

2000

Kathryn Collard v. Nagle Construction, Gary M. Nagle and Marilyn F. Nagle : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Plaintiff & Appellee,

v.

NAGLE CONSTRUCTION, INC., A
Utah corporation, GARY M. NAGLE,
an individual, MARILYN F. NAGLE,
an individual,
Defendants & Appellants.

GARY M. NAGLE,

Case No. 20000976-CA

Counterclaim Plaintiff & Appellant,

v.

KATHRYN COLLARD, TRUSTEE of the
LeRoy Collard Trust,

Counterclaim Defendant & Appellee.

BRIEF OF APPELLEE AND CROSS-APPELLANT

Appeal from the Judgment of the Third Judicial District Court
of Salt Lake County, the Honorable William B. Bohling

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Argument Priority 15

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BRIEF OF APPELLEE AND CROSS-APPELLANT

STATEMENT OF THE CASE

Nature of the Case

This is an action by Plaintiff Kathryn Collard, as Trustee of the LeRoy Collard Trust, to quiet title in the Plaintiff Trust to a condominium ("the Property") originally purchased by Plaintiff's decedent, LeRoy Collard, from the Nagle Construction Company, in March, 1978, pursuant to a *Uniform Real Estate Contract*.

Under the terms of the Contract, Mr. Collard agreed to purchase the Property for \$100,500.00 by: (1) making a \$10,000.00 down payment; (2) assuming an existing \$60,000.00 mortgage loan owed to First Security Bank ("FSB") by the Nagle Construction Company, and (3) tendering 55,000 shares of stock in Utah Coal & Chemical Corporation to Nagle Construction Company.

At the time of closing, Mr. Collard delivered the \$10,000 dollar down payment, assumed and began making the payments on the Nagles' mortgage loan from FSB and delivered the 55,000 shares of stock. Mr. Collard moved into the Property and recorded a Notice of Contract on May 18, 1979. From 1991 until his death in February, 1997, Mr. Collard's daughter, Kelly James Kirch, resided with him at the Property. During the more than twenty years that Mr. Collard and his daughter possessed the Property, they have paid all of the Nagles' mortgage payments to FSB (although Nagles were never formally taken off the FEB obligation) and paid all of the property taxes and improvements on the Property. Mr. Collard conveyed his interest in the Property to the Plaintiff Trust prior to his death.

On January 13, 1981, an attorney for the Nagles sent Mr. Collard a letter alleging a breach of contract, default and intent to foreclose on the property on January 13, 1981, based on an allegation that the 55,000 shares of stock previously conveyed by Mr. Collard did not have the value represented in the parties' Contract. Mr. Collard's daughter, attorney Kathryn Collard, sent the Nagles' attorney a letter with documentation from local stock brokers demonstrating that the stock could have been sold for \$85,000 on any number of occasions prior to the Nagles' letter. Subsequently, the Nagles took no affirmative legal action to forfeit or foreclose on the Property. The Nagles also never

returned the cash down payment or the stock to Mr. Collard, and continued to accept direct payments on the mortgage to FSB by Mr. Collard and/or his daughter, Kelly Kirch, for more than twenty years and continuing after the filing of this action.

In the Spring of 1999, Plaintiff Collard sought to pay off the outstanding amount on the FSB Obligation and sell the Property. However, the Nagles refused to convey title to the Trust, thereby precipitating the filing of this action to quiet title to the Property in the Plaintiff Trust.

Course of Proceedings

Plaintiff Collard filed the *Complaint* herein on July 28, 1999, seeking to quiet title to the Property in the Plaintiff Trust, and alleging breach of contract and failure to convey title to the property after full performance by Plaintiff's decedent. The Nagles filed an *Answer and Counterclaim*, denying Plaintiff's claims and asserting the affirmative defenses of failure to state a claim, waiver, estoppel and the six year statute of limitations for an action founded on a written contract contained in §§78-12-1 and 23, U.C.A. (1953), as amended, and asserting counterclaims seeking forfeiture, foreclosure and quiet title. In its *Reply To Counterclaim*, Plaintiff Collard asserted that the Nagles' counterclaims failed to state a claim, and alternatively, were barred by affirmative defenses, including the applicable statute of limitations, laches, waiver, and estoppel. The Nagles filed a *Motion For Summary Judgment* on February 24, 2000, and Collard filed a *Cross-Motion For Summary Judgment* on March 29, 2000.

Disposition In The Lower Court

Following the first oral argument on the parties' cross motions for summary judgment on July 17, 2000, the lower court initially held that the statute of limitations

contained in §78-12-23, U.C.A. (1953), as amended, barred both parties' legal claims and ordered briefing on the issue of whether the court could grant Plaintiff Collard equitable relief. After additional briefing and a second oral argument on August 30, 2000, further clarifying the claims of the parties and the evidence regarding their claims, the lower court modified its previous ruling and held that Plaintiff Collard's legal right to quiet title had not yet accrued and would accrue when Plaintiff Collard tendered the balance on the FSB Obligation and that the Nagles should be ordered to deliver title to the Property to Collard at that time.

The lower court also found and held that the Nagles' counterclaims for forfeiture, foreclosure and quiet title, all failed on the merits, or were waived and/or barred the six statute of limitations contained in Section 78-12-23, U.C.A. (1953), based upon Nagles' admissions that such claims accrued not later than January 25, 1981, and that the Nagles had taken no affirmative legal action to forfeit or foreclose on the Property for over twenty years until asserting these causes of action in their *Answer and Counterclaim* in this case in September, 1999. Plaintiff Collard filed a motion seeking an award of attorney's fees and costs pursuant to the provisions of the parties' Contract.

On November 6, 2000, the lower court entered its final *Findings of Fact and Conclusions of Law and Order* (Final Judgment) and an *Order Denying Motion For Award of Attorney's Fees And Costs*. The Nagles moved for a stay of judgment in the lower court, which was granted conditioned upon their payment of a supersedeas bond. When Nagles did not post the bond, the lower court vacated the stay of the judgment and ordered the escrow agent to deliver title to the Property to Collard as Trustee for the Plaintiff Trust upon payment of the outstanding FSB Obligation. The Plaintiff Trust paid

off Nagles' obligation to First Security Bank and received title to the Property which it later conveyed to a third party for value. The Nagles appealed and the Plaintiff Trust cross-appealed on the lower court's decision denying Plaintiff's motion for attorney's fees and costs under the provisions of the parties' Contract.

Statement of Facts

In the lower court, Plaintiff Collard disputed the factual allegations contained in paragraphs 7,8, 9-11 of the Nagles' "Statement Of Facts", Aplt. Br. 4-5, regarding the value of the 55,000 shares of stock conveyed by Mr. Collard under the parties' Contract. Plaintiff Collard also produced independent evidence verifying that the stock could have been sold for \$85,000 on numerous days between the time it was conveyed and January 13, 1981, when the Nagles notified Mr. Collard by letter than he was in alleged breach and default of this part of the Contract. *See*, "Statement of Facts", ¶¶ 19-21, *infra*, 9-10. Because the lower court held that the Nagles' counterclaims failed as a matter of law and/or were waived and/or barred by the statute of limitations, the lower court expressly declined to decide this issue. *See, Findings of Fact And Conclusions of Law*, dated November 6, 2000, "*FFCL*", ¶15, R.525.

The following facts set forth the lower court's factual findings and the additional undisputed facts and evidence supporting the lower court's findings:

1. The Property subject of this action is a condominium unit located at 3842 South Quail Hollow Drive, Salt Lake City, Utah, in the Cove Point condominiums, described as Lot B-24, Cove Point, Phase 1, a Planned Unit Development. *See*, *Complaint*, ¶5 and attached *Uniform Real Estate Contract*, R. 2, 7; *Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment And*

Memorandum In Support of Plaintiffs Cross Motion For Summary Judgment, hereinafter "Plaintiffs Memorandum", ¶1, R.128, 144-147; FFCL, dated November 6, 2000, "FFCL", ¶1 at 2, R.522.

2. On March 30, 1978, LeRoy Collard, as Buyer, and Nagle Construction Company, as Seller, entered into a Uniform Real Estate Contract ("Contract"). The stated purchase price for the Property was \$100,500.00. *Complaint*, ¶6, R.2, 7; *Plaintiffs Memorandum*, ¶2 and *Uniform Real Estate Contract* attached as Exhibit A thereto, R.128, 144-147.

3. On January 3, 1997, Mr. Collard transferred his interest in the Property by Warranty Deed to Plaintiff, Kathryn Collard, as Trustee for the LeRoy Collard Trust, and died on February 8, 1997. *Plaintiff's Memorandum*, ¶28 and "*Warranty Deed*", Exhibit G thereto, R.132, 180; *Complaint*, ¶15, 19, R.3. On April 12, 1978, the Nagle Construction Company conveyed its interest in the property to Gary M. Nagle. *See, Nagle Affidavit*, ¶6-7, R.112; *FFCL*, ¶2, n.1, R.523-524.

