

1990

William R. Kelley, JR. v. Leucadia Financial Corporation : Amicus Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WILLIAM R. KELLEY, JR.,

Plaintiff-Petitioner,

vs.

LEUCADIA FINANCIAL
CORPORATION, a Delaware
corporation,

Defendant-Respondent.

AMICUS CURIAE BRIEF OF THE OFFICE
OF THE DEPARTMENT OF COMMERCE OF

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WILLIAM R. KELLEY, JR.,

Plaintiff-Petitioner,

vs.

LEUCADIA FINANCIAL
CORPORATION, a Delaware
corporation,

Defendant-Respondent.

Priority No. 13

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IN THE UTAH SUPREME COURT

WILLIAM R. KELLEY, JR.,

Plaintiff-Petitioner,

VS.

LEUCADIA FINANCIAL
CORPORATION, a Delaware
corporation,

Defendant-Respondent.

Case No. 900187

Priority No. 13

AMICUS CURIAE BRIEF OF THE DIVISION OF REAL ESTATE
OF THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Does the decision rendered by the Utah Court of Appeals in this case incorrectly interpret the language of the standard Ernest Money Sales Agreement to eliminate the recognized right of a buyer to seek specific performance?

STATEMENT OF THE CASE

I. Nature of Proceedings

The Division adopts the "Statement of the Case" contained in page 1 of the Brief of Respondent in Opposition to Petition for Writ of Certiorari ("Br. in Opp."), and the "Nature of the Case" and "Course of Proceedings" contained at pages 2 and 3 of Petitioner's Petition for Writ of Certiorari ("Petition"), to the extent those statements are consistent.

II. Statement of Material Facts

1. The Division of Real Estate of the Department of Commerce of the State of Utah ("the Division") is charged with administration and enforcement of Utah's real estate licensing laws. Utah Code Ann. § 61-2-5 (1953, as amended).

2. The State of Utah, through the Real Estate Commission created pursuant to Utah Code Ann. § 61-2-5.5 (1953, as amended), and the Utah Attorney General, has prepared and approved a standard form Earnest Money Sales Agreement for use in real estate sales transactions in this State. With exceptions

not relevant here, the State's approximately 7,400 licensed real estate brokers and sales agents may use only those forms approved by the Real Estate Commission and the Attorney General in real estate transactions conducted in this State. Utah Code Ann. § 61-2-20 (1953, as amended).

3. On or about February 20, 1987, First Security Mortgage Company, Respondent's predecessor-in-interest, as seller, and William R. Kelley, Jr., as buyer, executed an Earnest Money Sales Agreement (the "Agreement") on the form approved by the Utah Real Estate Commission and the Attorney General pursuant to the statutes referenced in Paragraph 2 above. (See Br. in Opp. at 3, paragraph 1; Petition at 3, paragraph 1) A copy of the Agreement is attached hereto as Exhibit "A".

4. Before closing a survey disclosed that there was a boundary discrepancy with respect to the property subject to the Agreement. (Br. in Opp. at 4-5; Petition at 4, paragraph 4)

5. Also before closing, neighboring property owners apparently cut off the water supply to the property, causing a pond to dry up, thereby damaging the property. (Br. in Opp. at 4-5; Petition at 5, paragraph 6)

6. On or about September 22, 1987, Kelley brought this action seeking a declaration of the parties' respective rights and obligations under the Agreement, specific performance

of the Agreement and damages for alleged breaches. (Br. in Opp. at 7; Petition at 9, paragraph 20)

7. The trial court granted Kelley summary judgment on his claim of specific performance, and ordered First Security to convey the property to Kelley. The court reserved the question of Kelley's entitlement to an abatement of the purchase price of damages. Kelley and First Security then settled the damage issue, and final judgment was entered on May 6, 1988. (Petition at 9, paragraphs 22 and 23)

8. Thereafter, Respondent, Leucadia Financial Corporation, was substituted as defendant for First Security and appealed the trial court's grant of summary judgment in favor of Kelley. (Petition at 10, paragraph 24)

9. On or about January 5, 1990, the Utah Court of Appeals filed its Opinion in this case. A copy of the Opinion is attached hereto as Exhibit "B".

