ORALLY WAIVE OR CONVEY A VESTED RIGHT OF FIRST REFUSAL TO PURCHASE AN INTEREST IN REAL PROPERTY IN THE STATE OF UTAH.

The Supreme Court of the State of Utah has ruled that an option to purchase real estate is an "interest in real estate" and within the Statute of Frauds. (Coombs v. Ouzounian, 465 P.2d 356 [Utah, 1970]) This principal has been followed more recently in the case of Williams v. Singleton, 725 P.2d 421 (Utah, 1986). The Supreme Court in the Williams, supra., decision relied on the language found in 25-5-3, Utah Code Annotated, 1953, that

requires a contract to sell land be "in writing subscribed by the party to whom the sale is to be made". In this case now before the Court, the trial court found

. . . Mr. Smith said that he had no desire to individually meet the offer of Anderson and Appleby. The Court finds, based upon the credibility of the testimony of Salli Smith, that during this telephone conversation Jesse E. Smith further assured Salli Smith West that he would send her a letter to the effect that he would not exercise his first right of refusal. (Findings of Fact and Conclusions of Law, paragraph 18 and attached in the addendum to this brief)

The trial court also found that in his letter of September 29, 1986, Jesse E. Smith promised to send "a letter signed by Beth, Gen, and myself releasing you from our option of first right of refusal." (Findings of Fact, paragraph 19) The trial court specifically found that Jesse E. Smith did not provide the letter signed by all of the Plaintiffs. (Findings of Fact, paragraph 23) The trial court also found that the Defendant Salli Smith West reasonably relied on the telephone conversation and the letter of September 29, 1986, and closed the sale to Anderson and Appleby on October 2, 1986, four days before she sent the documents requested by Jesse E. Smith in his letter of September 29, 1986. (Findings of Fact, Paragraphs 20 through 25)

It is the contention of the Appellants that the trial court improperly relied on the telephone conversation of September 25, 1986, and the letter of Jesse E. Smith of September 29, 1986, when the court stated in paragraph 25 of the Findings of Fact:

By reason of Jesse E. Smith's oral and written representations, he gave up any claim he may have

had under his right of first refusal at that time,  
and is now estopped from asserting the same both by  
the principles of equitable and promissory estoppel.

The trial court committed reversible error when it failed to apply the Statute of Frauds to this fact situation. As pointed out above, an option is subject to the Statute of Frauds. (Coombs v. Ouzounian, and Williams v. Singleton, supra.) This Court has held that a right of first refusal is different from an option to purchase because a right of first refusal is not binding unless the offeror decides to sell the property. (G.G.A. v. Laventis, 773 P.2d 841 (Utah App., 1989) In the present case Salli Smith West did actually decide to sell her interest in the property and thereby made the Plaintiffs' right of first refusal the equivalent of an option. That interest in land could not be conveyed without compliance with the Statute of Frauds. The Utah Supreme Court has said that the purpose of the Statute of Frauds requirement that a grant of realty be by deed or conveyance in writing and subscribed by the granting party is to protect important matters like conveyance of realty from frauds and perjuries. (Guinand v. Walton, 450 P.2d 467, appeal after remand 480 P.2d 137 [Utah, 1969]) In this case there was no writing subscribed by any of the Plaintiff's conveying their right of first refusal.

#### POINT TWO

THE DEFENDANTS CANNOT CLAIM THAT THE DOCTRINE OF MERGER EXTINGUISHED THE PLAINTIFFS' RIGHT OF FIRST REFUSAL IN THE DEED FROM THE ESTATE OF ELIAS PENN SMITH BECAUSE ALL OF THE DEFENDANTS


WERE AWARE OF THE PLAINTIFFS' RIGHT IN THE PROPERTY.

At the time of the trial the Defendants raised the claim that the Plaintiffs' right of first refusal was merged into the deed from the estate of Elias Penn Smith and was extinguished in that instrument because that deed did not reserve the right of first refusal stipulated by Jesse E. Smith, Genevieve A. Smith, and Salli Smith West in the estate.(see Plaintiffs' exhibit #1 and Defendants' exhibit #8 and #9; also see T.20-21) The Defendants supported their claim with the Oklahoma case of Davis v. Davis, 632 P.2d 769 (Okla. App., 1981) The Plaintiffs answered that the Utah case of G.G.A. v. Laventis, 773 P.2d 841 (Utah App., 1989) was more similar to the instant facts. The trial court specifically found that the signatories of the stipulation in the estate of Elias Penn Smith intended the right of first refusal to continue between themselves as tenants in common and as family members after the distribution of the estate.( see Findings of Fact, paragraph 12) This finding of the court is well founded in the trial transcript where Salli Smith West (T.60-61), and Charles A. Appleby (T.131-132), and Kenneth R. Anderson (T. 139) all admitted to being aware of the Plaintiffs' right of first refusal prior to the option to purchase between the Defendants dated September 4, 1986. With all of the parties aware of the right of first refusal and the trial court's reliance on the G.G.A. case, supra, the Defendants cannot rely on the doctrine of merger to extinguish the right of first refusal held by the Plaintiffs.

CONCLUSION

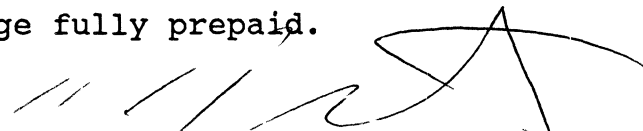
Because of the failure of the Defendants to show any compliance with the Statute of Frauds in conveying the interests of the Plaintiffs in the Pah Tempe property, and the knowledge of all of the parties of the Plaintiffs' right of first refusal, the trial court's Judgment should be reversed and the sale from Salli Smith West to the other Defendants should be rescinded. The Plaintiffs should be given the opportunity to purchase the interest of Salli Smith West under the same terms offered to Mr. Anderson and Mr. Appleby. The majority of the payments would now go to Mr. Anderson and Mr. Appleby, with the final balance due to Salli Smith West, once they are reimbursed.

