

2000

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Ralph J. Marsh; Backman, Clark & Marsh; Attorney for Appellants.

Kathryn Collard; Attorney for Appellee.

Recommended Citation

Reply Brief, *Collard v. Nagle Construction*, No. 20000976 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2981

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

IN THE UTAH COURT OF APPEALS

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Plaintiff-Appellee,

vs.

NAGLE CONSTRUCTION, INC., a Utah
corporation, GARY M. NAGLE and
MARILYN F. NAGLE, individuals,

Defendants-Appellants.

Case No. 20000976-CA

GARY M. NAGLE,

Counterclaim Plaintiff-
Appellant

vs.

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Counterclaim Defendant-
Appellee.

APPELLANT'S REPLY BRIEF

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

KATHRYN COLLARD (0697)
The Law Firm of Kathryn Collard
Nine Exchange Place, Suite 1111
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellee

RALPH J. MARSH (2092)
Backman, Clark & Marsh
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendants-Appellants

Argument Brief
FILED
Utah Court of Appeals

JAN 23 2002

IN THE UTAH COURT OF APPEALS

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Plaintiff-Appellee,

vs.

NAGLE CONSTRUCTION, INC., a Utah
corporation, GARY M. NAGLE and
MARILYN F. NAGLE, individuals,

Defendants-Appellants.

Case No. 20000976-CA

GARY M. NAGLE,

Counterclaim Plaintiff-
Appellant

vs.

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Counterclaim Defendant-
Appellee.

APPELLANT'S REPLY BRIEF

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

KATHRYN COLLARD (0697)
The Law Firm of Kathryn Collard
Nine Exchange Place, Suite 1111
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellee

RALPH J. MARSH (2092)
Backman, Clark & Marsh
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendants-Appellants

Argument Priority 15

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Corrections to Appellee's Statement of the Case	1
Nature of the Case	1
Disposition in the Lower Court	2
Corrections to Appellee's Statement of Facts	3
Argument	5
POINT I. THE LOWER COURT FOUND THAT COLLARD HAD NOT FULLY PERFORMED, DID NOT QUIET TITLE TO THE PROPERTY IN COLLARD AND ERRED IN CONCLUDING THAT THE STATUTE OF LIMITATIONS BARRED RECOVERY OF THE PURCHASE PRICE.	5
1. Despite Collard's assertions to the contrary, the lower court concluded that Collard had not fully performed under the contract.	5
2. The lower court should not have considered the statute of limitations defense raised by Collard.	7
3. The lower court could but did not modify its ruling that both parties were barred by the statute of limitations.	8
4. The lower court did not quiet title in Collard and she did not establish the elements necessary to quiet title. Thus, the claim that she was not barred by the statute of limitations is not applicable.	8
5. Collard's argument that her "quiet title" claim had not accrued while Nagle's claims had expired contradicts her argument that Nagle waived the assumption requirement.	10
6. The pleading of an offset is not required since a counterclaim can be utilized as an offset. Nagle's claims did coexist with Collard's claims.	10

7. Collard's arguments that Nagle's claims were barred are contradictory and rely upon cases involving earnest money agreements and not Uniform Real Estate Contracts. 12

POINT II. NAGLE'S CLAIMS OF FAILURE TO PAY THE PURCHASE PRICE, CONDITION PRECEDENT, NON-SEVERABLE CONTRACT AND DEPENDENT PROMISES WERE ALL PROPERLY PLEADED AND RAISED BELOW AND COLLARD HAD NOTICE OF THEM. 14

POINT III. WITH RESPECT TO THE CONCLUSION ON WAIVER OF THE ASSUMPTION REQUIREMENT, COLLARD MISUNDERSTANDS THE STANDARDS FOR FINDINGS AND CONCLUSIONS ON A MOTION FOR SUMMARY JUDGMENT. 16

POINT IV. THE DEFENSE OF LACHES WAS NOT ARGUED BELOW, WAS NOT CONSIDERED BY THE LOWER COURT AND IS HYPOCRITICALLY RAISED BY COLLARD HERE. 17

