

2015

**New York Ave., LLC, a Utah Limited Liability Company, Plaintiff, v.
David D. Harrison, and Individual, and Jan C. Harrison, and
Individual, Defendants : Brief of Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NEW YORK AVE., LLC, A Utah
limited liability company,

Plaintiff,

v.

DAVID D. HARRISON, an individual,
and JAN C. HARRISON, an individual,

Defendants.

Case No.: 20140719

(Appeal from the Fourth District
Court, Utah County, Judge David
Mortensen)

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FILED
UTAH APPELLATE COURTS

MAR 19 2015

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this case pursuant to Utah Code section 78A-3-102(j). Pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure, this matter was transferred to the Utah Court of Appeals for disposition.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Whether the district court erred in holding that NYA did not violate the covenant of good faith and fair dealing when it exercised its discretion under the REPC to extend the closing date indefinitely in disregard of Defendants' justified expectations and the agreed common purpose of the contract. The Court reviews the district court's "interpretation of a contract" for "correctness." *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134. This issue was preserved in the Harrisons' motion for summary judgment filed on November 8, 2011 (R. 110-80), and reply thereto (R. 229-65), and in their motion to reconsider filed on January 22, 2013 (R. 543-81), and reply thereto (R. 662-71).

ISSUE NO. 2: Whether the district court erred in holding that the Harrisons breached the REPC by refusing NYA's tender of payment which was conditioned on Defendants' acceptance of NYA's disputed interpretation of the REPC, including acceptance of terms not found in the REPC itself. The Court reviews the district court's "interpretation of a contract" for "correctness." *Green River Canal Co.*, 2003 UT 50, ¶ 16. The Court also reviews the district court's interpretation of a statute for correctness. *Gillmor v. Summit Cnty.*, 2010 UT 69, ¶ 16, 246 P.3d 102. This issue was preserved in the Harrisons' opposition to NYA's partial motion for summary judgment, filed February 24, 2012 (R.

325-51), and in their motion to reconsider filed on January 22, 2013 (R. 543-81), and reply thereto (R. 662-71).

ISSUE NO. 3: Whether the district court erred in holding that NYA was not required to perform its obligations under the REPC within a reasonable time. The Court reviews the district court's "interpretation of a contract" for "correctness." *Green River Canal Co.*, 2003 UT 50, ¶ 16. This issue was preserved in the Harrisons' motion for summary judgment filed on November 8, 2011(R. 110-80), and reply thereto (R.229-65), and in its opposition to NYA's motion for summary judgment, filed February 24, 2012 (R. 325-51).

ISSUE NO. 4: Whether the district court erred in holding that NYA did not breach the REPC as a matter of law by failing to make unconditional Extension Payments and failing to close on the Property. The Court reviews the district court's "interpretation of a contract" for "correctness." *Green River Canal Co.*, 2003 UT 50, ¶ 16. This issue was preserved in the Harrisons' motion for summary judgment filed on November 8, 2011(R. 110-80), and reply thereto (R. 229-65), and in their motion to reconsider filed on January 22, 2013 (R. 543-81), and reply thereto. (R. 662-71).

DETERMINATIVE PROVISIONS AND STATUTES

Utah Code Ann. § 78B-5-802. Tender – Offer in writing sufficient – Objection – Must be specific or waived.

- (1) An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.
- (2) The person to whom a tender is made shall, at the time, specify any objection to the money, instrument, or property, or it is considered waived.
- (3) If the objection is to the amount of money, the terms of the instrument or the amount or kind of property, the person shall specify the amounts, terms, or kind which is

required, or be precluded from objection afterwards.

(A copy of the statute is attached to the Addendum as Exhibit 1.)

STATEMENT OF THE CASE

This suit arises out of a dispute over the interpretation of a real estate purchase contract. The Harrisons, an elderly couple seeking money to fund their retirement, own 20.27 acres of real property located at approximately 950 West 700 South in the city of Springville, Utah County, Utah (the “Property”).¹ Plaintiff, New York Ave., LLC (“NYA”), a real estate investor with hopes to develop the Property, and the Harrisons entered into a Real Estate Purchase Contract (“REPC”) in November 2006. The REPC permitted NYA to exercise its “discretion” to extend the closing date from the agreed upon October 31, 2007, for thirty days at a time by paying \$6,250 in interest-free payments toward the purchase price to the Harrisons each month it extended (“Extension Payments”).

Unhappy with market conditions and the development potential of the Property, NYA sought to exercise its discretion under the REPC to convert the *purchase* contract into an indefinite-term option contract or interest-free seller-financed purchase. After delaying its purchase of the property for nearly two years beyond the original closing date and doing nothing to develop the Property within the previous year, NYA balked when the Harrisons requested that they purchase the Property within a reasonable time, set a date that they believed was reasonable, and invited a discussion with NYA about when a

¹ During the pendency of this case, Mrs. Harrison passed away.

reasonable time might be. NYA maintained that it had no obligation to purchase the Property within a reasonable time, either under the covenant of good faith and fair dealing or the common-law rule that contracts be performed within a reasonable time. After the commencement of this action, NYA purported to make the August 2009 Extension Payment (the “Disputed Extension Payment”) on the condition that the Harrisons accept NYA’s interpretation of the contract. This was an inappropriate use of the tender rule to attempt to bully the Harrisons into giving up their rights under the REPC. After the Harrisons returned the Disputed Extension Payment and expressed a continued willingness to accept unconditional tender, NYA did not withdraw its conditions and did not tender any additional Extension Payments thereafter.