DATED this 15th day of August, 1990.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Michael D. Hughes, THOMPSON, HUGHES & REBER, 148 East Tabernacle Street, St. George, Utah 84770, and Salli Smith West, 546 Onate Place, Santa Fe, New Mexico, 87501, this 15th day of August, 1990, first class postage fully prepaid.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MICHAEL W. PARK  
Attorney for Peititioner  
110 North Main Street, Suite F  
Cedar City, Utah 84720  
Telephone: 586-3879

---

IN THE DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH

---

IN THE MATTER OF THE ESTATE	)	
	)	STIPULATION AND PETITION
OF	)	FOR DISTRIBUTION
ELIAS PENN SMITH, Deceased.	)	Probate No. 2070

---

The Executrix, Genevieve A. Smith, and all of the other heirs of the estate, Jesse E. Smith, Salli Smith Girard, and Penn Harris Smith, hereby Stipulate and petition the Court as follows:

1. The Petitioners, being all of the heirs of the estate of E. Penn Smith, hereby Petition the Court for distribution of the property of the estate in accordance with this Stipulation hereinafter set forth.

2. The heirs of the estate hereby agree that Genevieve A. Smith, Jesse E. Smith, Salli Smith Girard and Penn Harris Smith shall each pay twenty five percent (25%) of the total liabilities of the estate in order to retire all debts which have been assessed against the estate. The case payments which should be made out of the estate at this time amount to a total of \$48,557.00. The total cash on hand, includes the sum of \$3,557.00, making the net liability payable by the estate in sum of \$45,000.00. Each heir to the estate, therefore, is indebted for the liabilities in the sum of \$11,250.00.

3. The parties hereby stipulate and agree that the property listed in the Inventory and Appraisement and known as the Industrial property shall be awarded to Penn Harris Smith and Salli Smith Girard as tenants in common, with Salli Smith Girard being entitled to twenty-nine percent (29%) of said property and Penn Harris Smith being entitled to seventy-one percent (71%) of said property.



4. As consideration for the above, Penn Harris Smith and Salli Smith Girard agree to pay to Genevieve A. Smith and Jesse E. Smith the total sum of \$12,250.00. Penn Harris Smith shall release any and all claim to the Pah Tempe Springs property, the Magelby property located in Pintura Utah, and the balance due on the sales contract between Jesse E. Smith and Elias Penn Smith. Salli Smith Girard shall release any and all claim she has to the Magelby property located in Pintura Utah. Salli Smith Girard shall also release any and all interest she has in and to the real estate sales agreement between E. Penn Smith and Genevieve A. Smith Sellers and Jesse E. Smith and Beth M. Smith Buyers.

5. The property known as Pah Tempe Hot Springs, the description of which is situated in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

6. The property known as the Magelby property located in Pintura Utah should be distributed to Jesse E. Smith and Genevieve A. Smith as tenants in common, and Penn Harris Smith and Salli Smith Girard hereby release any and all claim in and to said property. The proceeds from the real estate contract made between Elias Penn Smith and Genevieve A. Smith and Jesse E. Smith and Beth M. Smith shall become the property of Jesse E. Smith and Genevieve A. Smith, and Penn Harris Smith and Salli Smith Girard shall release any and all interest in and to said property.

7. The persons who take the property described above, shall take their property subject to any and all encumbrance which may exist thereon or any and all lease, rental or other assessment which may attach to that property, as of this date.

8. The parties who take the property set forth above as tenants in common, hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property

in the event that tenant wishes to sell. That tenant shall advise the co-tenant of his desire to sell and if a bona fide offer is recieved from a third party, that offer must be met or the tenant may sell to said third party or any other third party. If the tenant desires to excercise the right of first refusal and a third offer is unavailable, then the interest shall be determined by an evaluation of the fair market value of said property which can be accomplished by the appointment of appraisers by said tenants. Each tenant shall appoint an appraiser and if the tenants are still in disagreement, those appraisers shall appoint another appraiser and the decision of that appraiser shall be final.

9. The parties have divided the personal property among themselves.


10. Salli Smith Girard and her husband are presently indebted to the Estate in the sum of \$2,224.00.

11. The heirs accept the accounting of Genevieve A. Smith concerning the assets and liabilities of the estate and further agree with a payment to her of an executrix fee in the sum of \$3,220.00.

12. All of the parties to this agreement shall be responsible for one-fourth (1/4) of any additional taxes or estate debts and same shall be paid by the heirs within 30 days of notification of that debt.

WHEREFORE, your petitioners pray the Court for an Order distributing the property in accordance with the Petition and Stipulation set forth above.

DATED, this 7<sup>th</sup> day of February, 1977.

  
GENEVIEVE A. SMITH

  
JESSE E. SMITH

  
SALLI SMITH GIRARD



STATE OF UTAH     )  
                          )     ss.  
COUNTY OF IRON    )

Genevieve A. Smith, Jesse E. Smith, Salli Smith Girard,  
Penn Harris Smith, being the petitioners in all of the heirs to  
the Estate of Elias Penn Smith, hereby state that they have read  
the foregoing Petition and Stipulation and are aware of the  
contents thereof and duly acknowledge that they signed said  
document.

DATED, this 7<sup>th</sup> day of February, 1977..

Genevieve A. Smith  
GENEVIEVE A. SMITH

Jesse E. Smith  
JESSE E. SMITH

Salli Smith Girard  
SALLI SMITH GIRARD

Penn Harris Smith  
PENN HARRIS SMITH

SUBSCRIBED and sworn to before me this 7<sup>th</sup> day of February  
1977.