4. The \$100,500.00 purchase price was to be paid by Mr. Collard by three separate actions, or Installments, as follows: (1) a down payment of \$10,000.00 ("**Installment 1**"); (2) assumption of mortgage loan owed by Nagle Construction Company to First Security Bank in the approximate amount of \$60,000.00 (the "FSB Obligation"), (hereinafter, "**Installment 2**"); and (3) tender of 55,000 shares of stock of the Utah Coal and Chemical Company ("**Stock**") for the balance of the purchase price of \$30,541.26 (hereinafter "**Installment 3**"). *Id. See also, Plaintiff's Memorandum* and *Gary Nagle Deposition* attached thereto as Exhibit B at 16-17, R.152 (confirming amount of FSB balance); *FFCL*, ¶3, R.523.

5. Mr. Collard tendered the down payment in satisfaction of the requirements of **Installment 1**. *Plaintiff's Memorandum*, ¶5, R.129, and *Gary Nagle Deposition*, attached thereto as Exhibit B, at 16-17, R.152-153; *FFCL*, ¶4, R.523.

6. Mr. Collard assumed and began making payments on the FSB Obligation directly to First Security Bank in satisfaction of **Installment 2**, but did not refinance the loan in his own name or otherwise remove Nagles from the FSB Obligation. *Plaintiff's Memorandum*, ¶5, R.129, and *Gary Nagle Deposition* attached as Exhibit B thereto, at 16-17, R.152-153; *FFCL*, ¶5, R.523.

7. Mr. Collard immediately took possession of the Property, *Plaintiff's Memorandum*, ¶6, R.129; *Affidavit of Gary Nagle*, ¶9, R.104, and recorded a Notice of Contract on May 18, 1979. *Plaintiff's Memorandum*, ¶7, and "Notice Of Contract", Exhibit C thereto. R.129, 164-165; *FFCL*, ¶3, R.523.

8. On or prior to September 18, 1979, Mr. Collard tendered 55,000 shares of stock in San Juan Mining and Developing Company, the predecessor to Utah Coal & Chemical Company, ("Stock"), as required by **Installment 3** of the Contract; *FFCL*, ¶7, R. 524. Although the Defendant Gary Nagle initially denied receiving this stock, he subsequently admitted receipt of the stock on or about September 18, 1979, after being presented with a copy of the transfer documents. *Plaintiff's Memorandum*, ¶8, R.129; *Gary Nagle Deposition*, Exhibit B to *Plaintiff's Memorandum*, at 18 (admitting receipt of shares), R.152.

9. Defendant Gary Nagle testified that it was his intent that Mr. Collard was to completely assume the FSB obligation and that the Nagles were to be removed from

the FSB obligation. *Plaintiff's Memorandum*, ¶9 and Gary Nagle Deposition, Exhibit B thereto, at 27-29, R.129, 155; *FFCL*, ¶8, R. 524.

10. Defendant Gary Nagle testified that due to Mr. Collard's financial condition at the time, Mr. Collard was unable to refinance the FSB Obligation and that he considered this to be a breach of the Contract. *Plaintiff's Memorandum*, ¶10, and *Gary Nagle Deposition*, Exhibit B thereto, at 10, R.129, 151.

11. Defendant Gary Nagle testified that he told Mr. Collard he would not deliver title to the Property to Mr. Collard because he could not satisfy the requirement of assuming and refinancing the FSB Obligation. *Plaintiff's Memorandum*, ¶11 and *Gary Nagle Deposition*, Exhibit B thereto, at 26-28, R.130, 155.

12. Defendant Gary Nagle testified that he agreed to forego default and foreclosure proceedings at that time because Mr. Collard agreed to pay an additional \$50,000 in consideration for the Property which became Addendum No. 2 to the Contract. *Plaintiff's Memorandum*, ¶12 and Addendum 2, Exhibit A thereto, R.130, 147. *See also, Gary Nagle Deposition*, 29, R. 155; *FFCL*, ¶9, R.524.

13. Under Addendum No. 2, Defendant Gary Nagle agreed to transfer title to the Property to Collard upon the sale of the previously tendered stock for at least \$85,000.00. *Plaintiff's Memorandum*, ¶13 and Addendum No. 2, Exhibit A thereto, R.130, 147.

14. Under Addendum No. 2, Mr. Collard further agreed that if the value of the Stock did not reach a value of at least \$85,000 within 1 year, he would tender additional shares or cash to make up the difference. *Plaintiff's Memorandum*, ¶14 and Addendum No. 2, Exhibit A thereto, R.130, 147; *FFCL*, ¶10, R.524.

15. Defendant Nagle testified that Addendum No. 2 was executed on or about September 18, 1979. *Plaintiff's Memorandum*, ¶15 and *Gary Nagle Deposition*, Exhibit B thereto, at 30, R.130, 156; *FFCL*, ¶11, R.524.

16. Defendant Gary Nagle testified that he believed that Mr. Collard was in breach and default of the parties' Contract no later than January 25, 1981. *Plaintiff's Memorandum*, ¶23 and *Gary Nagle Deposition*, Exhibit B thereto, R.132, 159.

17. On January 13, 1981, several months after the one year period mentioned in Addendum No. 2 had expired, the law firm of Jensen & Lloyd wrote a letter to Mr. Collard on behalf of the Nagles, alleging that Mr. Collard had breached the Contract, specifically the requirements of Addendum No. 2. *Plaintiff's Memorandum*, ¶16 and Letter dated January 13, 1981, Exhibit D thereto, R.130, 166-167; *FFCL* ¶12, R.524.

18. In the same letter, the Nagles' counsel declared that Mr. Collard's failure to deliver additional stock or cash to satisfy the requirements of Addendum No. 2 prior to January 25, 1981, would be "deemed by Nagle Construction to be a default under the Contract and will result in the institution of legal proceedings against you for foreclosure of the contract as a note and mortgage." *Plaintiff's Memorandum*, ¶17 and Letter dated January 13, 1981, Exhibit D thereto, R.130-131, 166-167, (Emphasis supplied); *FFCL*, ¶13, R.524-525.

19. On January 25, 1981, attorney Kathryn Collard, daughter of LeRoy Collard, wrote a letter to the Nagles' counsel with documentation from local stockbrokers demonstrating that the stock in question could have been sold for the required \$85,000.00 on any number of dates between its delivery and the letter of January 13, 1981. *Plaintiff's Memorandum*, ¶18, and Exhibit E thereto, R.131,168; *FFCL*, ¶14, R.525.

20. Current independent research also establishes that the 55,000 shares of stock conveyed to Gary Nagle by Mr. Collard, could have been sold on any number of occasions during the period between March of 1979 and the letter of January 13, 1981, and realized the sum of \$85,000.00. *Plaintiff's Memorandum*, ¶19, and *Affidavit of Steven Earl*, dated March 29, 2000, Exhibit F, attached thereto, R.131,193-206.

21. Although the Nagles claim that Mr. Collard never tendered stock or cash sufficient to realize the \$85,000 referred to in Addendum No. 2, *See*, ¶¶ 9-10, "Statement Of Facts", Aplt. Br. 5, Defendant Gary Nagle testified that he believed that Mr. Collard was in default and had breached the Contract no later than January 25, 1981, and that neither he nor his attorneys had ever taken any action to sue Mr. Collard on the alleged breach or default since that date. *Plaintiff's Memorandum*, ¶¶23-24 and *Gary Nagle Deposition*, Exhibit B thereto, at 41, R.131-132, 160-161; *FFCL*, ¶16, R.525.

22. Defendant Gary Nagle also admitted that no additional agreements or changes to the Contract were entered into between he and Mr. Collard after January 25, 1981. *Plaintiff's Memorandum*, ¶21 and *Gary Nagle Deposition*, Exhibit B thereto at 44 (R. 131, 159); *FFCL*, ¶17, R.525

23. Defendant Gary Nagle further admitted that the Nagles have retained all 55,000 shares of Stock and the \$10,000.00 down payment tendered by Mr. Collard. *Plaintiff's Memorandum*, ¶24 and *Gary Nagle Deposition*, Exhibit B thereto, at 14, R.132, 152; *FFCL*, ¶18, R.525.

24. Mr. Collard and/or his heirs have continuously made the Nagles' monthly payments on the FSB Obligation since March, 1978. Kelly James Kirch, the daughter of LeRoy Collard, began residing at the Property with Mr. Collard in 1991 and has

continued to make the monthly mortgage payments on the FSB Obligation since Mr. Collard's death in February, 1997. *Plaintiff's Memorandum*, ¶29 and *Affidavit Of Kelly James Kirch*, ¶¶1-18, attached as Exhibit H thereto, R.132, 184-186.

25. Mr. Collard and his daughter, Kelly James Kirch, have been in exclusive, continuous and open possession of the Property for more than twenty years. *Plaintiff's Memorandum*, ¶31 and *Affidavit Of Kelly James Kirch*, ¶¶1-18, attached as Exhibit H thereto, R.132, 186-187.

26. Mr. Collard and/or his heirs have paid all of the real property taxes, assessments and improvements on the Property for more than twenty (20) years. *Plaintiff's Memorandum*, ¶32, and *Affidavit of Kelly James Kirch*, ¶¶7-11, 14-15, Exhibit H thereto, R.133, 185-186.

