

1990

Hooley v. Barter : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH

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Judge:

Priority

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

* * * * *

WILFORD HOOLEY,)	
)	
PLAINTIFF-RESPONDENT,)	
)	
VS.)	Case No. 900387-CA
)	Civil No. 89-213
CLINTON J. BARTER,)	
)	Judge:
DEFENDANT-APPELLANT.)	

* * * * *

APPELLANT'S BRIEF

* * * * *

Appeal from an Order of the Fourth Judicial District
Court of Utah County
Honorable Ray M. Harding

* * * * *

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann., Section 78-2a-3(2)(g), and Article VIII, Sections 3 and 4 of the Utah Constitution.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in granting Plaintiff's Motion for Summary Judgment and in specifically failing to find that once a party, the Plaintiff herein, repudiated the contract, the non-breaching party, the Defendant herein, was relieved from performing and could pursue his remedies for breach of contract?

2. Did the Court err in failing to find that once anticipatory repudiation has occurred, the Defendant in this matter was entitled to bring suit on the contract at any time within the statutory period of limitations?

3. Did the trial court err in its ruling with regard to Plaintiff's Motion for Summary Judgment in failing to make Findings of Fact, Conclusions of Law and an Order and Judgment specifically reciting the facts and theories relied upon in granting summary judgment?

DETERMINATIVE RULES AND CASE LAW

There are no determinative rules or case law that govern the disposition of this Appeal.

STATEMENT OF THE CASE

I

NATURE OF THE CASE

This is an action to determine the enforceability of an agreement to purchase property and thus determine the validity of a Notice of Interest filed on the property in question by the Defendant.

II

STATEMENT OF FACTS

The Plaintiff, Wilford Hooley, is approximately seventy-five years of age (R. 32), and recognized when his deposition was taken, that he was not as sharp as he used to be. (R. 33)

The Plaintiff, in his lifetime had sold only one other parcel of property, a former home, to his son. (R. 33-4)

The parcel of property involved in this matter is located at approximately 720 West 200 South in Lindon, Utah County, Utah and is more particularly described as follows:

Beginning 7.44 chains East and 0.50 chains North of the Southwest Corner of Section 33, in Township 5 South, Range 2 East of the Salt Lake Base and Meridian, in Utah County, State of Utah, thence North 372.24 feet; thence North 85°52'30" East 485.5 feet; thence South 158.50 feet; thence South 40° West 355 feet to road; thence West 240 feet to the place of beginning.

Together with any and all water rights appurtenant thereto and together with any and all improvements thereunto belonging.

The property consists of 3.36 acres and has Cobbler Ditch Company water appurtenant to it. (R. 35)

In June of 1987, the Plaintiff was living alone in a home located approximately a block to a block-and-a-half from the Defendant, Clinton Barter. (R. 39-41)

The Plaintiff and Defendant had met working in the pipe trade and at the time they negotiated the transaction involving the property had known each other for more than eleven (11) years. (R. 40) The Plaintiff characterized the relationship as "friendly" in his deposition (R. 49)

Approximately one week prior to the agreement of June 28, 1987, the Plaintiff and Defendant met to discuss the possible sale of the Plaintiff's property. (R. 42) The meeting took place at the Plaintiff's residence and on the property in question. (R. 42) The parties discussed generally the dimensions of the property and general price terms. (R. 44-5)

The parties then met two additional times during the next week to discuss the pending transaction. (R. 46) During those meetings, the Plaintiff was debating whether or not to accept the Defendant's offer of \$20,000.00 (R. 47).

The Plaintiff claimed that he was unsure of the value of the property but knew that approximately one year before the Plaintiff's

brother had sold one acre (located directly to the east of Plaintiff's property) for approximately \$12,000.00. (R. 48)

On Sunday, June 28, 1987, the Plaintiff was being visited by his grandson's family. (R. 50) The Defendant came to the Plaintiff's home and a discussion involving the property took place around the Plaintiff's kitchen table. (R. 51) The Plaintiff's relatives remained in the living room. (R. 51)

At that meeting, the Defendant, Mr. Barter, indicated that he wanted to close the deal and although the Plaintiff claims he had some mental reservations, the Plaintiff told the Defendant he was willing. (R. 52)

The agreement prepared by the Defendant was presented to the Plaintiff and the parties both signed the agreement. (R. 53) The text of the agreement is as follows:

I, Clinton Barter, am giving Wilford Hooley \$200.00 cash earnest money for property located at 720 West 200 South, Lindon, Utah, this 28th day of June, 1987. The remaining balance of \$19,800.00 for 3.36 acres due upon completion of title search proving clear title to said property.

Buyer: s/Clinton J. Barter
Seller: s/Wilford Hooley

Date: 6/28/87
Date: 6/28/87

(R. 28)

The Plaintiff accepted, at the time of the execution of the Agreement, Two Hundred Dollars (\$200.00) earnest money. (R. 54) The Plaintiff conceded that the Defendant at no time was rude or

overbearing with the Plaintiff in the parties' negotiations or the signing of the agreement. (R. 54-5)

It should be noted that during the week of negotiations, the Plaintiff did not attempt to call a real estate salesperson, appraiser or lawyer with regard to the value of the property or any other aspect of the transaction. (R. 56)

After the meeting on Sunday, June 28, 1987, with the Defendant, the Plaintiff called his brother in Lindon, Utah and formed the conclusion that he had sold the property for less than its value. (R. 58)