POINT V. COLLARD IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES. 18

Conclusion 19

Certificate of Service 21

Addendum 22

Exhibit A Kathryn Collard Letter of January 23, 1981 R. 129, Exhibit 6

Exhibit B Nagle Deposition Excerpts R. 129, pp. 32, 41, 52

TABLE OF AUTHORITIES

Cases	Page
<u>Church v. Meadow Springs Ranch Corp., Inc.</u> , 659 P.2d 1045, 1048-9 (Utah 1983)	9
<u>Conder v. Hunt</u> , 1 P.3d 558, 563-4 (Utah App. 2000)	7, 8, 9
<u>Coulon v. Coulon</u> , 915 P.2d 1069, 1072 (Utah App. 1996)	11, 12, 18
<u>Jacobsen v. Bunker</u> , 699 P.2d 1208, 1210 (Utah 1985)	11
<u>McMullin v. Shimmin</u> , 10 U.2d 142, 349 P.2d 720 (Utah 1960)	12, 13
<u>Moffitt v. Barr</u> , 837 P.2d 572, 575 (Utah App. 1992)	12, 18
<u>Music Service Corp. v. Walton</u> , 20 U.2d 16, 432 P.2d 334, 337-8 (Utah 1967)	9
<u>Plateau Mining Co. v. Utah Division of State Lands and Forrestry</u> , 802 P.2d 720, 730 (Utah 1990)	17
<u>Salt Lake City v. Telluride Power Co.</u> , 82 Utah 607, 17 P.2d 281 (Utah 1932)	11
<u>Soter's, Inc. v. Deseret Federal Savings</u> , 857 P.2d 935 (Utah 1993)	16
<u>Wasatch Mines Co. v. Hopkinson</u> , 24 U.2d 70, 465 P.2d 1007 (Utah 1970)	7
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104, 107 (Utah 1991)	3
Rules	
Rule 8(c), Utah Rules of Civil Procedure	14, 15
Rule 9(c), Utah Rules of Civil Procedure	14, 15
Rule 9(h), Utah Rules of Civil Procedure	7
Rule 52(a), Utah Rules of Civil Procedure	16

IN THE UTAH COURT OF APPEALS

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Plaintiff-Appellee,

vs.

NAGLE CONSTRUCTION, INC., a Utah
corporation, GARY M. NAGLE and
MARILYN F. NAGLE, individuals,

Defendants-Appellants.

Case No. 20000976-CA

GARY M. NAGLE,

Counterclaim Plaintiff-
Appellant

vs.

KATHRYN COLLARD, TRUSTEE
of the LeRoy Collard Trust,

Counterclaim Defendant-
Appellee.

APPELLANT'S REPLY BRIEF

CORRECTIONS TO APPELLEE'S STATEMENT OF THE CASE

Nature of the Case

On page 2 of Appellee's Brief, and elsewhere throughout the brief, Appellee ("Collard") has stated that Mr. Collard "assumed" the Nagles' mortgage loan. While payments were made on the loan by Collard, there never was an assumption of that loan.

An assumption requires, at the very least, that Collard become legally obligated to the bank for the payment of that loan [See Black's Law Dictionary under "Assumption" and "Assumption of Indebtedness"] and may require an application by the assuming party to the lender for approval of the assumption [See §57-15-8, U.C.A.]. That was not done at any time.

On pages 2 and 3 of Collard's brief, it is stated that Nagle "continued to accept direct payments on the mortgage to FSB." There was no acceptance by Nagle of those payments. They were made directly to the bank on behalf of Nagle while Nagle waited for Collard to perform under the contract by payment of the balance of the purchase price and by assumption of the loan.

Disposition in the Lower Court

Collard admits that the lower court held that the statute of limitations barred both parties' legal claims and requested briefing on the issue of whether the court had equitable power to grant relief to Collard. However, Collard then states on page 4 of her brief that the lower court "modified its previous ruling." There is no indication in the court's decision that it modified its previous ruling. It simply ignored its previous ruling and decided it had equitable power to grant relief to Collard without also doing equity to Nagle.

Collard further states, on page 4 of her brief, that the lower court also held that Nagle's claims "all failed on the merits, or were waived and/or barred." There was no determination on the merits of this case. The court simply decided that the statute of limitations barred the claims.

CORRECTION TO APPELLEE'S STATEMENT OF FACTS

On page 5 of her brief, Collard states that she "disputed the factual allegations contained in paragraphs 7, 8, 9-11 of the Nagles' 'Statement of Facts' regarding the value of the 55,000 shares of stock conveyed by Mr. Collard." That, of course, raised an issue of fact which precluded the lower court from granting a summary judgment. However, since the lower court nevertheless granted summary judgment to Collard, Nagle's statement of those facts must be accepted as true in reviewing that judgment. Winegar v. Froerer, 813 P.2d 104, 107 (Utah 1991) [On a motion for summary judgment, the court must accept all facts and inferences in the light most favorable to the losing party]. The lower court declined to make a finding as to those facts because, on a motion for summary judgment, it cannot make findings as to disputed facts, not, as Collard Claims, because it held that Nagle's claims failed as a matter of law.

In paragraphs 4-8 on pages 5 and 6 of her brief, Collard attempts to sever the contract into three separate parts by calling the various parts of the purchase price installments. Despite this attempt, the contract remains one unseverable contract and the full amount of the purchase price must be paid before a deed is due under the contract.

In paragraph 8 on page 6 of her brief, Collard states that Mr. Collard tendered 55,000 shares of stock in San Juan Mining and Developing Company "as required" by the contract. The fact is that the contract required delivery of 55,000 shares of Utah Coal and Chemical Company stock. The fact that San Juan Mining and Developing Company may have been a predecessor of Utah Coal and Chemical Company does not mean the shares of one are equivalent to the shares of the other. In any event the shares offered were not

worth the amount required by the contract and did not satisfy the requirement of the contract.