27. The Nagles have not paid any property taxes on the subject Property since 1978; have not entered the Property in the past ten (10) years, and that have not paid for any improvements on the Property since Mr. Collard took possession of the Property. *Plaintiff's Memorandum*, ¶33, and *Gary Nagle Deposition*, Exhibit B thereto, at 53, R.133, 161.

28. Subsequent to the letter dated January 13, 1981, declaring Mr. Collard to be in default and breach of the Contract, the Nagles took no affirmative legal action to assert a default in the Contract until filing the *Answer and Counterclaim* in this matter in September, 1999. R.1-12; *FFCL*, ¶21, R.526.

29. On July 28, 1999, Kathryn Collard, as Trustee for the LeRoy Collard Trust, filed the Complaint in this action, alleging causes of action to quiet title to the Property in the subject Trust and for breach of contract and adverse possession.

FFCL, ¶20, R.525.

30. In September, 1999, the Nagles filed an *Answer and Counterclaim* against Plaintiff Collard alleging as causes of action, forfeiture, foreclosure and quiet title, based solely on Mr. Collard's alleged breaches of the parties' Contract prior to January 25, 1981. R.24-38; *FFCL*, ¶22, R.526.

31. On October 12, 1999, Plaintiff Collard filed a *Reply to Counterclaim*, asserting various defenses, including the applicable statute of limitations previously referenced in the Nagles' *Answer and Counterclaim*, waiver and laches. R.46-54.

32. On February 24, 2000, the Nagles filed a *Motion for Summary Judgment*, R. 84-85. On March 29, 2000, Plaintiff Collard filed a *Cross- Motion For Summary Judgment*. R.181-183.

33. Following oral arguments on the parties' cross motions for summary judgment on July 17, 2000, the lower court initially held that the statute of limitations contained in §78-12-23, U.C.A. (1953), as amended, barred both parties' legal claims and ordered further briefing on whether the court could grant Plaintiff Collard equitable relief.

34. After additional briefing, R.352-360, and oral argument on August 30, 2000, R. 645, clarifying the claims of the parties and the evidence regarding their claims, the lower court modified its previous ruling and held that Plaintiff Collard's legal right to quiet title would only accrue when the balance of the FSB Obligation was paid and that Nagles should be ordered to deliver title to the Property to Collard at that time. *Transcript of Hearing, August 30, 2001*, R. 646, p.15, lines 9-17, p.16, lines 4-19; *FFCL*, Conclusions of Law, ¶¶14-15, R.528.

35. On November 6, 2000, after oral argument on the Plaintiff's motion for attorney's fees and the Nagles' objections to Plaintiff Collard's proposed Findings of Fact And Conclusions of Law, the lower court entered its *Findings of Fact and Conclusions of Law and Order* (Final Judgment), R. 521-531. On November 8, 2000, the Court entered an *Order Denying Motion For Award of Attorney's Fees and Costs*, R.532-534.

36. On December 4, 2000, the district court entered an Order staying the judgment on appeal on the condition that the Nagles post a supersedeas bond. R.599-604.

37. On December 21, 2000, the district court entered an Order vacating the stay of the judgment based on the Nagles' failure to post the supersedeas bond and directed the escrow agent to release the warranty deed to the Property to the Plaintiff Trust for recording in connection with the payoff of the obligation to First Security Bank and the release of the Nagles from the FSB obligation. Thereafter, Plaintiff Collard sold the Property to a third party for value. R. 621-626.

SUMMARY OF ARGUMENT

The lower court correctly held that title to the subject Property should be quieted in the Plaintiff Trust and that the Defendant Nagles' counterclaims for breach of contract, forfeiture, foreclosure and quiet title, fail on the merits and/or are barred by the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended.

Contrary to the Nagles' arguments, the lower court did not finally decide that the cited statute of limitations applied to bar the claims of both parties. The lower court correctly held that the cited statute of limitations did not bar Plaintiff Collard's quiet title claim based on its finding that such claim would not accrue until Plaintiff Collard paid the outstanding balance owing on the FSB obligation. Alternatively, it is undisputed that

Mr. Collard and his heirs were in continuous possession of the subject Property for over twenty years from the date of its purchase through the filing of this action. Under such circumstances, no statute of limitations bars Plaintiff Collard's action claim to quiet title in the Property in the Plaintiff trust under Utah law.

The lower court also correctly held that the Nagles' claims for breach of the parties' Contract had fully accrued not later than January 25, 1987, such that these claims, only asserted as counterclaims in this action in September, 1999, were barred by the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended.

When the Nagles failed to return the down payment and stock paid for the Property by Mr. Collard, they elected the remedy of forfeiture as a matter of law and could not pursue any other remedies. Thus, their alternative counterclaims for foreclosure, damages and quiet title failed as a matter of law. The lower court also correctly held that the Nagles' letter of January 13, 1981, providing that Mr. Collard was in alleged breach of the parties' Contract and that a default would be declared unless he cured the alleged breaches by January 25, 1981, did not comply with the strict requirements to effect a forfeiture of the Property under Utah law. The lower court also correctly held that the Nagles' failure to take any subsequent affirmative legal action to forfeit or foreclose on the Property, waived these claims and/or that such claims were barred not later than January 25, 1987, by the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended.

Contrary to the Nagles' argument, the lower court correctly considered Plaintiff Collard's statute of limitations defense to the Nagles' counterclaims because the Nagles never raised the argument that the defense was insufficiently pleaded in the lower court;

because the defense was adequately pleaded; because it was the only statute of limitations that could apply, and because the Nagles' had waived any objection to Plaintiff Collard's assertion of this defense by fully briefing and arguing the applicability of the defense to both parties claims in the lower court.

The Nagles' argument that their counterclaim for additional stock or cash, although barred by the statute of limitations, may still be used as an offset, fails as a matter of law because the parties' claims never coexisted, and the Nagles' attempt to circumvent the lower court's ruling dismissing their claims by asserting new affirmative defenses for the first time on appeal, is without merit and furnishes no ground for the reversal of the lower court's decision.

Finally, the lower court's decision not to award Plaintiff Collard the attorney's fees and costs incurred in the prosecution of this action and in this appeal, is incorrect and should be reversed because Plaintiff Collard prevailed on her preeminent quiet title claim and also prevailed on the Defendant Nagles' counterclaims. The parties' Contract provided for the payment of fees and costs to the party having to bring a legal action to enforce their rights under the Contract against the defaulting party. Here, the Nagles defaulted by refusing to deliver title to Plaintiff Collard when Plaintiff attempted to pay off the FSB obligation, thereby precipitating the filing of this action. The Nagles acknowledged the applicability of the fees and costs provision of the parties' Contract by pleading it in their *Answer and Counterclaim*, thus estopping the Nagles from claiming that Plaintiff Collard is not entitled to receive attorney's fees and costs under the provisions of the parties' Contract.

ARGUMENT

POINT I THE LOWER COURT CORRECTLY QUIETED TITLE IN THE PLAINTIFF TRUST AND DID NOT ERR IN CONSIDERING PLAINTIFF COLLARD'S DEFENSES TO THE NAGLES' COUNTERCLAIMS

Based upon its *Findings of Fact*, none of which are challenged in this appeal, Aplt. Br. *passim*, the lower court correctly concluded that Plaintiff Collard's decedent, LeRoy Collard, had performed all of the actions or "Installments" required for his receipt of the title to the Property from the Nagles under the parties' Contract, and/or that the Nagles' right to demand such performance had been modified or waived by their own inaction, and/or was barred by the statute of limitations contained in §78-12-23, U.C.A. (1953), as amended, such that Plaintiff Collard had a legal right to have title to the Property quieted in the Plaintiff Trust as soon as Plaintiff Collard tendered payment of the balance owing on the Nagles' mortgage loan from FSB ("the FSB Obligation"). *See, Findings of Fact, Conclusions of Law And Order*, R. 521-531.

Although the Nagles now complain that "the decision of the lower court in this case has effectively given the property to Collard without payment of the full purchase price", Aplt. Br. 10-12, Defendant Gary Nagle admitted in his deposition that he believed that Mr. Collard had breached the parties' Contract by failing to tender the full purchase price on or before January 25, 1981, but that neither he nor his attorneys ever took any affirmative legal action to forfeit or foreclose on the Property even after giving notice of the alleged breaches to Mr. Collard on January 13, 1981, and that the Nagles kept the

down payment and stock tendered by Mr. Collard and accepted his mode of paying off the Nagles' mortgage obligation to First Security Bank for over twenty years. *See, Statement of Facts*, ¶¶21-24, 28, *supra* at 10-11.

Based upon Defendant Nagles' own admissions, the lower court properly found and concluded that the Nagles' acceptance of Collard's direct payments to FSB for more than twenty years and Nagles' failure to take any legal action on the alleged breach and default of Installment No.2, after declaring it in the letter of January 13, 1981, until filing the *Answer and Counterclaim* in this matter in September of 1999, either modified the parties' contract to permit Collard to perform Installment 2 by direct payments and/or waived the Nagles' right to declare a breach or default of the Contract based on Collard's direct payment of the FSB Obligation. *See, FFCL*, Findings of Fact, Nos. 2, 8, 9, 12, 16, 19, 21, 22 and Conclusions of Law, Nos. 4,5, 8, R.522-527.

