

1990

William R. Kelley Jr. v. Leucadia Financial Corporation : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

66. : NO

WILLIAM R. KELLEY, JR.,

Plaintiff-Petitioner,

VS.

LEUCADIA FINANCIAL CORPORA-
TION, a Delaware corporation,

Defendant-Respondent.

Case No. 900187

Priority No. 14

PETITIONER'S REPLY BRIEF

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

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Plaintiff-Petitioner,)	
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INTRODUCTION

Kelley brought this action seeking a declaratory judgment of the parties' respective rights and obligations under an earnest money sales agreement (the "Agreement") and specific performance of the Agreement. The trial court granted specific performance, the parties settled the remaining issues, and First Security accepted Kelley's money and gave Kelley deeds to the property. See R. 815-24. The only issue on appeal was whether Kelley's tender of performance was defective, thereby precluding specific performance.

REPLY TO LEUCADIA'S STATEMENT OF FACTS

Certain portions of Leucadia's statement of facts are not supported by the record or misleading:

Part 2 of Leucadia's statement of facts paraphrases certain terms of the Agreement. Obviously, the Agreement speaks for itself. To the extent that Leucadia's paraphrases misstate the terms of the Agreement, they should be ignored or stricken.¹ See Utah R. App. P. 24(k).

¹ For example, Leucadia claims that the Agreement was "conditioned on" First Security furnishing good and marketable title to the Property. In fact, the provision with respect to the "Condition and Conveyance of Title" makes the obligation "to furnish good and marketable title" a covenant and not a condition. R. 185. Cf. Barnes v. Wood, 750 P.2d 1226, 1232-33 (Utah Ct. App. 1988) (the law overwhelmingly favors the construction of ambiguous contract provisions as covenants as opposed to conditions precedent).

Leucadia states that both Kelley and First Security understood that the property was enclosed "by fences, a stream, a spring and a pond," and that, as a result of the erroneous property description, the boundaries shifted so that "neither the spring, the stream, nor the pond" would be included in the conveyance. In fact, the pond was not part of the boundary problem. It was in front of the house and was not affected by the shift in boundaries. See R. 143, 194-96, 258-59 & 276. Thus, this is not simply a case of a title defect. There were several problems with the property--the boundary problem, the question of water rights, and damage to property that was clearly part of the Agreement regardless of the location of the boundaries.

Leucadia claims that "[i]t became clear" that the adjacent land owners (the Armstrongs) would not resolve these problems without substantial litigation and that First Security told Kelley that "resolution of the boundary dispute and property damage could not be done through negotiation." It cites to First Security's September 4, 1987, letter for both of these propositions. That letter does not say that the problems cannot be resolved through negotiation or without substantial litigation. Rather, it simply states that "First Security is no longer desirous of pursuing the lawsuit with the Armstrongs" and claims that "First Security has never viewed itself as having the ob-

ligation to clear title, nor does the earnest money agreement provide for that obligation." R. 115.

Leucadia states that, "[a]t Kelley's request, the closing date was extended until September 22, 1987." Although Kelley requested more time to close, he did not set the date of September 22, 1987. First Security did. And it was untraversed that, under the circumstances, September 22 provided an unreasonably short time for Kelley to close. See R. 278-80.

Leucadia claims that, on September 22, 1987, Kelley "declined to close under either of the agreed-upon options . . . required by the Agreement" and instead tendered his payment "conditioned on First Security resolving the boundary dispute, rectifying the property damage, and clearing title prior to closing." In fact, the letter of Kelley's counsel clearly states, "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." R. 120. Kelley and First Security clearly differed as to whether First Security had an obligation to resolve the problems with the property. That is why Kelley had to file this action. It was for the court, not First Security, to say what First Security's obligations were under the Agreement and what Kelley's options were.