In paragraph 19 on page 9 of her brief, Collard states that she wrote a letter with documentation 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." While this statement is irrelevant because the lower court refused to make a finding on the value of the stock, since Nagle had submitted evidence to the contrary, the fact is that the letter from Collard only included information on the prices for the stock from January 1, 1979, through March of 1979 [See Exhibit A attached hereto], which was six months before the stock was delivered and Addendum #2 to the contract was signed. [Nagle Deposition, p. 30, lines 3-5; p. 41, lines 3-5; see Exhibit B attached hereto].

In paragraph 20 on page 10 of her brief, Collard asserts that the stock could have been sold for the \$85,000. Nagle submitted evidence to the contrary and the lower court, on a motion for summary judgment, quite properly refused to make a finding on this disputed set of facts. Again, since the court ruled against Nagle, his view of the facts must be accepted as true in reviewing that decision.

In paragraph 23 on page 10 of her brief, Collard states that Nagle retained the stock. That, too, is irrelevant since the stock was worthless and could not be sold [Nagle Deposition, p. 52, lines 6-10; see Exhibit B attached hereto] and, under the contract, it was Collard's obligation to make up the difference between the value of the stock and the \$85,000.00.

In paragraph 30 on page 12 of her brief, Collard states that Nagle's claims were based "solely on Mr. Collard's alleged breaches of the parties' Contract prior to January 25,

1981." The fact is that Nagle's claims were based upon Collard's continuing breach in having failed to pay the purchase price which was the condition precedent to delivery of the deed.

ARGUMENT

POINT I

THE LOWER COURT FOUND THAT COLLARD HAD NOT FULLY PERFORMED, DID NOT QUIET TITLE TO THE PROPERTY IN COLLARD AND ERRED IN CONCLUDING THAT THE STATUTE OF LIMITATIONS BARRED RECOVERY OF THE PURCHASE PRICE.

1. Despite Collard's assertions to the contrary, the lower court concluded that Collard had not fully performed under the contract.

Collard continues, throughout her brief, to misrepresent the lower court's ruling. On page 16, she again asserts that "the lower court correctly concluded that . . . Collard, had performed all of the actions or 'Installments' required for his receipt of the title to the Property . . ." This statement is simply not true. The lower court did not ever find or conclude that Collard had performed all of the requirements of the contract. The court did find that the down payment had been paid, which was not disputed, but the court expressly refused to make a finding with respect to the value of the stock delivered [Finding #15, Exhibit E, Addendum to Appellant's Brief] and thus could not and did not conclude that the \$85,000 in value had been delivered. While the court did enter a conclusion that Nagle had waived the assumption requirement [Conclusion #8], it did so without any finding of fact to support that conclusion and without any evidence upon which such a finding could be based [See Appellant's Brief, Point II] and, in contradiction to that conclusion, it concluded that Collard's right to a deed had not arisen and was "conditioned upon payment of the remaining balance owed on the FSB Obligation." [Conclusions ##14 & 15, Exhibit E,

Addendum to Appellant's Brief]. That conclusion can only mean that Collard had not performed all the requirements of the contract, specifically the requirement to assume the FSB obligation. That conclusion also means that the requirement to assume the FSB obligation had not been waived because the court required that obligation to be paid by Collard as a condition to performance by Nagle. Payment in full of the FSB obligation is a greater requirement than assumption of that obligation but would obviously fulfill or replace the assumption requirement.

The significance of that requirement by the lower court (to pay FSB as a condition to receipt of a deed) cannot be overemphasized. It represents a conclusion that the contract had not been fully performed, that the contract was still alive and subject to suit for non-performance, that the statute of limitations had not expired and that Collard was not entitled to a deed until the purchase price had been fully paid. Thus, the whole basis of the lower court's decision must crumble. The statute of limitations had not expired with respect to the enforcement of the contract by Nagle.

Collard has argued, on page 17 of her brief, that the lower court's conclusion of waiver of the assumption requirement was based on "Nagles' own admissions." There is no such finding by the court and none of the references in that paragraph of her brief states that Nagle made any such admissions. Nagle, in fact, made no such admissions, the court made no such findings and, as pointed out above, the court's conclusion that delivery of a deed was conditioned upon payment of FSB is a conclusion that the assumption requirement was not waived.

It is, therefore, obvious that the lower court did not find or conclude that Collard had performed all of the requirements of the contract. The court specifically did not find

that Collard had delivered the \$85,000 in value and specifically concluded that the assumption requirement had not been met. Thus, Collard was in default and was not entitled to receive a deed to the property.

2. The lower court should not have considered the statute of limitations defense raised by Collard.

Collard argues on pages 18-19 of her brief that Nagle waived any argument that the lower court erred in considering Collard's statute of limitations defense. Her stated reasons are without support. The fact that Nagle properly pleaded the statute of limitations in his Answer and Counterclaim does not excuse Collard from failing to properly plead the statute as required by Rule 9(h), U.R.C.P. She further asserts that no other statute of limitations could apply. That also is not an excuse for failing to comply with Rule 9(h). She asserts that Wasatch Mines Co. v. Hopkinson, 24 U.2d 70, 465 P.2d 1007 (Utah 1970), the case cited by Nagle, is distinguishable on this ground. She misreads that case, since it did not involve a claim for fraud as she asserts and there was only one possible statute of limitations that could apply in that case. Wasatch Mines further reversed the lower court's application of the inadequately pleaded statute of limitation even though that argument was not raised in the lower court (a fact which is clear from reading the entire opinion). Thus, Wasatch Mines is controlling in this case. The more recent case of Conder v. Hunt, 1 P.3d 558, 563-4 (Utah App. 2000), followed Wasatch Mines in holding that the failure to properly plead the correct statute of limitations as required by Rule 9(h) is fatal to the assertion of that claim, even though not asserted in the lower court. Conder went on to refuse to consider other statutes of limitations that might apply since they were not properly pleaded.