The Plaintiff on June 28, 1987 then went to the home of the Defendant to see if he would back out of the transaction (R. 58) and was informed by the Defendant that he would not. (R. 59)

On Monday, June 29, 1987, the Plaintiff met with his attorney, Dallas Young. (R. 59) Mr. Dallas Young sent the Defendant a letter with the Two Hundred Dollars (\$200.00) repudiating the contract as of June 28, 1987. The Defendant, Mr. Barter, on July 2, 1987, returned Mr. Young's letter to him together with the Two Hundred Dollars (\$200.00). (Addendum 1)

On June 29, 1987, the Defendant had his attorney, Franklin H. Butterfield write the Plaintiff a letter, certified mail. (Addendum 2-3)

In conformity with the letter from Mr. Butterfield, the Defendant filed a Notice of Interest on June 29, 1987 (Addendum 4) and within approximately one month, had the title work done on the property. (Addendum 5-11)

After the discussion between the parties on June 28, 1987, the Plaintiff and the Defendant had no further discussions. (R. 61) The Plaintiff, after talking with his brother and contacting his lawyer, all of which was within one day of the agreement, repudiated the contract and did not intend to close the transaction with the Defendant. (R. 63-5)

Finally, from June 28, 1987 to the time the Plaintiff's deposition was taken, the Plaintiff did not undertake any further action to determine the value of the property. (R. 72-3)

III

COURSE OF PROCEEDINGS

The complaint was filed by the Plaintiff on February 2, 1989 (R. 1-3). The Answer, Counterclaim and Notice of the Plaintiff's Deposition were all filed on March 9, 1989. (R. 5-12)

The Reply of the Counterclaim was filed by the Plaintiff on April 10, 1989. (R. 13-16) An Amended Notice of Deposition was filed by the Defendant for the Plaintiff's deposition on April 14, 1989. (R. 17-18)

Plaintiff filed a Motion for Summary Judgment with accompanying Memorandum on November 9, 1989. (R. 19-90) Defendant filed a Memorandum of Points and Authorities in opposition to the Motion for Summary Judgment on November 22, 1989. (R. 91-101)

The Honorable Ray M. Harding entered his Memorandum Decision on the Motion for Summary Judgment on January 2, 1990 granting Plaintiff's Motion for Summary Judgment (R. 105-106)

Defendant filed a Motion to Amend the Findings with accompanying memoranda on February 2, 1990. (R. 114-118) The Plaintiff filed a Motion to Strike Defendant's Motion to Amend Findings with accompanying memoranda on January 16, 1990. (R. 110-112)

The Court entered its Memorandum Decision on the Defendant's Motion to Amend the Findings on February 5, 1990. By said Memorandum Decision, the Court denied the Motion to Amend the Findings filed by the Defendant. (R. 119)

The Court signed an Order prepared by counsel for the Plaintiff on February 9, 1990 adjudicating the Agreement of June 28, 1987 as unenforceable and of no further force and effect and further adjudicating the Notice of Interest filed by the Defendant in this matter as an unenforceable interest. Finally, the Order prepared by Plaintiff's counsel quieted title in the subject property in the Plaintiff, free and clear of any claim of the Defendant. (R. 121-22)

Notice of Appeal was filed by the Defendant on March 9, 1990.
(R. 123-124)

SUMMARY OF ARGUMENT

1. The trial court erred in granting Plaintiff's Motion for Summary Judgment and in specifically failing to find that once a party, the Plaintiff herein, repudiated the contract, the non-breaching party, the Defendant herein, was relieved from performing and could pursue his remedies for breach of contract.

2. The Court erred in failing to find that once anticipatory repudiation has occurred, the Defendant in this matter was entitled to bring suit on the contract at any time within the statutory period of limitations.

3. The trial court erred in its ruling with regard to Plaintiff's Motion for Summary Judgment in failing to make Findings of Fact, Conclusions of Law and an Order and Judgment specifically reciting the facts relied upon in granting summary judgment.

ARGUMENT

POINT I

PLAINTIFF-RESPONDENT REPUDIATED THE CONTRACT WITH THE PLAINTIFF

The Doctrine of Anticipatory Repudiation of a contract is accepted in nearly all American jurisdictions:

According to the general view prevailing now in nearly all American jurisdictions, where there has been an anticipatory breach of a contract by one party thereto, the

other party may treat the entire contract as broken and may sue immediately for the breach. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refute performance in the future. Such a breach precedes the time prescribed for performance, or at least the time when tender performance has been proffered. . . . (emphasis added).

17 Am.Jur. 2d, Contracts, Section 44, pp. 910-11.

The Restatement provides as follows;

Generally, a party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty. His statement is a repudiation if the threatened breach would, without more, have given the injured party a claim for damages for total breach.

II Restatement (2d) of Contracts, Section 250, Comment (d) at 274-75
(1981).

Lastly, as expressed by Corbin:

If one party to a contract, either wilfully or by mistake, demands of the other a performance to which he has no right under the contract and states definitely that, unless his demand is complied with, he will not render his promised performance, an anticipatory breach has been committed. Such a repudiation is conditional in character, it is true, but the condition is a performance to which the repudiator has no right. . .

Where the two contracting parties differ as to the interpretation of the contract or as to its legal effects, an offer to perform in accordance with his own interpretation made by one of the parties is not in itself an anticipatory breach. In order to constitute such a breach, the offer must be accompanied by clear manifestation of intention not to perform in accordance with any other interpretation.