Leucadia claims that First Security offered to extend the closing date to October 8, 1987, if Kelley would purchase the property "as is."² What Leucadia does not say is that First Security's "as is" did not mean that First Security would give Kelley the property in the condition it was in when the Agreement was made but in the condition it was in in September 1987, that is, with the water cut off, the pond dry and the fish gone, even though all the damage to the property occurred at a time when First Security bore all risk of loss due to vandalism.³ See R. 17 ¶ P. Leucadia also fails to say that even after Kelley declined this offer First Security continued to treat the Agreement as in effect. See, e.g., R. 283.

Leucadia claims that First Security executed a release of Kelley's earnest money deposit on September 24, 1987. The release, however, was expressly conditioned on Kelley's agreement to the release, and Kelley did not agree. R. 125.

Leucadia states that it entered into a binding Earnest Money Sales Agreement with First Security on November 2, 1987,

² Leucadia neglects to mention that First Security's offer was also conditioned on Kelley giving First Security a complete release of all claims he may have had against it. See Deposition of Wayne L. Lantz (R. 911) at 128.

³ First Security's definition of "as is" also extended to the condition of title, R. 117, negating First Security's contractual obligation to convey good and marketable title by special warranty deed. See R. 185. The Utah Court of Appeals has since rejected such a construction of "as is." See Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah Ct. App. 1990).

and that, on November 25, 1987, the property was sold to Leucadia. It neglects to mention, however, that the sale was made subject to the lis pendens that Kelley filed, placing Leucadia on notice of this action and Kelley's claim to the property. R. 331.⁴

SUMMARY OF ARGUMENT

Leucadia does not dispute that Kelley had until September 22, 1987, to tender his performance. E.g., Brief of Respondent at 9, 33, 35. Nor does Leucadia dispute that Kelley tendered his performance on September 22, 1987. Id. at 25, 33. Leucadia claims, however, that Kelley's tender was defective because he refused to waive title defects and insisted that First Security resolve the issues of title defects and water rights before closing.

Leucadia's arguments ignore the context in which Kelley's tender was made. The parties to a contract had a good-faith dispute over their respective rights and obligations under the contract. Kelley had the right to ask a court to resolve the dispute. By doing so, he did not lose his right to specific performance. (Point I.)

⁴ Any suggestion that Leucadia was somehow injured by the court's decree of specific performance is put to rest by the terms of Leucadia's contract with First Security, which provided that Leucadia would take the property subject to Kelley's lawsuit and required First Security to indemnify Leucadia completely and return its money with interest (at the prime rate) if Kelley was successful. See R. 510-14.

Moreover, Kelley's tender was not defective. Kelley was not required to waive title defects by September 22, 1987, so his alleged failure to waive defects did not make his tender defective (point II). Any condition imposed on his tender did not make the tender defective (point III). Even under Leucadia's position, Kelly's tender was timely (point V). If Kelley's tender were untimely or defective, any defect is irrelevant because his tender was excused (point IV).

Finally, even if the court of appeals were otherwise correct, it erred by directing entry of judgment in favor of Leucadia (point VI).

ARGUMENT

I.

LEUCADIA HAS ERRED BY FOCUSING EXCLUSIVELY ON KELLEY'S TENDER LETTER, WHICH IT HAS TAKEN OUT OF CONTEXT.

Leucadia does not dispute that Kelley tendered his performance. See, e.g., Brief of Respondent at 25, 33. It claims only that Kelley's tender was defective because it was conditional on First Security providing a remedy not required by the Agreement.

All of Leucadia's arguments are based on Kelley's tender letter of September 22, 1987. That letter stated:

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. 61.

The main problem with Leucadia's arguments is their tunnel vision. They focus solely on this provision of the letter and ignore, not only all of Kelley's other actions, but also First Security's actions that prompted the letter. Leucadia stands in the shoes of First Security and cannot have any better rights than First Security would have. Yet it has tried to distance itself from First Security's actions. The September 22 tender letter must be read in context, and, so read, it was an appropriate response to First Security's actions.