[Signature]  
NOTARY PUBLIC

Residing at: \_\_\_\_\_

My Commission expires: \_\_\_\_\_

MICHAEL D. HUGHES (Bar No. 1572)  
THOMPSON, HUGHES & REBER  
Attorneys for Defendants Anderson & Appleby  
148 East Tabernacle  
St. George, Utah 84770  
Telephone: (801) 673-4892

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

---

JESSE E. SMITH, BETH M. SMITH,	:	
and GENEVIEVE A. SMITH,	:	
	:	
Plaintiffs,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	
	:	
SALLI SMITH WEST, KEN ANDERSON,	:	
and CHARLES L. APPLEBY, JR.,	:	
	:	Civil No. 86-1058
Defendants.	:	

---

KEN ANDERSON and CHARLES L.	:	
APPLEBY, JR.,	:	
	:	
Cross-Claimant,	:	
vs.	:	
	:	
SALLI SMITH WEST,	:	
	:	
Cross-Defendant.	:	

---

THIS MATTER having come before the Court for trial on the 21st day of April, 1989, without a jury, and Plaintiffs being represented by and through their attorney of record James L. Shumate, and Defendants and Cross-Claimants Ken Anderson and Charles L. Appleby, Jr. being present and represented by their

attorney of record Michael D. Hughes, and Defendant and Cross-Defendant Salli Smith West appearing pro se, and the Court having heard the testimony of the witnesses and having received the evidentiary support for both Plaintiffs' unverified complaint and the defenses proposed by Defendants, Cross-Claimants, and Cross-Defendants, and the matter having been briefly argued and supplemented by written memoranda, now, therefore, the Court hereby enters its findings of fact and conclusions of law as follows, to-wit:

FINDINGS OF FACT

1. The pleadings were properly joined for trial, though a precipe for default and default judgment had been entered against Defendant and Cross-Defendant Salli Smith West and filed with the Court on April 14, 1989. Salli Smith West never filed a reply to said cross-claim.

2. This case involved the Plaintiffs' collective request for specific performance of a "right of first refusal" included in a Stipulation and Petition for Distribution (hereafter "Stipulation"), arising in the matter of the Estate of Elias Penn Smith, Washington County Probate No. 2070, and marked and received into evidence as Plaintiffs' Exhibit No. 1 (hereafter P.1).

3. Part of the estate mentioned in said Stipulation (P.1) included real property known as Pah Tempe Hot Springs, which is the subject matter of the case at bar.

4. The Stipulation (P.1) was signed by Genevieve A. Smith, Jesse E. Smith, Penn Harris Smith, and Salli Smith Girard

(n.k.a. Salli Smith West) and provided as follows:

5. The property known as Pah Tempe Hot Springs, the description of which is situated in the Inventory and Appraisement, should be distributed to Genevieve A. Smith, Jesse E. Smith, and Salli Smith Girard, as tenants in common.

...

8. The parties who take the property set forth above as tenants in common, hereby agree to grant their fellow tenants a right of first refusal to buy their interest in said property in the event that tenant wishes to sell.

5. Penn Harris Smith was not to be named as a tenant in common to this property and, indeed, was not a party to this lawsuit.

6. Though the Stipulation (P.1) was executed in February of 1977, the Defendants produced the Decree of Final Distribution and Order Approving First and Final Account and Report of Administration (hereafter "Decree"), which was marked and received by the Court as Defendants' Exhibit No. 8 (D.8).

7. The July, 1977, Decree (D.8) makes no mention of the right of first refusal, and has attached thereto as Exhibit "B" a Quit Claim Deed which varies from the Stipulation (P.1) in that the one-third interest to be awarded to Jesse E. Smith was conveyed to him and his wife Beth M. Smith; and, further, said deed, as subsequently recorded, contains no "first right of refusal" or other language which would facially limit a grantee-tenant's right to alienate his or her interest in the same.

8. Beth M. Smith was not a signor of the original Stipulation (P.1) and, further, the Plaintiff Beth M. Smith offered no testimony at trial and gave no evidence whatsoever therein.

9. Though Beth M. Smith received, by the Decree and the deed of conveyance attached thereto (D.8), an interest in the subject-matter property which conceivably makes her a co-tenant, that interest did not make her a party to the Stipulation (P.1) executed in February of 1977, nor to the right of first refusal contained in paragraph eight thereof.

10. Insofar as Beth M. Smith offered no evidence in support of her position as a holder of any right of first refusal as against any of the Defendants, she did not give any evidence whatsoever to establish any support of her complaint, and, therefore, the same should be dismissed with prejudice.

11. Defendants contended at trial that the right of first refusal contained in the Stipulation (P.1) was merged into the Decree and the deed which was attached thereto (D.8). In support of this proposition Defendants have cited, inter alia, the case of Davis v. Davis 632 P.2d 769 (Okla. App.).

12. The case of G.G.A. v. Laventis, 773 P.2d 841 (Utah App. 1989) is more in point, in that the Court finds the right of first refusal to be a collateral agreement to the division and distribution of the property in the estate. In so finding, the Court finds that it was the obvious intent of the signatories to the Stipulation (P.1) that the right of first refusal would continue between those signatories as tenants in common and family

members after the property was distributed. The Court therefore finds that there was no merger of the right of first refusal in the Decree and deed issued and subsequently recorded thereunder (D.8), and that the right of first refusal continued to exist. The signatories to the Stipulation (P.1) who appeared at trial and testified continued to show, by their subsequent conduct, that they considered the right of first refusal to exist between them, and that said right was designed to allow co-tenants in common a right to purchase any interest of another co-tenant desirous of selling his or her interest in and to the commonly-held property.

13. The Court, having determined that the right of first refusal survived the Decree and deed issued thereunder (D.8), finds that the claims of each of Plaintiff must be considered.

14. As early as October 12, 1985, Salli Smith West gave written notice that she was interested in selling her one-third share in the subject-matter property. On September 4, 1986, Charles L. Appleby, Jr. went to Santa Fe, New Mexico, and at that time Salli Smith West modified and extended a July 23, 1986, Option to Purchase, marked as Plaintiffs' Exhibit No. 17 (hereafter P.17), by drafting the Option to Purchase dated September 4, 1986, received into evidence and marked as Defendants' Exhibit No. 11 (hereafter D.11). By this Option (D.11), Ken Anderson and Charles L. Appleby Jr. took an option to purchase the interest of Salli Smith West in and to the subject-matter property.

15. By August of 1981, Salli Smith West had relocated in New Mexico, and the monthly income generated by the lease

agreement on the subject-matter property was modest in light of the option to purchase the property executed in September of 1986 by Anderson and Appleby (D.11).

16. Anderson and Appleby were aware of the right of first refusal, and Salli Smith West represented to them that she would personally take care of that factual matter with those holding or claiming the right.