By knowingly failing to pursue their alleged claims against Plaintiff Collard's decedent for his alleged breaches of the parties' Contract for over two decades until Plaintiff Collard filed this action in July, 1999, the Nagles' right to adjudicate disputed issues of fact regarding the alleged breaches and their claims regarding the alleged breaches, have been waived or barred by the statute of limitations contained in §78-12-23, U.C.A. (1953), as amended. This result is purely the effect of the Nagles' inaction and is not attributable to any unfair decision of the lower court as the Nagles seek to portray. Aplt. Br. 10-12. Thus, the Nagles' argument on this point furnishes no basis for the reversal of the lower court's decision and the decision should be affirmed.

A. The Nagles Have Waived Any Argument That The Lower Court Erred In Considering The Plaintiff's Statute Of Limitations Defense To Their Counterclaims

The Nagles first argue that the lower court erred in considering Plaintiff Collard's statute of limitations defense in reference to Nagles' counterclaims for forfeiture, foreclosure and to quiet title, because Collard did not plead the applicable statute of limitations by section number. Aplt. Br. 8, 12-13. This argument fails for several reasons: **First**, the Nagles had already specifically pleaded the applicable statute of limitations by section number in their *Answer And Counterclaim*, R.59. Because Plaintiff Collard did not deny that the statute of limitations cited by the Nagles was applicable to the parties' claims, Plaintiff simply referred to it as the "applicable statutes of limitation" in Plaintiff's *Reply To Counterclaim*, R.52. **Second**, no other statute of limitations could apply to the parties' claims in this case. Thus, this case is immediately distinguishable from *Wasatch Mines Co. v. Hopkinson*, 24 U.2d 70, 465 P.2d 1007 (Utah 1970), *cited* Aplt. Br. 12, in which the Utah Supreme Court declined to consider arguments regarding a statute of limitations that was never pleaded in reference to a cause of action for fraud that was never pleaded. **Third**, the Nagles never raised this argument in the lower court and cannot raise it for the first time on appeal, and in any event, no one could have been misled. *Attorney Gen. v. Pomeroy*, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937). **Fourth**, the Nagles waived this argument on appeal by fully briefing and arguing the application of the cited statute of limitations to both parties' claims in the court below, thereby consenting to its adjudication in the lower court. *See, e.g., Clark v. Second Circuit Court*, 741 P.2d 956, 957 (Utah 1987) (issues deemed tried by consent of the parties); *Industrial Indemnity Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1103 n. 1 (Alaska 1984) (findings and

conclusions demonstrate the issues were litigated); *Quillin v. Heston Corp.*, 230 Kan. 591, 640 P.2d 1195, 1196 (1982) (issue was considered by trial court even though not specifically raised by the parties). Thus, the lower court correctly rules that the Nagles' counterclaims were all waived and/or barred by the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended.

B. The Lower Court Did Not Finally Determine That Both Parties' Claims Were Barred By The Statute Of Limitations

Although the Nagles complain that the lower court "found that the statute of limitations barred both parties from pursuing their claims", Aplt. Br. 8, 12-14, the lower court modified this ruling after the second oral argument on the parties' cross motions for summary judgment which further clarified the differing positions and claims of the parties. *See, Transcript of Hearing, August 30, 2001*, R. 646, p.15, lines 9-17, p.16, lines 4-19; *FFCL, Conclusions of Law*, ¶¶14-15, R.528. Thus, the ruling does not appear in the Court's final *Findings of Fact and Conclusions of Law And Order*, as the Nagles concede. *Id.* Although the Nagles imply that the lower court was not free to depart from its initial ruling, *Id.*, this argument is incorrect. The lower court had the right to modify this interlocutory ruling at any time prior to the issuance of judgment. *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310-1311 (Ut. Ct. App. 1994); *Timm v. Dewsnup*, 851 P.2d 1178, 1184-1185 (Utah 1993); and *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988).

Here, the lower court correctly held that Plaintiff Collard's right to quiet title did not fully accrue until the outstanding balance due on the FSB obligation was paid. For this reason, the six year statute of limitations applicable to claims founded on a written instrument contained in §78-12-23, U.C.A. (1953), as amended, and asserted as an

affirmative defense to Plaintiff Collard's quiet title claim, could not have barred the claim before it even accrued. *See*, "Statement of Facts", ¶¶ 7, 25, *supra* at 7,11.

C. Those In Actual Possession Of Real Estate Are Not Barred From Seeking To Quiet Title By Any Statute of Limitations

Alternatively, the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended, did not preclude Plaintiff Collard's quiet title claim because the statute of limitations does not run against a party in possession of real property seeking to quiet title under Utah law. Here, it is undisputed that Plaintiff Collard and/or his heirs, continuously possessed the subject Property from the date of its purchase until and after the filing of this action. *See*, "Statement of Facts", ¶25, *supra* at 11.

In *Conder v. Hunt*, 2000 Ut. App. 105, 1 P.3d 170 (2000), decided after the parties' cross motions for summary judgment were briefed, the Utah Court of Appeals held that Utah "recognizes the general rule that those in actual possession of real estate are never barred by any statute of limitation from seeking to quiet their title," *citing Riddick v. Street*, 858 S.W.2d 63,64 (Ark. 1993); *Muktarian v. Barmby*, 407 P.2d 659, 660-61 (Cal. 1965); *Ankoanda v. Walker-Smith*, 52 Cal. Rptr. 2d 39, 42-43 (Cal Ct. App.), *review denied*, 1996 Cal. LEXIS 3695 (1996); *Peterson v. Hopkins*, 684 P.2d 1061, 1065 (Mont. 1984); *Viersen v. Boettcher*, 387 P.2d 133, 138 (Okla. 1963). *See also*, 65 Am. Jur. 2d, Quieting Title, Section 55 (1972). In *Conder*, the Court also observes that "while no Utah case cited by the parties specifically adopts this rule, a number of cases seem to assume that Utah adheres to it." *See, e.g., Rodgers v. Hansen*, 580 P.2d 233, 235 (Utah 1978); *Davidson v. Salt Lake City*, 95 Utah 347, 352-53, 81 P.2d 374, 376-77 (1938).

Thus, under *Conder*, the six year statute of limitations contained in §78-12-23, U.C.A.(1953), as amended, asserted by the Nagles, did not bar Plaintiff Collard's quiet title claim as a matter of law because Mr. Collard and/or his heirs were in continuous possession of the Property. For this additional reason, the lower court's decision quieting title to the Property in the Plaintiff Trust and rejecting the Nagles' statute of limitations defense to Plaintiff Collard's quiet title claim, should be affirmed.

Although the trial court did not rely on *Conder* in ruling that Plaintiff Collard's quiet title claim was not barred by the statute of limitations, this Court may affirm the trial court's judgment on any ground, even one not relied upon by the district court.

Hall v. Utah State Dept. of Corr., 2001 UT 34, ___ P.3d ___, citing, *Cache County v. Property Tax Div.*, 922 P.2d 758, 764 (Utah 1996); *Higgins v. Salt Lake County*, 855 P.2d 231, 241 (Utah 1993); *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992).

D. The Lower Court Correctly Held That The Nagles' Counterclaims Failed As A Matter Of Law Or Were Otherwise Barred By The Statute of Limitations Contained in §78-12-23, U.C.A. (1953), As Amended

The Nagles' arguments that the lower court erred and acted "inconsistently" by affording the Plaintiff Trust a remedy on its quiet title claim, while holding that Nagles' counterclaims were barred by the six year statute of limitations contained in §78-12-23, U.C.A. (1953), as amended, Aplt. App. 8-9, 12-13, are erroneous and ignore the crucial distinctions between the positions of the parties and the status of their claims: First, as explained above, Plaintiff Collard's quiet title claim had not accrued, whereas Nagles' counterclaims had accrued not later than January 25, 1981. Second, Mr. Collard and his successors continuously possessed the Property while the Nagles did not. Thus, for the

legal reasons explained above, the lower court correctly ruled that the statute of limitations did not bar Plaintiff Collard's quiet title claim because it had not accrued, while it did bar the Nagles' counterclaims which had accrued and/or had been waived long ago. Thus, the lower court's application of the statute of limitations was correct as a matter of law and was not the result of any alleged inequity on the part of the lower court as the Nagles suggest. Aplt. Br. 8-9; 12-14.

E. The Nagles' Argument That Their Counterclaim For Additional Stock Or Cash May Still Be Used As An Offset Fails Because The Parties' Claims Never Coexisted

Unlike the parties in the cases cited by the Nagles, Aplt. Br. 15-16, the Nagles never pleaded "offset" as an affirmative defense in their *Answer and Counterclaim*, thereby waiving this affirmative defense under U.R.C.P.12(h) by failing to plead it. R.24-28. Moreover, the Nagles never asserted this defense in the lower court. Having failed to do so, the Nagles have waived this defense and cannot raise it for the first time on appeal.

Moreover, although Utah law does allow otherwise time-barred claims to be raised as an offset, the claims may only be offset "if they coexisted." *See, Coulon v. Coulon*, 915 P.2d 1069, 1072 (Utah 1996), *citing Salt Lake City v. Teluride Power Co.*, 17 P.2d 281, 286 (Utah 1932), cited Aplt. Br. 15-16. Under the undisputed facts of this case, Nagles' "offset" argument fails because the parties' claims at no time coexisted.