The parties had originally agreed to close the sale on April 20, 1987.⁵ However, before April 20 First Security had discovered a boundary error, which it undertook to cure by filing a quiet title action against the neighboring landowners, the Armstrongs. See R. 23-36. Kelley and First Security agreed to three extensions of the closing date--twice after the agreed dates had expired--while First Security tried to remedy the problem. R. 19-21. In the meantime, the Armstrongs tore out water lines and cut off water to the property, causing the main pond

⁵ Leucadia states that the parties extended the closing date to April 20, 1987. Brief of Respondent at 4-5. In fact, that was the original closing date. See R. 18.

to dry up. R. 31, 45, 50-52. Throughout this period, First Security assured Kelley, who lived in Massachusetts, that it was taking care of the problems and that he did not need to hire an attorney. R. 289.

About the time the last extension was to expire, Leucadia entered the picture. It offered to purchase the property for more money, see R. 493, giving First Security a better deal than it had with Kelley and an easy way out of the lawsuit it had started to clear title. So on September 4, 1987, when Kelley was expecting the usual thirty-day extension, First Security wrote Kelley to say that he had until September 15 either to close or to "walk away from the deal." R. 115. First Security did not say that title to the property could not be insured.⁶ Nor did First Security say that it had done all it could reasonably be expected to do to try to clear title and had been unable to do so. Rather, First Security claimed it had "never viewed itself as having the obligation to clear title" and said it was simply "no longer desirous of pursuing the lawsuit with the Armstrongs." R. 115. First Security recognized that Kelley needed to review the legal issues involved "to make a fully informed judgment." It encouraged Kelley to obtain legal counsel and offered to cooperate with Kelley's chosen counsel. R. 115.

⁶ In fact, at the time the trial court entered its Partial Summary Judgment, R. 562, there was not even any evidence in the record of a preliminary commitment for title insurance.

In response to this letter, Kelley wired back, "Will not walk away. Based on history, need normal 30-day extension." R. 294. Kelley also retained counsel, who made an appointment with First Security's counsel to review the documents concerning the boundary and water problems, but First Security's counsel failed to keep the appointment. In fact, First Security did not provide Kelley with all the necessary documents until October 15, 1987. R. 283.

Because Kelley did not even receive First Security's September 4 letter until September 8, First Security extended its deadline to September 22, 1987. R. 117-18. At that time, Kelley had not seen any closing documents, had not been given the information necessary to evaluate the boundary and water problems and only knew that First Security claimed it had no obligation under the Agreement to try to remedy the problems.⁷

Under these circumstances, Kelley did the only thing he could do. On September 22, 1987, First Security's unilaterally imposed deadline, Kelley tendered his performance, "conditioned

⁷ First Security was also claiming that it would sell the property to Kelley "'as is' without warranty." R. 114, yet, even under First Security's definition of "as is," see supra, note 3, it was clear that First Security was not prepared to give Kelley the property in the condition it was in at the time the Agreement was made. At the time the Agreement was made, the property included a full trout pond. By September 22, 1987, the water to the pond had been cut off, and the pond had been emptied. See R. 50-52, 61.

only on First Security honoring its obligations pursuant to the Earnest Money Sales Agreement," R. 61, and he filed this action.

Leucadia now argues that, by asking First Security to clear title, as it had undertaken to do, Kelley somehow lost his right to buy the property. All the evidence shows that Kelley wanted to buy the property and refused to walk away from the deal. The evidence also shows that Kelley refused to accept First Security's unsupported assertion that it had no obligation to try to clear title or correct the problems relating to water rights and vandalism.