4 Corbin on Contracts, Section 973 at 910-11 (1951).

As applied to the facts of this case, there is no doubt that the Plaintiff-Respondent repudiated the contract. The repudiation is well documented in the Plaintiff's deposition, as set forth in the Statement of Facts. Within one day of the date he signed the Agreement with the Defendant, the Plaintiff hired an attorney and employed him to send a letter dated June 29, 1987 returning the \$200.00 earnest money and repudiating the contract. (R. 59-60)

The Plaintiff further indicated in response to the question as to whether or not he would have responded to any request to close the transaction, that he would not. (R. 64-65)

The issue as to whether or not the actions of the Plaintiff and the letter written by Plaintiff's counsel constitutes an anticipatory repudiation is moot. In the Plaintiff's Memorandum in support of their Motion for Summary Judgment, the Plaintiff states as follows:

The next day after signing the agreement, Hooley expressed to Barter his desire to repudiate the contract and return to Barter's attorney (Butterfield) the \$200.00 earnest money.

(R. 23)

As one reads the deposition of the Plaintiff-Respondent Wilford Hooley (R. 30-87), there leaves no question that within a day after the signing the agreement with the Defendant, that the Plaintiff personally went to the Defendant and through his attorney repudiated the contract.

POINT II

UTAH COURTS HAVE LONG RECOGNIZED THE DOCTRINE OF ANTICIPATORY REPUDIATION

The recognition in Utah of the Doctrine of Anticipatory Repudiation is documented in University Club v. Invesco, 29 Utah 2d 1, 504 P.2d (Utah 1972). In that case, University Club, Inc. sued its landlord, Invesco, Inc., to recover approximately \$30,000 in damages incurred because of the failure of an air conditioning system. The lease expressly provided that the lessor (Invesco) would furnish adequate air conditioning and keep it in repair. On approximately July 18, 1969, the system failed. After requesting Invesco to correct the situation, University Club proceeded to purchase an auxiliary air conditioning system.

Invesco relied upon a clause in the lease agreement which provided that only if lessor (Invesco), failed to make any repairs for a period of 30 days after written demand, could the lessor be held in default. Plaintiff, University Club, countered with proof that it had served written demand for performance on the defendant and had been informed by the defendant's manager that it would take two to three months before the air conditioning system could be replaced. The Court, on appeal, stated as follows:

The recognized rule is where one party definitely indicates that he cannot or will not perform a condition of a contract, the other is not required to uselessly abide time, but may act upon the breached condition. Indeed, in

appropriate circumstances, he ought to do so to mitigate damages.

Id. at 30.

The Supreme Court had a chance to set forth the parameters of the rule in Stanford Petroleum Co. v. Janssen, 209 P.2d 932 (Utah 1949). In that action, the plaintiff sued the defendant to recover \$1,000 paid to the defendant Janssen. Defendant counterclaimed for specific performance of a contract involving an assignment of an oil lease. The Court, in discussing the issues stated as follows:

The rule governing this phase of the appeal is stated in Restatement of the Law, Contracts 1 A.L.I., Section 306, which reads as follows: "where failure of the party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise or that he doubts whether though able he will do so, the duty of such other party becomes independent of performance of the condition or promise. He has power to nullify his manifestation of unwillingness or inability by retracting it, so long as the former party, in reliance thereon, has not changed his position.", (a) following such rule reads as follows: a. No man is compelled to do a useless act, and if performance of a condition will not be performed by performance of the promise which is conditional, it is useless for the intended purpose and it is therefore unnecessary to perform the condition. A promisee in judging whether performance of the condition will not be followed by performance of the promise is justified in taking the other party at his word. . . .

Id. at 936.

In one of the earlier statements on the subject, the Supreme Court again adopted the doctrine in Jordan v. Madsen, 252 P. 570 (Utah 1926). The Court stated as follows:

It, of course, is well settled that a renunciation or repudiation of the contract by one party before the time fixed for performance constitutes a breach and gives an immediate right of action to the adverse party. [citing secondary sources] It also is well settled that if one of the parties to a contract notifies the other that he will not perform unless such other assents to a material modification of the contract, or by the addition of new terms, such conduct amounts to a renunciation of the contract [citing secondary sources].

Id. at 573.

POINT III

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT AND IN FAILING TO FIND
AN ANTICIPATORY REPUDIATION BY THE PLAINTIFF-RESPONDENT

In Judge Ray M. Harding's Memorandum Decision dated January 2, 1990, the trial court stated as follows:

The court, having considered Plaintiff's Motion for Summary Judgment, will grant that Motion finding that the Defendant, after agreeing to take responsibility for completion of the contract, did not do so within a reasonable period of time. Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980), Commercial Security Bank of Ogden v. Johnson, 173 P.2d 277 (Utah 1946). Defendant has given the Court no reason to excuse the delay in completing this transaction. An unexplained delay of 19 months is not a reasonable time. The Court will therefore order defendant's notice of interest removed and will hold the earnest money agreement to be unenforceable.

Counsel for the plaintiff to prepare an order consistent with the terms of this decision and submit to opposing counsel for approval as to form prior to submission to the Court for signature.

(R. 105)

Defendant-Appellant respectfully claims that the trial court erred in its analysis of the Plaintiff's Motion for Summary Judgment.

First, the Court failed to make any finding as it relates to the Doctrine of Anticipatory Repudiation, and secondly, failed to make any finding as to the impact of a repudiation on the Defendant-Appellant's responsibility to go forward with his obligations under the terms of the contract.