The cross-demands must coexist; that is they must subsist in such a way that if one party had brought suit on his demand the other could have set up the demand he held against that of the plaintiff. There must be an overlapping of live demands in point of time. If the demand of one party becomes barred and is not subsisting as a cause of action when the demand of the other party comes into existence, the former demand is not available.

See, United Pacific Insurance Company v. Knudsen Construction, Inc., Case No. 2:97CV235C, (D. Utah, May 6, 2001), at 6, *quoting Teluride*, 17 P.2d at 285, *quoting, O'Neil v. Eppler*, 162 P. 311, 312, **Addendum A** hereto.

As discussed above, the statute of limitations on Nagles' counterclaims for forfeiture, foreclosure and quiet title, ran not later than January 25, 1987, six years after the Nagles' attorney notified Mr. Collard of the alleged breach and default alleged in their *Answer and Counterclaim* in September, 1999. However, Plaintiff Collard's quiet title did not fully accrue until Collard paid the outstanding balance on the Nagles' obligation to First Security Bank after the filing of this action. Thus, the parties' claims never "coexisted" and the Nagles' claim for "offset" fails as a matter of law.

POINT II THE LOWER COURT CORRECTLY HELD THAT THE NAGLES' COUNTERCLAIMS FAILED AS A MATTER OF LAW OR WERE OTHERWISE BARRED BY THE STATUTE OF LIMITATIONS

A. The Lower Court Correctly Ruled That The Nagles' Counterclaims For Forfeiture, Foreclosure And Quiet Title Failed As A Matter of Law

It is undisputed and the lower court found that under Addendum No. 2 to the parties' Contract, executed on or about September 18, 1979, Mr. Collard agreed that if the value of the 55,000 shares of stock he had delivered to Nagles did not reach a value of at least \$85,000 within 1 year, Collard would tender additional shares or cash to make up the difference. On January 13, 1981, several months after the expiration of the 1 year period specified in Addendum No. 2, attorneys for the Nagles wrote a letter to Mr. Collard alleging Mr. Collard had breached the Contract, specifically the requirements of Installment 3, as amended by Addendum No. 2. The letter declared that Collard's failure

to tender additional stock or cash to satisfy the requirements of Installment 3, as amended by Addendum No. 2, prior to January 25, 1981, would be "deemed by Nagle Construction to be a default thereunder and will result in the institution of legal proceedings against you for foreclosure of the contract as a note and mortgage."

It is also undisputed and the lower court found that on January 23, 1981, attorney Kathryn Collard, wrote a letter to Nagles' counsel informing him that the Stock could have been sold for \$85,000 on any number of dates between its delivery and January 13, 1981, and providing brokerage records to support this assertion. Following receipt of this letter, the Nagles failed to bring any foreclosure proceedings against Mr. Collard. Nagles did, however, retain the \$10,000 down payment and the Stock.

It is also undisputed and the lower court concluded as a matter of law, that "the letter from Defendants' counsel dated January 13, 1981, did not satisfy the strict notice and procedural requirements to effect a forfeiture under the Contract or Utah law. Therefore, no forfeiture occurred, and even if it had, Nagles' subsequent failure to take any affirmative legal action to forfeit or foreclose on the property for twenty years, waived any forfeiture or foreclosure."

The undisputed facts of this case demonstrate that Nagles had elected the remedy of forfeiture. Under Utah law, the election of the remedy of forfeiture is exclusive and precludes recovery of any other damages under the contract or at law. *McMillan v. Shimmin*, 349 P.2d 720 (Utah 1960). Forfeiture remedies such as those set forth in Section 16A of the parties' Contract, are automatically elected if the vendor fails to return the payments made by the vendee under an installment sales contract after default is

declared. *See*, Thomas and Backman, *Utah Real Property Law*, Sec. 14.01 (e)(1); *McMillan v. Shimmin*, 349 P.2d 720 (Utah 1960); *Andreason v. Hansen*, 335 P.2d 404 (Utah 1959).

It is also undisputed and the lower court found that "After sending the January 13, 1981, letter notifying Mr. Collard of the alleged default and electing the remedy of foreclosure, Defendants failed to take any further action to foreclose on the Property. Consequently, Defendants' claims and causes of action for foreclosure were barred by §78-12-23, U.C.A. (1953), as amended, no later than January 25, 1987. *See*, *FFCL*, ¶¶ 21-22, R.526.

At the hearing on the parties' cross-motions for summary judgment on July 17, 2000, Nagles' attorney conceded that Nagles' counterclaims for remedies other than forfeiture, were precluded as a matter of law, because Nagles had never returned the \$10,000 cash down payment or the 55,000 shares of stock he received from Mr. Collard on the Property. R. 644, at p.2, line 14, to p.3, line 5; p.4, line 24, to p.6, line 2. Thus, Nagles' counterclaims for: (1) foreclosure; (2) the right to enforce the obligation to convey additional stock or cash; and (3) quiet title, were extinguished by the Nagles' election of the remedy of forfeiture.

B. The Nagles May Not Raise Unpleaded Affirmative Defenses For The First Time On Appeal To Circumvent Dismissal Of Their Counterclaims

In the Nagles' *Answer And Counterclaim*, the only affirmative defenses pleaded by the Nagles were failure to state a claim, waiver, estoppel and the statute of limitations. R. 26-27. The Nagles now attempt to circumvent the lower court's decision that their counterclaims for breach of contract, forfeiture, foreclosure and quiet title, are barred by

the six year statute of limitations, by reincarnating these dismissed counterclaims as affirmative defenses and presenting them for the first time on appeal. Aplt. Br. 9-20.

For example, the Nagles' argument that Mr. Collard did not pay the purchase price set forth in the parties' Contract, Aplt. Br. 9, constitutes the affirmative defense of "failure of consideration" under U.R.C.P. 8(c). Nagles' argument that payment of the purchase price was a "condition precedent" to delivery of title, also constitutes an affirmative defense under U.R.C.P. 8 (c), and one which must be pleaded specifically and with particularity under U.R.C.P. 9 (c). Aplt. Br. 16-20. Finally, the Nagles' argument that Collard's obligation to pay the purchase price cannot be severed from Nagles' duty to deliver title, Aplt. Br. 18-20, to the extent it is anything more than a reformulation of Nagles' "condition precedent" affirmative defense, still constitutes an "avoidance" which must be pleaded as an affirmative defense under U.R.C.P. 8 (c) or be waived. These newly minted affirmative defenses were never pleaded by the Nagles in their *Answer and Counterclaim* and have been waived pursuant to U.R.C.P. 12(h), *Gill v. Timm*, 720 P.2d 1352 (Utah 1986), and cannot be raised for the first time on appeal. In addition, to the extent that Nagles are claiming that Mr. Collard breached the parties' Contract by allegedly failing to pay part or all of the purchase price for the subject Property, such claims have been waived or are barred by the statute of limitations for the reasons discussed above.

C. The Lower Court's Conclusion That The Nagles Waived Collard's Formal Assumption Of The Mortgage Is Supported By The Lower Court's Undisputed Findings Of Fact

Finally, the Nagles argue that "the conclusion that Nagles waived Collard's assumption of the mortgage is a disputed matter of fact which could not be determined on a motion for summary judgment," Apl't. Br. 21-23, is untenable. To the contrary, this conclusion is amply supported the Defendant Gary Nagle's own testimony and admissions, which are reflected in the undisputed factual findings of the lower court, none of which are challenged by the Nagles on appeal. *See*, Findings of Fact Nos. 5-19, R.521-530. "We uphold a lower court's findings of fact unless the evidence supporting them is so lacking that we must conclude the finding is 'clearly erroneous.'" *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998) (citations omitted).

In *Soter's, Inc. v. Deseret Federal Savings*, 857 P.2d 935 (Utah 1993), cited Apl't. Br. 21, the Court held that "to constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it . . . We further clarify that the intent to relinquish a right must be distinct." Here, Defendant Gary Nagle admitted that he believed that Mr. Collard was in breach and default of the parties' Contract by not taking Nagles off the mortgage, not later than January 25, 1981. In Utah, statutes of limitation begin to run "at the moment that a cause of action arises."