What this case comes down to is a dispute between the parties to a contract over their respective rights and obligations under the contract.⁸ It is undisputed that Kelley timely tendered his performance, "conditioned only upon First Security honoring

⁸ The Agreement was essentially a form contract, the relevant provisions of which had never been interpreted by Utah appellate courts. Leucadia claims that the parties "bargained for" its terms. Brief of Respondent at 5. With the exception of the provision that the property was to be sold "'as is' without warranty" and the provision requiring a current certified survey of the property, all of the terms Leucadia cites were part of a preprinted, standard form earnest money sales agreement approved by the Utah Real Estate Commission. The implication that, at the time they entered into the Agreement, the parties considered the problems that later arose and "bargained for" the remedies Leucadia claims are exclusive is belied by the testimony of Wayne L. Lantz, who negotiated the deal on behalf of First Security. Mr. Lantz testified that, had the parties "known of the ambiguity in the property description, we would not have signed the Earnest Money Agreement without specifically addressing that issue and thereby ensuring that Mr. Kelley understood that he was taking the property subject to the ambiguity in the description." R. 686 ¶ 10.

its obligations pursuant to the [Agreement] and delivering the property free from those defects which it has undertaken to cure." R. 61. First Security claimed it had no such obligation. Kelley thought it did. Consequently, he filed this action to ask the court to declare the parties' respective rights and obligations under the Agreement and to enforce the Agreement according to its terms.⁹ By filing this action, Kelley made an irrevocable election to enforce the Agreement. See Salt Lake City v. Industrial Comm'n, 81 Utah 213, 220-21, 17 P.2d 239, 242-43 (1932); Cook v. Covey-Ballard Motor Co., 69 Utah 161, 169, 253 P. 196 (1927); Howard v. J.P. Paulson Co., 41 Utah 490, 495, 127 P. 284 (1912). He paid his money into court and had no right to get it back.¹⁰ If Kelley was not entitled both to specific performance and to the other relief he sought, then the appropriate response would have been to deny Kelley the other relief. But

⁹ Leucadia claims that Kelley requested "an order of the Court that First Security was obligated to resolve the boundary dispute, repair or replace the property, and then convey the property to Kelley," Brief of Respondent at 10 (emphasis added), suggesting that Kelley would not take the property with the problems unresolved. In fact, Kelley's Complaint asked for a judgment interpreting the Agreement, R. 6-7, and "a decree of specific performance requiring First Security to convey the Subject Property to him as contracted in the [Agreement] as interpreted by the Court's Order." R. 7-8 (emphasis added). Clearly, if the court held that First Security had no obligation to remedy the problems, Kelley would have to take the property with the problems unresolved.

¹⁰ Thus, First Security suffered no damage as a result of Kelley's filing this action.

the parties settled their remaining claims, thereby mooting that issue.

Nevertheless, Leucadia would have this Court hold that, by asking a court to resolve the dispute, Kelley lost his right to enforce the Agreement. That has never been the law of this state, and the Court should not make it so now.

II.

KELLEY WAS NOT REQUIRED TO WAIVE TITLE DEFECTS BEFORE TENDERING HIS PERFORMANCE

Leucadia argues that Kelley's refusal to waive claims regarding title defects and property damage in his September 22, 1987, tender letter, caused the Agreement to terminate by its own terms. Leucadia relies primarily on paragraph H of the Agreement, regarding title insurance.¹¹ 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 en-

¹¹ Leucadia also mentions paragraph G. However, as the court of appeals correctly noted, paragraph G does not require the buyer to waive title defects. It merely gives him the option of terminating the agreement, and "Kelley refused to accept this option." Slip op. at 3.

cumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

R. 15.

Paragraph H was obviously meant for the buyer's benefit. If the buyer cannot obtain title insurance, paragraph H gives the buyer the option of waiving unexcepted defects and encumbrances or getting his earnest money back. The question is, When was Kelley required to make that election?

Under the terms of paragraph H, Kelley's alleged obligation to waive title defects or walk away from the deal could not even arise until there had been a preliminary commitment for title insurance that contained exceptions other than those provided for in a standard form ALTA title insurance policy. First Security introduced no evidence in the trial court of any preliminary commitment for title insurance, let alone a standard form ALTA policy, because it never claimed that paragraph H precluded Kelley's claim for specific performance. Because there was no evidence that paragraph H even applied, the trial court properly ignored paragraph H in holding that Kelley was entitled to specific performance.¹²

¹² Leucadia has not disputed the fact that there was never any showing--either before or after this action was filed--that any of the conditions precedent to Kelley's obligation to elect his remedy under paragraph H had been met. It simply claims that there was "no factual issue in that regard." Brief of Respondent at 40. That is because First Security, whose burden it was to prove that paragraph H applied, did not even argue

Even if Kelley were required to waive defects under paragraph H or walk away from the deal, Kelley was not required to make his election before September 22, 1987, when he elected to enforce the Agreement by filing this action.