3. The lower court could but did not modify its ruling that both parties were barred by the statute of limitations.

It is not contested that the lower court could modify its earlier ruling that the statute of limitations barred both parties from relief. It is simply pointed out that the lower court did not modify its earlier ruling. No where in the record is there a statement by the court that it changed its mind or modified its earlier ruling. Of course, in preparing the findings and conclusions, Collard omitted the court's ruling against it on this point but it is significant that Collard did not include a statement that the court had modified that ruling. In fact, the court did not change its mind. It had asked the parties to find an equitable ground upon which it could order a deed to be delivered to Collard. After the second hearing, it believed it had found such a ground and directed Collard to prepare findings and conclusions consistent with her argument. Her argument was that she was entitled to a deed as soon as she paid off the FSB obligation. That required the court to order specific performance of the contract by Nagle, that is, to deliver a deed, which is an equitable remedy. However, the court failed to require equity on Collard's side by paying the purchase price. The determination that Collard was entitled to a deed after she paid the FSB obligation meant that the contract was still in force. If the contract was still in force, the whole contract was in force and could not be severed.

4. The lower court did not quiet title in Collard and she did not establish the elements necessary to quiet title. Thus, the claim that she was not barred by the statute of limitations is not applicable.

Collard argues, on pages 20-21 of her brief, that she is not barred by the statute of limitations because, she asserts, the statute of limitations does not bar one in possession of property from seeking to quiet title. She relies on Conder v. Hunt, *supra*, to support that

argument. In fact, Conder v. Hunt, at 564, states that "no Utah case cited by the parties specifically adopts this rule . . . [and] a definitive ruling on the question must await a case in which it is more squarely in issue." Thus, Collard's reliance on that case is misplaced. However, a glance at the judgment in this case demonstrates that the lower court did not quiet title in Collard but rather ordered specific performance of the contract by ordering delivery of a deed. While that judgment lacks support, for reasons set forth in Appellant's Brief and elsewhere herein, there was no basis for a quiet title judgment in favor of Collard in this matter. One who seeks to quiet title must prevail on the strength of his own title and not on the weakness of the other party's title. Music Service Corp. v. Walton, 20 U.2d 16, 432 P.2d 334, 337-8 (Utah 1967) [A case in which the Supreme Court remanded for further proceedings since neither party had established a right to quiet title]. Church v. Meadow Springs Ranch Corp., Inc., 659 P.2d 1045, 1048-9 (Utah 1983) ["To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own title and not on the weakness of a defendant's title or even its total lack of title."] Collard's only claim to title was pursuant to the contract which she sought to enforce. She did not prove any right, and the court did not grant quiet title, based on adverse possession, chain of title or any other ground. Nagle, on the other hand, held actual recorded title to the property, based on a chain of title of record, and no weakness in his title was demonstrated. A quiet title judgment for Collard could not have been entered. The judgment was simply an order to specifically perform a contract. Thus, the argument that one in possession of property is not barred by the statute of limitations from seeking to quiet title is not applicable.

5. Collard's argument that her "quiet title" claim had not accrued while Nagle's claims had expired contradicts her argument that Nagle waived the assumption requirement.

On page 21 of her brief, Collard asserts that her "quiet title" claim had not accrued yet. The first response to this is that her claim was not a quiet title claim but a claim for specific performance and the lower court so held. [See point 4, above]. Secondly, this argument contradicts her argument that Nagle waived the assumption requirement. The lower court required Collard to pay FSB in full as a condition to receipt of the deed. As set forth in point 1, above, this means that Collard had not fully performed and the contract was still subject to suit for non-performance. However, if, as Collard argues, Nagle had waived the assumption requirement in 1981, Collard had performed in 1981 (ignoring the requirement to pay \$85,000 in value, which Collard also claims was due then and now barred) and was entitled to a deed in 1981. Therefore, Collard was barred after 1987 from pursuing a claim for the deed. [See pp. 22-23 of Appellant's Brief]. She cannot have it both ways. Either the assumption requirement was waived and she is barred by the statute of limitations or the whole unseverable contract is still in force and Nagle is not barred by the statute of limitations. The lower court's order of specific enforcement, an equitable remedy, is inequitable unless Collard is also required to do equity by payment of the purchase price.

6. The pleading of an offset is not required since a counterclaim can be utilized as an offset. Nagle's claims did coexist with Collard's claims.