If one reviews the documents submitted to the trial court relative to the Motion for Summary Judgment, almost the entire response of the Defendant-Appellant went to the issue of the anticipatory repudiation and its implication in the matter. (R. 91-101)

Despite the fact that the Defendant-Appellant submitted to the Court the rationale and authority for the doctrine relating to anticipatory repudiation, the Court did not mention the same in its Memorandum Decision of January 2, 1990. (R. 105) Instead, the Court relied upon two cases for the doctrine of reasonable time to complete one's obligations under a contract. It is respectfully submitted that neither case is on point with regard to the issues in this matter.

In Bradford, supra, the plaintiffs brought suit against the defendant seeking specific performance or damages for breach of an earnest money agreement to convey the home to the plaintiff. On February 17, 1978, the plaintiffs made an offer to purchase the home from the defendants using the standard earnest money receipt and

offer to purchase. The offer was conditioned by the clause "Sale subject to buyer obtaining financing (FHA)." On February 22, 1978, the defendants accepted the plaintiff's offer. Although visiting a financial institution, the plaintiffs did not file an application for a loan. In March 1979, the defendants conveyed their interest in the subdivision to another entity. A representative of the successor company informed the plaintiffs that because they had failed to obtain financing within a reasonable time, the company would not honor the earnest money agreement. Finally, in July 1979, the plaintiffs submitted a "loan commitment" from a financial institution. In discussing the issue, the Supreme Court found that inasmuch as the plaintiffs were seeking equitable relief, it was their burden to discharge their own obligations and that they did not do so in a reasonable period of time. Id. at 1242. There is absolutely no discussion in Bradford, supra relating to the Doctrine of Anticipatory Repudiation and its effect upon the duties of the non-breaching party.

The second case cited by Judge Harding was Commercial Security Bank of Ogden v. Johnson, supra. In that 1946 decision, the court again simply dealt with the issue of reasonable time and defines it as:

The contract did not specify the time in which the plant was to be constructed and put into operation. The law implies (as all parties agree) that the plant was to be constructed and put into operation within a reasonable

time. A "reasonable time" has been defined as: "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty require should be done in a particular case." [Citing cases]

So much time as is necessary, for a reasonably prudent and diligent man to do, conveniently, what the contractor duty requires should be done, having a regard for the rights and possibility of loss, if any, to the other party to be affected.

Id. at 280-81.

In essence, the trial court avoided ruling upon the issue of anticipatory repudiation which, Plaintiff-Appellant respectfully submits is documented by both parties in this action. It is respectfully submitted that the Court's failure to review the issue of the Doctrine of Anticipatory Repudiation and rule on the same, with sufficient detail to give the Court on Appeals an outline of the mental process constitutes reversible error.

POINT IV

ONCE AN ANTICIPATORY REPUDIATION HAS OCCURRED,
THE NON-BREACHING PARTY IS THEREAFTER RELIEVED FROM
ANY FURTHER OBLIGATION OF PERFORMANCE AND HAS A RIGHT TO
BRING SUIT FOR THE BREACH

The Arizona Court in United California Bank v. Prudential Insurance Co. of America, 681 P.2d 390, 430 (Ariz. App. 1983) stated as follows:

An anticipatory repudiation is a breach of contract giving rise to a claim for damages and also excusing the necessity for the non-breaching party to tender performance. (citations omitted). A repudiating party is not entitled to demand performance from the innocent party or use the latter's failure to tender as a defense as to the claimant.

As stated another way, tender is excused where a party indicates that it will not be accepted because the law does not require the non-breaching party to do a futile or useless act. (citations omitted). Thus, to recover damages for anticipatory breach, the injured party need only show that he had the ability to perform his own obligation under the agreement. (Citations omitted) (emphasis added).

United Cal Bank at 435-36.

The authors of one secondary source specifically stated the application of the Doctrine of Anticipatory Repudiation on the non-breaching parties duty to respond as follows:

Nearly all the courts considering the question have reached the conclusion that a renunciation or repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive, although this is optional.

17 Am.Jur 2d Contracts, Sec. 449.

There is no question in this case on the same day the contract was signed and the day after, Mr. Hooley, the Plaintiff herein repudiated the contract. The case law and secondary sources are clear, that once the repudiation has occurred, he has no further duty to go forward. Mr. Barter filed a Notice of Interest on the property (Addendum 4) and in fact within thirty days completed a title search (Addendum 5-11). The assertion in the lower court that because Mr. Barter, the Defendant herein did not have any further contact with

the Plaintiff, he was barred from pursuing the purchase of the property is totally contrary to the authorities cited above. The fact that there was no further communication between the Plaintiff and Defendant after the repudiation of the contract, is simply evidence that the Plaintiff-Respondent never withdrew his repudiation. It is respectfully submitted that the facts of this case as submitted for determination for the Plaintiff's Motion for Summary Judgment clearly indicate that upon the determination of anticipatory repudiation, Mr. Barter had no further obligation to go forward.

POINT V

ONCE THE ANTICIPATORY REPUDIATION OCCURRED, DEFENDANT
WAS ENTITLED TO BRING SUIT AT ANY TIME WITHIN
THE STATUTORY PERIOD OF LIMITATIONS

Utah Code Annotated, Section 78-12-23 (1985 as amended) states:

Within six years: (2) an action upon any contract, obligation or liability founded upon an instrument in writing except those mentioned in Section 78-12-22.

