

1990

William R. Kelley v. Leucadia Financial Corporation : Brief of Petitioner

Utah Supreme Court

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David R. Olsen, Charles P. Sampson, Paul A. Simmons; Suitter, Axland, Armstrong and Hanson; R. Paul Van Dam; Attorney General; David W. Lund; Assistant Attorney General; D. Frank Williams, David W. Johnson; Attorneys for Petitioner.

John A. Snow, Kathryn H. Snedaker; Van Cott, Bagley, Cornwall, and McCarthy; Attorneys for Respondent.

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DOCKET NO.

IN THE UTAH SUPREME COURT

))))))))))

Priority No. 14

BRIEF OF PETITIONER

REVIEW BY WRIT OF CERTIORARI OF AN OPINION AND ORDER
OF THE UTAH COURT OF APPEALS, CASE NO. 880534-CA, REVERSING
A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR
SUMMIT COUNTY, STATE OF UTAH

DAVID R. OLSEN, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300
Attorneys for Petitioner

D. FRANK WILKINS, ESQ.
175 South Main Street #1000
Salt Lake City, Utah 84111
(801) 531-1555

DAVID W. JOHNSON, ESQ.
P.O. Box 3598
Park City, Utah 84060
(801) 649-5602
Attorneys for Amicus Curiae
Utah Association of Realtors

R. PAUL VAN DAM, ESQ.
Attorney General
DAVID W. LUND, ESQ.
Assistant Attorney General
130 Utah State Capitol;
Salt Lake City, Utah 84144
(801) 538-1019
Attorney for Amicus Curiae
Felicis Real Estate

FILED

DEL 17 1990

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

WILLIAM R. KELLEY, JR.,)	
)	
Plaintiff-Petitioner,)	
)	
vs.)	Case No. 900187
)	
LEUCADIA FINANCIAL CORPORA-)	Priority No. 14
TION, a Delaware corporation,)	
)	
Defendant-Respondent.)	

BRIEF OF PETITIONER

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JOHN A. SNOW, ESQ.
KATHRYN H. SNEDAKER, ESQ.
VAN COTT, BAGLEY, CORNWALL
& MCCARTHY
50 South Main Street, # 1600
Salt Lake City, Utah 84144
(801) 532-3333
Attorneys for Respondent

DAVID R. OLSEN, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101
(801) 532-7300
Attorneys for Petitioner

D. FRANK WILKINS, ESQ.
175 South Main Street #1000
Salt Lake City, Utah 84111
(801) 531-1555

DAVID W. JOHNSON, ESQ.
P.O. Box 3598
Park City, Utah 84060
(801) 649-5602
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Utah Association of Realtors

R. PAUL VAN DAM, ESQ.
Attorney General
DAVID W. LUND, ESQ.
Assistant Attorney General
130 Utah State Capitol;
Salt Lake City, Utah 84144
(801) 538-1019
Attorney for Amicus Curiae
Division of Real Estate

PARTIES TO THE PROCEEDINGS BELOW

The caption contains the names of all parties to the appeal in the Utah Court of Appeals. The defendant in the trial court was First Security Mortgage Company. It was represented by Craig L. Taylor, Esq., Anthony B. Quinn, Esq. and Jeffrey D. Eisenberg, Esq. of Ray, Quinney & Nebeker. On June 3, 1988, after the final judgment was entered in the trial court, Leucadia Financial Corporation was substituted for First Security Mortgage Company as the defendant.

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and (j) and 78-2-2(5) (1987).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Was Kelley required to tender his performance on September 22, 1987?

2. Did Kelley improperly impose conditions on his tender, thereby rendering it defective?

3. Was Kelley's tender of performance excused?

4. Did the Court of Appeals err in concluding as a matter of law that Kelley's remedies were limited to a return of his earnest money deposit or a waiver of any title defects?

5. Did the Court of Appeals err in concluding as a matter of law that Kelley refused to waive any defects?

6. Did the Court of Appeals err in remanding the case for entry of judgment?

Issues 1 through 3 relate to the propriety of the trial court's grant of summary judgment. In determining whether the trial court correctly granted summary judgment, the Court resolves only legal issues and does not defer to the trial court. It determines only whether the trial court correctly held that there were no disputed issues of material fact and whether the court

erred in applying the governing law. Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

The remaining issues (issues 4 through 6) present questions of law. This Court reviews the lower court's rulings for correctness and accords them no particular deference. See, e.g., Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988); Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 805 (Utah 1979).

STATEMENT OF CASE

A. Nature of the Case.

Kelley brought this action seeking a declaratory judgment as to the parties' respective rights and obligations under an Earnest Money Sales Agreement for the sale of real property, between Kelley as buyer and First Security Mortgage Company as seller, and seeking specific performance of the agreement. The complaint also sought damages for First Security's alleged breach of the agreement.

B. Course of Proceedings.

Kelley filed this action on September 22, 1987. First Security filed a motion to dismiss the complaint, and Kelley filed a motion for partial summary judgment. The trial court denied First Security's motion to dismiss and granted Kelley summary judgment ordering First Security to convey the property to Kelley.

(A copy of the Partial Summary Judgment is included in the Addendum as exhibit A.) The court reserved the question of whether Kelley was entitled to an abatement of the purchase price or damages. The parties then settled the damage issue, and a final judgment was entered on May 6, 1988. (A copy of the Final Judgment and Decree of Specific Performance is included in the Addendum as exhibit B.) First Security conveyed the property to Kelley, and Kelley and his family have occupied the property since then.

On June 3, 1988, Leucadia was substituted as defendant for First Security and filed this appeal. On January 5, 1990, the Utah Court of Appeals reversed the trial court's judgment and remanded the case for entry of judgment consistent with its opinion. (A copy of the Court of Appeals' Opinion is included in the Addendum as exhibit C.) Kelley's petition for rehearing was denied on February 16, 1990. On April 23, 1990, Kelley petitioned this court for a writ of certiorari. The Utah Association of Realtors and the Division of Real Estate of the Department of Commerce of the State of Utah sought leave to file amicus curiae briefs in support of Kelley's petition. This Court granted the amici leave to file briefs, and, on August 22, 1990, after the briefing was completed, the Court granted Kelley's petition.

C. Statement of Facts.

1. On or about March 2, 1987, Kelley, a resident of Massachusetts, entered into an Earnest Money Sales Agreement (the "Agreement") with First Security Mortgage Company, as seller, for the purchase of residential property in Park City, Utah (the "Property"). Record [hereinafter "R."] 14-22. Under the Agreement, the seller agreed "to furnish good and marketable title to the property," subject to encumbrances and exceptions noted in the Agreement and evidenced by a current policy of title insurance. R. 16 ¶ 3. Title was to be conveyed by special warranty deed. R. 16. The seller was also to provide a current survey. R. 18. The seller bore all risk of loss or damage to the property, by vandalism or other means, until closing. R. 17 ¶ P. The closing was to be on or before April 20, 1987. R. 18.¹

2. In reliance on the Agreement, Kelley paid the \$10,000 earnest money and began arranging the funds necessary to complete the sale by liquidating assets. R. 276 ¶ 3.

3. At the time the Agreement was signed, both Kelley and First Security understood the Property to consist of a residence surrounded by approximately 12 3/4 acres of grounds. The grounds are substantially enclosed by fences, a spring and a stream. The home is situated on the edge of the stream, which

¹ Other provisions of the Agreement are discussed infra.

feeds the pond and irrigates the pastures located on the Property. R. 190-92, 194-95, 207-08, 258-59, 276.

4. Shortly after the Agreement was signed, First Security, in accordance with the Agreement, had the Property surveyed. The survey revealed that the quitclaim deed by which First Security acquired its interest contained an erroneous property description that placed the boundaries 15.22 feet farther south than the boundaries of the property that First Security and its predecessors occupied and intended to convey. R. 25-27, 29-30.

5. After the Agreement was executed, the adjacent property owners, the Armstrongs, cut off the water to the pond, removed a pipe on the property that carried water from the spring to the pond and removed fish from the pond. R. 45, 50-53. Consequently, the pond dried up.

6. First Security believed that the boundary and water problems affected not only the value of the Property, but also its ability to convey marketable title. See R. 29-30, 50-51.

7. To give it time to resolve these problems, on April 22, 1987--two days after the scheduled closing date--First Security requested that the closing date be extended to June 1, 1987. Kelley agreed to the request. R. 19, 277 ¶ 8, 289 ¶ 4.

8. On May 28, 1987, First Security again requested that the closing date be extended, to July 1, 1987. Kelley agreed to the request. R. 20, 277 ¶ 8, 289 ¶ 4.

9. On July 6, 1987--five days after the latest scheduled closing date--First Security again requested that the closing date be extended, this time to August 31, 1987. Kelley agreed to the request. R. 21, 277 ¶ 8, 289 ¶ 4.

10. First Security was unable to resolve the boundary and water problems with the Armstrongs informally, so it filed a Complaint against the Armstrongs in the Third Judicial District Court, seeking a declaration of rights, an order quieting title to the Property in First Security, and damages resulting from drainage of the trout pond. See R. 23-59. In its Amended Complaint, First Security claimed that because of the erroneous legal description it could not convey marketable title to the Property and that the Property's value had been substantially reduced because of the loss of the stream, spring and trout pond. R. 29-31, 50-52.

11. Throughout this period, First Security told Kelley that it would get the boundary and water problems cleared up and that it was not necessary for him to retain counsel. R. 289 ¶ 4.

12. In late August or early September 1987, Leucadia expressed an interest in purchasing the Property directly from

First Security. By selling the Property directly to Leucadia, First Security could avoid paying a \$45,000 real estate commission, could negotiate its way out of the Armstrong lawsuit and obtain a higher, cash purchase price for the Property. See R. 493, 505-07, 510-14.