Leucadia claims that First Security's letter of September 4, 1987, triggered Kelley's duty to elect under paragraph H.¹³ But that argument ignores the terms of that letter. First Security did not claim that its obligations were excused under paragraph H.¹⁴ It did not claim that it had tried to obtain a title insurance policy and that no policy could be issued without the standard exceptions. Nor did it claim that it had exercised reasonable diligence to clear title and had been unable to do so. It simply said it was "no longer desirous" of pursuing the actions it had already undertaken to correct the problems

that paragraph H applied, let alone introduce any evidence to show that it applied.

¹³ At one point, Leucadia suggests that Kelley was required to make an election once the title defects became known. Brief of Respondent at 26. But First Security's own actions belie this argument, since it waited more than four months after first discovering the problems and extended the closing date three times before it ever claimed that Kelley was required to close.

¹⁴ The only contract provision First Security even mentioned was the provision that the property was "sold 'as is' without warranty." Leucadia has not disputed that, as Kelley has shown, that provision referred to the physical condition or habitability of the property and not to any warranties of title. Compare Brief of Petitioner at 26-28, with Brief of Respondent at 30.

with the property and that it "never viewed itself as having the obligation to clear title." R. 114-15. That was insufficient to trigger Kelley's election of remedy under paragraph H.

Moreover, under any construction of paragraph H, Kelley was entitled to a reasonable time to evaluate his options and elect his remedy. The undisputed evidence showed that First Security's unilateral deadline of September 22, 1987, did not provide Kelley a reasonable time to make an informed decision. See infra pt. V.

But even if Kelley were required to waive title defects or walk away from the deal by September 22, 1987, as Leucadia claims, the evidence shows that Kelley unequivocally refused to walk away from the deal. Kelley responded to First Security's letter with a mailgram stating, "Will not walk away." R. 294. He did not accept First Security's offer to return his earnest money. R. 125. And on September 22, 1987, he tendered his performance¹⁵ and filed this action to specifically enforce the Agreement, thereby electing his remedy. See, e.g., Salt Lake City v. Industrial Comm'n, 81 Utah 213, 17 P.2d 239, 242-43 (1932). If Kelley's only options were to waive defects or walk away from the deal, he clearly chose not to walk away from the deal. One would have to conclude from this evidence that, as a

¹⁵ The sufficiency of Kelley's tender is discussed infra, pt. III.

matter of law, Kelley waived any defects or was estopped from claiming damages for defects.¹⁶

Leucadia argues that the September 22, 1987, letter from Kelley's counsel "was clearly and unequivocally a refusal to waive title defects." Brief of Respondent at 12. But the September 22 letter must be read in conjunction with First Security's letters of September 4 and September 17, which prompted the September 22 letter. The fact that Kelley asked First Security to deliver the property free from those defects it had undertaken to cure and to resolve the issue of water rights does not mean that Kelley refused to waive those defects. It merely means that he refused to waive them based solely on First Security's unilateral (and erroneous) assertion that it had no obligation under the contract to try to resolve the problems.

III.

KELLEY'S TENDER OF PERFORMANCE WAS NOT DEFECTIVE.

Leucadia next argues that Kelley's failure to make an unconditional tender of performance precludes specific performance. It claims that Kelley's tender was defective because it was conditioned on First Security undertaking obligations that

¹⁶ The proper response for First Security would then have been to ask the court to deny Kelley's claim for damages. But it did not. Instead, after the trial court granted Kelley specific performance and reserved the question of damages, First Security settled Kelley's damage claim, thereby mooting any question of whether Kelley was entitled to both specific performance and damages.

were not required by the Agreement. In fact, Kelley's tender letter states, "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." R. 61 (emphasis added). A tender conditioned only on the other party keeping its part of the deal 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. v. Smith, 637 P.2d 1020, 1023 (Wyo. 1981).