Section 78-12-22 grants an eight-year statutory period of limitations. In any event, the non-breaching party to a contract is entitled to bring the suit within six years. The Plaintiff was advised by the letter from Butterfield of Defendant's intent the day they were informed of the repudiation of the contract. Ruling on the Defendant-Appellant's Motion to Amend the Findings which again urged the Court to review the issue of anticipatory repudiation, Judge

Harding ruled as follows on February 5, 1990, and in doing so stated as follows:

The Court, having received Defendant's Motion to Amend Findings will deny that Motion as there are no findings in existence in this matter. It is not material whether there was an anticipatory repudiation of this contract because the alleged repudiation was not in writing, and Plaintiff's time for performance had not yet arrived. Defendant had the obligation to pursue completion of the contract, and the Court has ruled that he did not do so within a reasonable time period.

(R. 119)

It is respectfully submitted that Judge Harding erred with regard to the application of pursuing the action for specific performance. The sentence of Judge Harding's Decision that indicates that it is not material whether there was an anticipatory repudiation of the contract because the alleged repudiation was not in writing, is clearly error. There is nothing in Utah case law, the secondary sources or otherwise that requires the repudiation to be in writing. As indicated at the outset of this Brief, all that is necessary is a statement repudiating a party's intent to go forward with his obligations under the contract. There is absolutely no authority, known to the Defendant-Appellant that requires the repudiation to be in writing. However, even Plaintiff agrees that the letter from Plaintiff's counsel on June 29, 1987 constituted a repudiation. (R. 23) Further, the statement in Judge Harding's Decision that because Plaintiff's time for performance had not arrived, that the doctrine

was inapplicable. The statement is a contradiction. The Doctrine of Anticipatory Repudiation expressly applies, as heretofore set out, to a situation where a party repudiates his obligation to go forward under the terms of the contract before his time to perform has arrived under the contract. Finally, the Ruling as it relates to "reasonable time" is inappropriate inasmuch as performance by Mr. Barter was excused by the Plaintiff's anticipatory repudiation of the contract.

POINT VI

THE COURT ERRED IN FAILING TO MAKE SUFFICIENT FINDINGS RELATIVE TO THE ISSUES INVOLVED IN THIS ACTION

The standard with regard to the granting of a Motion for Summary Judgment was set out by the Court in Frisbee v. K & K Construction Co., 676 P.2d 387 (Utah 1984). The court stated as follows:

Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It should be granted only where it clearly appears that there is no reasonable probability that the party moved against could prevail. As this court explained the standard:

Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.

Id. at 389. See also Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982); Lockhart Co. v. Equitable Realty, Inc., 657 P.2d 1333 (Utah 1983).


In this case, it is respectfully submitted that the evidence is clear and convincing that the Plaintiff repudiated the contract in this matter. It is upon that basis that the Defendant-Appellant requests that the matter be reversed for entry of judgment on that issue in favor of the Defendant. However, certainly there is no way that the deposition of Mr. Hooley, the Plaintiff herein, can be read to support the proposition that there is no issue of fact as it relates to his repudiation. The Court simply failed to make any specific findings as to the issue of repudiation and the conduct of the parties and based thereon, the case law interpreting Rule 56 mandates that the case be reversed.

CONCLUSION

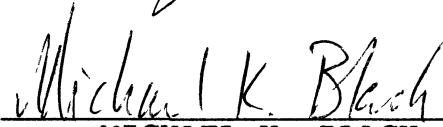
Based upon the foregoing, it is respectfully submitted that the Court should reverse the Memorandum Decisions and Orders of Judge Harding in this matter. It is respectfully submitted that the evidence is uncontroverted as to the issue of anticipatory repudiation and therefore, the Court should find, as a matter of law, that the Doctrine of Anticipatory Repudiation applies in this matter, and that in fact the Plaintiff-Respondent did repudiate the contract, thus, leaving for determination at trial the issue as to the

implementation of the specific performance requested by the Defendant and rulings on the other relief requested by the Defendant-Appellant in his Counterclaim.

DATED this 25 day of September, 1990.



GARY J. ANDERSON, ESQ.
Attorney for Defendant

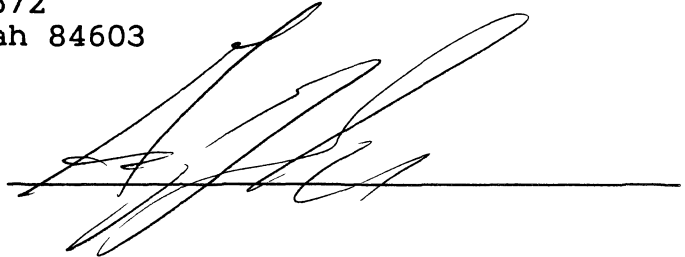


MICHAEL K. BLACK, ESQ.
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 25 day of September, 1990, I mailed 4 copies of the Appellant's Brief to counsel noted hereinafter, postage prepaid.

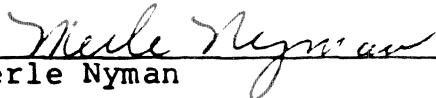
Dallas H. Young, Esq.
IVIE & YOUNG
Attorneys for Plaintiff
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

A handwritten signature in dark ink, appearing to be 'D. H. Young', is written over a horizontal line.