Collard claims, on page 22 of her brief, that the parties in the cases relied on by Nagle for the proposition that a counterclaim may be utilized as an offset actually pleaded offset while Nagle did not is not true. There is no indication in any of those cases that a

claim for an offset had been pleaded as an affirmative defense and there is no statement in any of those opinions that an offset must be pleaded as an affirmative defense. In fact, each of those cases state that a "defendant may therefore utilize a counterclaim, normally barred by the statute of limitations, to offset a plaintiff's claim," Coulon v. Coulon, 915 P.2d 1069, 1072 (Utah App. 1996), "the amount due Bunker on the Jacobsen note may be used as an offset against the amount owed Jacobsen," Jacobsen v. Bunker, 699 P.2d 1208, 1210 (Utah 1985), and a "if a defendant had a counterclaim that otherwise would have been barred by a statute of limitations, the counterclaim could be set-off against the plaintiff's claim," Jacobsen, at 1210, citing Salt Lake City v. Teluride Power Co., 82 Utah 607, 17 P.2d 281 (Utah 1932). Thus, it is not necessary to separately plead offset as an affirmative defense because the pleading of a counterclaim is the pleading of an offset if the counterclaim is barred.

Collard's assertion that the claims did not coexist is also false. Again, if her argument that the assumption requirement was waived in 1981 is accepted, her claim for specific performance arose in 1981 while Nagle's claim were, admittedly, still alive. Furthermore, this argument assumes she can sever this nonseverable contract into three parts in order to apply the statute of limitations to each part separately. It further ignores the fact that payment of the purchase price was a condition precedent to delivery of the deed and that delivery of the deed was a promise dependent on payment of the purchase price. [See pages 16-21 of Appellant's Brief]. Collard has apparently agreed with those positions since she has not countered them any where in her brief. Since she had not paid the purchase price, the claim for the purchase price was still alive and coexisted with her

claim for a deed. Moreover, her position ignores an important policy issue, as stated in Coulon, at 1073:

This result is consistent with the policy prohibiting a plaintiff from delaying an action until after a defendant's counterclaim is barred by the statute of limitations.

This policy is more fully stated in Moffitt v. Barr, 837 P.2d 572, 575 (Utah App. 1992):

[A]ppellees' interpretation penalizes "reluctant" litigants, i.e., those who would rather avoid litigation than assert the claims they possess, and who take the basically non-litigious position that they will assert their claims only if the other party brings litigation to fruition by filing a complaint against them, their real preference being to stay out of court altogether. . . . If a party files a complaint against a reluctant litigant, the reluctant litigant may then assert his or her own right to relief in the form of a counterclaim.

Nagle's claims clearly coexisted with Collard's claims and he was a reluctant litigant because he knew that when Collard wanted a deed, he would have to pay the purchase price. The above policy justifies his "wait and see" attitude.

7. Collard's arguments that Nagle's claims were barred are contradictory and rely upon cases involving earnest money agreements and not Uniform Real Estate Contracts.

On pages 23-25 of her brief, Collard states that Nagle sent a letter to Collard in 1981 that his default "will result in the institution of legal proceedings against you for foreclosure of the contract as a note and mortgage." She then argues that this letter did not satisfy the "strict notice and procedural requirements to effect a forfeiture under the Contract or Utah law." She ignores the fact that foreclosure and forfeiture are very different procedures under Uniform Real Estate Contracts and that if a party attempts and fails at one procedure, he could start over and elect another procedure as long as the default still exists. She cites McMullin v. Shimmin, 10 U.2d 142, 349 P.2d 720 (Utah 1960), for the

proposition that the election of forfeiture is exclusive and precludes recovery of any other damages under the contract or at law. McMullin, and the other authorities she cites, involve an Earnest Money Receipt and Offer to Purchase, which contains a clause giving the seller the option to retain the earnest money as liquidated and agreed damages if the buyer fails to close the sale. Thus, by retaining the earnest money, the seller has elected his remedy and is barred from suing for specific performance or for actual damages. Those cases do not apply to situations where the sale has been closed and a final Uniform Real Estate Contract has been signed, as is the case here, and the buyer has partially performed but fails to pay some portion of the purchase price. Those Uniform Real Estate Contracts expressly allow the seller alternative remedies, one of which is forfeiture and another of which is foreclosure of the contract as a note and mortgage. Neither forfeiture nor foreclosure requires the seller to refund the down payment and a failure to properly effect a forfeiture does not preclude the seller from later pursuing foreclosure if a default still persists.

Collard claims that Nagle's attempt to effect a forfeiture failed. Nagle could, therefore, have abandoned that remedy for the time being and later properly pursued a forfeiture by following the strict requirements or he could have given notice of his intent to foreclose the contract. Or, if he assumed that the forfeiture remedy was effective (since it was not challenged at the time) and Collard became a tenant at will in the property, Nagle could allow Collard to remain in the property as a tenant at will with the right to evict him at any point in time. Collard's payment of the mortgage payments could have been considered the payment of rent as a tenant. It could also be argued that Collard's claim that forfeiture was not effective was barred by the statute of limitations since he took no action within six years of the forfeiture in 1981. None of these issues was considered by the lower

court since it's only holding was that Nagle was barred by the statute of limitations from asserting any of his claims. That holding is the issue that is challenged on this appeal.