13. On September 4, 1987, First Security's attorney sent a letter to Kelley demanding that the sale close by September 15, 1987, or First Security would consider the Agreement to have terminated. The letter stated in pertinent part:

First Security is prepared to sell the property to you "'as is' without warranty" in accordance with the terms of the earnest money agreement. First Security is also prepared to assign you its rights in the lawsuit against the Armstrongs. Absent any obligation to the contrary or reimbursement from you for its legal costs and fees, First Security is no longer desirous of pursuing the lawsuit with the Armstrongs. First Security has not pursued the legal action against the Armstrongs as a result of any legal obligation, but simply because of its interest in closing the deal with you. First Security has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation. Accordingly, as indicated above, First Security will sell the property in accordance with the terms of the earnest money agreement, as extended by this letter to September 15th. Otherwise, . . . First Security will return the \$10,000.00 earnest money deposited in escrow to you and pursue other alternatives.

I am aware that you have some questions regarding the legal issues of the lawsuit and strongly encourage you to obtain legal counsel to advise you concerning those issues. I will be happy to cooperate with whomever

you select as counsel in order that you can make a fully informed judgment. . . . If I do not hear from you or a representative by the close of business on September 15th, I will consider the agreement as having expired and will have the funds in escrow returned to you.

R. 114-15 (emphasis added). This was the first time that First Security had told Kelley that he needed legal counsel. R. 289 ¶ 4.

14. The September 4 letter was sent over the Labor Day weekend, and Kelley did not receive it until September 8, 1987. R. 277-78 ¶ 9, 289 ¶ 4, 294.

15. Kelley subsequently retained counsel and sent a mailgram to First Security stating that he would not walk away from the Property and that he needed the customary 30-day extension before he could close. R. 278, 288-89, 294.

16. Kelley's Utah counsel immediately contacted First Security's counsel. First Security agreed to provide all the documents concerning the boundary and water problems for review so that Kelley could make an informed decision regarding the Property. See R. 115. An appointment was made for the production of those documents, but counsel for First Security failed to keep the appointment or to make the records available for review. R. 282-83.

17. On September 14, 1987, counsel for First Security extended the deadline for closing to September 22, 1987. R.

116. The requested documents were not provided by that date. In fact, First Security's counsel did not give Kelley all the documents he needed to review the boundary and water problems until October 15, 1987. R. 283.

18. On September 22, 1987, Kelley's attorney wrote First Security's attorney to inform him that Kelley was ready, willing and able to close the Agreement, that the funds necessary for the down payment were on deposit with Williamsburg Savings Bank and that he expected First Security to perform as agreed. R. 119-21.

19. On September 22, 1987, this action was filed, seeking a declaration of the rights of the parties pursuant to the Agreement and a decree of specific performance requiring First Security to convey the Property to Kelley pursuant to the Agreement, as interpreted by the court. Kelley also sought damages for First Security's alleged breach of contract and interference with Kelley's performance. R. 1-11. The escrow funds were subsequently deposited with the Summit County Clerk. R. 68-70.

20. On September 22, 1987, First Security declared the Agreement null and void and, on September 24, 1987, executed the release of Kelley's \$10,000 earnest money deposit. R. 123-25. Kelley refused to accept the release. See R. 149, 155.

21. On September 25, 1987, Leucadia formally offered to purchase the Property from First Security.² R. 493.

22. On November 10, 1987, First Security moved to dismiss Kelley's complaint. R. 72-73. Kelley responded by filing a motion for partial summary judgment, seeking an order requiring First Security to allow him to close on the property and reserving any damage claims Kelley might have against First Security. R. 137-39.

23. On January 10, 1988, the trial court granted Kelley's motion for partial summary judgment and ordered First Security to convey the Property to Kelley. The court retained jurisdiction over Kelley's claim to an abatement of the purchase price, damages and attorneys' fees. The conveyance was ordered to occur when final judgment was entered in this action. R. 562-64.

24. On May 6, 1988, a final judgment was entered. R. 815-24. First Security accepted the monies deposited with the court and conveyed the Property that it owned to Kelley by special warranty deed and the 15.22 foot discrepancy caused by the erroneous legal description by quitclaim deed. See Brief of Respondent app. A.

² The earnest money agreement between Leucadia and First Security, as amended, provided that First Security would indemnify Leucadia for any losses it sustained as a result of this action. R. 510-14.

25. On June 3, 1988, Leucadia was substituted as defendant in this action and filed this appeal. R. 844-46, 847-49.

26. On appeal, the parties both stated that the issue was the timeliness and sufficiency of Kelley's tender of performance. See Brief of Appellant at 1; Brief of Respondent at 2. The Court of Appeals, however, stated the issues as (1) whether the Agreement provided remedies to Kelley if the defendant was unable to convey marketable title, and (2) whether those remedies required the defendant to convey the property if title was not marketable. Kelley v. Leucadia Fin. Corp., No. 880534-CA, slip op. at 1 (Utah Ct. App. Jan. 5, 1990) [hereinafter slip. op.].

27. The Court of Appeals' opinion focused on paragraph H of the Agreement (mistakenly referred to as paragraph 4), a provision never addressed in the trial court or in the appeal briefs. Paragraph H provided as follows:

If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or en-

cumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated.

R. 15.³

28. The Court of Appeals concluded, first, that "[t]itle could not be made insurable without exceptions for defects," and, second, that "Kelley refused to waive the defects." Therefore, the court held, Kelley's remedy under paragraph H "was limited to a refund of his earnest money deposit, not specific performance." Slip. op. at 3.

29. With Judge Bench dissenting, the court reversed the trial court's judgment and remanded the case "for entry of judgment consistent with this opinion." Slip op. at 4.

³ The court also looked at paragraph G of the Agreement which stated in pertinent part:

. . . Seller shall be required, through escrow at closing, to cure the [title] defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

R. at 15. Paragraph G, unlike paragraph H, does not expressly require the buyer to waive any title defect. It merely gives the buyer the option of terminating the Agreement. As the court correctly noted, "Kelley refused to accept this option." Slip op. at 3.

SUMMARY OF ARGUMENTS

First Security argued in the trial court (and the Court of Appeals apparently agreed) that Kelley lost whatever rights he had under the Agreement by not closing on September 22, 1987, as First Security demanded. But Kelley was entitled to a reasonable time after First Security gave notice of its intention to close, and the evidence was undisputed that September 22, 1987, was not a reasonable time under the circumstances. Therefore, Kelley did not lose any rights on September 22, 1987. (Point I.)

First Security also argued that Kelley lost his rights under the Agreement because his tender was conditional. Not only was Kelley's tender unconditional (point II), but in fact his tender was excused (point III). It was First Security who made a defective tender by conditioning its offer to close on Kelley's waiver of his rights under the Agreement. First Security also committed an anticipatory breach of the Agreement by repudiating its obligations under the Agreement, further excusing Kelley's tender of performance. Because Kelley's tender was not defective and in fact was not even required, Kelley was entitled to specifically enforce the Agreement.

The Court of Appeals concluded, however, that paragraph H of the Agreement limited Kelley's remedy to a return of his earnest money. The Court of Appeals' decision was based on facts that were not developed in the trial court and not of record.

Moreover, the facts that were of record did not support the court's factual findings. (Point IV.)

More important, the Court of Appeals erred in concluding, as a matter of law, that Kelley was required to waive any title defect and in fact refused to waive any defect. Kelley was not required to waive defects under paragraph H because there was no evidence that the conditions precedent to the remedy provisions of paragraph H had been met. But even if Kelley were required to waive title defects, as a matter of law he must be deemed to have done so since, by filing this action, Kelley elected to enforce the Agreement according to its terms. (Point V.)

Finally, the Court of Appeals erred in remanding the case for entry of judgment. (Point VI.)

ARGUMENT

I.

KELLEY WAS ENTITLED TO A REASONABLE TIME TO CLOSE,
AND THE UNDISPUTED EVIDENCE SHOWS THAT HE TOOK
APPROPRIATE ACTION WITHIN A REASONABLE TIME.

Kelley brought this action asking the court to declare the parties' respective rights and obligations under the Agreement and to enforce the Agreement. See R. 1-11. In the trial court First Security argued that Kelley was not entitled to specific performance because the Agreement expired on September 22, 1987, and Kelley failed to make a proper tender of performance by that

date. See R. 87.⁴ The trial court properly rejected this argument. The Court of Appeals, however, did not expressly deal with the issue of tender because it found that Kelley's only remedy under the Agreement was to waive any defect or to terminate the Agreement and, it found, Kelley had refused to waive any defect. It apparently based its conclusion on a tender letter from Kelley's counsel and his filing of this action, both of which occurred on September 22, 1987. See infra point IV.B.

The defendant's and the Court of Appeals' analyses both proceed from the same false premise, namely, that Kelley's duty of performance under the Agreement arose before he filed this action and paid his money into court. If Kelley's duty to perform had not arisen at that time, then he had no duty to tender before, and any alleged defect in his tender of September 22, 1987, was therefore irrelevant. Similarly, if Kelley's duty to perform had not arisen, then he was not yet required to choose between waiving any alleged defect or walking away from the deal. Kelley's duty to perform did not arise before he filed this action and paid his money into court, and, by doing so, he preserved the status quo until the court could resolve the parties' respective claims.

⁴ On appeal, Leucadia also argued that Kelley lost his right to specific performance because he did not make an unconditional tender of performance on or before September 22, 1987. Brief of Appellant at 18.