990\BARTER.BR

ADDENDUMS

On July 2, 1987 at 2:31 p.m., Clinton Barter brought to the office of Dallas H. Young, Jr. and left with Mr. Young's secretary an original letter dated June 29, 1987 from Mr. Young to Mr. Barter. Enclosed in the letter from Mr. Young to Mr. Barter, and returned to the office of Mr. Young on July 2, 1987, was the sum of \$200.00. Mr. Young was not in the office at the time of the delivery on July 2, 1987.


Merle Nyman

FRANKLIN H. BUTTERFIELD

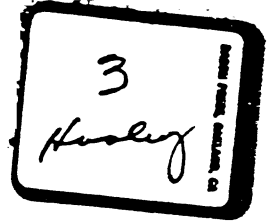
Attorney at Law
Orem, Utah

June 29, 1967

140 West 500 North
Suite 204

Phone 241-4100

Mr. Wilford Hoolay
412 West, 3700 North,
Provo, Utah 84604



Dear Sir:

Mr. Clinton Barter has just this day consulted this office relative to an Earnest Money Agreement he signed with you for the purchase of real estate in Lindon, Utah, said agreement is in writing, and there is consideration passing from Buyer to Seller. He has filed a Notice of Interest in the subject property and is arranging a title search on the property.

When that is done he will set up an appointment with a title company to close the transaction.

I have assured him that he has complied with all requirements of Utah law for the purchase of real property, and that should you now decide not to sell the subject property for the price as contained in the agreement, that he has a meritorious cause of action for Specific Performance of a contract for the purchase of property.

I trust that this will not be necessary, and that your attendance at the closing will be forthcoming.

Very truly yours,


F H BUTTERFIELD

P-187 972 323

POSTAGE FOR CERTIFIED MAIL

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

PS Form 3800, June 1985

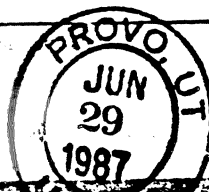
W. Ford Hooley
472 W 3700 N
Provo, UT 84604

.22

.75

PS Form 3800, June 1985

Postage	
Postage and Fees	1.67



SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and address address. 2. ☐ Restricted Delivery.

3. Article Addressed to:

WILFORD HOOLEY
472 WEST 3700 N
PROVO UT 84604

4. Article Number

P487 972 323

Type of Service:

- ☒ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and **DATE DELIVERED**.

5. Signature - Addressee

X *W. Ford Hooley*

6. Signature - Agent

X

7. Date of Delivery

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Feb. 1986

DOMESTIC RETURN RECEIPT

NOTICE OF INTEREST IN REAL PROPERTY

STATE OF UTAH)
COUNTY OF UTAH)

ENT25132 BK 2429 PG 503
WINA B REID UTAH COUNTY RECORDER DEPT
1987 JUN 29 10:36 AM FEE: 7.00
RECORDED FOR CLINTON J BARTER

TO WHOM IT MAY CONCERN:

Notice is hereby given that the undersigned has an interest in certain real property situated in Utah County, State of Utah, described as follows:

BEGINNING 7.44 CHAINS EAST AND 0.50 CHAINS NORTH OF THE SOUTHWEST CORNER OF SECTION 33, IN TOWNSHIP 5 SOUTH, RANGE 2 EAST OF THE SALT LAKE BASE AND MERIDIAN, IN UTAH COUNTY, STATE OF UTAH, THENCE NORTH 372.24 FEET, THENCE NORTH 85 DEGREES 52 MINUTES 30 SECONDS EAST 485.5 FEET, THENCE SOUTH 158.50 FEET, THENCE SOUTH 40 DEGREES WEST 355 FEET TO ROAD, THENCE WEST 240 FEET TO THE PLACE OF BEGINNING.

TOGETHER WITH ANY AND ALL WATER RIGHTS APPURTENANT THEREUNTO, AND TOGETHER WITH ANY AND ALL IMPROVEMENTS THEREUNTO BELONGING.

Said interest is evidenced by a certain EARNEST MONEY SALES AGREEMENT dated 28 JUNE 1987, by and between WILFORD L. HOOLEY, TRUSTEE (seller)

OF THE WILFORD L. HOOLEY FAMILY TRUST as Sellers and the undersigned as Buyers.
(seller)

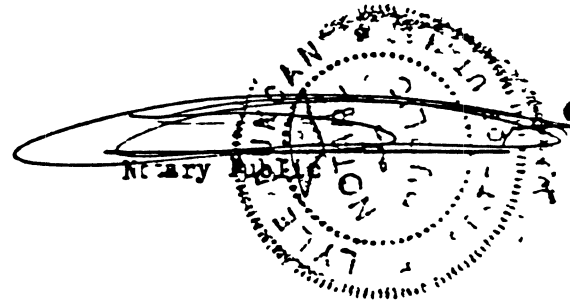
Clinton J. Barter
(Buyer)
CLINTON J. BARTER

(Buyer)

Subscribed and sworn to before me this 29 day of JUNE A.D., 19 87.

Residing at Provo, Utah

My Commission Expires 6-1-90



Prepared for:

CLINTON J. BARTER

SCHEDULE A

GF No. 6319

Inquiries should be directed
to FIDELITY TITLE
375-6315

1. Effective date: 28 JULY 1987 @ 8:00 A.M.

2. Policy or Policies to be issued:

Amount

(a) ☐ ALTA Owners Policy —

Form — 1970

\$ TBD

Proposed insured:

CLINTON J. BARTER

(b) ☐ ALTA Standard Loan Policy.