10. In its Opinion the Court of Appeals concluded that a buyer under the standard Earnest Money Sales Agreement could not obtain specific performance upon discovery of defects rendering title uninsurable, but was limited by the language of the Agreement to return of his earnest money deposit or acceptance of the property subject to the defects. (Exhibit "B" at 3)

11. On May 9, 1990, the Utah Real Estate Commission passed a Resolution, a copy of which is attached hereto as Exhibit "C", requesting that the Attorney General take such action and file such papers as are necessary to obtain review of the decision of the Court of Appeals.

12. On May 22, 1990, Mr. Blaine Twitchell, Director of the Division, wrote a letter to David W. Lund, Assistant Attorney General. The letter requests that the Attorney General file a brief of amicus curiae on behalf of the Division, and sets forth the Division's position with respect to the Opinion of the Court of Appeals. A copy of the letter is attached hereto as Exhibit "D".

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Utah Court of Appeals because the decision incorrectly interprets the language of the standard Earnest Money Sales Agreement to eliminate the recognized right of a buyer to seek specific performance.

ARGUMENT

The Division is charged, pursuant to Utah Code Ann. § 61-2-5 (1953, as amended), with the responsibility of administration and enforcement of Utah's real estate licensing laws. Utah Code Ann. § 61-2-20 (1953, as amended), administered

and enforced by the Division, provides in relevant part that, "Real estate licensees may fill out those forms approved by the Utah Real Estate Commission and the Attorney General and those forms provided by statutes . . ." The Earnest Money Sales Agreement at issue in this case, was on the form approved by the Utah Real Estate Commission and the Utah Attorney General's Office pursuant to the foregoing statute.

In rendering its decision in this case, the Utah Court of Appeals, interpreting Paragraph H of the Agreement (a copy of which is attached hereto as Exhibit "A"), held that when title cannot be made insurable, a buyer's only remedies are acceptance of the property with waiver of defects or termination of the agreement with a refund of the earnest money deposit, not specific performance. (Exhibit "B" at 3) This interpretation of the standard Earnest Money Sales Agreement effectively requires a buyer to waive his or her right to specific performance, and is contrary to the long established rule that "a vendee has the right to insist upon performance by the vendor to the extent that 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).

This Court has consistently held that a buyer under a contract for the sale of real estate may specifically enforce

such an agreement. See, e.g., Eliason v. Watts, 615 P.2d 427 (Utah 1980); Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980); Reed v. Alvey, 610 P.2d 1374 (Utah 1980); and Huck v. Hayes, 560 P.2d 1124 (Utah 1977).

The Division believes that the Court of Appeals incorrectly interpreted one provision of the Earnest Money Sales Agreement in isolation, without regard to other relevant provisions contained therein. (See Exhibit "D") Specifically, Paragraphs "N" and "P" of the Agreement provide guidance as to the proper interpretation of the Agreement. For example, Paragraph N provides in relevant part that, "Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise." (Exhibit "A" at Paragraph "N") (emphasis added). The language of Paragraph "H", read in context with the language of Paragraph "N", illustrates the intent of the drafters of the Agreement to preserve a buyer's right to specific performance as provided "by applicable law." Id.

The effect of the Court of Appeals' decision is a shift in the balance of rights, remedies and obligations between the buyer and seller in favor of the seller. Such a shift was neither contemplated nor intended by the drafters of the Agreement. (See Exhibit "D" at page 2) Silence in Paragraph "H" as to the right of a buyer to specific performance should not be construed to exclude that remedy. Such a result is in conflict with other sections of the Agreement, and is in direct contravention of Utah case law allowing specific performance with an abatement of the purchase price. Reversal of the Court of Appeals' decision is particularly appropriate if, as is alleged by Kelley, the decision (and its consequent impact on Utah real property transactions) was made sua sponte, without the aid of briefs, oral argument or the raising of the dispositive issues by the parties. (See Petition at 13-17)

Finally, Leucadia's argument that the Court of Appeals' decision has little precedential value because it is an unpublished opinion is incorrect. (Br. in Opp. at 29) While the Division recognizes the existence and effect of Rule 4-508 of the Utah Code of Judicial Administration, which provides that unpublished opinions have no precedential value, as a practical matter, the decision indicates how the Court of Appeals would react to a similar situation in the future. Leucadia's argument

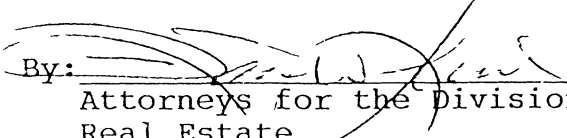
also ignores the fact that this Court could issue a published opinion upholding the decision of the Court of Appeals on the same grounds, and that such an opinion would obviously constitute precedent. The decision of the Court of Appeals, published or unpublished, therefore, remains a concern to the Division.