17. On or about September 26, 1986, the Salli Smith West gave sufficient notice to Jesse E. Smith, by telephone, of the offer of Appleby and Anderson to purchase her interest in the subject-matter property. This telephone call was made to Jesse E. Smith while he was at work and is substantiated by the telephone records received into evidence as Defendants' Exhibit No. 13. Though Mr. Smith indicated that he could not be reached by telephone at his place of employment, the Court, en camera and with counsel present, made a call to the number indicated on the telephone records and was able to reach Mr. Smith's assistant, who indicated that Mr. Smith was out of town, but otherwise could have been telephonically contacted.

18. Salli Smith West disclosed the nature of the offer to Jesse E. Smith, and Mr. Smith said that he had no desire to individually meet the offer of Anderson and Appleby. The Court finds, based upon the credibility of the testimony of Salli Smith, that during this telephone conversation Jesse E. Smith further assured Salli Smith West that he would send her a letter to the effect that he would not exercise his first right of refusal.

19. Approximately three days subsequent to said telephone call, Jesse E. Smith sent a letter dated September 29, 1986, marked and received into evidence as Plaintiffs' Exhibit No. 4 (hereafter P.4), to Salli Smith West indicating that upon receipt of a copy of Anderson and Appleby's offer to purchase the property he would give her "a letter signed by Beth, Gen, and myself releasing you from our option of first right of refusal."

20. Salli Smith West relied on the oral and written representations of Jesse E. Smith in allowing Anderson and Appleby to exercise their option to purchase her interest in the subject-matter property. Considering that Salli Smith West was dealing primarily with family members, her reliance on Jesse E. Smith's oral and written representations was reasonable.

21. On or about October 2, 1986, Salli Smith West, together with Anderson and Appleby, completed the closing of the real estate option before Terra Title Company in St. George, Utah, as is represented by Plaintiffs' Exhibit No. 7.

22. Salli Smith West, in a letter dated October 6, 1986, which is marked and received into evidence as Plaintiffs' Exhibit No. 5, complied with the terms set forth in the Jesse E. Smith's letter of September 29, 1986 (P.4).

23. Jesse E. Smith knew, or had reason to know, that Salli Smith West would rely on his representations orally made on September 26, 1986, also made in writing on September 29, 1986 (P.4). However, after Salli Smith West gave Jesse E. Smith the information requested of her, Jesse E. Smith did not provide the



promised letter to Salli Smith West, contrary to both his oral and written representations.

24. By letter dated October 13, 1986, marked and received into evidence as Plaintiffs' Exhibit No. 6, Jesse E. Smith avoided sending the promised letter waiving the right of first refusal and instead stalled the sending of that letter by requesting documents which the Court finds irrelevant to the right of first refusal as contained in the Stipulation (P.1).

25. By reason of Jesse E. Smith's oral and written representations, he gave up any claim he may have had under his right of first refusal at that time, and is now estopped from asserting the same both by the principles of equitable and promissory estoppel.

26. Salli Smith West, in reliance on the representations made by Jesse E. Smith, consummated the sale and put herself in a position of jeopardy by his subsequent conduct, which conduct breached and reneged on the promises made both orally and in writing to her.

27. The July 23, 1986, option (P.17) need not have been communicated to the Plaintiffs because the same was not accepted in its form by Salli Smith West, and, as a result, there was no need, by reason of the original Stipulation (P.1), to communicate that offer to her other co-tenants. As Judge Greenwood stated in the G.G.A. case:

A right of first refusal to purchase property is different from an option in that a right of first refusal is not binding unless the offeror decides to sell the property. [G.G.A. v. Laventis, supra.]

28. The Court specifically finds that Salli Smith West did not decide to sell the property under the July 23, 1986, option.

29. Prior to trial, Genevieve A. Smith created a Nevada corporation, to-wit: Silver Sands Inc., and conveyed her interest in the subject-matter property to said corporation by warranty deed on or about May 17, 1988.

30. In making this conveyance, Genevieve A. Smith ceased to be a co-tenant in and to the property. Furthermore, in making said conveyance, she did not abide by the terms of the right of first refusal because she felt it was "her corporation" and that the right of first refusal did not apply.

31. The right of first refusal belonged to co-tenants as specified in the Stipulation (P.1) and was meant to be a family right to entitle the grantees under the Decree (D.8) to hold the property as part of the family in the event any one of them intended to sell.

32. At the time of trial, Genevieve A. Smith was no longer a co-tenant, and she did not have the right to claim a benefit to the right of first refusal as she lost the status or standing as an individual to pursue that right.

33. A corporation is a separate legal entity. The fact that Genevieve A. Smith may be the sole stockholder in the corporation does not alter the fact that it is a different legal entity, and Genevieve A. Smith is no longer a co-tenant. As a result, the Court holds against Genevieve A. Smith on her claim, and finds she

had no standing to assert the same at the time of trial.

34. Beth M. Smith was not a party to the Stipulation (P.1), and cannot claim any rights under it. Furthermore, the position of Beth M. Smith cannot be ascertained by reason of her failure to offer any testimony or evidence at trial and by reason of the fact that the complaint stands unverified in the file.

35. Upon being sued, Anderson and Appleby, by reason of the Warranty Deed marked and received into evidence as Defendants' Exhibit No. 1, requested defense of their title from Salli Smith West.

36. As the Court has ruled for the Defendants Anderson and Appleby, affirming their title to Salli Smith West's former interest in the subject-matter property, the cross-claim of Anderson and Appleby for indemnification for their attorney's fees in defending the title as received under the Warranty Deed (D.1) from Salli Smith West should, likewise, be denied and dismissed.

37. Defendants' attorney, Michael D. Hughes, offered testimony, which testimony is uncontroverted, that the attorney's fees in defending this matter were \$6,500.00 through the date of trial, and Hughes was thereafter instructed by the Court to prepare further pleadings in conformity to this Court's memorandum decision.

38. Costs in defending the suit, however, should be awarded to the prevailing Defendants Anderson and Appleby.

#### CONCLUSIONS OF LAW

1. Plaintiff Beth M. Smith has no standing to bring the

instant cause of action against Defendants in that she was not a signor to the original Stipulation, and she filed no affidavits nor offered no testimony in support of her complaint. As a result thereof, Beth M. Smith's complaint as against all Defendants should be dismissed with prejudice.