On summary judgment, the district court ruled that the Harrisons did not anticipatorily breach the REPC by requesting that NYA close on the Property within a reasonable time. The district court further ruled that NYA was not required to perform under the REPC within a reasonable amount of time, that NYA did not violate the covenant of good faith and fair dealing by extending the closing indefinitely or by making the Disputed Extension Payment conditioned on the Harrisons accepting its interpretation of the REPC, and that the Harrisons breached the REPC by refusing the Disputed Extension Payment, which the district court characterized as “valid tender.” The district court denied the Harrisons motion to reconsider this ruling.² After another

² Copies of the Ruling and Order are attached to the Addendum respectively as Exhibits 2 and 3.

round of summary judgment briefing on damages, which the Harrisons appealed in part but are not pursuing, the district court entered final judgment against the Harrisons, which it modified in its ruling on NYA's subsequent Rule 60(b) motion. This appeal followed.

FACTUAL BACKGROUND

A. The Parties Enter Into the Real Estate Purchase Contract and Addenda

1. The Harrisons own 20.27 acres of real property located at approximately 950 West 700 South in the city of Springville, Utah County, Utah (the "Property"). (R. 40, ¶ 7.)

2. On November 10, 2006, NYA and the Harrisons entered into a Real Estate Purchase Contract for Land ("REPC") to purchase the Property. (R. 40, ¶ 8; Real Estate Purchase Contract for Land ("REPC"), attached to the Addendum as Exhibit 4.)

3. NYA's purchase of the Property was conditioned on its approval of a physical condition inspection of the Property, a survey, and approval of laws, ordinances, regulations, and deed restrictions. (R. 29, ¶ 8; REPC ¶ 8.) In order to object to the Property and modify the REPC on these grounds, NYA was required to notify the Harrisons of its objections within 90 days of November 22, 2006. (R. 24, ¶ 11; Addendum No. 1 to Real Estate Purchase Contract ("REPC Addendum No. 1") ¶ 11, attached to the Addendum as Exhibit 5.)

4. After the Due Diligence Deadline, the earnest money was dispersed to the Harrisons and became “non-refundable thereafter if Buyer fails to close for any reason.” (R. 24, ¶ 9; REPC Addendum No. 1 ¶ 9.)

5. Addendum No. 1 set settlement for 180 days from the date of the fully executed contract and permitted NYA to pay \$12,500 per month in “non-refundable earnest money” to extend the contract beyond that date. (R. 24, ¶¶ 3, 10; REPC Addendum No. 1 ¶¶ 3, 10.)

6. On or about November 22, 2006, the parties entered into a second addendum modifying the earlier agreement (“Addendum No. 2”). (R. 39, ¶ 15; Addendum No. 2 to Real Estate Purchase Contract (“REPC Addendum No. 2”) ¶ 15, attached to the addendum as Exhibit 6.) This addendum, among other things, extended closing to October 31, 2007, reduced the Extension Payments to \$6,250 per month, and required the Harrisons to include 20.27 water shares with the purchase. (R. 21, ¶¶ 1-5; REPC Addendum No. 2 ¶¶ 1-5.)

7. Between the contract date and closing, the Harrisons agreed that they would not change the leases, alter or improve the property, or financially encumber the property. (R. 28, ¶ 12; REPC ¶ 12.) The Harrisons were also required to pay taxes and other carrying costs during the time the Property was under contract. (R. 28, ¶ 10.1; REPC ¶ 10.1.)

8. The REPC, addenda, exhibits, and seller’s disclosures constitute the “entire” contract between the parties and can only be changed “by written agreement of the parties.” (R. 28, ¶ 14; REPC ¶ 14.)

9. Time is of the essence in performance of obligations under the REPC. (R. 27, ¶ 21; REPC ¶ 21.)

B. NYA Delays Closing on the Property for Nearly Two Years

10. About two months after the parties entered into the REPC, on January 30, 2007, NYA owner Steven Kelly wrote a letter to the Harrisons informing of them of a problem connecting the Property to the Springville sewer system. He further stated

It looks like I won't be able to develop the property until mid-2008 at the earliest. However, I like the property and want to continue the contract as it is currently written. . . . On October 31st I will start making the monthly payments to you that we agreed upon until I close on the property, which will be when the sewer trunk line is installed and I can get the necessary approvals from the city to develop.

(R. 151-52.)

11. The information contained in the January 30, 2007 letter, which was sent nearly two months after the parties entered into the REPC, was never added to the REPC or agreed to by the Harrisons. (*See generally* REPC.)

12. On September 19, 2007, Mr. Kelly wrote a letter to the Harrisons updating them on his progress in developing the Property. Specifically, he informed them that he had found a way to work around the problem with connecting to the Springville sewer system. He further stated, "I will be paying the extension fees as outlined in the purchase contract until I close. *It shouldn't be too far into the future.*" (R. 149-50. (emphasis added.))

13. In early 2008, Mr. Kelly unsuccessfully attempted to get approval from Springville City to work around the sewer trunk line issue. (R. 141.) Mr. Kelly did not attempt to receive sewer approval thereafter. (R. 137, 127.)

14. In April 2008, Mr. Kelly disclosed to his site engineer Brian Gabler that “[W]e are holding off pursuing this at the current time.” (R. 126.)

15. On March 5, 2009, frustrated with NYA’s lack of progress toward purchasing the Property, the Harrisons requested NYA close on the property no later than August 5, 2009, nearly two years after the original closing deadline, on the grounds that under Utah common law, agreements that do not specify a time for performance must be performed within a reasonable amount of time, and that NYA’s failure to close violated the covenant of good faith and fair dealing. (R. 124-25 (a copy of the Letter from S. Newman to K. Kelly, dated March 5, 2009 (“March 5 Letter”) is attached to the addendum as Exhibit 7).); *see also Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 858 (Utah 1998). The Harrisons invited NYA to propose “a reasonable settlement deadline.” (R. 124-25; March 5 Letter.)

16. The district court specifically held that the March 5 Letter and the Harrisons’ legal position that NYA was required to perform in a reasonable time was not an anticipatory breach of the REPC, and this ruling has not been appealed. (R. 391.)