Leucadia claims that Kelley had no right to insist that First Security deliver title to the property free from the defects it had undertaken to cure because the Agreement did not set forth such an obligation. Similarly, Leucadia suggests that Kelley had no right under the Agreement to insist that First Security remedy any property damage caused by vandalism.¹⁷ But

¹⁷ Paragraph P of the Agreement states:

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 between 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

a contracting party has obligations in addition to those expressly set forth in the contract. An obligation of good faith and fair dealing "adheres in every contractual relation." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 306 (Utah 1982). 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). Similarly, First Security had an implied contractual obligation to act in good faith to try to remedy any property damage.

Before the provisions of paragraph H and P could apply, First Security was required to show that it had met its implied

ten percent (10%) of the purchase price and 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.

R. 17. Leucadia admits that paragraph P "does not clearly state the remedy available to a purchaser in the event the seller refuses to repair or replace property damage caused by vandalism." Brief of Respondent at 12 n.3. Leucadia claims, however, that "the only reasonable interpretation of the Paragraph is that the Agreement terminates unless the purchaser waives property damage claims." Id. In other words, under "the only reasonable interpretation" of paragraph P, even though the seller bears all risk of loss before closing, simply by not agreeing in writing to repair or replace damaged property, the seller can avoid the sale or deprive the buyer of any remedy for property damage, no matter how minor. Kelley interpreted the Agreement differently.

obligation of good faith and fair dealing. First Security did not claim that it had met this obligation. It simply claimed it had no obligation to try to clear title and implied it had no obligation to do anything about any property damage. The "condition" that Kelley placed on his tender merely showed that he did not accept First Security's verdict that it had no obligation to do anything about the title problems and vandalism, nor was Kelley required to accept First Security's declaration of its own obligations under the Agreement. See, e.g., Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974); Yost Farm Co. v. Cremer, 152 Mont. 200, 447 P.2d 688, 692 (1968).

IV.

KELLEY'S TENDER OF PERFORMANCE WAS EXCUSED.

Kelley has argued that any alleged defect in his tender is irrelevant because his tender was excused. The law is clear that, where a contract contemplates simultaneous performance by both parties, such as a contract for the sale of real estate, neither party can be in default until the other party has tendered his performance. Century 21 All Western Real Estate & Investment, Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982) (citation omitted). First Security never properly tendered its performance and in fact repudiated its obligations under the Agreement, thereby excusing Kelley's tender. Brief of Petitioner at 23-32.

Leucadia argues that First Security's tender was not required because First Security was not the one seeking to enforce the Agreement, Kelley was. Yet Leucadia claims that First Security's September 4 letter required Kelley to elect between waiving defects or walking away from the deal. So under Leucadia's own theory, by trying to trigger Kelley's alleged duty to elect, First Security was trying to enforce the Agreement, that is, to cause its alleged election of remedy provision to take effect.

Leucadia also argues that First Security did not repudiate its obligations under the Agreement because the Agreement did not expressly require First Security to clear title. But the contractual obligation to convey clear title carries with it the implied obligation to clear title if it can be done in the exercise of reasonable diligence. Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1975); Langston v. Huffacker, 36 Wash. App. 779, 678 P.2d 1265, 1271 (1984).¹⁸ Leucadia tries to distinguish Langston on the grounds that the court "essentially concluded" that the seller had acted in bad faith in not clearing title. Brief of Respondent at 28. In fact, the trial court in

¹⁸ First Security never claimed it had met its obligation. It claimed it had no obligation and was simply not interested in pursuing the Armstrong action. First Security's lack of interest at best constituted subjective impossibility, which did not excuse it from conveying clear title. Carcione v. Clark, 96 Nev. 808, 618 P.2d 346, 348 (1980).