Coverage — 1970

\$

Proposed insured:

3. The estate or interest in the land described or referred to in this Commitment and covered hereby is:

A FEE

4. Title to said estate or interest in said land is at the effective date hereof vested in:

WILFORD L. HOOLEY AND ZELTA A. HOOLEY, TRUSTEES OF THE WILFORD
L. HOOLEY FAMILY TRUST

5. The land referred to in this Commitment is located in the County of UTAH
State of UTAH and described as follows:

BEGINNING 7.44 CHAINS EAST AND 2.50 CHAINS NORTH OF THE SOUTHWEST
CORNER OF SECTION 33, IN TOWNSHIP 5 SOUTH, RANGE 2 EAST OF THE
SALT LAKE BASE AND MERIDIAN, IN UTAH COUNTY, STATE OF UTAH,
THENCE NORTH 372.24 FEET; THENCE NORTH 85 DEGREES 52' 30" EAST
485.5 FEET; THENCE SOUTH 158.50 FEET; THENCE SOUTH 40 DEGREES
WEST 355 FEET TO ROAD; THENCE WEST 240 FEET TO THE PLACE OF
BEGINNING.

NOTE: LEGAL DOES NOT CLOSE

PROPERTY ADDRESS: 720 WEST 200 SOUTH, LINDON, UTAH 84062

SCHEDULE B-1

I. The following are the requirements to be complied with:

- 1. Instruments necessary to create the estate or interest to be insured must be properly executed, delivered and duly filed for record.**
- 2. Payment of the consideration for the estate or interest to be insured.**
- 3. Payment of all taxes, charges, assessments, levied and assessed against subject premises, which are due and payable.**
- 4. Satisfactory evidence should be had that improvements and/or repairs or alterations thereto are completed; that contractor, subcontractors, labor and materialmen are all paid.**

5. PROVIDE SURVEY DESCRIPTION OF SUBJECT PROPERTY DISCLOSING FENCE LINES AND DEED LINES.

6. RELEASE JUDGMENT OR PROVIDE NEW PROPOSED OWNER INSURED.

H. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
2. Rights or claims of parties in possession not shown by the public records.
3. Any discrepancies, conflicts in boundary lines, shortage in area, encroachments, overlapping of improvements, or other boundary or location disputes.
4. Any roadway or easement, similar or dissimilar, on, under, over, or across said property, or any part thereof not shown by the public records.
5. Any liens for labor, services, or material, or claims to same which are not shown in the public records.
6. Any titles or rights asserted by anyone including, but not limited to, persons, corporations, governments, or other entities, to tidelands or lands comprising the shores or bottoms of navigable streams, lakes, bays, oceans, or gulfs or lands beyond the line of the harbor or bulkheads as established or changed by the United States Government or riparian rights, if any.
7. Any unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims or titles to water.
8. Community property, dower, curtesy, or homestead rights, if any, of any spouse of the Insured.
9. The lien of all taxes and assessments for the year 1987, and thereafter.
10. Restrictive covenants affecting the property above described.
11. TAXES FOR 1987 WHICH ARE ACCRUING BUT NOT YET DUE AND PAYABLE. TAXES FOR 1986 HAVE BEEN PAID UNDER TAX SERIAL NUMBER D-1228-B IN THE AMOUNT OF \$605.96. SAID AMOUNT WAS BASED ON A LAND EVALUATION OF \$37,585.00 WITH IMPROVEMENTS OF \$5,385.00 THEREON.
12. SUBJECT TO ANY AND ALL SPECIAL ASSESSMENTS LEVIED BY THE CITY OF LINDON. LINDON CITY REPORTS NONE.
13. SUBJECT TO A 4.9254 FOOT OVERLAP ON THE NORTHEAST CORNER DECREASING TO A 6.466 FOOT GAP THEN INCREASING TO A 36.4867 FOOT OVERLAP AT THE SOUTHEAST CORNER.
14. DECREE OF ANNULMENT DATED 08 JANUARY 1981 EXECUTED BY AND BETWEEN KAREN BARTER, AS PLAINTIFF AND CLINTON BARTER, AS DEFENDANT, UNDER CIVIL NO. 53934, RECORDED 08 JANUARY 1981 IN THE OFFICIAL RECORDS, MORE SPECIFICALLY DESCRIBED AS FOLLOWS:

THE DEFENDANT IS IN ARREARS IN CHILD SUPPORT PAYMENTS IN THE AMOUNT OF \$150.00 AND THAT THE PLAINTIFF SHALL HAVE A JUDGMENT THEREFOR.
15. SECOND AMENDED DECREE OF ANNULMENT DATED 06 MAY 1981 EXECUTED BY AND BETWEEN KAREN BARTER, AS PLAINTIFF AND CLINTON BARTER, AS DEFENDANT, UNDER CIVIL NO. 53934, RECORDED 06 MAY 1981 IN THE OFFICIAL RECORDS.
16. JUDGMENT BY DEFAULT DATED 25 JUNE 1982 EXECUTED BY AMFAC DISTRIBUTION CORPORATION DBA AMFAC MECHANICAL SUPPLY COMPANY, AS PLAINTIFF, AGAINST CLINTON BARTER DBA C.B. PLUMBING, AS DEFENDANT, UNDER CIVIL NO. 60419, IN THE AMOUNT OF \$6,218.33, TOGETHER WITH ATTORNEY'S FEES IN THE SUM OF \$1,200.00, RECORDED 25 JUNE 1985 IN THE OFFICIAL RECORDS.