C. The Parties Commence Litigation

17. On June 22, 2009, NYA brought claims against the Harrisons for rescission, breach of contract, and declaratory judgment. (R. 21-41.) The Harrisons

counterclaimed for breach of contract and breach of the covenant of good faith and fair dealing on the grounds that NYA failed to close within a reasonable time. (R. 42-58.)

18. NYA continued to make unconditional Extension Payments under the REPC in June and July 2009, which the Harrisons accepted. The Harrisons did not sell or attempt to sell the Property to any other purchaser, and therefore complied with their obligation under the REPC.

19. Two months after litigation commenced, on August 31, 2009, NYA purported to make an Extension Payment (the "Disputed Extension Payment"). The Disputed Extension Payment was accompanied by a three-page letter from NYA's counsel outlining NYA's interpretation of the REPC (the "August 31 Letter"). (R. 116-18 (a copy of the Letter from K. Kelly to M. Gaylord et al., dated August 31, 2009 ("August 31 Letter") is attached to the addendum as Exhibit 8).) It made acceptance of the Disputed Extension Payment contingent on the Harrisons' acceptance of NYA's interpretation as set forth in the Amended Complaint. (R. 116-18; August 31 Letter.)

20. In the August 31 Letter, NYA set forth its understanding of the terms of the REPC as follows:

(a) The purchase price for the property was based on the assumption that it could be developed as single family residential that would maximize the development potential of the land based on the zoning laws in place that govern the subject property. With the lack of sewer capabilities, and through further information garnered through the development process that showed insufficient storm drainage capacity, the property could not (at the time) be developed to its maximum potential.

(b) The ability to postpone closing on the property until it could be developed to its maximum potential was crucial to my clients.

Accordingly, Extension Payments were “a credit towards the purchase price” of the property as stated in the REPC and was in no way to be considered “rent” or an interest payment.

(c) The closing deadline was being extended and the Extension Payment reduced in part to account for the fact that, since the sewer was not readily available, it might be some time before the property could be developed as anticipated.

(d) The REPC could be extended, at [NYA’s] discretion as stated in the REPC, to allow for the property to be developed to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinance of Springville City and existing market conditions.

(R. 116-17; August 31 Letter at 2-3.)

21. The August 31 Letter concluded:

By negotiating this \$6,250 check, you are agreeing with my client that it is entitled under the REPC to make these payments in order to postpone closing in accordance with the express terms of the REPC until it is economically feasible to move forward with a residential development of the property as discussed above, including in paragraphs (a) through (d).

(R. 116; August 31 Letter at 3.)

22. The conditions set forth in the August 31 Letter were not part of the express terms of the REPC. Had the Harrisons accepted the conditions they would have waived their pending claims for breach of the REPC for failure to close within a reasonable time and of the implied covenant of good faith and fair dealing for exercising discretion under the REPC to deprive the Harrisons of the benefit of their bargain. Utah Code Ann. 78B-5-802(3).

23. In response to NYA’s conditional tender of the Disputed Extension Payment, the Harrisons, through counsel, informed NYA that its “attempt to modify the

terms of the [REPC] and to make the negotiation of the monthly check conditioned upon your client's unilateral and unexpressed intentions and 'understanding' is not only inappropriate, but constitutes a further breach of the parties' [REPC.]" (R. 114-15³ (a copy of the Letter from J. Boren to K. Kelly, dated September 2, 2009 ("September 2 Response") is attached to the addendum as Exhibit 9).) They further informed NYA that they would "continue to accept the monthly checks so long as you withdraw your inappropriate conditions." (R. 114-15; September 2 Response.)

24. NYA refused to withdraw its inappropriate conditions and made no more Extension Payments under the REPC, nor did it purchase the Property.

25. In late 2011 and early 2012, the Harrisons and NYA cross-moved for summary judgment on all claims. Specifically, on November 8, 2011, the Harrisons filed a motion for summary judgment. (R. 110-80.) NYA opposed the motion on December 7, 2011 (R. 192-224), and Harrison replied on December 19, 2011 (R. 229-65). NYA filed a cross-motion for partial summary judgment on January 9, 2012. (R. 290-319.) The Harrisons opposed the motion on February 24, 2012 (R. 325-51), and NYA replied on March 8, 2012 (R. 352-82).

26. On June 14, 2012, the Court issued a Ruling on Cross Motions for Summary Judgment ("Ruling"). (R. 384-401.) The Harrisons appeal this Ruling and related Order, which held among other things, that:

³ The second page of the September 2 Response letter was not labeled in the record by the lower court, thus references to the letter shall be to R. 114-15.

(a) Because NYA could extend the contract at its discretion, it did not deprive the Harrisons of the fruit of the contract when it exercised its discretion. (R. 387-88.)

(b) NYA was not required to purchase the Property within a reasonable time because the REPC permitted it to exercise its discretion to extend closing indefinitely. (R. 386-87.)

(c) The Disputed Extension Payment constituted valid tender because the letter accompanying the payment contained only conditions the Harrisons had agreed to when they permitted NYA to extend closing at its discretion. (R. 389-91.)

SUMMARY OF ARGUMENT

The district court's summary judgment ruling should be reversed. NYA effectively sought to transform the REPC into a long-term financing agreement, which was not contemplated by the parties, and inappropriately used the tender rule to pressure the Harrisons into accepting this modification. NYA breached the REPC by exercising its discretion under the contract to deprive the Harrisons of the benefit of the bargain—the sale of the property—and refusing to purchase the Property within a reasonable time, as required by Utah law. NYA further breached the contract by failing to make the August extension payment and failing to close within 30 days of its last Extension Payment, as required by the REPC. Conversely, the Harrisons never breached the REPC. They at all times remained willing to accept Extension Payments while the parties litigated the interpretation of the REPC, only refusing to accept the Disputed Extension

Payment, which would have required them to accept NYA's interpretation of the REPC, essentially ending the litigation in NYA's favor without allowing a court to adjudicate the dispute. The refusal of the Disputed Extension Payment under the circumstances here was not a breach of the REPC, let alone a material breach. Accordingly, this Court should reverse the district court's grant of summary judgment in favor of NYA and against the Harrisons.