POINT II

NAGLE'S CLAIMS OF FAILURE TO PAY THE PURCHASE PRICE, CONDITION PRECEDENT, NON-SEVERABLE CONTRACT AND DEPENDENT PROMISES WERE ALL PROPERLY PLEADED AND RAISED BELOW AND COLLARD HAD NOTICE OF THEM.

Collard relies upon Rules 8(c) and 9(c), U.R.C.P., to argue that Nagle waived its claims of failure to pay the purchase price, condition precedent and dependent promises. She ignores the provisions of those rules which provide:

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation. [Rule 8(c)].

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence. [Rule 9(c)].

In paragraph 18 of Collard's complaint, she alleges that "Collard or his successors have tendered all sums due and owing under the Contract to Defendants and have otherwise performed all required acts under the Contract" [R. 3] and, in paragraph 35 of her complaint, she alleges that "Plaintiffs are entitled to a Declaratory Judgment by this Court finding that Collard and Plaintiff have fulfilled all of the Buyer's obligations under the Contract." [R. 5]. In Nagle's Answer and Counterclaim, he not only denies those allegations in paragraphs 13 and 23 of his Answer [R. 26 & 27], but he affirmatively alleges in his

Counterclaim [See R. 31-33] the condition precedent in paragraph 21 by quoting from Addendum #2 in full, including that buyer shall

bring the total value conveyed to seller to \$85,000 before seller conveys title to premises sold to buyer.

He affirmatively alleges in paragraph 25:

Collard never tendered sufficient Stock and/or cash to Nagle so as to enable Nagle to realize \$85,000.

He affirmatively alleges in paragraph 29:

Nagle retained the legal title to the Property as security for Collard's obligations and, under the Contract, he had no obligation to deliver title to Collard unless and until Collard fully performed his obligations thereunder.

He affirmatively alleges in paragraph 30:

Nagle reasoned that because he held legal title to the Property to secure Collard's obligations under the Contract, he could simply wait and eventually, if Collard wanted to obtain legal title, Collard would have to make good on his obligations and deliver \$85,000 worth of Stock and/or cash to him.

He affirmatively alleges in paragraph 31:

Thus, Nagle chose not to exercise any of his default remedies under the Contract, satisfied to allow Collard to continue making the monthly payments to First Security Bank, thus benefitting Nagle by increasing his equity in the Property and decreasing his personal liability on the mortgage, knowing that eventually Collard would have to make good on his obligations if he wanted title to the Property.

Those are specific and particular denials of performance, as required by Rule 9(c), and they make specific reference to the provisions of the contract where the condition precedent is set forth. And, since they are set forth in the Counterclaim, they satisfy the requirements of Rule 8(c). There is no requirement that the words "condition precedent" be used. Further, the law with respect to dependent promises is a rule of law which applies to all

contracts and need not be specially pleaded. The burden was, therefore, on Collard to prove her allegations of performance. She failed to so prove and the lower court found that she had failed to perform. The condition precedent has not been performed and performance by Nagle is not yet due.

POINT III

WITH RESPECT TO THE CONCLUSION ON WAIVER OF THE ASSUMPTION REQUIREMENT, COLLARD MISUNDERSTANDS THE STANDARDS FOR FINDINGS AND CONCLUSIONS ON A MOTION FOR SUMMARY JUDGMENT.

Nagle's position on pages 21-23 of Appellant's Brief is simply that the lower court made no finding of fact which would support its conclusion of law that Nagle waived the assumption requirement. Collard argues that there is evidence in the record to support that conclusion and that Nagle has failed to marshal the evidence to show that the findings of fact are clearly erroneous. Since there is no such finding of fact, there is no need to marshal evidence to support it. Further, the requirement of marshalling evidence does not apply on a motion for summary judgment since the lower court has no business making findings of fact on disputed evidence. The facts must be totally without dispute in order to justify a summary judgment and if there is any dispute in the facts, they must be viewed in the light most favorable to the losing party--Nagle, in this instance. Furthermore, the "clearly erroneous" standard of Rule 52(a), U.R.C.P., only applies in "actions tried upon the facts without a jury" There was no trial upon the facts in this case. On a motion for summary judgment, the court could not "assess the totality of the circumstances to determine whether the relinquishment [of a known right] is clearly intended," as required by Soter's, Inc. v. Deseret Federal Savings, 857 P.2d 935, 941 (Utah 1993). Whatever, facts may appear

in the record must be construed in the light most favorable to Nagle which means there was no intentional relinquishment of his right and no waiver of the assumption requirement.

POINT IV

THE DEFENSE OF LACHES WAS NOT ARGUED BELOW, WAS NOT CONSIDERED BY THE LOWER COURT AND IS HYPOCRITICALLY RAISED BY COLLARD HERE.