CONCLUSION

This case presents important questions regarding the interpretation of the standard Earnest Money Sales Agreement used by real estate agents and brokers in the vast majority of real estate transactions in this State. Because the interpretation given the Agreement of the Court of Appeals incorrectly alters Utah law regarding availability of specific performance, this Court should reverse the Court of Appeals' decision.

DATED this 13 day of December, 1990.

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(801) 533-3200

By: 
Attorneys for the Division of
Real Estate

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of December, 1990,
I caused to be mailed via United States Postal Service, first
class, postage prepaid, 4 true and accurate copies of the
foregoing to:

DAVID R. OLSEN, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
SUITTER, AXLAND, ARMSTRONG & HANSON
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DAVID W. JOHNSON
P.O. Box 3598
Park City, Utah 84060

D. FRANK WILKINS
175 South Main Street, Suite 1000
Salt Lake City, Utah 84111

Bardie Mills

EXHIBIT "A"

EARNED MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



GENERAL PROVISIONS (Sections)

INCLUDED ITEMS. Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property: plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reliance on any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income potential or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances are sound or in satisfactory working condition at closing.

CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

ACCELERATION CLAUSE. No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, then within three (3) days after notice of waiver or disapproval or on the date of closing, whichever is earlier, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

TITLE INSPECTION. No later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, Buyer shall have the opportunity to inspect either an abstract of title brought current with an attorney's opinion, or a preliminary title report on the subject property. Buyer shall have a period of three (3) days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall give written notice thereof to Seller or Seller's agent, within the prescribed time period specifying objections to title. Thereafter, Seller shall be required, through escrow at closing, to cure the 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 Buyer, and all monies received herewith shall be returned to the respective parties.

TITLE INSURANCE. 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. Seller agrees to pay any cancellation charge.

EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer no later than fifteen (15) days after Seller's acceptance of this Agreement, but not less than three (3) days prior to closing, a copy of all existing leases (and any amendments thereto) affecting the property. Unless written objection is given by Buyer to Seller or Seller's agent within three (3) working days thereafter, Buyer shall take title subject to such leases. If objection is not remedied within the stated time, this Agreement shall be null and void.

id : Yes(X) - No(0)

EARNEST MONEY RECEIPT

DATE: FEBRUARY 20, 1987

I, the undersigned Buyer BILL KELLEY hereby deposits with Brokerage
EARNEST MONEY the amount of Ten thousand Dollars (\$ 10,000),
in the form of personal check to be deposited in accordance with applicable State Law.
WILLIAMS REAL ESTATE, INC. Received by [Signature]
Address 601-648-8550 Phone Number

OFFER TO PURCHASE

PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 320 WEST
WOW'S LANE in the City of TALL CITY County of SUMMIT Utah,
subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer
in accordance with Section G. Said property is more particularly described as:

CHECK APPLICABLE BOXES:

UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____

IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property.

The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: ALL PERSONAL
PROPERTY CURRENTLY AT SUBJECT PROPERTY.

(b) Excluded items. The following items are specifically excluded from this sale: NONE

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:

<input checked="" type="checkbox"/> public sewer <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> well <input checked="" type="checkbox"/> connected <input type="checkbox"/> Other _____	<input checked="" type="checkbox"/> electricity <input checked="" type="checkbox"/> connected
<input checked="" type="checkbox"/> septic tank <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> irrigation water/secondary system	<input checked="" type="checkbox"/> ingress & egress by private easement
<input type="checkbox"/> other sanitary system _____	# of shares _____ Company: _____	<input checked="" type="checkbox"/> dedicated road <input type="checkbox"/> paved
<input checked="" type="checkbox"/> public water <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> TV antenna <input type="checkbox"/> master antenna <input type="checkbox"/> prewired	<input checked="" type="checkbox"/> curb and gutter
<input checked="" type="checkbox"/> private water <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> natural gas <input checked="" type="checkbox"/> connected	<input type="checkbox"/> other rights _____

(d) Survey. A certified survey ☒ shall be furnished at the expense of SELLER prior to closing. ☐ shall not be furnished