ARGUMENT

I. NYA VIOLATED THE COVENANT OF GOOD FAITH AND FAIR DEALING BY USING ITS DISCRETION UNDER THE TERMS OF THE REPC TO DEPRIVE THE HARRISONS OF THE BENEFIT OF THE BARGAIN

The district court incorrectly ruled that because the REPC gave NYA "sole discretion" to extend the closing deadline indefinitely by making an Extension Payment, that it could exercise its discretion in a way that deprived the Harrisons of the benefit of the parties' bargain—the sale of the Property. (R. 387.) Specifically, it held that because the contract permitted NYA to "pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline," which was left to NYA's "sole discretion," that requiring NYA to close in a reasonable amount of time would be inconsistent with an express term of the contract. (R. 392-93, 387.) It also held that there were disputed issues of fact about the parties' justified expectations. (R. 387.) Both rulings were in error: an express grant of discretion does not abrogate the covenant of good faith and fair dealing, and the undisputed facts demonstrate that at the time the

parties entered into the REPC, they anticipated that NYA would purchase the Property within a reasonable time.

Under the covenant of good faith and fair dealing, parties to a contract agree “not to intentionally do anything to injure the other party’s right to receive the benefits of the contract.” *Markham v. Bradley*, 2007 UT App 379, ¶ 18, 173 P.3d 865. An explicit statement giving NYA “discretion” does not remove the covenant of good faith and fair dealing from the contract, but instead amplifies the duty. *See Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶ 19, 84 P.3d 1154 (“[W]here one party has discretion over another according to the terms of a contract, that party must act with good faith and fair dealing.”); *Cook Assocs. v. Utah Sch. & Inst. Trust Lands Admin.*, 2010 UT App 284, ¶ 27, 243 P.3d 888. Indeed, “[t]he degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms.” *Markham*, 2007 UT App 379 ¶ 21 (quoting *Smith*, 2003 UT 57, ¶ 20). When “express contract terms” do not limit a party’s exercise of discretion, the covenant of good faith and fair dealing is paramount. *Id.* While the covenant of good faith and fair dealing cannot create “obligations inconsistent with express contractual terms,” it can fill in the gaps in a contract with terms “the parties would doubtless have adopted if they had thought to address [them] by contract,” so that one party cannot run amok with the discretion granted to it under the terms of the contract. *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 10, 266 P.3d 814 (internal quotations omitted).

Courts have frequently implied a “reasonableness” limitation on the exercise of contractually permitted discretion. In *Markham*, the court supplied an “objective standard of reasonableness” to a seller’s discretion to cancel a real estate purchase contract if it disapproved of the buyer’s financial information. *Markham*, 2007 UT App 379 ¶ 22. The court noted that without an objective reasonableness standard governing the seller’s discretion, the seller’s promise to sell the Property would be “illusory.” *Id.* ¶ 23. Similarly, in *Cook Assoc.*, a clause in a lease agreement gave the landlord “sole discretion” to raise rents every five years as the landlord deemed “reasonably necessary.” *Cook Assoc.*, 2010 UT App 284, ¶¶ 18, 27. The court held that because of the explicit grant of discretion to the landlord, the covenant of good faith and fair dealing served “to protect the other party from an inappropriate exercise of that discretion.” *Id.* ¶ 27. Because the contract imposed no “agreed formula” or “express standard,” the landlord was required to exercise its discretion “reasonably within the contemplation of the parties” in accordance with their “purpose, intentions, and expectations” when it raised rent. *Id.* ¶¶ 28-29.

Here the Real Estate **Purchase** Contract gave NYA “sole discretion” with respect to when the closing would take place. Although NYA was required to pay additional money toward the purchase of the Property in order to secure an extension of the settlement deadline, there was no stated contractual limit on the number of times NYA could extend the deadline. Accordingly, the covenant of good faith and fair dealing required NYA to exercise its discretion “reasonably within the contemplation of the parties” in accordance with their “purpose, intentions, and expectations.” *Cook Assocs.*,

2010 UT App 284, ¶¶ 28-29; *see also Markham*, 2007 UT App 379, ¶ 21 (“Where the contract allows discretion but does not provide any express standard for exercising that discretion, the covenant imposes an objective standard of reasonableness.”). It is undisputed that the parties entered into a purchase contract (as opposed to an option contract or a seller-financed transaction), that NYA informed the Harrisons on several occasions that it would close within a relatively short period of time, and that the parties never agreed that closing could be postponed on the basis of the availability of the sewer line or the economic feasibility of development of the Property. Extending the closing for nearly two years beyond the parties’ originally agreed-upon deadline deprived the Harrisons of the fruits of the contract in violation of the covenant of good faith and fair dealing as a matter of law. Taken to its extreme, this interpretation permits NYA to pay \$6,250 per month interest-free until it pays off the Property in approximately *forty years*.⁴ Given the fact that the REPC is a purchase contract, the age of the Harrisons, and the communications between the parties, such an interpretation is far outside the contemplation of the parties when they entered the REPC. Accordingly, this Court should reverse the district court’s grant of summary judgment in favor of NYA and enter summary judgment for the Harrisons. Alternatively, the Court should reverse the district court and remand for a determination of whether NYA’s conduct in extending closing for

⁴ Had NYA obtained a \$3,000,000 loan amortized over 40 years, his payments would have been approximately \$17,563.70 per month at a 6.5% interest rate. The present value of \$3,000,000 paid over 40 years with a 6.5% rate of return is \$291,666.56.

nearly three years beyond the original contract date and two years beyond the original closing date was at odds with the parties' justified expectations.