Where a contract sets the time for performance, that is when the duty to perform arises. In this case, the Agreement initially called for a closing on or before April 20, 1987. R. 18. However, the parties had continually extended the closing date by agreement and, by their conduct, had waived any provision that time was of the essence. See R. 19-21. In such a case, the contractual obligations can continue beyond the closing date. Century 21 All Western Real Estate & Investment Inc. v. Webb, 645 P.2d 52, 55 (Utah 1982). During this executory period of the contract, neither party was in default, and neither party's duty of performance arose until the other party tendered performance. Id. at 55-56. First Security could thereafter make time of the essence, but it was required to give Kelley a reasonable time within which to perform. See, e.g., Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980). What constitutes a reasonable time depends on the facts and circumstances of the case. See, e.g., Sohayegh v. Oberlander, 155 A.D.2d 436, 438, 547 N.Y.S.2d 98, 100 (1989) (citations omitted); Cline v. Hullum, 435 P.2d 152, 156 (Okla. 1967).

All the evidence in this case showed that September 22, 1987, was not a reasonable time.

The only direct evidence on this issue was Mr. Kelley's affidavit, in which he stated that, under the circumstances, the time that First Security provided him to close allowed him

"absolutely no time for review, no time to consult with counsel and no time to fully appreciate what had transpired relating to the property." R. 278 ¶ 9. Mr. Kelley further testified as follows:

I travelled to Park City, Utah prior to September 15, 1987 to review the situation. It was my understanding that First Security was to make their files available, yet I received only the Complaint and Counterclaim, and this was at a time significantly after it was promised. I did not receive their review relating to water rights or any other internal documents. . . . I did not receive Interrogatories or the rest of their pending file. This made it impossible for me to make a meaningful review of the case.

R. 278-79 ¶ 10. Because First Security had repeatedly assured Kelley that it would take care of the problem and that he did not need an attorney, see R. 289 ¶ 4, Kelley needed a reasonable period of time to review First Security's files, obtain engineering information and assess the situation. R. 280 ¶ 14. He was not able to complete his review before September 22, 1987, "in large part because First Security . . . failed to make required and requested information available to me and because the time was simply too short to independently verify and assess the situation without this information." R. 280 ¶ 14. Finally, Kelley testified that, had First Security provided him a reasonable period of time, "I would have been able to complete my review and close," accepting whatever title First Security had. See R. 280 ¶ 14, 279 ¶ 13.

None of this evidence was disputed. Moreover, Mr. Kelley's testimony that September 22, 1987, was not a reasonable time for him to close under the circumstances was supported by all the evidence in the case.

Initially, First Security gave Kelley seven days, until September 15, 1987, to close.⁵ At the same time, First Security told Kelley that it would sell the property to him without warranty (even though the Agreement called for a special warranty deed) and that it would assign to him its rights in the lawsuit against the Armstrongs but would not pursue the action because it "has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation." R. 114-15. First Security's offer to close was clearly contrary to the parties' Agreement. See infra point III. Had Kelley simply accepted that offer, he may have waived his rights under the Agreement. See Leche v. Stout, 514 P.2d 1399, 1403 (Okla. 1972). Thus, First Security correctly advised Kelley to obtain legal counsel. First Security also promised to cooperate with Kelley's chosen counsel "in order that you can make a fully informed judgment." R. 115.

⁵ Although the letter giving Kelley until September 15 to close was dated September 4, because it was sent over the Labor Day weekend, Kelley did not receive it until September 8. See R. 288 ¶ 2 & 116.

Clearly, seven days was not a reasonable time for Kelley, who lived in Massachusetts, to get an attorney in Utah, for his attorney to review the matter, which involved complex legal and factual issues regarding the boundary and water problems,⁶ and to make a decision as to how to proceed.

Apparently First Security agreed, because it extended the closing date a week, to September 22, 1987. R. 116. However, even that was not reasonable. As First Security itself recognized, before Kelley could make "a fully informed judgment," his attorney would have to review the relevant documents, which were in First Security's possession. See R. 115. Thus, under these circumstances, a reasonable time to perform would have been some time after First Security gave Kelley or his attorney the relevant documents, and it was undisputed that First Security did not give Kelley all the information he needed until October 15, 1987. R. 283. By that time, Kelley had filed this action and paid his down payment into court to preserve his rights under the Agreement.

In short, all of the evidence in the case showed that September 22, 1987, did not give Kelley a reasonable time to

⁶ For example, if the Armstrongs could cut off the water to Kelley's pond, could they also cut off his culinary water? Would he have a \$600,000 home with no running water? If he later wanted to sell the Property, could he, or would a new buyer be unable to get financing or title insurance because of the boundary and water problems?

close. But even if September 22, 1987, would otherwise have been a reasonable date, First Security's failure to cooperate with Kelley excused his performance by that date. "One party to a contract cannot by willful act or omission make it impossible or difficult for the other party to perform and then invoke the other[']s nonperformance as a defense." Reed v. Alvey, 610 P.2d 1374, 1379 n.24 (Utah 1980). Accord Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979). See also Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980) (it is assumed that parties to a real estate contract will cooperate with each other in good faith for its performance). Yet that is exactly what happened here. First Security imposed an unreasonably short deadline on Kelley's performance, promised to cooperate with him so that he could meet that deadline, and then broke its promise. It was undisputed that First Security did not give Kelley the information that First Security itself acknowledged he needed to make a "fully informed judgment" before its own, unilaterally imposed deadlines. It cannot now claim that Kelley was the one who defaulted.

Nevertheless, Kelley took appropriate action by First Security's deadline of September 22, 1987. His counsel wrote First Security's counsel, tendering the down payment and offering to close in accordance with the Agreement, and he filed this action. By filing this action and paying his money into court, he elected to proceed with the deal, and he preserved the status

quo until the court could declare the parties' respective rights and obligations under the Agreement. See, e.g., Reeves v. Hutson, 144 Cal. App. 2d 445, 301 P.2d 264, 269-70 (1956).

II.

KELLEY'S TENDER OF PERFORMANCE WAS NOT DEFECTIVE

First Security also argued that Kelley's tender of performance was defective because it was conditional. That argument is based on one sentence in a three-page letter from Kelley's counsel to First Security's counsel, which was hand-delivered the same day that this action was filed. The letter states in relevant part:

My client hereby tenders the down payment owed pursuant to the Earnest Money and Receipt to Purchase and all amendments thereto. My calculation is that the down payment is to be \$130,000; \$10,000 has earlier been placed in escrow which is to be a part of the down payment, requiring payment of \$120,000. As we have seen no closing statements, notes, deeds or mortgages, we are uncertain as to the exact amount of cash necessary to close. Therefore, Mr. Kelley has wired \$140,000 to Williamsburg Savings Bank to be held in an account and applied to closing. This tender is conditioned only upon First Security honoring its obligations pursuant to the Earnest Money Sales Agreement and delivering the property free from those defects which it has undertaken to cure. Mr. Kelley further requests that First Security resolve the issue regarding the water rights to the pond immediately in front of the home.

R. at 120 (emphasis added).

The only "condition" that this letter imposes is that "First Security honor[] its obligations pursuant to the Earnest

Money Sales Agreement and deliver[] the property free from those defects which it has undertaken to cure." A "condition" that one party to a contract comply with its obligations under the contract is no condition at all and does not make a tender defective. See, e.g., Kodiak Island Borough v. Large, 622 P.2d 440, 448 (Alaska 1981); Burke Aviation Corp. v. Alton Jennings Co., 377 P.2d 578, 581 (Okla. 1962); Panhandle E. Pipe Line Co., 637 P.2d 1020, 1023 (Wyo. 1981). See also Woods v. Dixon, 193 Or. 681, 240 P.2d 520, 522 (1952) ("a tender may be good if accompanied by a condition upon which the buyer has a right to insist"). The parties clearly had a difference of opinion as to whether First Security had a contractual obligation to clear title. That is why Kelley was required to file this action. But the September 22, 1987, letter did not impose any new condition on Kelley's tender. It merely set out Kelley's understanding of the parties' rights and obligations under the Agreement and insisted that First Security keep its part of the deal. If anything, it shows that Kelley was ready, willing and able to close the deal. It was only because First Security denied its obligations under the Agreement that the deal did not close at that time.

Thus, even if Kelley were required to tender his performance by September 22, 1987, his tender was not defective. But, in fact, Kelley's tender of performance was excused.

III.

KELLEY'S TENDER OF PERFORMANCE WAS EXCUSED.

Where a contract "contemplates simultaneous performance by both parties, such as the Earnest Money agreement involved in this case, neither party can be said to be in default . . . until the other party has tendered his own performance." Century 21 All Western Real Estate & Investment Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982) (citation omitted). For a tender to put the other party in default, it "must be complete and unconditional." Id.

It was First Security--not Kelley--who made a defective tender of performance by offering Kelley less than the Agreement called for. Because First Security did not properly tender its own performance under the Agreement, Kelley's tender was excused.

The Agreement required First Security to "furnish good and marketable title to the property." R. 16 ¶ 3. It also required First Security to give Kelley a special warranty deed to the Property. R. 16. First Security's letter of September 4, 1987, however, repudiated both of these obligations. That letter stated, in pertinent part:

First Security is prepared to sell the property to you "'as is' without warranty" in accordance with the terms of the earnest money agreement. First Security is also prepared to assign you its rights in the lawsuit against the Armstrongs. Absent any obligation to the contrary or reimbursement from you for its legal

costs and fees, First Security is no longer desirous of pursuing the lawsuit with the Armstrongs. First Security has not pursued the legal action against the Armstrongs as a result of any legal obligation, but simply because of its interest in closing the deal with you. First Security has never viewed itself as having the obligation to clear title, nor does the earnest money agreement provide for that obligation.