2. Defendant and Cross-Defendant Salli Smith West relied, to her detriment, on the oral and written representations of Plaintiff Jesse M. Smith in conveying the property to Anderson and Appleby. As a result thereof, Jesse M. Smith is estopped, by the principles of promissory and equitable estoppel, from asserting any claim to exercise his right of first refusal which he agreed to waive and which agreement to waiver was relied on by Salli Smith West.

3. The right of first refusal was held by co-tenants who were members of the family of Elias Penn Smith; and, upon termination of Genevieve A. Smith's co-tenancy, the right of first refusal held by Genevieve A. Smith was also terminated.

4. The grantee corporation of Plaintiff Genevieve A. Smith is a different legal entity than the individual, and Genevieve A. Smith had no standing to bring suit based upon the right of first refusal where she had, prior to trial, conveyed her interest in and to the subject-matter property to a Nevada corporation.

5. Plaintiffs' complaint should be dismissed with prejudice with costs to Defendants.

6. Having prevailed on their claim for a valid title,

Defendants Anderson and Appleby are not entitled to reimbursement of attorney's fees despite the issuance of a Warranty Deed to them by Salli Smith West and despite her representations that she would take care of the right of first refusal.

7. A judgment in accordance with the foregoing findings of fact and conclusions of law should be entered and formally executed by the Court.

DATED this 5 day of ~~January~~<sup>Feb</sup>, 1990.

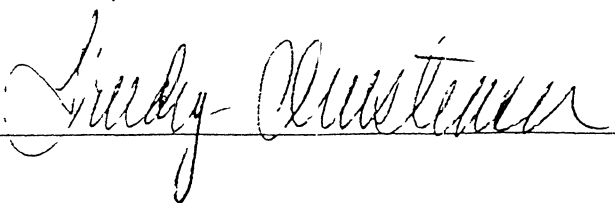
  
DEAN E. CONDER

AFFIDAVIT OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 7<sup>th</sup> day of ~~January~~<sup>February</sup>, 1990, addressed as follows:

Mr. James L. Shumate  
P.O. Box 623  
Cedar City, Utah 34720

Ms. Salli Smith West  
546 Onate Place  
Santa Fe, New Mexico 87501



Henderson, Nevada  
Sept. 29 1986

Dear Sally,

I have been unable to talk with Gen about the Springs. She had to take some horses to the coast and I do not know for sure when she will be back. I don't think she can come up with any money at the Present time because she is in a big law suit in Phoenix and is also being hounded by the I.R.S. over Mountain Shadows. I can not handle \$125,000.00 by myself.

What I will need from You is a copy of their offer to buy properly signed by them and notarized. Also a copy of the sales agreement. I will give You a letter signed by Beth, Gen, And myself releasing You from our option of first right of refusal.

Under the Present conditions, at Pah-Tempe, the \$125,000.00 offer from Appleby & Anderson may look good, but I think it is too low, however It would take more than 40 Years to, get that money, and with out interest, from Your Part of the rent.

I am sure Appleby & Anderson will be after me and Gen to sell after they get Your Part. I will need some documentation in the event they exercise their option to buy Gen and I out.

As You may or maynot know an offer to buy real Property must be made in writing and signed to be valid under Utah law. I must have this documentation if it becomes nessesary to have an appraisal at a later time. Please get this out to me soon.

Love  
Your Brother  
Jesse

copy:  
Gen Smith  
Mike Park  
file

m. Generally, a juror affidavit can only be used to impeach a jury verdict when: 1) the verdict is determined by chance or bribery, *Rosef v. Sullivan*, 676 P.2d 372, 375 (Utah 1983); *Hillier v. Lamborn*, 740 P.2d 300, 304 (Utah Ct. App. 1987); or 2) when "extraneous judicial information was improperly brought to the jury's attention or an outside influence was improperly brought to bear on any juror." Utah R. Evid. 606(b); *State v. DeMille*, 756 P.2d 81, 83 (Utah 1988); *Hillier*, 740 P.2d at 304. The reason for narrowly limiting the circumstances under which juror affidavits can be used to impeach a jury verdict is that otherwise, litigants would obtain juror affidavits on "all manner of things" and the process would become interminable and impracticable. *Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 250 P.2d 932, 937 (1952). Further, "[s]uch post mortems would be productive of no end of mischief and render service as a juror unbearable." *Id.*

In *State v. DeMille*, 756 P.2d 81 (Utah 1988), the Utah Supreme Court considered whether a juror's affidavit regarding a divine revelation could be used to impeach the jury's verdict under Utah R. Evid. 606(b). In *DeMille*, the juror affidavit stated that one juror allegedly told another juror during deliberations that she had prayed for a sign during closing argument as to DeMille's guilt and claimed to have received a revelation that if defense counsel did not make eye contact, DeMille was guilty. Defense counsel did not make eye contact and DeMille was found guilty.

In reviewing whether the juror affidavit should have been admitted under Utah R. Evid. 606(b), the court stated that construing "outside influence" to include responses to prayer could well infringe upon the juror's religious liberties. *Id.* at 84. The court stated that as long as the juror can fairly weigh the evidence and apply the law to the facts, the juror's decision cannot be challenged on the ground that the juror reached the decision by aid of prayer. *Id.* Accordingly, the court held that under Rule 606(b), prayer and supposed responses to prayer are not included within the meaning of the words "outside influence." *Id.* The court also noted, however, that a juror might be disqualified from service if he or she is unable to fairly consider the evidence and properly apply the law due to oracular signs. *Id.* The court then found that this fact did not save DeMille's challenge to the verdict for two reasons. *Id.* First, the affidavit did not aver facts which would disqualify a juror. Second, even if the affidavit averred such facts, the court stated,

[a] claim that a juror is so affected by religious conviction as to disqualify him or her from service does

not fall within these exceptions [Rule 606(b)]; rather it goes to the fitness of the person to serve on the jury, a matter that could and should have been raised at voir dire.

*Id.* at 85.