Fredrickson v. Knight Land Corp., 667 P.2d 34 (Utah 1993). Thus, based on Defendant Gary Nagle's own testimony, it is apparent that the Nagles had knowledge of an alleged right to sue for breach and default of the Contract by the letter dated January 13, 1991. Under the six year statute of limitations applicable to all actions based on written instruments including mortgage instruments, the Nagles had a duty to bring suit on

Collard's alleged breaches and default under the parties' Contract no later than January 25, 1997. *See*, U.C.A., §78-12-23; *see also*, *Crompton v. Jensen*, 1 P.2d 242, 245 (Utah 1938); *Utah Real Property Law*, 14.03 (cc) (3)(v)(B)(VII). Yet, Defendant Gary Nagle admitted in his deposition that neither he nor his counsel ever took any affirmative legal action to follow up on the letter of January 13, 1981, or to otherwise forfeit or foreclose on the Property, and further admitted that he allowed Collard to make direct payments on the FSB obligation for more than twenty years including up to and after the filing of this action. Thus, the lower court's conclusion that the Nagles had waived their right to have Collard taken them off the mortgage, is fully supported by Nagles' own testimony as reflected in findings of fact of the lower court set forth above. Accordingly, the Nagles' argument that "there is no evidence before the Court to indicate that Nagle accepted or continued to accept that procedure", Aplt. Br. 21-23, simply ignores the foregoing evidence and the court's factual findings on this issue, instead of marshalling the evidence to show that they are "clearly erroneous" such that they could not support the challenged legal conclusion. Accordingly, the Nagles' argument that the lower court's erred by holding that the Nagles has waived Collard's formal assumption of the mortgage by accepting Collard's direct mortgage payments to First Security Bank on behalf of the Nagles for more than twenty years, is without merit and must be rejected.

D. The Lower Court's Decision Should Also Be Affirmed Under The Defense Of Laches

Plaintiff Collard also asserted laches as a defense to the Nagles' Counterclaims for forfeiture, foreclosure and Quiet Title. R. 43-56. The doctrine of laches has long been recognized in the context of quiet title actions. *See, e.g., Jacobsen v. Jacobsen*, 557 P.2d 156 (Utah 1976). In Utah, laches will bar recovery where the party asserting laches can

show: (1) lack of diligence on the part of the offending party; (2) causing an injury to another because of the offending party's lack of diligence. *Plateau Mining Co. v. Utah Division of State Lands and Forestry*, 802 P.2d 720, 731 (Utah 1990).

The Montana Supreme Court has held that in determining whether laches will bar a claim the court is to consider several factors, including whether the party or an important witness has died, thereby depriving the injured party of important testimony; whether the property involved has increased in value; whether the property has passed into the hands of innocent third persons; and whether the position of the parties has changed resulting in injustice in the event laches is not applied. *Filler v. Richland County*, 247 Mont. 285, 290, 806 P.2d 537 (Mont. 1991). Similarly, the Wyoming Supreme Court has held that there is an inherent injustice in permitting one who purportedly holds a right to assert ownership in property to await a propitious event and then, when all risk is over, assert a claim. The Wyoming Supreme Court held that courts should look with disfavor on the claims of parties who "lie idle and wait for the results to play out to the prejudice of others." *See, Madrid v. Norton*, 596 P.2d 1108, 1120 (Wyo. 1979).

Here, the Defendant Gary Nagle specifically admits in his *Answer and Counterclaim* that he was fully aware of his right to sue Collard, but that he has simply been sitting and waiting: "Nagle reasoned that because he held legal title to the Property . . . he could simply wait and eventually, if Collard wanted to obtain legal title, Collard would have to make good on his obligations..." , *See, Defendants' Counterclaim*, Para. 30, R. 32. This is exactly the type of conduct the Montana and Wyoming Supreme Court identified as inequitable conduct in refusing to allow the offending party to sit on its legal

rights indefinitely and await the turn of events. Moreover, there is no evidence whatsoever that the Nagles were impaired or unable to proceed with legal action on their alleged counterclaims for the past nineteen years.

Additionally, the passage of such a significant period of time has resulted in severe prejudice to Plaintiff Collard, satisfying a second criteria for laches. *See, Plateau Mining*, 802 P.2d *supra*, at 731. By waiting for the passage of nearly 20 years, the Nagles can now offer virtually any self-serving testimony regarding the events that transpired between himself and Mr. Collard. Moreover, in the two decades that have elapsed, the original Contract has been lost, the daily trading history of the Stock has been lost or is difficult to determine because the brokerages and transfer agents have gone out of business, material witnesses have died and the Defendant Gary Nagle's own memory has faded significantly, as shown by his failure to remember that he had received and kept the 55,000 shares of stock conveyed to him by Mr. Collard pursuant to the parties' Contract.

The passage of time, the loss of key documents and the death of Mr. Collard have all operated to prejudice the Plaintiff while the Nagles sat idly by waiting to see whether they would be better off by holding the Stock or attempting to recover the Property when someone inquiring after the legal title. Even assuming *arguendo* that the Nagles' claims are not waived or barred by the six year statute of limitations in §78-12-23, equity demands that Nagles not be permitted to sit on their rights for twenty years and then elect the option that best suits them. Thus, Nagles' counterclaims are barred by the doctrine of laches and for this additional reason, the lower court's decision should be affirmed.

**POINT III THE LOWER COURT ERRED IN FAILING TO AWARD
PLAINTIFF ATTORNEY'S FEES AND COSTS UNDER
THE PARTIES' CONTRACT**

Where a contract provides the "right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to recover the fees attributable to those claims on which the party was successful." *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, 993 P.2d 222, 227 (1999), *quoting Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217, 221 (Ut. Ct. App. 1990). "Furthermore, when a plaintiff brings multiple claims involving a common core of facts and related legal theories, and prevails on at least some of its claims, it is entitled to compensation for all attorney fees reasonably incurred in the litigation." *Dejavue, supra* at 227, *quoting, Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct.1933, 1940 (1983)(additional citations omitted.)

In this action, Plaintiff Collard asserted claims for quiet title, breach of contract and adverse possession, and prevailed on the quiet title claim which was the primary claim in the action. Plaintiff Collard also had to defend and prevailed on the Nagles' counterclaims for forfeiture, foreclosure and quiet title. Having brought multiple claims involving a common core of facts and related legal theories, and having prevailed on Plaintiff's preeminent quiet title claim and having defeated Nagles' counterclaims, the Plaintiff Trust is entitled to compensation for all attorney fees and costs reasonably incurred in the litigation." *See, Dejavue, supra* at 227, *quoting, Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983). With respect to the payment of attorney's fees and costs, the parties' *Uniform Real Estate Contract* provides that:

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

See, Contract, § 21, R.41.

Although the lower court denied Plaintiff Collard attorney's fees and costs without allowing oral argument, based on "my sense of this matter being a very difficult and a controversial case, in which it was unclear what the governing law is given how long ago it was, and it just seems to the Court that it would be an iniquity (sic) as well as against the law to award those fees", R. 646, p.1, these are not sufficient reasons for denying Plaintiff Collard the attorney's fees and the costs incurred by the Plaintiff Trust in enforcing its rights under the parties' Contract, where the Contract specifically provided for the award of such fees and costs incurred in enforcing a party's rights under the Contract. R. 412-423.

The very factors mentioned by the lower court in denying Plaintiff's motion for attorney's fees, demonstrate how difficult it was for the Plaintiff to prevail in this matter. Given the barrage of legal arguments and defenses deployed by the Nagles, the Plaintiff Trust necessarily incurred substantial attorney's fees and costs in order to demonstrate to the lower court why the Nagles' multiple legal arguments were without merit and that the Plaintiff Trust was entitled to prevail. Because the Plaintiff Trustee, Kathryn Collard, does not specialize in property law, the Plaintiff Trust was required to engage and pay for the services of an attorney practicing in that area of the law.

Plaintiff Collard was also at an additional disadvantage in litigating this action because her father, Mr. Collard, had died prior to the filing of this action, leaving the Nagles free to make self-serving statements concerning the parties' dealings. In fact, as stated above, the Nagles initially denied that they had received any stock from Mr. Collard and would have been able to maintain that position throughout this litigation if the Plaintiff had not located and placed in evidence, the old stock transfer records confirming that the Nagles had received the 55,000 shares of stock Mr. Collard was obligated to convey under the parties' Contract.

Defendants' arguments that it would be inequitable for the Court to award attorney's fees in this matter because "Defendants were never in default and Collard never performed", R. 501, are without merit. It is undisputed that the Nagles refused to convey title to Plaintiff Collard in the Spring of 1999 when Plaintiff Collard gave notice of her intent to pay off the FSB Obligation and sell the Property, thereby precipitating the filing of this action to quiet title to the Property in the Plaintiff Trust once the obligation was paid.

Nagles' alternative, unsubstantiated argument that "Collard never performed", likewise furnishes no reason for the denial of Plaintiff's fee claim pursuant to the parties' Contract, where the Nagles knowingly sat on their rights for more than nineteen years they alleged the breach of the parties' Contract, waiting to see whether it was more advantageous to hold the stock or attempt to retake the Property or use their unasserted claims as a defense to an individual seeking legal title.

In this case, both Plaintiff Collard and the Defendant Nagles asserted their entitlement to attorney's fees and costs under the terms of the Contract. *See, Complaint*, R.6; *Answer and Counterclaim*, ¶, R. 28, 37, Thus, the Nagles are estopped from claiming that the Contract's attorney fee provision does not apply to this case. Additionally, the Nagles did not challenge the amount or reasonableness of the attorney's fees and costs requested by Plaintiff. R. 501, 507.

Based on the foregoing, the Court should reverse the lower court's denial of attorney's fees and costs, and award the Plaintiff Trust the reasonable attorney's fees and costs incurred in the prosecution of the lower court and in this appeal.