R. 114-15 (emphasis added).

First Security's claim that it had no obligation to clear title was simply wrong. First Security's express contractual obligation to "furnish good and marketable title" carried with it the implied obligation to clear the title if it could be done by the exercise of reasonable diligence. Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265, 1271 (1984); Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974). Cf. Beck v. Farmers Ins. Exch. 701 P.2d 795, 798 (Utah 1985) (duty of good faith and fair dealing implied in every contract).⁷ First Security apparently recognized such a duty when it filed an action against the Armstrongs, claiming that the action was necessary to enable it to fulfill its obligation to give Kelley marketable title to the Property. See R. 29-31.

For title to property to be marketable, "title must be such as to make it reasonably certain that it will not be

⁷ Don Griffin, the seller's agent, also suggested that an obligation to clear up the boundary and water problems was implied in the contract. See Deposition of Don Griffin at 96-97 (exhibit A to Kelley's Petition for Rehearing before the Court of Appeals).

called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto.'" Hedgecock v. Stewart Title Guar. Co., 676 P.2d 1208, 1210 (Colo. Ct. App. 1983) (quoting Morley v. Gieseke, 142 Colo. 490, 351 P.2d 392 (1960)). By First Security's own admission in the Armstrong complaint, title to the Property was unmarketable. See R. 29-30 ¶ 17. Obviously, if First Security felt that title was marketable irrespective of the boundary and water problems or that it had no obligation to furnish marketable title, it would not have filed the Armstrong action. Moreover, the very fact that the Armstrong suit existed is clear evidence that the hazard of litigation was not merely a possibility but a reality.

By the time First Security sent its demand letter on September 4, 1987, First Security had apparently changed its mind. It did not claim that title to the property was marketable or that it could not be made marketable. It simply claimed that it had no obligation to clear title. This assertion was clearly wrong. Kelley did not have to accept First Security's interpretation of its own obligations under the Agreement, nor did he have to waive his contractual right to receive good and marketable title based solely on First Security's assertion that it had no obligation to clear title. See, e.g., Ace Realty, Inc. v. Looney, 531 P.2d 1377 (Okla. 1974); Yost Farm Co. v. Cremer, 152 Mont. 200, 447 P.2d 688, 692 (1968).

In denying its obligation to clear title, First Security relied on a handwritten provision of the Agreement, which read in pertinent part: "Property sold 'as is' without warranty. Title conveyed by Special Warranty Deed corp. form. Other terms to remain the same." R. 16. This provision did not relieve First Security of its obligation "to furnish good and marketable title."

Obviously, the handwritten phrase "property sold 'as is' without warranty" referred to the physical condition or habitability of the property and not to any implied warranties of title. From the time that a contract for the sale of real property is executed until the deed is delivered and accepted, there are no implied warranties of title that can be disclaimed. Indeed, the seller need not even have title to the property during the executory period of the contract. Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417, 421 (1973); Callister v. Millstream Associates, Inc., 738 P.2d 662 (Utah Ct. App. 1987). Because there are no implied warranties of title associated with the contract of sale, the only warranties that can be disclaimed by a seller at the time the contract of sale is executed are the warranties of habitability, good and workmanlike construction and compliance with building codes. All of these warranties concern the physical condition of the property, not the status of its title. See Schepps v. Howe, 665 P.2d 504 (Wyo. 1983);

Schoeneweis v. Herrin, 110 Ill. App. 3d 800, 443 N.E.2d 36 (1982); Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967); Mulkey v. Waggoner, 177 Ga. App. 165, 338 S.E.2d 755 (1985). Thus, the phrase "Property sold 'as is' without warranty" did not relieve First Security of its obligation to furnish Kelley marketable title by special warranty deed.

Similarly, the provision that the conveyance was to be by "special warranty deed" did not alter First Security's obligation to furnish marketable title. In the context of agreements for the purchase of real property, a promise to furnish marketable title is entirely compatible with conveyance by warranty deed, special warranty deed or quitclaim deed. Department of Public Works and Buildings v. Halls, 35 Ill. 2d 283, 220 N.E.2d 167 (1966); Lininger v. Blackhills Greyhound Racing Association, 82 S.D. 507, 149 N.W.2d 413 (1967); Wallach v. Riverside Bank, 206 N.Y. 434, 100 N.E. 50 (1912).

Because First Security was not prepared to convey marketable title as required by the Agreement when it made its offer of September 4, 1987, its own tender was defective and therefore could not put Kelley in default or force him to choose between his alleged contractual remedies of waiving the defect and walking away from the deal.

First Security's tender was also defective for another reason. First Security's offer to sell the Property to Kelley

"'as is' without warranty," was contrary to the next sentence of the Agreement, which required First Security to convey title by Special Warranty Deed. First Security's interpretation of the "as is" provision read the next sentence out of the Agreement. All provisions of an agreement must be given meaning if possible. See, e.g., Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980). The obvious way to reconcile the two provisions is to realize that the "as is" provision relates to the physical condition of the Property and has nothing to do with the warranties of title included in a special warranty deed. Cf. Breuer-Harrison, Inc. v. Combe, 146 Utah Adv. Rep. 26, 32 (Utah Ct. App. 1990).

Even if First Security's interpretation of the "as is" provision were correct, the undisputed evidence shows that First Security in fact was not prepared to sell Kelley the Property in the condition it was when the Agreement was made. The property was marketed as including three ponds and a year-round running stream. R. 259. When the Agreement was made, the ponds were full, and the stream was running. Sometime thereafter, the Armstrongs cut off the water to the property, causing the trout pond to dry up. The Agreement stated, "All risk of loss or damage to the property shall be borne by the Seller until closing." R. 17 ¶ P. Yet First Security refused to do anything about the admitted vandalism to the property, which First Security

itself acknowledged had damaged the property and "reduced its value substantially," R. 50 ¶ 74. See R. 120.

In short, if anyone put conditions on his tender of performance, it was First Security, not Kelley. First Security's offer to close required Kelley to accept First Security's own interpretation of its contractual duties, which was contrary to the terms of the Agreement and to the applicable law. Had Kelley accepted First Security's offer on its terms, he would have had to waive his rights under the Agreement. Thus, First Security's offer was improperly conditioned on Kelley's acceptance of less than he was entitled to under the Agreement.

Not only did First Security's letter of September 4, 1987, constitute a defective tender of performance, but, by that letter, First Security repudiated its obligations under the Agreement to give Kelley good and marketable title by special warranty deed. When a party to an executory contract manifests a positive and unequivocal intent to not render its promised performance at the required time, an anticipatory breach of the contract occurs. Breuer-Harrison, Inc. v. Combe, 146 Utah Adv. Rep. 26, 30 (Utah Ct. App. 1990) (citing Hurwitz v. David K. Richards Co., 20 Utah 2d 232, 436 P.2d 794, 796 (1968)). First Security's repudiation of any obligation on its part to try to clear title constituted an anticipatory breach of the Agreement. Cf. id.

Whether First Security's refusal is considered an anticipatory breach of the contract or a defective tender of First Security's own performance, the effect was to relieve Kelley of his obligation to tender. See, e.g., Reed v. Alvey, 610 P.2d 1374, 1379 (Utah 1980); Huck v. Hayes, 560 P.2d 1124 (Utah 1977); Barker v. Francis, 741 P.2d 548, 553 (Utah Ct. App. 1987); King v. Allen, 9 Mass. App. 821, 398 N.E.2d 510 (1980); Leche v. Stout, 514 P.2d 1399, 1403 (Okla. 1972).

The law does not require a contracting party to do a "useless act and tender performance where the other contracting party cannot or will not perform his part of the agreement." Barker, 741 P.2d at 553 (quoting Jenson v. Richens, 74 Wash. 2d 41, 442 P.2d 636, 639 (1968), which held that, where vendors had undertaken to deliver an encumbrance-free title, the promise to furnish good title was a condition precedent to the promise to purchase). See also McFadden v. Wilder, 6 Ariz. App. 60, 429 P.2d 694 (1967) (where the seller does not tender marketable title, the duty of the purchaser to tender performance does not arise, and the seller is therefore not excused from performance).

In Huck v. Hayes, 560 P.2d 1124 (Utah 1977), the purchaser sued to compel specific performance of an agreement to purchase residential property. The agreement provided that the defendant would furnish marketable title with a title insurance policy in the purchaser's name. Upon receipt of the title in-

surance policy, however, the real estate broker realized that the property was burdened by a federal tax lien and several other exceptions to title. The broker contacted each party regarding these title problems and he was instructed to resolve them as soon as possible. On the original closing date, the purchaser had sufficient funds to make the payment required by the agreement but did not tender payment. After several meetings and a delay of six weeks, the real estate broker informed the vendor that all of the problems had been resolved and that closing could be accomplished at any time. It was at that time that the vendor first indicated that he was no longer interested in closing the transaction. About a month later, the real estate broker again contacted the vendor to secure the closing. The vendor then stated that since the purchaser had failed to make the payment required by the contract on the first closing date, he recognized no further obligations under the contract. Upon the vendor's continued refusal to cooperate, the purchaser sued for specific performance.

This court upheld the trial court's judgment of specific performance and rejected the defendant's contention that it was released from any obligation under the contract because the plaintiff had failed to perform:

Inasmuch as under the contract it was the defendant's responsibility to furnish good title and a title insurance policy, the furnishing thereof was a condition

precedent to his right to demand payment from the purchaser (plaintiff).