II. NYA WAS REQUIRED TO PURCHASE THE PROPERTY WITHIN A REASONABLE AMOUNT OF TIME

When a contract does not specify a time for performance, “the law implies that it shall be done within a reasonable time under the circumstances.” *Coulter & Smith*, 966 P.2d at 858; *see also Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 27, 71 P.3d 188; Restatement (Second) of Contracts § 204 (1981) (“When the parties to a . . . contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”). “An implied reasonable time limit is as much a part of the agreement as those terms that are expressed.” *Coulter & Smith*, 966 P.2d at 858. If the reasonable time for performance under a contract is clear based on the undisputed facts, the Court may rule as a matter of law. *See IHC Health Servs. v. D&K Mgmt, Inc.*, 2008 UT 73, ¶ 19, 196 P.3d 588 (holding that the district court may resolve fact-dependent questions on summary judgment under appropriate circumstances); *Contimortgage Corp. v. Mortgage Am., Inc.*, 47 F. Supp. 2d 575, 578 (E.D. Pa. 1999) (“[T]he court may decide what is a reasonable time as a matter of law . . . where the time taken is clearly reasonable or unreasonable that there can be no question of doubt as to the proper answer to the question.”).

Here, the REPC stated a settlement deadline of October 31, 2007, but granted “sole discretion” to NYA to extend that deadline an indefinite number of times in 30-day increments. The district court incorrectly ruled that because NYA extended the

unspecified closing deadline each time it made earnest money payments to the Harrisons, that the REPC included a specific time for performance term of payment date plus 30 days. (R. 393-94.) On this ground, it declined to hold that NYA had an obligation to close on the Property within a reasonable time. But the fact that NYA had to fulfill a condition to maintain its indefinite time for performance does not somehow make the time for performance definite. Under the district court's interpretation, without a reasonableness term, NYA would be able to make interest-free payments on the property for forty years. During this time, the Harrisons would not be permitted to alter the Property in any way or to financially encumber it and would bear all costs of ownership. It is for situations like this that the law supplies a reasonableness term for time for performance, which the Court should supply here.

NYA's failure to close on the Property by August 5, 2009, can be determined as a matter of law based on the following undisputed material facts: (1) The parties agreed to a closing date of October 31, 2007 (Factual Background ¶ 6), with an unspecified number of extensions thereafter; (2) In September 2007, NYA indicated to the Harrisons that closing "shouldn't be too far into the future" (*id* ¶ 12); (3) NYA did not seek to terminate or alter the contract during the Due Diligence Period to account for any kinks in its development plan ; (4) The Harrisons notified NYA on March 5, 2009, that August 5, 2009 was a reasonable time for performance, which gave NYA five months to pull together the necessary financing to close on the Property (*id* ¶ 15); and (5) the parties agreed that time was of the essence in the performance of the REPC (*id* ¶ 12).

Accordingly, this Court should reverse the denial of the Harrisons' motion for summary

judgment that NYA failed to close within a reasonable time. Alternatively, the Court should remand this case to the district court for a factual determination of a reasonable time to perform.

III. THE DISPUTED EXTENSION PAYMENT WAS NOT VALID TENDER

Because NYA's Disputed Extension Payment was conditioned on the Harrisons' acceptance of NYA's interpretation of the REPC, it was not valid tender. Tender of payment is not valid if it "impose[s] on the other party a new condition or requirement not already imposed by the contract." *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1243 (Utah 1992). "The prohibition against conditional tender forbids the tendering party from adding new noncontractual conditions or requirements for receiving the tender." *PDQ Lube Ctr. v. Huber*, 949 P.2d 792, 800 n.13 (Utah Ct. App. 1997); *see also Century 21 All W. Real Estate and Inv. Inc. v. Webb*, 645 P.2d 52, 56 (Utah 1982). If a party accepts tender of payment offered with conditions it is statutorily "precluded from objection afterwards." Utah Code Ann. § 78B-5-802(3).

In *Century 21*, the Utah Supreme Court held that prospective buyers of real property had not made valid tender of performance to purchase the property when they sent a letter to the seller advising that they were "ready and willing to close on this transaction" because the buyers concurrently insisted that the sellers accept their interpretation of the contract's requirements as a condition of their performance. *Century 21*, 645 P.2d at 54-56. The contract in *Century 21* was silent on the specific condition in dispute. *Id.* On the other hand, in *Kelley*, where the contract explicitly required marketable title, the court held that conditioning performance on the clearing of a cloud

caused by a boundary dispute was not a conditional tender of performance. *Kelley*, 846 P.2d at 1243-44.

The district court held that the Disputed Extension Payment was “valid tender” because the August 31 Letter “only contained conditions that NYA already had a right to insist upon based on the REPC.” (R. 390.) This was in error because the August 31 Letter adds terms not expressly included in the REPC and at odds with the covenant of good faith and fair dealing and the inherent term of a reasonable time for performance. The REPC was silent on the economic feasibility of development or development potential of the Property, the availability of the sewer line, and the storm drain capacity. (Factual Background ¶¶ 10-11.) Even if NYA had not breached the covenant at the time of the Disputed Extension Payment, had the Harrisons accepted NYA’s terms, NYA could never breach the covenant of good faith and fair dealing by extending the closing deadline as it pertains to time to complete the purchase of the Property. In entering the REPC, the Harrisons *never* agreed that NYA could continue the closing date indefinitely for any possible reason. They never agreed to a 40-year installment purchase during which they would bear the costs of ownership with none of the benefits. NYA should not be permitted to use the tender rule to circumvent the adjudication of a good faith dispute over contractual terms.