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical condition, except: _____

2. PURCHASE PRICE AND FINANCING. The total purchase price for the property is Six Hundred Thousand
Dollars (\$ 600,000) which shall be paid as follows:

10,000 which represents the aforescribed EARNEST MONEY DEPOSIT
50,000 representing the approximate balance of CASH DOWN PAYMENT at closing.
_____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed
by buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____
which include ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees ☐ other _____
_____ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be
assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____
which include ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees ☐ other _____
_____ representing balance if any, including proceeds from a new _____ loan to be paid as follows: _____

Other UPON ACCEPTANCE BUYER TO DEPOSIT AN ADDITIONAL
\$40,000, NON-REFUNDABLE IN CONSIDERATION OF 60 DAY CLOSING
500,000 TOTAL PURCHASE PRICE BUYER HAS THE OPTION TO EXTEND THE CLOSING
15 DAYS FOR AN ADDITIONAL \$100,000

If Buyer is required to assume an underlying obligation and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same and to
be made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within NA
days after Seller's acceptance of this Agreement, to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed _____ %
Buyer does not qualify for the assumption and/or financing within NA days after Seller's acceptance of this Agreement, this Agreement shall be voided
the option of the Buyer or Seller upon written notice.

Seller agrees to pay \$ NA towards Buyer's total financing and closing costs, including but not limited to loan discount points
If this Agreement involves the assumption of an existing loan or obligation on the property, Section F shall apply.

Estate contract. This Agreement is subject to encumbrances and exceptions herein, evidenced by a current policy of title insurance in the amount of purchase price. An abstract brought current, with an attorney's opinion (Section H).

INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☒ has not reviewed any condominium CC & R's prior to signing this Agreement.

VESTING OF TITLE. Title shall vest in Buyer as follows: AS DIRECTED 5 DAYS PRIOR TO CLOSING.

SELLER WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: NONE

Limitations to the above and Section C shall be limited to the following: NONE

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: NONE

CLOSING OF SALE. This Agreement shall be closed on or before 60 DAYS FROM ACCEPTANCE BY SELLER, 1987 at a reasonable location to be designated by Buyer subject to Section Q. Upon demand, Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R, shall be made as of ☒ date of possession ☒ date of closing ☐ other.

3. POSSESSION. Seller shall deliver possession to Buyer on CLOSING unless extended by written agreement of parties.

4. GENERAL PROVISIONS. Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated into this Agreement by reference.

1. AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller has until 2:00 (AM-PM) FEBRUARY 27, 1987 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the BEST MONEY to the Buyer.

Signature of Buyer: [Signature] Date: 2/20/87 Signature of Buyer: _____ Date: _____

COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

REJECTION. Seller hereby REJECTS the foregoing offer. (Seller's Initials) _____

COUNTER-OFFER. Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER-OFFER for Buyer's acceptance. Buyer shall have until 10:00 (A.M.-P.M.) 3-2, 1987 to accept the terms specified below.

Purchase price to be \$750,000 cash at closing. Property sold "As is" without warranty. Title conveyed by Special Warranty Power of Attorney. The terms to remain the same. No survey to be provided by seller.

Signature of Seller: [Signature] Signature of Seller: _____

COUNTER OFFER. Buyer accepts the counter offer.

Signature of Buyer: [Signature] Signature of Buyer: _____

COMMISSION. The undersigned hereby agrees to pay to Gump & Sons (Brokerage Commission of As per agreement) as consideration for the efforts in procuring a buyer.

Signature of Seller: [Signature] Date: 2-25-87 Signature of Seller: _____ Date: _____

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

A. ☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

NATURE OF SELLER: _____ SIGNATURE OF BUYER: [Signature] Date: _____ Date: March 25

B. If I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 1987

AUTHORITY OF SIGNATORS. If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

COMPLETE AGREEMENT — NO VERBAL AGREEMENTS. This instrument constitutes the entire Agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or vary this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement unless expressly modified or excluded therein.

DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement, or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller agree that the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

ABROGATION. Execution of a final real estate contract, if any, shall abrogate this Agreement.

RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property on or after the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may, at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing, or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price, Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, fire, flood, extreme weather, governmental regulations, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than thirty (30) days beyond the closing date provided herein. Thereafter, time shall be of the essence. This provision relates only to the extension of closing date. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs including title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than excepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the existing real estate contract therein.