It is fundamental that a party to a contract should obtain no advantage from the fact that he is himself unable to perform. Since the defendant had not come forth with the agreed title insurance policy demonstrating that he could convey a clear and marketable title as of the proposed closing date, . . . he could neither demand payment by the plaintiff on that date, nor claim that the latter was in default for failing to make the payment.

560 P.2d at 1126 (footnotes omitted). See also Fischer v. Johnson, 525 P.2d 45 (Utah 1974); Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1912).

In this case, as in Huck v. Hayes, First Security, as seller, was required to furnish marketable title as a condition precedent to its right to demand that Kelley tender his performance. Its unjustified refusal to do so excused Kelley's tender. Thus, Kelley's tender, rather than being imperfect, as First Security asserted, was not even required, and Kelley was entitled to ask the court to specifically enforce the Agreement.

IV.

THE COURT OF APPEALS' DECISION WAS BASED ON
FINDINGS OF FACT THAT WERE NOT MADE BELOW AND NOT
SUPPORTED BY THE RECORD.

The Court of Appeals nevertheless concluded that Kelley's only remedy was a refund of his earnest money deposit, not specific performance. The court based its decision on the following syllogism:

a. Under paragraph H of the Agreement, if title to the property could not be made insurable without exceptions for defects, Kelley had two options: (1) to waive the defects and proceed with the sale, or (2) terminate the Agreement and have his earnest money refunded.

b. Title could not be made so insurable.

c. Kelley refused to waive the defects.

d. Therefore, Kelley's only remedy was a return of his earnest money.

The Court of Appeals' decision cannot stand if either of the two minor premises of the syllogism (b or c) fails. The Court of Appeals erred in concluding, as a matter of law, that title could not be made insurable and that Kelley refused to waive any defect.

Both minor premises of the Court of Appeals' syllogism are statements of fact. The trial court did not expressly make factual findings with respect to either premise, because First Security did not raise any issue with respect to either premise. Thus, for the Court of Appeals to rule as it did, it first had to find its own facts.

It is axiomatic that trial courts find facts and appellate courts review their findings. An appellate court cannot substitute itself as a finder of fact. E.g., Board of County Commissioners v. Auslaender, 745 P.2d 999, 1002 (Colo. 1987).

Yet that is what the Court of Appeals did in this case. For that reason alone, this Court should reverse the decision of the Court of Appeals. The Court should also reverse, however, because the Court of Appeals' factual findings were not supported by the evidence.

A. Insurability of Title.

As Leucadia recognizes, the facts relevant to the Court's determination that title could not be made insurable without exceptions for defects were not before the Court of Appeals. See Brief of Respondent in Opposition to Petition for Writ of Certiorari at 14 n.7 & 16 n.10. The mere fact that there was a title problem does not trigger the remedy provisions of paragraph H. That paragraph states:

If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a standard form ALTA policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated.

. . .

R. 15. Thus, before the Court of Appeals could even determine whether paragraph H applied, it had to determine that the title policy to be issued did not contain certain exceptions. To make that determination, the court had to compare the title policy

to be issued with the preliminary commitment for title insurance or a standard form ALTA policy, none of which were in the record on appeal.

Before relying on paragraph H, the court also had to determine whether title could be made "insurable through an escrow agreement at closing." Again, there was no evidence on this issue on which the Court of Appeals could base its decision.⁸ There was no evidence that the alleged title defect in this case was in fact not curable, let alone not curable through an escrow agreement at closing.

B. Refusal to Waive Title Defects.

The Court of Appeals' finding that "Kelley refused to waive" any defects was also contrary to the undisputed evidence.⁹

A waiver is an unequivocal relinquishment of a known right. American Sav. & Loan Ass'n v. Blomquist, 21 Utah 2d 289,

⁸ What evidence there was in the case, all of which was developed through discovery after the trial court's ruling, suggests that the property was insurable. For example, Don Griffin, the real estate agent involved in the transaction, testified that there was a title insurance company that would insure the property. See Deposition of Don Griffin at 101-03, a copy of which was included as exhibit A to Kelley's Petition for Rehearing.

⁹ It was also inconsistent with the Court of Appeals' conclusion that Kelley refused to accept the option of terminating the Agreement under paragraph G. See slip op. at 3. If Kelley had the option under either paragraph G or H to enforce the Agreement or to terminate it and he refused to terminate it, then he must have chosen to enforce the Agreement, which necessarily meant waiving any title defects if he was in fact required to waive them under paragraph H.

445 P.2d 1, 3 (1968). Intention to waive a right is ordinarily a question of fact. See, e.g., Yates v. American Republic Corp., 163 F.2d 178, 180 (10th Cir. 1947); Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31, 33 (1967). The only evidence of Kelley's intent was Kelley's affidavits, which unequivocally showed that Kelley intended to enforce the Agreement. R. 279 ¶¶ 12-13 & 289 ¶¶ 2-3.¹⁰

The closing date had been extended three times by agreement, for a minimum of thirty days each time, to allow First Security to clear up the boundary and water problems, which First Security had undertaken to do on its own, without any request from Kelley. During this time Kelley was repeatedly told that First Security was working out the problems and would correct them before closing. See R. 289 ¶ 3. He was looking for another extension agreement when he received the letter from First Security's counsel giving him seven days to close, with the title issues still unresolved, or to "walk away from the deal." R. 114-15, 292-93. In response to this letter Kelley sent First Security's attorney a mailgram stating, "Will not walk away."

¹⁰ Kelley's deposition testimony, which admittedly was not part of the record in the Court of Appeals, is consistent with his affidavit. Kelley repeatedly testified that he was willing to close at any time, even with the boundary problems, and that he communicated that willingness to Don Griffin and Vivian Cropper, the seller's agents. See Deposition of William R. Kelley, Jr. at 71-86, 125-28, 134-36 (exhibit A to Kelley's Petition for Rehearing before the Court of Appeals).

Based on history, need normal 30-day extension." Id. at 294. Kelley's response does not indicate any refusal to waive title defects. Rather, it shows a refusal to walk away from the deal. If Kelley was in fact required to choose between waiving defects or walking away from the deal, one must conclude from this evidence that Kelley elected to waive any defects.

The only possible bases for the Court of Appeals' conclusion that Kelley refused to waive any defect are his counsel's letter of September 22, 1987, and his filing of this action. Neither action, however, proves that Kelley refused to waive any defect. They merely show that Kelley refused to waive any rights he might have under the Agreement. They show that Kelley elected to enforce the Agreement according to its terms and that he wanted a court--not First Security--to construe those terms. If to enforce the Agreement according to its terms meant that Kelley had to waive any title defect, the evidence shows that he was prepared to do so, and he must be deemed to have done so. But it was for the court--not First Security--to say whether he was required to do so. By not raising the issue as a defense and then settling Kelley's damage claim, it was First Security --not Kelley--who lost its right to enforce the Agreement (as it understood the Agreement).

In short, the only evidence was that Kelley insisted that First Security comply with the Agreement, that he brought

an action to enforce compliance and that he accepted a special warranty deed from First Security that did not include the disputed portion of the property. These actions show that Kelley in fact did not refuse to waive any defect. The Court of Appeals' contrary finding was not supported by the record.

Regardless of whether the Court of Appeals' conclusions on these fact issues were correct, however, it was for the trial court--not the Court of Appeals--to find the facts. The trial court made no findings of fact on these issues because they were never raised by First Security. This Court has reversed decisions of the Court of Appeals where that court has failed to properly apply the clearly erroneous standard of review to a trial court's finding of facts. See, e.g., Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990). This Court should also reverse the decision of the Court of Appeals where, as here, that court makes its own findings of fact that are not supported by the record.

V.

THE COURT OF APPEALS' DECISION WAS WRONG
AS A MATTER OF LAW.

Not only was the Court of Appeals' decision based on improper findings of fact, but it was also based on errors of law.

A. Kelley Was Not Required to Waive Any Defect.

The Court of Appeals' conclusion that Kelley "refused to waive" title defects could only limit Kelley's remedies if he was required to waive defects. Under the facts of this case, he was not.

First, as shown in point IV.A, supra, First Security never met its burden of showing that the conditions precedent had been met for the remedy provisions of paragraph H to even apply.

Moreover, Kelley was not required to waive any title defect if it could be corrected. First Security had an obligation to clear title if it could do so by the exercise of reasonable diligence. See supra point III. Paragraph H could only come into play after First Security fulfilled that obligation. Whether or not First Security could have cleared title by the exercise of reasonable diligence and whether or not it had in fact exercised reasonable diligence were fact questions that were never raised or decided in the trial court and therefore did not preclude the trial court's grant of partial summary judgment in favor of Kelley. The only evidence before the trial court was that First Security undertook to correct the boundary and water problems and then changed its mind. First Security did not base its September 4, 1987, demand on any inability to clear title. Rather, it claimed it had no obligation to clear title and simply

was "no longer desirous of pursuing the lawsuit" it had started to clear title. Neither claim excused First Security's contractual obligation to convey clear title, see Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974); Carcione v. Clark, 96 Nev. 808, 618 P.2d 346, 348 (1980), and thus Kelley's obligation to elect his remedy under paragraph H never arose.

B. Kelley's Election of Remedy Constituted a Waiver of Any Title Defect.

Similarly, the Court of Appeals' conclusion that Kelley refused to waive any defect is contrary to the controlling law. Assuming that the remedy provision of paragraph H applied, Kelley had the option to waive any title defects and enforce the Agreement or to declare the Agreement null and void and receive a return of his earnest money. "The former remedy counts upon the affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the [same] time." Cook v. Covey-Ballard Motor Co., 69 Utah 161, 169, 253 P. 196 (1927).