Even if “sole discretion” can plausibly be read to encompass the additional conditions imposed by the August 31 Letter (it cannot), the fact that the REPC is silent on these conditions is sufficient for the Court to hold that the additional conditions invalidated the tender. This is especially the case here because the Harrisons agreed to

accept the payment upon withdrawal of the conditions, an objection they were required to make under Utah Code section 78B-5-802. Specifically, had the Harrisons not raised their objections at the time NYA made the Disputed Extension Payment, they would have been “precluded from objection afterwards.” Utah Code § 78B-5-802(3). Under the district court’s ruling, the Harrisons were in an impossible position: either agree to NYA’s interpretation of the REPC, which meant giving up on their claims which were already the subject of litigation, or risk the district court finding them in breach for refusing the tender. This is an inappropriate use of the tender rule. Accordingly, the Court should reverse the district court’s denial of the Harrisons’ summary judgment motion and hold that the Disputed Extension Payment was not a valid tender, and NYA has breached the REPC as a matter of law by failing to purchase the Property or make Extension Payments.

IV. THE HARRISONS DID NOT BREACH THE REPC BY REJECTING THE DISPUTED EXTENSION PAYMENT

The Harrisons’ refusal of the Disputed Extension Payment did not breach the REPC even if the Harrisons’ interpretation of the REPC ultimately turned out to be wrong because the Harrisons remained willing to honor the contract. The district court held that the Harrisons’ refusal of the Disputed Extension Payment violated its contractual obligation to accept Extension Payments and constituted a breach of the contract. (R. 389-90.) This ruling was in error because the Harrisons never refused to extend the closing deadline, only to accept the \$6,250 payment to do so. Moreover, even

if the refusal of a \$6,250 payment was a breach of the REPC, in light of the \$3,000,000 purchase price, it was not a material breach relieving NYA of performance.

A. The Harrisons Remained Willing to Perform Under the REPC

Rejection of the Disputed Extension Payment was not a breach of the Harrisons' contractual obligation because the Harrisons remained ready, willing, and able to sell the Property, and never manifested a "positive and unequivocal intent" not to do so. *Cobabe v. Stanger*, 844 P.2d 298, 303 (Utah 1992) (explaining the standard for anticipatory repudiation). "[A]n anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future." *Clarke v. Living Scriptures, Inc.*, 2005 UT App 225, ¶ 13, 114 P.3d 602. As the district court correctly ruled, the Harrisons' negotiation and litigation over the terms of the REPC were not a "positive and unequivocal" statement that they would not abide by the terms of the REPC. The Harrisons' willingness to abide by the terms of the REPC continued even after they rejected the Disputed Extension Payment. The Disputed Extension Payment triggered the Harrisons' obligation to sell the Property to NYA within the next thirty days. At no time did the Harrisons repudiate this obligation, even in the face of what they considered a default in NYA's Extension Payments. In fact, the Harrisons specifically informed NYA at the time they returned the Disputed Extension Payment that they would "continue to accept the monthly checks," indicating that they remained willing to perform their contractual obligation. (Factual Background ¶ 23.) Accordingly, the district court erred in ruling that the Harrisons breached their contractual obligations by rejecting the

Disputed Extension Payment, and the Court should reverse the entry of summary judgment against the Harrisons on this issue.

B. Rejection of the Disputed Extension Payment Was Not a Material Breach

Even if rejection of the Disputed Extension Payment was a breach of the REPC by the Harrisons, it was not a material breach or a repudiation of the contract under these circumstances, and therefore did not excuse NYA's subsequent non-performance. Only "substantial" or "material" breaches of a contract excuse performance by the non-breaching party. *Cross v. Olsen*, 2013 UT App 135, ¶ 26, 303 P.3d 1030 (internal citations omitted). A breach which is "incidental and subordinate to the main purpose of the contract" is not material. *Id.* ¶ 27. "The relevant question is not whether the breach goes to the heart of the provision breached, but whether it goes to the heart of the contract." *Id.* ¶ 28. A district court considers the following factors when evaluating the

materiality of a breach:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. While the materiality of a breach is usually a question of fact, if the facts are undisputed, it is a question of law. *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997).

Considering these factors, the Harrisons did not materially breach the REPC as a matter of law by returning the Disputed Extension Payment. There is no question based on the Harrisons' response to the August 31 Letter that the Harrisons were still willing to sell the property to NYA under the terms of the REPC. As a result, NYA was not damaged by the Harrisons refusal of the Disputed Extension Payment. To the extent NYA was damaged, such damage could be calculated in the context of the lawsuit that was already proceeding at the time of the Disputed Extension Payment. Because the Harrisons remained willing to honor their obligation to sell the Property to NYA—and put that willingness in writing—neither party would suffer forfeiture as a result of the Harrisons' return of the Disputed Extension Payment. The Harrisons remained at all times willing to abide by the court's interpretation of the terms of the REPC. For the same reasons, the Harrisons' conduct did not violate the covenant of good faith and fair dealing. In contrast, NYA's actions in conditioning the Disputed Extension Payment on their interpretation of the contract were a clear violation of the covenant of good faith and fair dealing. Based on the undisputed facts, the Court should reverse the district court and hold that the Harrisons' rejection of the Disputed Extension Payment was not material and that NYA was required to continue to make Extension Payments under the REPC. By failing to do so, NYA breached the REPC.

CONCLUSION

The Court of Appeals should reverse the district court's grant of summary judgment to NYA and denial of summary judgment to the Harrisons.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(A), the undersigned hereby certifies that this brief contains 6,727 words, excluding the parts of the brief exempted by Utah Rule of Appellate Procedure 24(f)(1)(B).