Applying the law to the facts in this case, we need not reach whether the affidavit alleged facts that would disqualify any juror because, according to *DeMille*, juror affidavits regarding divine revelations do not fall within the exception set forth in Rule 606(b). Therefore, we hold that the trial court did not err in excluding the juror affidavit.

We have examined the other issues raised in this appeal and conclude that those issues are without merit. Affirmed in part and reversed in part.

Pamela T. Greenwood, Judge

I CONCUR:

Regnal W. Garff, Judge

I CONCUR IN THE RESULT:

Richard C. Davidson, Judge

---

---

Cite as  
107 Utah Adv. Rep. 65

## IN THE UTAH COURT OF APPEALS

G.G.A., INC., an Indiana Corporation,  
Plaintiff and Respondent,

v.

Toula K. LEVENTIS,  
Defendant and Appellant.

No. 870546-CA

FILED: April 28, 1989

---

Third District, Salt Lake County  
Honorable J. Dennis Frederick

ATTORNEYS:

Nick J. Colessides, Salt Lake City, for  
Appellant

Bryan A. Larson, Salt Lake City, for  
Respondent

Before Judges Davidson, Greenwood, and  
Orme.

---

### OPINION

GREENWOOD, Judge:

This case involves real property occupied by G.G.A., Inc., doing business as a Wendy's Old Fashioned Hamburgers restaurant, located at about 550 East 400 South in Salt Lake City, Utah. Toula Leventis (Leventis), who leased the property to G.G.A., appeals from the trial

court's summary judgment in favor of G.G.A., claiming that her notice to G.G.A. of an offer to purchase the property for \$210,000 did not obligate her to sell to G.G.A. for that price. G.G.A., however, contends that Leventis's communication of that offer to G.G.A. created an irrevocable option in its favor. We affirm on the basis that G.G.A. had a right of first refusal for ninety days after notice of the offer.

In 1977, Leventis leased the subject property to G.G.A., which constructed a Wendy's Old Fashioned Hamburgers restaurant on the premises and commenced doing business. The parties' lease provided, in Article XIV entitled Option to Purchase and Right of First Refusal, that after the expiration of the initial twenty-five year term of the lease, G.G.A. would have an option to purchase the property for an agreed upon price or at market value, to be determined by three appraisers. The second paragraph of Article XIV stated that

Landlords further covenant and agree that in case Landlords shall at any time during the term of this lease intend or desire to sell Landlords' estate in the demised premises, or if Landlords shall receive a bona fide offer to purchase said demised premises, Landlords shall first notify Tenant of such desire and intent or of such offer and the price at which and the terms upon which Landlords are willing to sell such estate. Thereupon, Tenant shall have the option, to be exercised within ninety (90) days after receipt by Tenant of written notice from the Landlords to elect to purchase the demised premises at, for such price and upon such stated terms and conditions.

Finally, the lease provided that in the event of litigation due to breach, the successful party would be entitled to reasonable attorney fees and costs.

On September 9, 1986, Leventis received an offer to purchase the premises for \$210,000 from Jimmy P. Brown. On September 15, 1986, Leventis notified G.G.A. of the offer and enclosed a copy of Brown's earnest money agreement. In early October, prior to October 28, 1986, Phillip Arlt, on behalf of G.G.A., orally advised Leventis that G.G.A. would exercise its option to purchase the premises for \$210,000. On October 28, 1986, Leventis wrote G.G.A. a letter stating that Brown had withdrawn and rescinded the offer. The letter also stated, "I do want to sell my property and will entertain new offer(s) to sell it; accordingly I do not consider myself bound to sell at the price of \$210,000."

On November 20, 1986, Leventis received an offer from Janus and Associates to purchase

the property for \$250,000 and informed G.G.A. of the offer the following day. On December 6, 1986, G.G.A. wrote Leventis a letter offering \$210,000 for the property. Leventis refused to sell the property for \$210,000. On February 6, 1987, G.G.A. initiated this action against Leventis, alleging that G.G.A. was entitled to specific performance and claiming it was entitled to an injunction to prevent Janus and Associates from purchasing the property. G.G.A. paid Leventis \$250,000 for purchase of the property and specifically stated that it reserved its right to purchase the property for \$210,000. Closing of the sale and purchase took place on February 27, 1987. The warranty deed stated that Leventis conveyed the property for "ten dollars and other good and valuable consideration." After the property was purchased, G.G.A. amended its complaint against Leventis to include a cause of action for breach of contract and to enforce the \$210,000 purchase price.

Both G.G.A. and Leventis filed motions for summary judgment. The trial court granted summary judgment for G.G.A. and awarded it principal, costs and attorney fees in the amount of \$44,792.75. Leventis filed this appeal raising the following issues: 1) Did delivery and acceptance of the warranty deed constitute a merger and thereby extinguish G.G.A.'s rights under the lease? 2) Did Leventis's September 15 letter constitute an irrevocable option or a right of first refusal? 3) Did the trial court err in awarding G.G.A. attorney fees and costs under the lease?

#### MERGER

Leventis asserts that her delivery of the warranty deed and G.G.A.'s acceptance, constitute merger of the lease into the deed, thus extinguishing G.G.A.'s rights under the lease. As a result, Leventis claims, G.G.A. cannot assert the parties' lease as the basis for this action.

The doctrine of merger provides that upon delivery and acceptance of a deed, the provisions of the underlying contract for the conveyance are deemed extinguished or superseded by the deed. *Secor v Knight*, 716 P.2d 790, 792 (Utah 1986). However, there are several exceptions to this doctrine, including fraud, mistake and the existence of collateral rights in the contract of sale. *Id.* at 793. Under the collateral rights exception, "if the original contract calls for performance by the seller of some act collateral to conveyance of title," his obligations under the original contract are not extinguished. *Stubbs v Hemmert*, 567 P.2d 168, 169 (Utah 1977). Whether the terms of the contract are collateral depends to a great extent on the intent of the parties. *Id.* The court applied the collateral rights exception in *Stubbs*, and found that the parties had entered into an agreement collateral to the conveyance of the real property, to the effect



the seller of the property could remove equipment from the building. After g that the parties' testimony indicated they clearly intended to allow plaintiff to ter the property and retrieve his equip- after the deed was delivered, the court d that the agreement regarding retrieval e equipment was collateral to the deed eying the property.