AGENCY DISCLOSURE. Selling Brokerage may have entered into an agreement to represent the Seller.

BROKERAGE. For purposes of this Agreement, any references to the term "Brokerage" shall mean the respective listing or selling real estate office.

DAYS. For purposes of this Agreement, any references to the term "days" shall mean business or working days exclusive of legal holidays.

A ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes ☒ a COUNTER OFFER ☐ an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 20th day of February, 1987, between William R. Kelley, Jr. as buyer(s), and First Security Bank of Utah as seller(s), covering real property described as follows:

320 West Snow's Lane
Summit County, Utah

The following terms are hereby incorporated as part of THE AGREEMENT:

1. Purchase price to be \$650,000 with total earnest money deposit of \$10,000. Seller to finance 80% of purchase price, upon qualification and approval by Seller; with 7% interest only payments quarterly and balance due in full 9 months from close of escrow. No pre-payment penalty for early pay-off of this note. Loan fees to be one percent of mortgage amount plus regular closing costs
2. Closing to be on or before April 20, 1987
3. Current certified survey will be provided by Seller

All other terms of THE AGREEMENT shall remain the same. ~~Seller~~ Buyer shall have until 5:00 (~~A.M.~~/P.M.) March 3, 1987 to accept the terms specified above. Unless so accepted this Addendum shall lapse

Date February 27, 1987
Time 5:00 (~~A.M.~~/P.M.)

Signature of ☒ Seller ☐ Buyer

First Security Bank
By [Signature]

ACCEPTANCE/COUNTER OFFER REJECTION

Check One

☒ I hereby ACCEPT the foregoing on the terms specified above

☐ I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

William R. Kelley, Jr.
Signature

Signature

March - 2
Date

87 - 12:25
Time

☐ I hereby reject the foregoing (Initials)

DOCUMENT RECEIPT

☒ I acknowledge receipt of a final copy of the foregoing bearing all signatures

William R. Kelley, Jr.
Signature of Buyer(s)

March - 2
Date

Signature of Seller(s)

Date

☐ I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on March - 2

1987, by Certified Mail and return receipt attached hereto to the ☒ Seller ☐ Buyer

1.11.11. P. J. N. B. - F. I. E. D. A.

EXHIBIT "B"

FILED

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

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. East 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

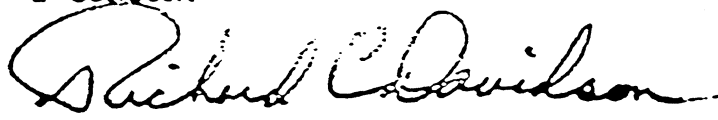
2. This court recently discussed the requirement of tender, where a purchase agreement contemplates simultaneous performance by the parties, in Bell v. Elder, 121 Utah Adv. Rep. 16 (Ct. App. 1989), as Carr v. Enoch Smith Co., 119 Utah Adv. Rep. 89 (Ct. App. 1989). See also Utah Code Ann. § 78-27-1 (1987).

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

EXHIBIT "C"

RESOLUTION

Be It resolved by the Utah Real Estate Commission as follows:

Whereas, the Utah Real Estate Commission has reviewed the decision of the Utah Court of Appeals, Case Number 880534-CA; and

Whereas, the decision of the Court of Appeals in that case purports to give an interpretation of the standard form Earnest Money Sales Agreement which interpretation severely limits the rights of buyers to specific performance thereunder; and

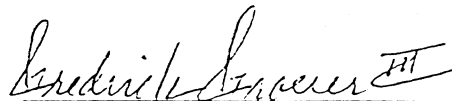
Whereas, the Standard form Earnest Money Sales Agreement is a form document approved by the Utah Real Estate Commission and the Attorney General for the State of Utah; and

Whereas, the Utah Real Estate Commission is gravely concerned with the decision of the Court of Appeals as it relates to its interpretation of the standard form Earnest Money Sales Agreement which form is used by real estate salesagents throughout the State of Utah; and

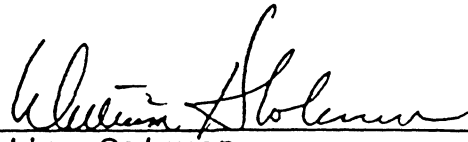
Whereas, it is in the best interest of the Real Estate Industry in the State of Utah that the Utah Supreme Court review the decision of the Utah Court of Appeals as it relates to its interpretation of the standard form Earnest Money Sales Agreement limiting the rights of buyers to specific performance; and

Now therefore, the Utah Real Estate Commission does hereby resolve that the Attorney General for the State of Utah be requested to take such action and file such papers as are necessary and appropriate to obtain a review of the this decision by the Utah Supreme Court, and to allow the State of Utah to provide such input, and to assert its position regarding the interpretation and enforceability of the standard form Earnest Money Sales Agreement and the rights of buyers to obtain specific performance thereunder.