Having just argued that a claim may not be raised for the first time on appeal, Collard then argues that laches applies even though it was not argued to the lower court and the lower court did not make any findings or conclusions with respect to laches. The cases generally hold that laches does not apply when the statute of limitations has not expired because, until then, the parties still have rights to enforce. Since the lower court's application of the statute of limitations is the substance of this appeal, laches does not apply. Collard relies on Plateau Mining Co. v. Utah Division of State Lands and Forestry, 802 P.2d 720, 731 (Utah 1990), to support its laches argument. That case held that laches did not apply because the party asserting the defense had failed to perform its duty under the contract. For the same reason, it does not apply here. It is Collard who has failed to perform under the contract by failing to pay the purchase price.

The argument that Nagle has simply been "sitting and waiting" for some "propitious event and then, when all risk is over, assert a claim" simply doesn't apply here. There has been no "propitious" event that prejudices Collard. Nagle has simply been waiting for Collard to pay the purchase price before he conveys title. That has not prejudiced Collard in any way. In fact, her whole argument is that, because Nagle has waited so long, it is he who is prejudiced because he cannot now assert his claim for payment of the purchase price. Collard's claims of prejudice are false. Though the original contract may

be lost, all parties have copies which have been submitted to the court and no claims of prejudice were made below. Furthermore, both parties have submitted evidence of trading history of the stock demonstrating that such evidence is available. And failing memories do not come into play here because the only issue is whether the stock was delivered and whether it had sufficient value to satisfy the contract. There is no question as to what stock was delivered and the value of the stock can be established by the trading history evidence which is available. That evidence shows that the stock has been worthless, or nearly so, from the time it was delivered until the present. There has been no prejudice to Collard by the passage of time.

Collard's "sitting and waiting" argument is also contrary to the policy set forth in Coulon and Moffit, above, that encourages reluctant litigants to avoid litigation by waiting for the other party to first take action. This is especially true where Nagle is not obligated to deliver a deed until Collard has paid the purchase price. He was fully justified in waiting for Collard's performance.

POINT V

COLLARD IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

Collard argues that she prevailed on her "preeminent quiet title claim" and is, therefore, entitled to attorney's fees. In addition to again misstating the lower court's holding, she fails to cite any authority that would grant attorney's fees in a quiet title action. In fact, there is no contract or statutory basis for fees in such a case.

She also ignores the lower court's basis for its ruling and for its refusal to award attorney's fees. The lower court found no legal basis on which it could grant relief to either

party and asked the parties to brief the court on whether an equitable ground existed to require a deed to be delivered to Collard. Since the court was no longer construing the contract but was acting in equity to grant some remedy to Collard, it concluded that there was no legal basis on which Collard was entitled to attorney's fees and that it would be inequitable to award such fees. That, incidentally, was the only equity the court granted to Nagle, having refused to require that Collard pay the purchase price, which would have constituted true equity in this case.

In addition, since the lower court held that Collard was not entitled to a deed until after she paid off the FSB obligation, which was not done until after conclusion of the action, it was obvious that Collard's suit was premature and no fees were deserved. The court did not conclude that Nagle had breached the contract which would be a necessary basis for an award of fees under the contract. Under the circumstances, the court's refusal to award fees was amply justified.

Furthermore, even if an award of fees could be justified under the contract, such an award could only be made against a party to the contract. Nagle Construction Company, Inc. is the seller under the contract. Gary M. Nagle, as an individual, has not taken an assignment of the contract and has not assumed any of the obligations of the contract. There is, therefore, no contractual basis for an award of fees against him.

CONCLUSION

The decision in this case must be reversed because the lower court erred in applying the law with respect to the statute of limitations. It should not have considered the statute which Collard failed to plead as required by the rules. If the statute applies to Nagle, it also applies to Collard, as the court concluded. The court granted an equitable remedy

to Collard without requiring that she do equity by paying the full purchase price. Nagle's counterclaim, even if barred, may still be used as an offset against Collard's claim for title, thus requiring the consideration for the deed to be paid. Payment of the purchase price was a condition precedent to delivery of the deed and those dependent covenants may not be severed to force compliance with one without reciprocal compliance with the other.

The lower court concluded that Collard had not fully performed and did not quiet title in Collard. It erred in applying the statute of limitations to a claim that Collard had not yet performed.

Nagle's claims were all properly pleaded and raised below and Collard cannot claim surprise with respect to any one of them. The court's conclusion that the statute of limitations applied simply made its consideration, in its mind, of those claims unnecessary.

The court's conclusion that Nagle waived the assumption requirement was without a supporting finding and without supporting evidence. There is no evidence on this issue and on a motion for summary judgment all material facts must be without dispute and all facts and inferences must be considered in a light most favorable to the losing party.

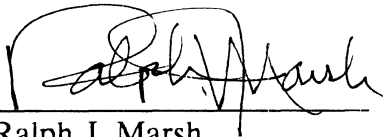
The laches argument was not raised and considered below and does not apply because of Collard's default and Collard is not entitled to attorney's fees.

The lower court's decision in this case must be reversed.

DATED this 22 day of January, 2002.