Where, as here, a party has a choice between two or more inconsistent remedies, he has a duty to choose between them. And, "where the duty to elect applies, then the bringing of an action based upon one of the remedies or rights constitutes an

election which is irrevocable except in case of mistake of fact or some other good and sufficient legal excuse." Howard v. J.P. Paulson Co., 41 Utah 490, 495, 127 P. 284 (1912).

By filing this action for specific performance, Kelley elected his remedy. He chose to treat the Agreement as valid and paid his down payment into court. He could not thereafter terminate the contract. Cook, 69 Utah at 168; Salt Lake City v. Industrial Comm'n, 81 Utah 213, 220-21, 17 P.2d 239, 242-43 (1932) (an election of remedy is made when an action is commenced on one of two inconsistent remedies). If the consequence of Kelley's election was that he thereby waived any title defects, then the court could tailor its order of specific performance accordingly. But First Security never raised that defense, and its settlement of the issue that the trial court reserved for decision, namely, whether or not Kelley was entitled to damages for First Security's failure to convey clear title to the entire property, moots any defense First Security may have had based on paragraph H.

VI.

THE COURT OF APPEALS ERRED IN THE RELIEF IT GRANTED.

Leucadia's appeal followed the trial court's grant of partial summary judgment to Kelley. If the trial court erred in granting Kelley partial summary judgment, the proper remedy would have been to reverse the summary judgment and remand the case for

a trial on the merits. Instead, the Court of Appeals remanded the case for entry of judgment, presumably in favor of Leucadia. If the Court of Appeals was correct that paragraph H of the Agreement was dispositive of this case, at a minimum there existed disputed factual questions concerning the insurability of the title and Kelley's intention in waiving or refusing to waive any defect, precluding summary judgment.

CONCLUSION

Equity allows contracts for the sale of real property to be specifically enforced because each piece of real property is unique. One of the features of the Property in this case that made it unique--indeed, that made it the Kelleys' dream home--was the stream and trout pond. But there were problems with the Property. Because of a boundary survey error, the Armstrongs thought they were entitled to cut off the water to the Property. They did, and the pond dried up.

First Security undertook to correct the problems and told Kelley not to worry about them. For over four months, First Security gave Kelley the impression that it was First Security's problem, not Kelley's, and that First Security would take care of it. Then, when a better deal came along offering First Security a way out of the lawsuit it had started to resolve the problems, First Security changed its tune. It wrote Kelley, repudiating its obligations under the Agreement to convey clear

title and to give Kelley any title warranties. It offered Kelley two choices--to close the deal on First Security's terms, which Kelley thought were contrary to the terms of the parties' Agreement, or to walk away from the deal.

Even First Security recognized that Kelley needed time to review the situation and to make "a fully informed judgment." He did not want to be in the position of the ambassador to Kuwait, living in a house without any water. Yet, after First Security had had over four months to review the problems, it gave Kelley less than three weeks to evaluate the situation and then withheld from him documents he needed to make his decision.

Nevertheless, all of the evidence in the case shows that Kelley refused to walk away from the deal. But he also did not want to waive any rights he had under the Agreement based solely on First Security's own interpretation of its obligations under the Agreement.

Kelley thought he had a third option--to take the Property and ask a court to sort out the parties' respective rights and obligations. After all, courts are in the business of interpreting contracts and resolving disputes. So he brought this action, asking the court to interpret and enforce the par-

ties' Agreement according to its terms.¹¹ In effect, Kelley said, "Give me the Property, and we'll see what rights I have."

The trial court agreed that Kelley was entitled to the Property. At that point, First Security could have asked the court to rule that, because Kelley chose to take the Property, he waived any right to claim damages for any title defects or an abatement in the purchase price. But it did not. Instead, it settled Kelley's damage claim.

That should have ended the matter. But the Court of Appeals took a provision of the Agreement that was never an issue in the trial court and was clearly meant for the buyer's benefit and construed it to give the seller the option of terminating the Agreement by simply refusing to do anything about any title defect.

The Court of Appeals' decision that Kelley refused to waive defects was simply wrong. Kelley never said he would not take the Property with title defects. He simply asked First Security to do what the Agreement said it would do and what it had undertaken to do but later denied having any obligation to do. He simply asked the court to enforce the Agreement according to its terms. If that meant that he had no remedy for title

¹¹ By bringing this action, Kelley also sought to prevent First Security from selling the Property out from under him.

defects, that would have been the proper decision--not that he lost his right to enforce the Agreement.

Because the Court of Appeals' decision was contrary to the undisputed evidence, this Court should reverse that decision and affirm the judgment of the trial court.

DATED this 17th day of December, 1990.

SUITTER AXLAND ARMSTRONG & HANSON

Paul M. Simmons

DAVID R. OLSEN, Esq.
CHARLES P. SAMPSON, Esq.
PAUL M. SIMMONS, Esq.
Attorneys for Petitioner

(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Brief of Petitioner were mailed, postage prepaid thereon, this 17th day of December, 1990, to:

John A. Snow, Esq.
Kathryn H. Snedaker, Esq.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorneys for Appellant
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144

D. FRANK WILKINS, ESQ.
DAVID W. JOHNSON, ESQ.
175 South Main Street #1000
Salt Lake City, Utah 84111
Attorneys for Amicus Curiae
Utah Association of Realtors

R. PAUL VAN DAM, ESQ.
Attorney General
DAVID W. LUND, ESQ.
Assistant Attorney General
130 Utah State Capitol;
Salt Lake City, Utah 84144
Attorney for Amicus Curiae
Division of Real Estate

Paul M. Ammons

(Original signature)

A D D E N D U M

DAVID R. OLSEN, ESQ. #2458
CHARLES P. SAMPSON, ESQ. #4658
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

NO.....
FILED

FEB 9 1988

Clerk of Summit County

BY..... Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

WILLIAM R. KELLEY, JR.,

Plaintiff,

vs.

FIRST SECURITY MORTGAGE
COMPANY, a Utah corporation
and JOHN DOES I-X,

Defendants.

PARTIAL SUMMARY JUDGMENT

Civil No. 9532

Plaintiff's Motion for Partial Summary Judgment came on regularly before the above-entitled Court, the Honorable Homer F. Wilkinson presiding, for hearing on Monday, December 7, 1987 at the hour of 10:00 a.m. Plaintiff was represented by David R. Olsen, Esq. and Charles P. Sampson, Esq. and defendant First Security Mortgage Company was represented by Craig L. Taylor, Esq. The Court, having entered its Order granting plaintiff's Motion for Partial Summary Judgment, hereby

ORDERS, ADJUDGES AND DECREES that:

1. Plaintiff is entitled to a decree of specific performance and defendant First Security Mortgage Company is,

therefore, to convey by Special Warranty Deed that property which is the subject of that Earnest Money Receipt and Offer to Purchase dated February 20, 1987, between William R. Kelley, Jr. as "Buyer" and First Security Mortgage as "Seller" (hereinafter "Agreement"), specifically described in Exhibit "A" attached hereto, together with any and all water rights incident thereto or appurtenant therewith. The conveyance is to take place at the time final judgment is entered in this action.

2. The Court will retain jurisdiction over this matter to determine:

(a) whether plaintiff is entitled to an abatement of the purchase price and, if so, in what amount; and/or

(b) whether First Security Mortgage Company intended to convey and/or is obligated to convey the additional approximate 15.22 feet on the border of the property as more particularly referenced in the Amended Complaint filed in First Security Mortgage Company vs. Armstrong, et al., Civil No. 9447, In the Third Judicial District Court of Summit county, State of Utah.

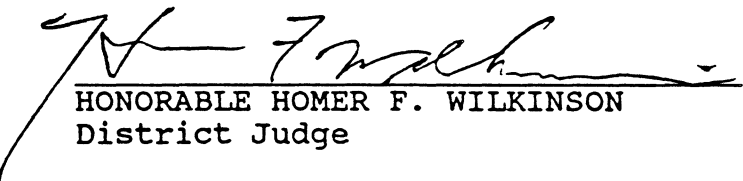
(c) whether plaintiff is entitled to actual and punitive damages as a result of any breaches of the Agreement and/or First Security Mortgage Company's conduct;

0566

(d) The other relief prayed for in plaintiff's Complaint together with the defenses raised by defendant First Security Mortgage Company.

DATED this 1 day of ^{Feb.} ~~January~~, 1988.

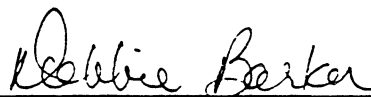
BY THE COURT:


HONORABLE HOMER F. WILKINSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Partial Summary Judgment was hand delivered this 20th day of January, 1988, to:

Craig L. Taylor, Esq.
Ray, Quinney & Nebeker
79 South Main #400
Salt Lake City, Utah 84111



CS15.38

DAVID R. OLSEN, Esq. #2458
CHARLES P. SAMPSON, #4658
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

NO.
FILED

MAY 6 1988

Clerk of Summit County

BY.....
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

WILLIAM R. KELLEY, JR.,)	FINAL JUDGMENT AND
)	DECREE OF SPECIFIC
Plaintiff,)	PERFORMANCE
)	
vs.)	
)	
FIRST SECURITY MORTGAGE COMPANY,)	Civil No. 9532
a Utah corporation, and JOHN)	
DOES I-X,)	
)	
Defendants.)	