that case made a factual finding that failure of the sale to close by the closing date was the fault of the closing agent "if there were fault" and not the fault of the seller.¹⁹ 678 P.2d at 1269. The Washington Court of Appeals did not disturb this factual finding, but rejected the trial court's conclusion that any fault of the closing agent was not attributable to the seller. The court of appeals concluded that the trial court's "unchallenged" findings of fact established that "diligent attention by [the seller] to her duty to clear her title . . . would have made it possible to close the transaction" by the closing date. Id. at 1271; see also id. at 1268. Thus, Langston was decided on the basis of findings of fact--findings that were not made in this case because First Security never claimed that it had satisfied its duty to clear title; it simply claimed it had no such duty.

On its facts, this case is much closer to Ace Realty, which Leucadia has not tried to distinguish. The seller in that case failed to obtain a quitclaim deed necessary to clear title. The court held that the seller's failure to obtain the quitclaim deed did not excuse his obligation or preclude the buyer from obtaining specific performance. The court noted that the seller based its actions "not on the ground of inability, but upon the

¹⁹ The trial court also made a finding of fact that the seller's title could have been cleared by the closing date. 678 P.2d at 1269.

contention that the purchaser had lost the right to enforce the contract." 531 P.2d at 1380. Similarly, in this case, First Security did not claim it was unable to clear title but simply that it had no obligation to do so. The Oklahoma court rejected such an argument, noting that it "would give the vendor the potential right and power to take advantage of his own wrong." Id. at 1381. By the same token, First Security should not have been the final arbiter of its obligations under the Agreement. Kelley was entitled to ask a court whether First Security had an obligation to try to clear title and whether or not it had complied with its obligations under the Agreement.

Leucadia also argues that there was no indication that First Security was the cause of the problems or acted in bad faith and that, in fact, First Security did exercise reasonable diligence to clear title and was unable to do so. On the other hand, there was no evidence that First Security had exercised reasonable diligence to clear title and was unable to do so. The only evidence was that First Security had undertaken an action to correct the problems and then decided it was "no longer desirable" of pursuing the action. First Security did not claim that it had exercised reasonable diligence to clear title; it simply claimed it never had any obligation to try to clear title. In other words, it repudiated its implied contractual obligation of good faith and fair dealing, thereby excusing Kelley's tender.

See, e.g., Reed v. Alvey, 610 P.2d 1374, 1379 (Utah 1980); Huck v. Hayes, 560 P.2d 1124, 1126 (Utah 1977).

Finally, Leucadia argues that, even if Kelley's tender was excused, he was still required to make an election and that the September 22 letter showed he elected to refuse to waive title defects. Apart from the fact that there was no evidence that Kelley's alleged duty to elect ever arose, see supra pt. II, that argument ignores the fact that, the same day Kelley's counsel sent the letter, he also filed this action asking the court to declare the parties' rights and obligations under the Agreement and to enforce the Agreement according to its terms. By filing this action, Kelley made an election. He elected not to terminate the Agreement but to enforce it. It was for the court--not First Security--to say whether the "as is" provision (the only provision First Security relied on) required Kelley to waive title defects before enforcing the Agreement.

V.

KELLEY WAS ENTITLED TO A REASONABLE TIME WITHIN WHICH TO PERFORM, AND HE TENDERED HIS PERFORMANCE WITHIN A REASONABLE TIME.

Leucadia claims that the "time of the essence" clause of the Agreement caused the Agreement to terminate by its own terms on September 22, 1987, precluding specific performance. That provision states:

In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, 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 is 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.

R. 17 ¶ Q.

Paragraph Q makes time of the essence only after there has been a delay in closing due to some force majeure. There was no such occurrence in this case. Therefore, the "time is of the essence" provision did not apply.