CONCLUSION

The lower court's decision quieting title in the Plaintiff Trust and dismissing the Defendant Nagles' counterclaims as being without merit, waived and/or barred by the statute of limitations, is correct and should be affirmed. The lower court's decision denying attorney's fees and costs to the Plaintiff Trust under the provisions of the parties' Contract is incorrect and should be reversed, and the Plaintiff Trust should be awarded its attorney fees and costs reasonably incurred in the lower court and in this appeal

DATED AND RESPECTFULLY SUBMITTED this 26th day of November,
2001.

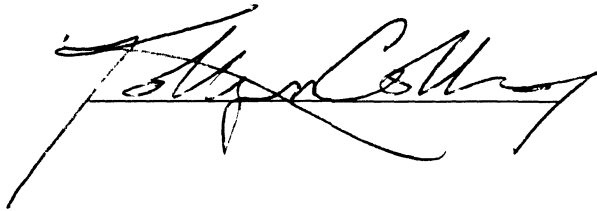
THE LAW FIRM OF KATHRYN COLLARD, LC



KATHRYN COLLARD
Attorney For Plaintiff

CERTIFICATE OF MAILING

On this 26th day of November, I mailed two (2) true and correct copies of the above and foregoing Brief of Appellee, to Mr. Ralph J. Marsh, Backman, Clark & Marsh, 800 McIntyre Building, 68 South Main Street, Salt Lake City, UT, 84101, by depositing the same in the United States Mail, postage prepaid.

A handwritten signature in black ink, appearing to read "Ralph J. Marsh", written over a horizontal line.

Tab A

LOIS Federal District Court Opinions: Non-Referenced

UNITED> <PACIFIC> <INSURANCE> <COMPANY> <v>. <KNUDSEN> <CONSTRUCTION>, <INC., (Utah

UNITED PACIFIC INSURANCE COMPANY, a Pennsylvania corporation, Plaintiff, v.

KNUDSEN CONSTRUCTION, INC., a Utah corporation, et. al, Defendants/Third

Party Plaintiffs, v. DALE BARTON AGENCY, a Utah corporation, Third-Party

Defendant.

Case No. 2:97CV235C

United States District Court, D. Utah, Central Division.

May 6, 2001

ORDER

TENA CAMPBELL, United States District Judge

This diversity matter comes before the court on cross-motions for partial summary judgment by Plaintiff United Pacific Insurance Company ("UP" or "surety"), Third-Party Defendant Dale Barton Agency ("Barton"), and Defendants Knudsen Construction, Inc., et. al (hereinafter collectively referred to as "Knudsen" or "indemnitors"). UP and Barton move for summary judgment on several claims, asserting: 1) that UP's claimed attorneys' fees - the basis for UP's first claim of relief - are now payable on demand because the written indemnity agreement between UP and Knudsen is clear on its face and there is no implied reasonableness requirement on fees claimed; 2) that Knudsen's seven counterclaims for relief against UP are barred by the applicable statutes of limitation; and 3) that Knudsen's five claims for relief contained in the Third-Party Complaint against Barton are similarly barred by the applicable statutes of limitation. Knudsen moves for partial summary judgment, asserting: 1) there is an implied element of reasonableness in the agreement and that therefore they are not liable for excessive or redundant fees; and 2) that some of UP's claimed fees are time-barred. Knudsen has not moved for summary judgment on any of its counterclaims against UP nor for its third-party claims against Barton.

Background

This is a case regarding indemnity for attorneys' fees. Plaintiff UP is a corporate surety that issued performance and payment bonds ("bonds") to cover a Utah construction project undertaken by Knudsen. UP is seeking to enforce a written indemnity agreement ("agreement") that requires Knudsen to reimburse UP for all attorney fees and expenses ("attorneys' fees" or "fees") which UP incurred subsequent to its issuance of bonds for a construction project.

At issue are approximately \$1.2 million in attorneys' fees and costs that UP incurred while first defending, and then successfully seeking to overturn an adverse judgment, in an action by the construction project's lender against the bonds issued by UP. In that action, the lender first obtained a \$3.5 million dollar judgement against UP. In an effort to

overturn this adverse judgment, UP hired its own counsel and, after a seven-year litigation period, successfully absolved itself of liability after an appeal process which reversed the judgment and remanded the case for a new trial, which ultimately ended in a judgment for UP.

In the present case, UP is seeking what it alleges is the entire amount of attorneys' fees that it incurred overturning the earlier judgment. In doing so, it relies primarily on three provisions in the agreement:

NOW, THEREFORE, in consideration of the execution of any such Bond or Bonds and as an inducement of such execution, we, the undersigned, agree and bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally:

. . .

SECOND: To indemnify, and keep indemnified, and hold and save harmless the Surety against all demands, claims, loss, costs, damages, expenses, and attorneys' fees whatever, and any and all liability therefor, sustained or incurred by the Surety by reason of executing or procuring the execution of any said Bond or Bonds, or any other Bonds, which may be already or hereafter executed on behalf of the Contractor, or renewal or continuation thereof; or sustained or incurred by reason of making any investigation on account thereof, prosecuting or defending any action brought in connection therewith, obtaining a release therefrom, recovering or attempting to recover any salvage in connection therewith, or enforcing by litigation or otherwise any of the agreements herein contained. Payment of amount due surety hereunder together with legal interest shall be payable upon demand.

(Indemnity Agreement at 1.) (emphasis added).

. . .

TENTH: The Surety shall have the exclusive right for itself and for the undersigned to decide and determine whether any claim, demand, suit or judgment upon said Bond or Bonds shall, on the basis of liability, expediency or otherwise be paid, settled, defended or appealed, and its determination shall be final, conclusive and binding upon the undersigned . . .; and any loss, costs, charges, expense or liability thereby sustained or incurred, as well as any and all disbursement on account of costs, expenses and attorneys' fees, deemed necessary or advisable by the Surety shall be borne and paid immediately by the undersigned, together with legal interest. In the event of any payment, settlement, compromise or investigation, an itemized statement of the payment, loss, costs, damages, expenses, or attorneys' fees, sworn to by any officer of the Surety or the voucher or vouchers or other evidence of such payment, settlement or compromise, shall be prima facie

evidence of the fact and extent of the liability of the undersigned to the Surety in any claim or suit hereunder and in any and all matters arising between the undersigned and the Surety.

Id. at 2. UP contends that these clauses require Knudsen to reimburse UP for any claims it tenders because "the extent of the liability of" Knudsen is determined solely by the sum sworn by UP and that this sum, once demanded, is now payable to UP. In essence, UP claims that all that is required by the agreement is that UP submit a sworn list that tallies the attorneys' fees it paid.

Knudsen, on the other hand, while admitting that it has a duty to reimburse UP for attorneys' fees, challenges the amount it actually owes. Knudsen argues that the amount claimed by UP is too great, and that it actually owes UP a lesser amount for basically two reasons: first, it asserts that some of the fees are redundant and/or unreasonable and are therefore not subject to reimbursement under the agreement; second, it argues that some of the fees are time-barred by the applicable statute of limitation.

In addition Knudsen also has counterclaims against both UP and Barton. Knudsen contends that its agreement with UP is a grossly unfair, one-sided contract of adhesion. Knudsen also argues that UP and Barton breached their alleged fiduciary duty to Knudsen to assure that the construction lender had properly escrowed the loan proceeds the loan proceeds for the construction project. In answer to these claims, UP counters, asserting first that claims for fee reimbursement under the contract must be accepted on their face absent a showing of fraud or bad faith (not unreasonableness), and second that none of its claims are time-barred. UP and Barton also contend that Knudsen's counterclaims are time-barred.

The questions to be resolved, therefore, are: 1) whether the agreement is binding on its own terms or whether it has an implied element of reasonableness requiring that UP must not only submit an accounting of fees it demands from Knudsen, but also ensure that submitted fees are reasonable; 2) whether any of the fees UP submitted are time-barred under the applicable statute of limitations; 3) whether Knudsen's counterclaims are time-barred or otherwise legally barred.[fn1]

Analysis

A. Is the Indemnity Agreement Enforceable on Its Face or Should the Court Imply a Standard of Reasonableness Regarding the Amount of Fees Claimed?

Under Utah law,[fn2] "[a]ttorney fees awarded pursuant to contract or statute are usually those found by the court to be 'reasonable,' unless the statute or contract provides otherwise." Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1361 (Utah App. 1990) (emphasis added), quoting Canyon Country Store v. Brace, 781 P.2d 414, 420 (Utah 1989). The Ringwood court applied this rule in an indemnity situation. See id. Knudsen relies on this case in support of its contention that all claims for attorneys' fees under indemnity agreements are, under Utah law, subject to a determination of reasonableness. Knudsen, however, does not address exception to the rule where a statute or a contract provides otherwise.