Trial in this action was scheduled for May 5 and 6, 1988, before the Honorable Pat B. Brian, District Judge. On February 3, 1988, this Court entered its Order of Partial Summary Judgment requiring defendant to convey the property to plaintiff. On May 6, 1988, this Court entered its Order which, among other particulars, granted summary judgment in favor of the defendant relating to plaintiff's claims for punitive damages. The only issue remaining for trial was the amount of damages to be awarded to plaintiff. The parties have settled all claims relating to the amount of damages to be awarded to plaintiff and the Court, being fully advised in the premises, hereby

ORDERS, ADJUDGES AND DECREES that:

1. Plaintiff is entitled to a decree of specific performance and defendant First Security Mortgage is ordered to convey by Special Warranty Deed that property located in Summit County, State of Utah, more particularly described as follows:

Tract A: Beginning at a point South 2630.74 feet and West 2776.80 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4°03' East 421.40 feet; thence South 56°22' West 261.80 feet; thence South 50°52' West 278.0 feet; thence South 47°34' West 500.0 feet; thence North 28°34' West 538.0 feet to the center line of ditch; thence North 53°10' East 36.0 feet along said ditch to an old spring; thence North 40° East 181.0 feet; thence North 71° East 87.0 feet; thence North 66°38' East 147.61 feet; thence North 30°35' East 43.50 feet; thence East 111.0 feet; thence North 45° East 86.0 feet; thence North 37°38' East 125.0 feet; thence North 59°50' East 207.0 feet; thence South 67°05' East 23.0 feet; thence North 37°55' East 55.0 feet; thence North 34°15' East 75.0 feet; thence East 43.82 feet; thence South 37.0 feet; thence South 88°25' East 77.0 feet to the point of beginning.

Tract B: Beginning at a point South 2630.74 feet and West 2776.80 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4°03' East 421.40 feet; thence North 53°40' East 112.67, thence North 0°53' East 354.74 feet; thence South 89°30' West 126.00 feet to the point of beginning.

Together with a right-of-way for ingress to and egress from Tract A and Tract B over a roadway which is approximately three rods wide, the centerline of which is more particularly described as follows:

Beginning at a point South 2607.61 feet and West 2853.77 feet from the Northeast corner

of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 89°36' East, 2597.86 feet, more or less, to the center of the state highway.

Less and excepting from Tract A and Tract B, the following:

Beginning at a point South 2615.05 feet and West 2724.10 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, said point also being on a fence line and running thence South 1°24'14" West along said fence line 151.84 feet; thence North 88°25' West 132.89 feet; thence North 0°16' West 150.00 feet; thence South 88°25' East 84.595 feet; thence North 89°30' East 52.69 feet to the point of beginning.

The form of the conveyance shall be by Special Warranty Deed in that form attached hereto as Exhibit "A" and incorporated herein by this reference.

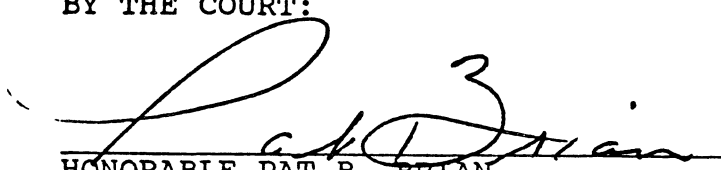
2. Defendant First Security Mortgage Company shall execute and deliver to plaintiff a Quit Claim Deed in the form attached hereto as Exhibit "B".

3. The Clerk shall deliver to counsel for plaintiff all sums held by the Court.


4. Gump & Ayers Real Estate, Inc. shall deliver to plaintiff the Earnest Money deposit held by it.


DATED this 6 day of May, 1988.

BY THE COURT:


HONORABLE PAT B. BRIAN
DISTRICT JUDGE

APPROVED AS TO FORM:


CRAIG L. TAYLOR, Esq.
RAY, QUINNEY & NEBEKER
Attorneys for Defendant


DAVID R. OLSEN, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused a true and correct copy
of the foregoing Judgment Decree of Specific Performance to be
mailed this 6th day of May, 1988, postage prepaid, to:

Craig L. Taylor, Esq.
Ray, Quinney & Nebeker
Attorney for Defendants
79 S. Main #400
Salt Lake City, UT 84111



WHEN RECORDED, MAIL TO:

Space Above for Recorder's Use

SPECIAL WARRANTY DEED

FIRST SECURITY MORTGAGE COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to WILLIAM R. KELLEY, JR., grantee, of P. O. Box 257, Hull, Massachusetts 02045, for the sum of TEN AND NO/100 DOLLARS the following described tracts of land in Summit County, State of Utah:

See Exhibit "A" attached hereto and by this reference incorporated herein and made a part hereof.

With exception to the following:

1. An action pending in the District Court of the Third Judicial District in and for the County of Summit, State of Utah, entitled First Security Mortgage Company, a Utah corporation (successor in interest to R E H, Incorporated), Plaintiff, vs. Hebert S. Armstrong, William Melbourne Armstrong, Jr., Joseph F. Ringholz and Raye C. Ringholz, Defendants, and filed as Civil No. 9447, records of Summit County, Utah.

Lis Pendens in said action was recorded on July 10, 1987, as Entry No. 273994, in Book 438, at Page 20, records of Summit County, Utah.

2. An action pending in the District Court of the Third Judicial District, in and for the County of Summit, State of Utah, entitled William R. Kelley, Jr., Plaintiff, vs. First Security Mortgage Company, a Utah corporation, et al., Defendant, filed as Civil No. 9532, records of Summit County, Utah. (See copy of complaint for purpose of action.)

Lis Pendens in said action was recorded September 22, 1987, as Entry No. 277037, in Book 445, at page 193, records of Summit County, Utah.

3. A Special Warranty Deed executed in favor of Leucadia Financial Corporation, dated November 25, 1987, recorded November 30, 1987, as Entry No. 280465, in Book 454, at Page 217, records of Summit County, Utah.
4. A Quit-Claim Deed executed in favor of Leucadia Financial Corporation, dated November 25, 1987, recorded November 30, 1987, as Entry No. 280466, in Book 454, at Page 220, records of Summit County, Utah.

.. The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized by the grantor.

In witness whereof, the grantor has executed this deed as of this duly authorized officers this 6th day of May, 1988.

FIRST SECURITY MORTGAGE CORPORATION

By: _____

Its: _____

STATE OF UTAH)
 : ss.
COUNTY OF SUMMIT)

On the 6th day of May, 1988, personally appeared before me _____, who being by me duly sworn, did say, that he is the _____ of First Security Mortgage Company, and that said instrument was signed in behalf of said corporation by authority of its bylaws or a resolution of its board of directors, and said _____ acknowledged to me that said corporation executed the same.

My Commission Expires: _____

Notary Public
Residing at _____

3340g

EXHIBIT "A" TO SPECIAL WARRANTY DEED

The real property subject to said Special Warranty Deed is located in Summit County, State of Utah and is more particularly described as follows:

Said real property is also described as follows:

Parcel No. 1: Beginning at a point South 2630.74 feet and West 2776.80 feet from the northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence South 56 degrees 22' West 261.80 feet; thence South 50 degrees 52' West 278.0 feet; thence South 47 degrees 34' West 500.0 feet; thence North 28 degrees 34' West 538.0 feet to the center line of a ditch; thence North 53 degrees 10' East 36.0 feet along said ditch to an old spring; thence North 40 degrees East 181.0 feet; thence North 71 degrees East 87.0 feet; thence North 66 degrees 38' East 147.61 feet; thence North 30 degrees 35' East 43.50 feet; thence East 111.0 feet; thence North 45 degrees East 86.0 feet; thence North 37 degrees 38' East 125.0 feet; thence North 59 degrees 50' East 207.0 feet; thence South 67 degrees 05' East 23.0 feet; thence North 37 degrees 55' East 55.0 feet; thence North 34 degrees 15' East 75.0 feet; thence East 43.82 feet; thence South 37.0 feet; thence South 88 degrees 25' East 77.0 feet to the point of beginning.

PARCEL NO. 2: Beginning at a point South 2630.74 feet and West 2776.80 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 4 degrees 03' East 421.40 feet; thence North 53 degrees 40' East 112.67 feet; thence North 0 degrees 53' East 354.74 feet; thence South 89 degrees 30' West 126.00 feet to the point of beginning.

TOGETHER WITH a right-of-way for ingress to and egress from Parcel No. 1 and Parcel No. 2 over a roadway which is approximately three rods wide, the centerline of which is more particularly described as follows:

BEGINNING AT a point South 2607.61 feet and West 2853.77 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South

89 degrees 36' East, 2597.86 feet, more or less, to the center of the state highway.

LESS AND EXCEPTING from Parcel No. 1 and Parcel No. 2, the following:

BEGINNING AT a point South 2615.05 feet and West 2724.10 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, said point also being on a fence line and running thence South 1 degree 24'14" West along said fence line 151.84 feet; thence North 88 degrees 25' West 132.89 feet; thence North 0 degrees 16' West 150.00 feet; thence South 88 degrees 25' East 84.595 feet; thence North 89 degrees 30' East 52.69 feet to the point of beginning.

SUBJECT TO easements, restrictions, and rights of way appearing of record.

ALSO SUBJECT TO the lien of general property taxes after January 1, 1987.

WHEN RECORDED, MAIL TO:

Space Above for Recorder's Use

Quit-Claim Deed

FIRST SECURITY MORTGAGE COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby QUIT CLAIMS to WILLIAM R. KELLEY, JR., an individual, grantee, of P. O. Box 257, Hull, Massachusetts 02045, for the sum of TEN AND NO/100 DOLLARS, the following described tracts of land in Summit County, State of Utah:

See Exhibit "A" attached hereto and by this reference incorporated herein and made a part hereof.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized by the grantor.

In witness whereof, the grantor has executed this deed as of this 6th day of May, 1988.