EMILY WEGENER

March 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **BRIEF OF APPELLANT** was served to the following this 19th day of March 2015, in the manner set forth below:

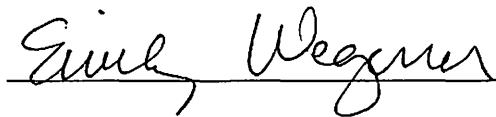
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ADDENDUM

1. Utah Code Ann. § 78B-5-802.
2. Ruling on Cross Motions for Summary Judgment.
3. Order on Cross Motions for Summary Judgment.
4. Real Estate Purchase Contract for Land.
5. Addendum No. 1 to Real Estate Purchase Contract.
6. Addendum No. 2 to Real Estate Purchase Contract.
7. Letter from S. Newman to K. Kelly, March 5, 2009.
8. Letter from K. Kelly to M. Gaylord, et al., August 31, 2009.
9. Letter from J. Boren to K. Kelly, September 2, 2009.

EXHIBIT 1

Utah Code Ann. § 78B-5-802

Statutes current through the 2014 General Session

Utah Code Annotated > **Title 78B Judicial Code** > **Chapter 5 Procedure and Evidence** > **Part 8 Miscellaneous**

78B-5-802. Tender — Offer in writing sufficient — Objection — Must be specific or waived.

- (1) An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.
- (2) The person to whom a tender is made shall, at the time, specify any objection to the money, instrument, or property, or it is considered waived.
- (3) If the objection is to the amount of money, the terms of the instrument or the amount or kind of property, the person shall specify the amounts, terms, or kind which is required, or be precluded from objection afterwards.

History

L. 1951, ch. 58, § 1; C. 1943, Supp., 104-27-1; C. 1953, 78-27-1; renumbered by L. 2008, ch. 3, § 834.

Annotations

Notes

Amendment Notes. —

The 2008 amendment, effective February 7, 2008, renumbered this section, which formerly appeared as § 78-27-1, and added the (1) designation and (2) and (3).

NOTES TO DECISIONS

Ability to make tender good.

Conditions.

Extinguishing lien.

Foreclosure.

Interest.

Tender.

—By check.

—By mail.

—To attorney.

Ability to make tender good.

Under this section, where a person makes a tender in writing, he is excused from actually producing the money at the time of making the tender, but the statute excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute. To have the effect of a valid tender, the party tendering must have the ability to produce it, and must act in good faith. Nor does such a tender deprive the creditor of the allowance of a reasonable time in which to ascertain the amount due, and to determine whether he will accept; and if he accepts, and debtor fails to produce the money, his tender will be of no avail. Hyams v. Bamberger, 10 Utah 3, 36 P. 202, 1894 Utah LEXIS 1 (Utah 1894).

Plaintiff did not make a valid tender because it failed to fulfill a condition of the cashier's check, and the defendant need not have objected to the tender of the check to prevail. PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

Conditions.

A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon. Sieverts v. White, 273 P.2d 974, 2 Utah 2d 351, 1954 Utah LEXIS 219 (Utah 1954).

Extinguishing lien.

Valid tender made by pledgor of personal property at any time before sale will have the effect of extinguishing pledgee's lien. Hyams v. Bamberger, 10 Utah 3, 36 P. 202, 1894 Utah LEXIS 1 (Utah 1894).

In action against tractor dealer who wrongfully held plaintiff's tractor demanding the amount due on plaintiff's open account plus the amount of repairs, the evidence showed that the defendant was so adamant in its position that a tender of the amount of repairs would have been a "fruitless gesture" and, thus, plaintiff was excused from making the tender because it would have been useless. Jenkins v. Equipment Ctr., 232 Utah Adv. 48, 869 P.2d 1000, 1994 Utah App. LEXIS 19 (Utah Ct. App.), cert. denied sub. nom., Jenkins v. Hesston, 242 Utah Adv. 55, 879 P.2d 266, 1994 Utah LEXIS 111 (Utah 1994).

Foreclosure.

In action to foreclose real estate contract, a valid tender of all existing delinquencies prevents plaintiff from foreclosing on the mortgage and note. Romero v. Schmidt, 392 P.2d 37, 15 Utah 2d 300, 1964 Utah LEXIS 252 (Utah 1964).

Interest.

If tender is made of full face of account, and no demand for interest is made, interest, at least for the purposes of a tender, is waived. Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 434, 160 P. 283, 1916 Utah LEXIS 43 (Utah 1916).

Tender.**—By check.**

Where a tender is made by check, the person to whom it is tendered must specify his objections or he will be deemed to have waived all objections, except such as he insists upon when tender is made. Hirsh v. Ogden Furn. & Carpet Co., 48 Utah 434, 160 P. 283 (1916). See also Ulibarri v. Christenson, 275 P.2d 170, 2 Utah 2d 367, 1954 Utah LEXIS 224 (Utah 1954).

A check for the amount due, presented within time and when no exception is taken to the form of the tender, is a valid and legal tender of the amount due, but only when there are adequate funds in the account of the drawer to

pay such check upon presentation in due course. Sieverts v. White, 273 P.2d 974, 2 Utah 2d 351, 1954 Utah LEXIS 219 (Utah 1954).

Plaintiff did not make a valid tender because it failed to fulfill a condition of the cashier's check, and the defendant need not have objected to the tender of the check to prevail. PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

—By mail.

Tender of check by mail is good tender in absence of special objections. Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 434, 160 P. 283, 1916 Utah LEXIS 43 (Utah 1916).

—To attorney.

A tender to an attorney with authority to collect is the same as though made to creditor himself. Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 434, 160 P. 283, 1916 Utah LEXIS 43 (Utah 1916).

Research References & Practice Aids

Cross-References. —

Settlement offers, Rules of Civil Procedure, Rule 68.


Uniform Commercial Code, Sales, tender of payment, § 70A-2-511.