this case, G.G.A.'s attorney wrote a to Leventis's attorney on February 17, stating that G.G.A. was exercising its n to purchase the property for \$250,000. ever, the letter also stated that G.G.A. ved that it had timely exercised its option rchase the property for \$210,000. Finally, tter stated,

You are further notified that GGA hereby specifically reserves all of its rights and remedies under the terms of that certain Real Estate Ground Lease and specifically, but not by way of limitation to, the rights and remedies provided for in Article XIV and further reserves all of its rights and remedies under the Sep- tember 15, 1986 option and GGA's timely exercise thereof.

n February 27, 1987, G.G.A.'s attorney e another letter to Leventis's attorney iring that Leventis and G.G.A. were ving all claims, rights and defenses in the uit and nothing in the closing was to be preted as waiving those claims and defe-. The letter specifically stated that G.G.A. not relinquishing its right to purchase the erty for \$210,000. Leventis did not ond to either letter nor otherwise manifest intention inconsistent with G.G.A.'s ess reservation of rights.

plying the doctrine of merger and the ateral rights exception to the present case, find that these letters manifest a clear nt to preserve the rights set forth in the e, notwithstanding delivery of the deed. In ition, similar to *Stubbs*, the collateral ter of interpretation of the lease was rly a question to be resolved after closing delivery of the deed. Therefore, we hold the lease was an agreement collateral to conveyance of the real estate, and delivery he deed did not extinguish G.G.A.'s rights ler the lease.

#### PTION TO PURCHASE OR RIGHT OF FIRST REFUSAL

Ve now turn to Leventis's claim that the l court erred in granting summary judg- nt in favor of G.G.A. Leventis claims that letter of September 15, 1986, informing J.A. that she had received an offer to chase the property for \$210,000 from my P. Brown, did not create an irrevoc- e option to purchase the premises. Conve-

rsely, G.G.A. contends that Leventis's letter triggered an irrevocable 'option' exercisable within ninety days, to purchase the property for \$210,000.

In reviewing the trial court's grant of summary judgment, we liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion. *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988). Further, because summary judgment is granted as a matter of law, we are free to reappraise the trial court's legal conclusions. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987).

In interpreting a contract, we determine what the parties intended by examining the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole. *Sears v. Riemersma*, 655 P.2d 1105, 1107-08 (Utah 1982). The cardinal rule is to give effect to the intentions of the parties and, if possible, to glean those intentions from the contract itself. *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988). Additionally, a contract should be interpreted so as to harmonize all of its terms and provisions, and all of its terms should be given effect if possible. *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988).

The focal point in this case is whether in light of the underlying lease provision, Leventis's letter effectuated an option or if it created a right of first refusal which was open for ninety days. An option to purchase property is a contract in which the owner of the property sells to the optionee the right to buy the property in accordance with the terms and conditions specified in the option. *Spokane School Dist. No. 81 v. Parzybok*, 96 Wash. 2d 95, 633 P.2d 1324, 1325 (1981). A right of first refusal to purchase property is different from an option in that a right of first refusal is not binding unless the offeror decides to sell the property. 11 S. Williston, *Contracts* §1441A, at 949-50 (3rd ed. 1968); *Northwest Television Club, Inc. v. Gross Seattle, Inc.*, 26 Wash. App. 111, 612 P.2d 422, 425 (1980). A right of first refusal limits the owner's right to dispose of his property by requiring him to first offer it to the party who has the right of first refusal. 11 S. Williston, at 949-50.

Article XIV of the parties' lease, entitled "OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL," contains two paragraphs. Although the first paragraph is not applicable in this case, interpretation of that paragraph assists our interpretation of paragraph two, which is the pivotal provision in this case. Paragraph one states that at any time during the term of the lease, the tenant has an option to purchase the premises. If the tenant notifies the landlord of its intent to exercise that

option and the parties are unable to agree upon a price three appraisers will be selected to determine the fair market value of the property. After that value is determined the tenant has sixty days to elect to purchase the property. In contrast paragraph two provides that

Landlords further covenant and agree that in case Landlords shall at any time during the term of this lease receive a bona fide offer to purchase said demised premises Landlords shall first notify Tenant of such desire and intent or of such offer and the price at which Landlords are willing to sell such estate. Thereupon, *Tenant shall have the option, to be exercised within ninety (90) days after receipt by Tenant of written notice from the Landlords to elect to purchase the demised premises.* If Tenant exercises said option within said ninety (90) day period of time, the closing of the purchase and sale shall be consummated with reasonable promptness thereafter. If Tenant shall not exercise said option Landlords shall have the right to conclude a sale; however, *the Tenant's option to purchase aforesaid and Tenant's right of first refusal as herein contained shall remain in force and be binding upon any subsequent owners.*

(Emphasis added)

Paragraph one describes an option to purchase the premises, and the method for determining the price. The facts of this case indicate, however, that the parties were not operating under the provisions of paragraph one of Article XIV, because the tenant, G G A, did not initiate the discussion regarding purchase of the property and the price was set by a third party rather than by the parties or three appraisers.

We next examine paragraph two to determine if it sets forth a right of first refusal or an option to purchase and to determine the effect of Leventis's letter concerning Jimmy Brown's offer under paragraph two. Paragraph two requires Leventis to inform G G A of any bona fide offers she receives and the price at which she is willing to sell the property. Thus, if a third party proposes an offer and Leventis accepts that offer Leventis is obliged to first inform G G A of the offer and permit G G A ninety days within which to agree to purchase the property at the offered and accepted price. Part of the confusion in this case appears to stem from use of the word "option" in paragraph two. However, it appears that the first paragraph of Article XIV grants an option to purchase

while the second paragraph provides a right of first refusal. Therefore the plain meaning of "option" as used in paragraph two is not the usual technical legal definition, but describes an alternative right to purchase the property upon the offered and accepted terms and conditions of a third party, a right of first refusal. Furthermore, the word "option" has been interpreted in at least one other contract to actually denote a right of first refusal. See *Cummings v. Nielson*, 42 Utah 157, 129 P. 619-621 (1913). Finally, the last sentence in paragraph two lends further credence to the notion that the first paragraph or 'aforesaid' portion of Article XIV describes an option, while the second paragraph of Article XIV "herein" specifies a right of first refusal. Accordingly, paragraph two gives G G A a right of first refusal and limits Leventis's right to dispose of the property in that she is compelled to permit G G A ninety days to exercise its right of first refusal.