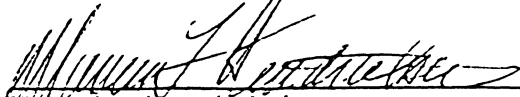
In witness whereof the undersigned members of the Utah Real Estate Commission have set their hands on this 9th day of May, 1990.



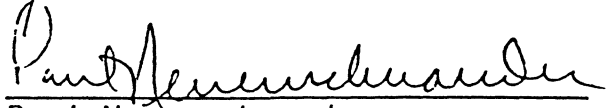
Fredrick "Buck" Froerer, III



William Coleman



Marvin Hendrickson



Paul Neuenschwander



Beth Tolbert

EXHIBIT "D"



State of Utah

DEPARTMENT OF COMMERCE
Division of Real Estate

Norman H. Bangertter
Governor

David L. Buhler
Executive Director

Blaine E. Twitchell
Division Director

Heber M. Wells Building
160 East 300 South/P.O. Box 45802
Salt Lake City, Utah 84145-0802
(801) 530-6747

May 22, 1990

David W. Lund, Esq.
Attorney General's Office
236 State Capitol
Salt Lake City, Utah 84114

RE: Amicus brief

Dear Mr. Lund:

The Division of Real Estate hereby requests the Attorney General to file an amicus brief on behalf of the Division in Kelley v. Leucadia Financial Corp., Case No. 880534-CA (Utah App. 1990). We are concerned that the decision by the Court of Appeals in that case is incorrect and will drastically alter the rights of buyers of real property in the State of Utah.

The Court of Appeals decision was based on an interpretation of one of the general provisions in the standard form Earnest Money Sales Agreement which all real estate licensees in Utah must use. The form contract was approved by the Attorney General and the Utah Real Estate Commission. The State therefore has a keen interest in the integrity of the contract. The Division believes that the Court of Appeals incorrectly interpreted one provision of the contract in isolation without regard to a number of other provisions in the contract.

The result of this interpretation is to limit the rights which a buyer of real property has upon default by the seller. Historically, buyers have had a number of remedies available to them when a seller fails to perform. Buyers have been able to sue for rescission of the contract, for money damages, or for specific performance of the contract. In the Kelley case, the Court of Appeals interpreted the language of the standard form contract to say that if a seller defaults because of a title problem, the buyer may not sue for specific performance. The Court stated that the buyer's only remedy is a return of his earnest money. Presumably the buyer could not sue for damages under the Court's interpretation of the contract.

This decision moves Utah back toward the days of "buyer beware". If the buyer defaults, the seller may elect a number of remedies,

Including specific performance or suing the buyer for damages. Yet, if the seller defaults, the buyer would be limited to getting his earnest money back and walking away from the transaction. The effect of the Court of Appeals decision could be to dramatically shift the balance of rights in favor of sellers in real estate transactions.

It was not the intent of either the committee which drafted the Earnest Money Sales Agreement or the Utah Real Estate Commission to limit the buyer's remedies. There was no discussion before either body about limiting the buyer to a refund of his earnest money if the seller defaulted because of a title problem. Quite the contrary, there was considerable discussion about making the contract one contract which evenly balanced seller's rights and buyer's rights and which would protect both parties equally. The provision upon which the Court of Appeals based its decision was put into the contract to protect buyers of real estate, but the court has interpreted that provision to give sellers an unfair advantage over buyers.

The Division of Real Estate respectfully requests that the Attorney General file an amicus brief on its behalf in this case arguing that the Court of Appeals interpretation of the Earnest Money Sales Agreement is incorrect and against public policy

Sincerely,

DIVISION OF REAL ESTATE


Blaine E. Twitchell
Director

skwlet.ag