17. WARRANT FOR DELINQUENT TAX DATED 01 NOVEMBER 1982 EXECUTED BY AND IN FAVOR OF THE STATE TAX COMMISSION OF UTAH, AGAINST CLINTON J. BARTER AND D. B. PLUMBING, IN THE AMOUNT OF \$103.71, UNDER DOCKET NO. A-37-448, RECORDED 03 NOVEMBER 1982 IN THE OFFICIAL RECORDS.

18. WARRANT FOR DELINQUENT TAX DATED 01 NOVEMBER 1982 EXECUTED BY AND IN FAVOR OF THE STATE TAX COMMISSION OF UTAH, AGAINST CLINTON J. BARTER AND D. B. PLUMBING, IN THE AMOUNT OF \$106.05, UNDER DOCKET NO. A-37-449, RECORDED 03 NOVEMBER 1982 IN THE OFFICIAL RECORDS.

19. ORDER DATED 21 APRIL 1983 EXECUTED BY AND BETWEEN KAREN BARTER, AS PLAINTIFF AND CLINTON BARTER, AS DEFENDANT, UNDER CIVIL NO. 53934 RECORDED 06 MAY 1981 IN THE OFFICIAL RECORDS, MORE SPECIFICALLY DESCRIBED AS FOLLOWS:

THAT JUDGMENT IS ENTERED IN FAVOR OF THE PLAINTIFF AGAINST THE DEFENDANT FOR DELINQUENT CHILD SUPPORT AS OF APRIL 15, 1983 IN THE SUM OF \$1,200.00.

JUDGMENT IS ENTERED AGAINST THE DEFENDANT IN FAVOR OF THE PLAINTIFF, FOR A REASONABLE ATTORNEY'S FEE FOR THE USE AND BENEFIT OF PLAINTIFF'S COUNSEL IN THE SUM OF \$150.00, PLUS COURT COST IN THE SUM OF \$2.50.

20. ORDER DATED 28 AUGUST 1985 EXECUTED BY AND BETWEEN KAREN BARTER, AS PLAINTIFF AND CLINTON BARTER, AS DEFENDANT, UNDER CIVIL NO. 53934 RECORDED 20 AUGUST 1985 IN THE OFFICIAL RECORDS.

A. THAT DEFENDANT IS DELINQUENT IN THE PAYMENT OF CHILD SUPPORT TO AND INCLUDING AUGUST 31 IN THE SUM OF \$1,500.00. COURT FURTHER FINDS THAT WITH REGARD TO THE JUDGMENT PREVIOUSLY ENTERED IN THE AMOUNT OF \$1,800.00 THAT \$300.00 OF SAID JUDGMENT HAS BEEN PAID. DEFENDANT HAS NOT COMPLIED WITH THE PRIOR ORDER OF THE COURT WITH THE PAYMENT, THEREFORE PLAINTIFF IS ALLOWED TO PURSUE EXECUTION ON THAT JUDGMENT.

B. COURT FINDS THAT THE SUM OF \$200.00 IS REASONABLE ATTORNEY'S FEES AND ENTERS JUDGMENT AGAINST THE DEFENDANT FOR SAID SUM. THE COURT FURTHER ENTERS JUDGMENT IN THE SUM OF \$17.75 FOR COURT COSTS FOR THIS PROCEEDING.

C. COURT FINDS THAT THERE HAS BEEN ENTERED IN THE CIRCUIT COURT, UTAH COUNTY, PROBATE DEPARTMENT, A JUDGMENT AGAINST THE PLAINTIFF IN FAVOR OF IFC HOSPITALS, INC., IN THE SUM OF \$1,081.57 FOR MEDICAL EXPENSES RELATING TO THE CARE OF THE PARTIES' MINOR CHILD. THE COURT THEREFORE ORDERS PURSUANT THE DECREE OF DIVORCE THAT JUDGMENT BE ENTERED AGAINST THE DEFENDANT FOR ONE-HALF OF SAID SUM WHICH IS THE AMOUNT OF \$540.78.

21. WARRANT FOR DELINQUENT TAX DATED 15 SEPTEMBER 1986 EXECUTED BY AND IN FAVOR OF THE STATE TAX COMMISSION OF UTAH, AGAINST CLINTON BARTER, IN THE AMOUNT OF \$693.76, UNDER DOCKET NO. ST-86-2595, RECORDED 24 SEPTEMBER 1986 IN THE OFFICIAL RECORDS. OK

~~22. BOUNDARY AGREEMENT DATED 17 JANUARY 1986 EXECUTED BY AND IN FAVOR OF THE STATE OF UTAH, AGAINST CLINTON BARTER, IN THE AMOUNT OF \$125.21, UNDER DOCKET NO. ST-86-2596, RECORDED 24 SEPTEMBER 1986 IN THE OFFICIAL RECORDS.~~ OK

23. BOUNDARY AGREEMENT DATED 17 JANUARY 1987 EXECUTED AND BETWEEN THE WILFORD L. HOOLE FAMILY TRUST AND LOIS J. WILKINSON, RECORDED 20 JANUARY 1987 AS ENTRY NO. 2258 IN BOOK 2377 AT PAGE 570 OF THE OFFICIAL RECORDS.

122319-86

CONDITIONS AND STIPULATIONS

1. The term "mortgage," when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.
3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions, the Conditions and Stipulations, and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.