Applying paragraph two to the facts of this case, it is clear that Leventis's letter of September 15, 1986 triggered G G A's right to purchase the property on the same terms as Brown proposed, i.e., for \$210,000. Leventis clearly received and accepted an offer from a third party and informed G G A of that offer. In accordance with the lease, G G A then had ninety days to exercise its right of first refusal. On December 6, 1986, G G A timely exercised its right of first refusal. Consequently, the trial court properly granted summary judgment in favor of G G A.

#### ATTORNEY FEES AND COSTS

Leventis also contends that the trial court erred in awarding G G A attorney fees and costs. Attorney fees are generally recoverable in Utah if provided for by contract. *E.g., Dixie State Bank v. Bracken*, 764 P.2d 998 (Utah 1988).

The lease in this case provides that if landlord or tenant is required to resort to litigation on account of any breach, the successful party shall recover all costs and expenses including reasonable attorney fees paid or incurred in connection with the litigation. Therefore, because the contract clearly provides that G G A is entitled to recover attorney fees and costs if successful, the court properly awarded attorney fees and costs. *Id.* at 991 ("if reasonable fees are recoverable by contract or statute it is a mistake of law to award less than that amount.")

G G A is also entitled to attorney fees and costs incurred on appeal, as the contract provision includes both trial and appeal fees and costs. *Jenkins v. Bailey*, 676 P.2d 391, 393 (Utah 1984). We remand to the trial court for a determination of attorney fees incurred on appeal.

Affirmed

Pamela T. Greenwood, Judge  
WE CONCUR:  
Gregory K. Orme, Judge  
Richard C. Davidson, Judge

Cite as  
107 Utah Adv. Rep. 69

IN THE  
UTAH COURT OF APPEALS

Charles FLOYD,  
Plaintiff and Appellant,  
v.  
WESTERN SURGICAL ASSOCIATES,  
NC., Martin C. Lindem, Jr., M.D., Lynn L.  
Wilcox, M.D., and St. Mark's Hospital,  
Defendants and Respondents.

No. 880243-CA  
FILED: April 28, 1989

Third District, Salt Lake County  
Honorable Richard H. Moffat

ATTORNEYS:

D. Clayton Fairbourn, Midvale, for Appellant  
Clifford J. Williams, Larry R. Laycock, Salt  
Lake City, for Western Surgical Associates,  
Inc. and Martin C. Lindem  
Anthony Eyre, Salt Lake City, for Lynn L.  
Wilcox  
Gary D. Stott, Salt Lake City, for St. Mark's  
Hospital  
Before Judges Garff, Greenwood and  
Jackson.

OPINION

GREENWOOD, Judge:

Charles Floyd brought this action seeking damages against defendants resulting from allegedly unnecessary surgery. The trial court granted summary judgment for all defendants, stating that Floyd's claims were barred by the statute of limitations set forth in Utah Code Ann. §78-14-4 (1987). The court stated that Floyd discovered, or through the exercise of reasonable diligence should have discovered, more than two years before he commenced the action, that he had sustained an injury and that the injury was caused by negligent action. We affirm.

After experiencing severe heartburn for many years and consulting at least two doctors about the problem, Floyd consulted Dr. Wilcox in November 1981. Dr. Wilcox examined Floyd, told him that he had a hiatal hernia and referred him to Dr. Lindem for surgery to correct the problem. Floyd met with

Dr. Lindem and discussed possible hiatal hernia surgery only. Dr. Lindem told him the hernia was a tear between the esophagus and the stomach and the surgical process would entail pulling the stomach up over the esophagus and tying it in. Neither Dr. Lindem nor Dr. Wilcox told Floyd that he had ulcers. On December 8, Dr. Lindem's nurse asked Floyd to sign a consent form authorizing the surgery. According to Floyd, the consent form stated that the proposed medical treatment was hiatal hernia surgery only.

On December 9, 1981, Dr. Lindem conducted three surgical procedures on Floyd: 1) hiatal hernia surgery, also called fundoplication; 2) a vagotomy, which is severance of the stomach nerves to reduce stomach secretions and correct ulcer disease; and 3) pyloroplasty, which enlarges the opening from the stomach to the duodenum to allow the contents of the stomach to empty more rapidly. At the time Floyd was discharged from the hospital, he told Dr. Lindem he had diarrhea and Dr. Lindem said that it would go away in time.

Over the next few months Floyd's diarrhea became worse, his stomach was upset almost continuously, he was depressed and began to lose weight. In about March or April 1982, Floyd's wife asked Dr. Lindem what he had done to Floyd. At that time, Dr. Lindem told Floyd and his wife that he had performed additional surgery. According to Floyd, Dr. Lindem stated that he had repaired the hernia, removed a portion of his stomach that was covered with ulcer scars, and cut the nerves in his stomach and opened up the bottom of his stomach so he could process food faster. Dr. Lindem also stated that it might take two or three years for Floyd to recover. During his deposition, Floyd testified that in March or April of 1982, he learned for the first time that Dr. Lindem had performed surgery he had never discussed with him and to which he had not consented. Floyd also stated that he understood at that time that the unconsented to surgery caused his diarrhea, upset stomach, weight loss and depression. Later in the deposition, however, Floyd indicated that he did not fully realize at that time that Dr. Lindem had done something that Floyd had not authorized.

In September 1982, Floyd consulted Dr. Wilcox regarding his ongoing diarrhea, upset stomach and depression. Floyd stated during his deposition, that he informed Dr. Wilcox at that time that Dr. Lindem had performed surgery in addition to fundoplication and that his problems were probably caused by the surgery. Dr. Wilcox confirmed that additional surgery was performed, ran tests on Floyd and determined that he had "dumping syndrome," a condition in which the stomach empties about ten minutes after eating instead of 77 minutes as with an average stomach. Dr. Wilcox told Floyd that dumping syndrome