FIRST SECURITY MORTGAGE COMPANY

By _____
Its

STATE OF UTAH)
 : ss.
COUNTY OF SUMMIT)

On the 6th day of May, 1988, personally appeared before me _____, who being by me duly sworn, did say, that he is the _____ of First Security Mortgage Company, and that said instrument was signed in behalf of said corporation by authority of its bylaws or a resolution of its board of directors, and said _____ acknowledged to me that said corporation executed the same.

My Commission Expires:

Notary Public
Residing at _____

EXHIBIT "A" TO QUITCLAIM DEED

The real property subject to said Quitclaim Deed is located in Summit County, State of Utah and is more particularly described as follows:

Said real property is also described as follows:

Beginning at a point South 2615.05 feet and West 2724.10 feet from the Northeast corner of Section 8, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence North 89°30'00" East 73.31 feet; thence South 00°53'00" West 369.97 feet; thence South 53°40'00" West 112.67 feet; thence South 56°22'00" West 261.80 feet; thence South 50°52'00" West 278.0 feet; thence South 47°34'00" West 500.00 feet; thence North 28°34'00" West 550.31 feet to the center line of a ditch; thence North 53°10'00" East 43.37 feet along said ditch to an old spring; thence along said centerline of ditch the following twelve courses: thence 1) North 40°00'00" East 181.00 feet; thence 2) North 71°00'00" East 87.00 feet; thence 3) North 66°38'00" East 147.61 feet; thence 4) North 30°35'00" East 43.50 feet; thence 5) East 111.00 feet; thence 6) North 45°00'00" East 86.00 feet; thence 7) North 37°38'00" East 125.00 feet; thence 8) North 59°50'00" East 207.00 feet; thence 9) South 67°05'00" East 23.00 feet; thence 10) North 37°55'00" East 55.00 feet; thence 11) North 34°15'00" East 75.00 feet; thence 12) East 43.82 feet; thence South 37.00 feet; thence North 88°25'00" West 7.60 feet; thence South 00°16'00" East 150.00 feet; thence South 88°25'00" East 132.89 feet; thence North 01°24'14" East 151.84 feet to the point of beginning.

State of Utah)
County of Summit) ss

I, Douglas R. Geary, Clerk of the District Court in and for Summit County, State of Utah, do hereby certify that the foregoing is a full, true and correct copy of the _____

the matter of the entitled # 9532

the matter of the entitled # 9532
 s the same appears of record and upon file in my office.

V WITNESS WHEREOF I have hereunto set my hand and
 affix the seal of said Court this 10th day of May 1988
De G. S. EARY Clerk
 by Jorge De Rueda Deputy Clerk

FILED

IN THE UTAH COURT OF APPEALS

-----00000-----

JAN 5 1990
Gary Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

William R. Kelley, Jr.,)
)
Plaintiff and Respondent,)
)
v.)
)
Leucadia Financial Corporation,)
a Delaware corporation,)
)
Defendant and Appellant.)

OPINION
(Not For Publication)

Case No. 880534-CA

Third District Court, Summit County
The Honorable Pat B. Brian

Attorneys: John A. Snow and Kathryn H. Snedaker, Salt Lake
City, for Appellant
David R. Olsen, Charles P. Sampson, and Claudia F.
Berry, Salt Lake City, for Respondent

Before Judges Davidson, Bench, and Jackson.

JACKSON, Judge:

Leucadia Financial Corporation (Leucadia)¹ appeals a summary judgment decree of specific performance requiring it to convey real property to respondent (Kelley) pursuant to a sales agreement. The lower court reserved Kelley's damages as an issue to be tried, but the parties settled that issue out of court prior to the appeal. We reverse.

The issues we must decide are (1) whether the parties' sales agreement provides remedies to Kelley if Leucadia is unable to convey marketable title, and (2) whether those remedies require conveyance by Leucadia if title is not marketable.

1. During the proceedings below, Leucadia succeeded to the interest of the original seller, First Security Mortgage Company. For simplicity, we will refer to Leucadia as the seller.

The property contemplated by the parties in their sales agreement was not surveyed until after the parties executed that agreement. The survey revealed that Leucadia's property description did not include certain acreage containing a stream, a pond, and a spring, all of which the parties had believed to be part of their agreement. Leucadia was unable to resolve the land description problem by negotiating with the adjoining property owner. Thereafter, Leucadia initiated litigation against the adjoining owner and then decided it was not worth prosecuting. While Leucadia was trying to clear title to the disputed land and water rights, the parties in the instant action extended their closing date. Later, each of the parties maneuvered to obtain remedies which each believed to flow from their contract.

Leucadia offered to convey title subject to the defects or to return Kelley's earnest money deposit. Kelley tendered a portion of the agreed purchase price and insisted that Leucadia clear title and then convey the property. Simultaneously, Kelley filed suit for (1) a declaratory judgment of the parties' rights under the terms of the contract, and (2) specific performance pursuant to the contract terms, as declared.

The lower court implicitly interpreted the contract as not providing an agreed remedy in the event Leucadia could not convey clear and marketable title to all the property. Judgment was entered for an equitable remedy, i.e., specific performance, with an abatement of the purchase price to follow. Thus, the lower court interpreted the parties' agreement as a matter of law, not determined by extrinsic evidence of intent. We accord that construction no particular weight and review the determination under a correctness standard. See Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). Whether ambiguity exists in a contract is also a question of law. Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983). We find, as a matter of law, no ambiguity in the agreement concerning the rights and remedies of the parties in the event title was found to be defective and unmarketable.

A cardinal principle of contract law is that, in the absence of fraud or mutual mistake, a clear and unambiguous contract must be enforced according to its terms. Fast v. Kahan, 206 Kan. 682, 481 P.2d 958, 961 (1971). The terms of the contract, where clear and unambiguous, are conclusive. Goodman v. Newzona Inv. Co., 101 Ariz. 470, 421 P.2d 318, 320 (1966). The first source of inquiry is the written document

itself. Big Cottonwood Tanner Ditch Co. v. Salt Lake City Corp., 740 P.2d 1357, 1359 (Utah Ct. App. 1987). Thus, we turn to the terms to which these parties agreed.

Leucadia agreed "to furnish good and marketable title to the property," subject to encumbrances and exceptions noted in the contract. Paragraph G (Title Inspection) of the agreement provided a title inspection procedure prior to closing, including how the parties would deal with any title defect that appeared: "If said defect is not curable through an escrow agreement at closing, this agreement shall be null and void at the option of the buyer, and all monies received herewith shall be returned to the respective parties." Kelley refused to accept this option. The parties agreed that title insurance would be utilized for closing. Paragraph 4 (Title Insurance) of the agreement provided the procedure for insuring title: "If title cannot be made insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects and encumbrances, be refunded to Buyer, and this agreement shall thereupon be terminated." Title could not be made insurable without exceptions for defects. Kelley refused to waive the defects, thus his remedy, as agreed, was limited to a refund of his earnest money deposit, not specific performance.

We have examined the other issues argued by the parties, including that of tender,² and conclude they are meritless or that they do not require our consideration in light of the clear and unambiguous terms of the parties' agreement.³

2. This court recently discussed the requirement of tender, where a purchase agreement contemplates simultaneous performance by the parties, in Bell v. Elder, 121 Utah Adv. Rep. 16 (Ct. App. 1989), at Carr v. Enoch Smith Co., 119 Utah Adv. Rep. 89 (Ct. App. 1989). See also Utah Code Ann. § 78-27-1 (1987).

3. In its brief, Leucadia touched on a related issue of vandalism, believed to have been committed by the adjoining landowner, which diverted the water and dried up the pond. Paragraph P (Risk of Loss) of the parties' agreement provided a procedure for dealing with loss or damage to the property prior to closing. Kelley did not seek to use that procedure.

The judgment of the trial court is reversed, and the case is remanded for entry of judgment consistent with this opinion.


Norman H. Jackson, Judge

I CONCUR:


Richard C. Davidson, Judge

BENCH, Judge (dissenting):

The main opinion reverses this judgment because there is no contractual provision allowing for specific performance. If Kelley made a proper and timely tender of payment, I believe the remedy of specific performance is available.

My colleagues are correct in limiting the parties' remedies at law to the terms of the contract. If there was a "defect" in Leucadia's title, the contract permits Kelley to: 1) waive the defect and go through with the purchase; or 2) take a refund of his earnest money. In this case, Leucadia agreed to sell property located at a specific address in Summit County. Leucadia had good and marketable title to property located at that address. Leucadia erroneously believed and represented that the property contained a neighboring stream, pond, and spring. That fact should not cloud title to the property Leucadia actually owned. There is, therefore, no "defect" in Leucadia's title. See Black's Law Dictionary 1332 (5th ed. 1979) (defective title means unmarketable title). Clearly, where the contract has not provided a legal remedy, the trial court could order specific performance of the contract.

Even where a legal remedy is provided, however, the trial court has the discretion to order specific performance of the contract if the legal remedy is inadequate. See generally Restatement (Second) of Contracts §§ 357-360 (1981). "The rule

has been long established that a vendee has the right to insist upon performance by the vendor to the extent the latter is able to perform with an abatement in the purchase price equal to the value of the deficiency or defect." Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976); see also In re Hayhurst's Estate, 478 P.2d 343 (Okla. 1970); Streator v. White, 26 Wash. App. 430, 613 P.2d 187 (1980).

I believe the trial court had the discretion to order Leucadia to convey the property it owned with an abatement in the purchase price. Resolution of this appeal should turn not on the unavailability of specific performance as a remedy, but on whether Kelley made a proper and timely tender, as argued by the parties.

A handwritten signature in cursive script, reading "Russell W. Bench". The signature is written in dark ink and is positioned above a horizontal line.

Russell W. Bench, Judge