Respectfully submitted,

BACKMAN, CLARK & MARSH


By 

Ralph J. Marsh
Attorneys for Defendants-Appellants

CERTIFICATE OF MAILING

On the 22 day of January, 2002, I mailed two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF, postage prepaid, to the following:

KATHRYN COLLARD
The Law Firm of Kathryn Collard
1111 Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111



ADDENDUM

Exhibit A

Kathryn Collard Letter of January 23, 1981

Exhibit B

Nagle Deposition Excerpts

Tab A

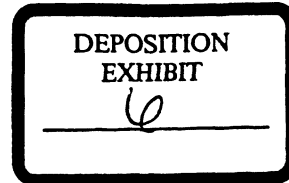
COLLARD, KUHNHAUSEN, PIXTON & DOWNES

ATTORNEYS AT LAW

TEN EXCHANGE PLACE, SUITE 210
SALT LAKE CITY, UTAH 84111
TELEPHONE 801 - 534-1883

KATHRYN COLLARD
/TEN KUHNHAUSEN
/IN PIXTON
JAM W. DOWNES, JR.

January 23, 1981



Mr. W. Waldan Lloyd
Jensen & Lloyd
870 Commercial Security Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

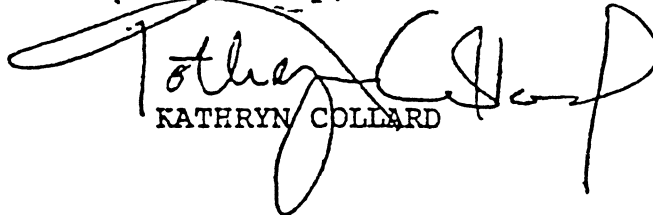
RE: Roy Collard/ Uniform Real Estate Contract dated
March 30, 1978

Dear Mr. Lloyd,

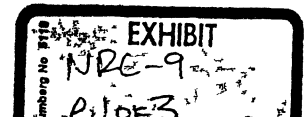
I have enclosed for your information the Wilson-Davis stock quotation sheets showing the selling price of Utah Coal & Chemicals Corp. stock subsequent to the date of the real estate contract. These summary sheets show the number of shares from January 1, 1979 through March of 1979, when the stock in question could have been sold for the profit of \$85,000.00 referred to in the contract.

I appreciate your attention to this matter.

Yours Very Truly,


KATHRYN COLLARD

cc: Roy Collard
Enc.



Tab B

1 Addendum 2?

2 A Yes.

3 Q And do you recall when that agreement was
4 entered into?

5 A I think it was in September of '79.

6 Q Right about the time that you got the San
7 Juan stock?

8 A That's right.

9 Q Was there anywhere in Addendum 2 that
10 explains, the way you read it, or from your under-
11 standing, that in addition to the realization of
12 \$85,000 that he would also pay off the First Security
13 loan?

14 A That's our understanding, yes.

15 Q Okay. My question was -- I know that's
16 your understanding. The question is: Is there
17 anything in Addendum 2 that you can show me that
18 talks about the payoff of the First Security loan?

19 A It says we'll get \$85,000 in cash. It
20 doesn't say it'll pay the loan out with it.

21 Q So is it your testimony that Addendum 2
22 replaced Addendum 1 or was in addition to Addendum 1?

23 A Well, it replaces it, I believe.

24 MR. LARSEN: You can see on page 1 of
25 Exhibit 1 in paragraph 6 it refers to the loan. So

1 Q Had it expired by a long time, short
2 time, do you remember either way?

3 A The two documents speak for themselves.
4 If this was in September when we got the stock and
5 registered it, that was September of '79, this is
6 January of '81, so that's more than a year.

7 Q Did you read that letter before it was
8 sent to Mr. Collard?

9 A I assume so.

10 Q I assume if it was sent out, it was with
11 your approval?

12 A Yes.

13 Q The letter states on paragraph -- last
14 paragraph of the letter, that Mr. Collard's failure
15 to deliver the stock would be "deemed by Nagle
16 Construction to be a breach of the contract and a
17 default thereunder." Is that what the letter says?

18 A That's what it says.

19 Q So it was your position, wasn't it, that
20 as of January 25th, the deadline, unless the money or
21 additional stock was delivered, that you considered
22 the contract to be in default?

23 A Yes.

24 Q And at that time, as of January 25th,
25 1981, did you in fact believe that Mr. Collard had

Q What about Wilson-Davis Securities?

A I don't know who that is.

Q Have you been able to find out -- going back and looking at what the trading values of these two stocks were during this period of time?

A Well, I can tell you this, that in 1979, from there on, it was just downhill. I don't think they ever became worth anything. And there was no market for them. I couldn't get anybody to buy them, that I knew of.

Q Do you have any documents or any computer programs that you've been able to find the value of these stocks as of, say, between --

A I don't.

Q -- the date in 1970 and 1980?

A I do not.

Q And in the preceding 20 years, Nagle Construction has gone out of business?

A Yes.

Q And apparently the original contract has been lost, or at least is not here yet?

A It's not here.

Q And in the intervening 20 years, Collard and his family have continued making payments on the First Security loan; correct? As far as you know?