Under Utah law, "contracts mean what they say, and parties will be

bound by them." *Russ v. Woodside Homes, Inc.*, 905 P.2d 906 n. 1 (Utah App. 1995) citing *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1047 (Utah 1985). It is axiomatic in Utah contract law that "[p]ersons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain." *Biesinger v. Behunin*, Utah, 584 P.2d 801, 803 (1978). Parties "should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." *Carlson v. Hamilton*, 332 P.2d 989, 991 (1958); see also *Bekins V Ranch v. Huth*, Utah, 664 P.2d 455, 459 (Utah 1983) (affirming policy). "Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable." *Resource Management*, 706 P.2d at 1040. These principles are continually reaffirmed in Utah case law. See, e.g., *id.* (recognizing cases and policy). "[T]he courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident." *Cole v. Parker*, 300 P.2d 623, 626 (Utah 1956). Absent "legal excuse or justification for failure to perform the obligations of a contract, it must be enforced according to its terms." *Zions Properties, Inc. v. Holt*, 538 P.2d 1319, 1322 (Utah 1975). These principles have been recognized and applied in indemnity contracts. See *Pavoni v. Nielsen*, 999 P.2d 595, 599 (Utah App. 2000).

The important question is therefore: does the agreement "provide otherwise"? The agreement reads:

The Surety shall have the exclusive right for itself and for the undersigned to decide and determine whether any claim, . . . suit or judgment upon said Bond or Bonds shall . . . be paid, settled, defended or appealed, and its determination shall be final, conclusive and binding upon the undersigned . . .; and any loss, costs, charges, expense or liability thereby sustained or incurred, as well as any . . . costs, expenses and attorneys' fees, deemed necessary or advisable by the Surety shall be borne and paid immediately by the undersigned. . . . In the event of any payment, settlement, compromise or investigation, an itemized statement of the payment, loss, costs, damages, expenses, or attorneys' fees, sworn to by any officer of the Surety or the voucher or vouchers or other evidence of such payment, settlement or compromise, shall be prima facie evidence of the fact and extent of the liability of the undersigned to the Surety in any claim or suit hereunder and in any and all matters arising between the undersigned and the Surety.

(Indemnity Agreement ¶ 10.) (emphasis added).

This provision explicitly provides that a sworn statement by an officer of UP on the extent and fact of liability is evidence of the actual extent and liability to the surety. Because the indemnity contract explicitly provides that the surety has the exclusive right to determine appropriate attorney action and that the indemnitor is bound that decision, Knudsen is liable for the fees as tendered so long as they were not tendered in bad faith. No implied element of reasonableness inheres in the agreement because the agreement specifically provides otherwise.

UP is thus entitled to attorneys' fees in the amount tendered to the extent that they were not tendered in bad faith.^[fn3]

B. Are Some Claims at Issue Time-Barred?: The Applicable Statute of Limitations

1. UP's Claims for Fees

Under Utah law, an action on any contract, obligation or liability founded upon an instrument in writing must be brought within six years. Utah Code Ann. § 78-12-23 (1996). "As a general rule, a cause of action for indemnity does not arise until the party seeking indemnity results in his damage, either through payment of a sum clearly owed or through the injured party's obtaining an enforceable judgment." *Perry v. Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984) (emphasis added).

The Indemnity Agreement specifically provides:

NOW, THEREFORE, in consideration of the execution of any such Bond or Bonds and as an inducement of such execution, we, the undersigned, agree and bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally: . . .

To indemnify, and keep indemnified, and hold and save harmless the Surety against all demands, claims, loss, costs, damages, expenses, and attorneys' fees whatever, and any and all liability therefor, sustained or incurred by the Surety by reason of executing or procuring the execution of any said Bond or Bonds, or any other Bonds, which may be already or hereafter executed on behalf of the Contractor, or renewal or continuation thereof; or sustained or incurred by reason of making any investigation on account thereof, prosecuting or defending any action brought in connection therewith, obtaining a release therefrom, recovering or attempting to recover any salvage in connection therewith, or enforcing by litigation or otherwise any of the agreements herein contained. Payment of amount due surety hereunder together with legal interest shall be payable upon demand.

(Indemnity Agreement at 1.) (emphasis added).

Under the plain language of the contract, it is apparent that failure to pay upon demand would constitute breach. Indeed, UP asserts that Knudsen breached the indemnity agreement by refusing to pay UP "upon demand" as provided by the agreement. UP paid its counsel in the underlying action monthly from 1986 to 1996. Thereafter, UP made a demand, as provided by the indemnity agreement, for Knudsen to indemnify them for total costs. Knudsen refused to tender payment upon UP's demand in 1996 and UP contends that this action was a breach of the specific provision emphasized above. UP filed this action April 11, 1997, less than a year after the alleged breach. Utah law provides that an action on any contract, obligation or liability founded upon an instrument in writing must be brought within six years. See Utah Code Ann. § 78-12-23. As such, none of UP's claims are time barred. The breach of contract claim was brought within one year of the alleged breach - Knudsen's refusal to pay "upon demand" - and is therefore well

within the six year statutory allotment.

2. Knudsen's Counterclaims

Knudsen's counterclaims are in part based on an allegation of breach of fiduciary duty by UP and Barton. Knudsen contends that when UP and Barton issued bonds to the Knudsen, UP and Barton breached their fiduciary duty to discern that the owner's construction lender had failed to escrow the loan proceeds in a construction account sufficient to insure that Knudsen would be fully paid for its work. The remaining counterclaims rely on an allegation that the indemnity agreement is grossly unfair, one-sided contract of adhesion. As a threshold matter, there are two issues with regard to viability Knudsen's counterclaims: first, whether their claims against UP are time-barred, and, even if so, are they still permitted as a "set-off"; and 2) whether their claims against Barton are time-barred.

With regard to the claim that UP and Barton breached their fiduciary duty to Knudsen to monitor the escrow of construction loan proceeds, sufficient evidence has been presented to demonstrate that Knudsen knew about the problems with the loan escrow at the latest in 1988. With regard to the second claim that the indemnity agreement is a contract of adhesion, Knudsen signed the agreement in 1982. Under Utah law, an action for cancellation of an instrument is generally deemed to accrue on the date on which the instrument was delivered. See, e.g., *Baker v. Pattee*, 684 P.2d 632, 635 (Utah 1984). At best then, given the six year statute of limitation in Utah, Knudsen's counterclaim could only have been brought as late 1994, six years after it would have known about any alleged problems with the escrow. See Utah Code Ann. § 78-12-23 (six-year statute of limitation on actions based upon a written instrument). Therefore, no matter how Knudsen styled its claim against UP, it would fall well outside the six years allowed by the statute of limitation since the counterclaims were filed in 1997.[fn4]

Utah law does, however, allow otherwise time-barred claims to be raised as a "setoff" against liability claims. *Jacobsen v. Bunker*, 699 P.2d 1208, 1210 (Utah 1985). "A defendant may therefore utilize a counterclaim, normally barred by the statute of limitations, to offset a plaintiff's claim, but only to the extent the claims equal each other." *Coulon v. Coulon*, 915 P.2d 1069, 1072 (Utah 1996). However, the claims may be offset only if they coexisted. See *id.* (emphasis added), citing *Salt Lake City v. Telluride Power Co.*, 17 P.2d 281, 286 (Utah 1932). On this point, Knudsen's "offset" argument fails because the claims at no time coexisted.

[T]he cross-demands must coexist; that is they must subsist in such a way that if one party had brought suit on his demand the other could have set up the demand he held against that of the plaintiff. There must be an overlapping of live demands in point of time. If the demand of one party becomes barred and is not subsisting as a cause of action when the demand of the other party comes into existence, the former demand is not available.

Telluride, 17 P.d at 285, quoting *O'Neil v. Eppler*, 162 P. 311, 312 (emphasis added). "[T]wo claims are coexistent and overlapping in point of time . . . [if] both are subsisting claims before the statute of limitations has run against either. *Id.* at 286 (emphasis added). Here, as discussed above, the statute of limitations ran on Knudsen's

counterclaim at the latest in 1994 - six years after Knudsen knew of any alleged problem with the escrow. This present action was filed in 1997, and therefore Knudsens claimed "setoff" action against UP is at least three years too late.

Knudsen's claim against Barton for breach of fiduciary duty is similarly time-barred. As discussed above, the claim against Barton's alleged breach of fiduciary duty would have begun to run in 1988, the latest date that the evidence suggests Knudsen would have known of the apparent problem with the escrow. Knudsen's claim against Barton therefore fails because the statute of limitation ran on the claim, six years later, in 1994. See Utah Code Ann. § 78-12-23. Accordingly, Knudsen's claim against Barton is time-barred. Finally, because Barton has no claim against Knudsen, Knudsen cannot maintain that its claim against Barton is a "setoff."

Order

For the reasons set forth above, Defendants' motion for summary judgment is DENIED and Plaintiff and Third Party Defendant's Motion for Summary Judgment is GRANTED in part as to Defendants' counterclaims and third-party claims.

[fn1] Knudsen has not moved for summary judgment on the merits of its counterclaims. Therefore, only UP's and Barton's contention that the counterclaims are legally barred is at issue.

[fn2] At the March 28, 2001 hearing on these cross motions, the parties agreed that Utah law governs this matter.

[fn3] UP concedes that this seeming "blank check" regarding attorneys' fees can be challenged if it is demonstrated that plaintiff committed fraud or acted in bad faith in submitting fees for indemnification. (Pl.'s Mem. in Supp. of Mot. for Part. Summ. J. at 5-6.)

[fn4] With regard to the first issue, defendants seem to concede that their counterclaims would be time-barred under the applicable statute of limitations, but nevertheless contend that their claims are valid as a setoff.