Even if the Agreement made time of the essence, the parties waived that requirement by their conduct. They repeatedly extended the closing date, twice after it had already expired. Even First Security did not treat the Agreement as if it had expired on August 31, 1987, the last agreed closing date. Under these circumstances, any requirement that time was of the essence was waived. E.g., Huck v. Hayes, 560 P.2d 1124, 1126 (Utah 1977); Schwoyer v. Fenstermacher, 251 Pa. Super. 243, 380 A.2d 468, 470 (1977); Cline v. Hullum, 435 P.2d 152, 156 (Okla. 1967). The contract therefore continued in effect. Century 21 All Western Real Estate & Investment, Inc. v. Webb, 645 P.2d 52, 55

(Utah 1982). First Security could thereafter make time of the essence, but it was required to give Kelley a reasonable time within which to perform. Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980). And the evidence was undisputed that September 22, 1987, did not give Kelley a reasonable time. See R. 278-80.

Leucadia argues that First Security's repeated extensions of the closing date (twice after the date had passed) did not waive the time of the essence provisions of the Agreement. Even if this argument were correct, First Security still waived the time of the essence provision by its conduct after September 4, 1987. As First Security recognized, before Kelley could make an informed decision with respect to the property, he needed to consult with counsel about the boundary and water problems. R. 115. Despite First Security's offer to cooperate with Kelley's counsel, id., it is undisputed that First Security failed to keep its appointment to discuss the problems with Kelley's counsel and did not give Kelley's counsel all the documents he needed to evaluate the problems until October 15, 1987, R. 283, well after its unilaterally imposed deadline of September 22, 1987. Thus, the Agreement did not expire on September 22, 1987, as Leucadia claims.

Finally, even if September 22, 1987, were the bewitching hour, Kelley took appropriate action on September 22, 1987: He

tendered his performance (conditioned only on First Security fulfilling its part of the deal),²⁰ and he filed this action to enforce the Agreement according to its terms.

VI.

THE COURT OF APPEALS ERRED IN DIRECTING THAT
JUDGMENT BE ENTERED IN FAVOR OF LEUCADIA.

Leucadia argues that the court of appeals properly directed that judgment be entered for Leucadia because there were no factual disputes to be resolved on remand. Kelley agrees that there were no factual disputes before the trial court that would have precluded summary judgment for Kelley. But the court of appeals reversed that summary judgment based on a contract provision that was never raised in the trial court. If the court of appeals properly decided the appeal based on paragraph H, then there existed disputed factual issues that precluded entry of judgment in favor of Leucadia.

Leucadia claims that there was no factual dispute that title was not insurable. In fact, there was no evidence with respect to title insurance at all--no preliminary commitment,

²⁰ As shown supra, pt. III, Kelley's tender was not defective because conditional. The only "condition" he imposed was that First Security comply with its obligations under the Agreement. It was only because First Security insisted it had no obligation that Kelley had to file this action.

no title insurance policy and no ALTA standard form.²¹ See supra pt. II. For that reason alone, the court of appeals erred in directing judgment for Leucadia.

Leucadia also claims that there was no question that Kelley refused to waive title defects. Waiver is generally a question of fact or at least a mixed question of law and fact. See Loftis v. Pacific Mut. Life Ins. Co., 38 Utah 532, 553, 114 P. 134, 139 (1911). The only evidence was that Kelley refused to walk away from the deal or to accept First Security's assertion that it had no obligation to try to clear title. See R. 279. That is not the same as a refusal to waive title defects. If Kelley were required to waive title defects (and there was no evidence before the trial court that he was), the evidence as to whether or not he refused to waive defects was at best ambiguous, precluding judgment for Leucadia.

Finally, by deciding the appeal based on a contract provision not raised below, the court of appeals deprived Kelley of any opportunity to present defenses to paragraph H, for example, to show that First Security waived or was estopped from relying on the provisions of paragraph H, which would also have presented fact questions.

²¹ Title could be insurable if, for example, there was a title insurance company that was willing to insure over any problem.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the judgment of the district court affirmed.

DATED this 22nd day of March, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Petitioner's Reply Brief were mailed, postage prepaid thereon, this 22nd day of March, 1991, to:

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