Utah Code Annotated

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EXHIBIT 2

RECEIVED
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JUN 14 2012
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

NEW YORK AVE., LLC, a Utah limited
liability company,

**RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT**

Plaintiff,

vs.

Date: June 14, 2012

DAVID D. HARRISON, an individual, and
JAN C. HARRISON, an individual,

Case No: 090402295

Defendants.

Judge David N. Mortensen

This matter is before the court on cross motions for summary judgment. The motion were fully briefed and argued before the court on April 19, 2012. The court has been fully informed and for reasons more fully set forth below denies defendant's motion and grants plaintiff's motion in part.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted where "the moving party is entitled to judgment as a matter of law," and "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Utah R. Civ. P. 56(c)*. "[A]n adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* at (e).

Additionally, the court "will view the facts in a light most favorable to the party opposing the motion." *Brower v. Brown*, 744 P.2d 1337, 1338 (Utah 1987).

UNDISPUTED MATERIAL FACTS

1. NYA is a Utah limited liability company doing business in Utah County, Utah. Steven Kelly is the registered agent and manager of NYA.
2. The Harrisons are the owners of over 20 acres of real property located at approximately 950 West 700 South in the Springville, Utah (the "Property").
3. On or about November 10, 2006, the parties entered into a real estate purchase contract ("REPC") whereby NYA agreed to purchase the Property for \$3 million.
4. Addendum #1, signed along with the REPC, provided that the Settlement Deadline was 180 days from the date of the fully executed contract.
5. Addendum #1 provided as follows:

"The Buyer may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline. This additional money will be paid monthly at a rate of \$12,500 per month, and will be a credit towards the purchase price at closing."
6. On November 22, 2006, the parties entered into Addendum #2.
7. Addendum #2 provided that the "settlement deadline is to be extended until after the harvest season 2007 which will be October 31, 2007."

8. Addendum #2 reduced the Extension Payments to \$6,250 per month and required the Harrisons to include 20.27 water shares with the purchase.
9. The parties have not agreed in writing to a limitation on the number of extensions of the settlement deadline that NYA may secure by timely payment of the Extension Payment.
10. The REPC and addenda provided that the initial earnest money deposit of \$10,000 along with the monthly Extension Payments all constitute non-refundable earnest money that would have been applied to the purchase price at closing.
11. The parties have not entered into any addenda to the REPC other than Addendum #1 and Addendum #2 nor any other written agreements modifying the REPC.
12. REPC Addendum #2 states that the "date of the fully executed contract is to be the latest signature date on this Addendum #2," which is November 22, 2006.
13. Section 21 of the REPC states that "Time is of the Essence."
14. Under the terms of the REPC, NYA had 90 days from the date of the fully executed contract to conduct due diligence (the "Due Diligence Deadline").
15. If, prior to the Due Diligence Deadline, NYA determined that the results of its due diligence were unacceptable, it could choose to cancel the contract or to provide written notice to the Harrisons of its objections.
16. After the Due Diligence Deadline the earnest money was "deemed earned and non-refundable thereafter if Buyer fails to close for any reason."

17. On January 30, 2007, Mr. Kelly wrote a letter to the Harrisons informing them of a problem connecting the Property to the Springville sewer system. He further stated:
"It looks like I won't be able to develop the property until mid-2008 at the earliest.
However, I like the property and want to continue the contract as it is currently written...On October 31st I will start making the monthly payments to you that we agreed upon until I close the property, which will be when the sewer trunk line is installed and I can get the necessary approvals from the city to develop."
18. On September 19, 2007, Mr. Kelly wrote a letter to the Harrisons updating them on his progress in developing the Property. Specifically, he informed them that he had found a way to work around the problem with connecting to the Springville sewer system. He further stated, "I will be paying the extension fees as outlined in the purchase contract until I close. It shouldn't be too far into the future."
19. In October 2007, NYA began making the monthly Extension Payments in accordance with the terms of the REPC and its addenda.
20. In early 2008, Mr. Kelly attempted to get approval from Springville City to work around the sewer trunk line issue.
21. In April 2008, Mr. Kelly disclosed to his site engineer Brian Gabler that "[W]e are holding off pursuing this at the current time."
22. In July 2008, Mr. Harrison informed Mr. Kelly that he did not want to wait any longer for

NYA to close.

23. In December 2008, Mr. Harrison began discussing with Mr. Kelly his options for terminating the contract. The parties did not come to an agreement.
24. On March 5, 2009, the Harrisons through their attorney, Steve Newman, sent a letter to NYA stating that it had been 16 months since the original Settlement Deadline and that any reasonable time for closing had passed.
25. The March 5, 2009 letter asserted that NYA was in breach of the implied covenant of good faith and fair dealing, but that the Harrisons were willing to close on or before August 5, 2009.
26. The March 5, 2009 letter asserted that if not closed by August 5, 2009, the Harrisons reserved all their rights and remedies under the REPC.
27. On April 22, 2009, NYA's counsel sent a letter that stated, "My clients have the right to continue making the Extension Payments under the Contract, without an arbitrary and artificial August 5, 2009 deadline."
28. NYA did not agree in writing, or otherwise, to the August 5, 2009 closing date.
29. On May 14, 2009, after a failed settlement negotiation, the Harrisons informed NYA that it expected it to continue to perform its obligations under the REPC.
30. On August 31, 2009, NYA's counsel sent Harrison's counsel the Extension Payment along with a letter that contained that following:

(a) The purchase price for the property was based on the assumption that it could be developed as single family residential that would maximize the development potential of the land based on the zoning laws in place that govern the subject property. With the lack of sewer capabilities, and through further information garnered through the development process that showed insufficient storm drainage capacity, the property could not (at the time) be developed to its maximum potential.

(b) The ability to postpone closing on the property until it could be developed to its maximum potential was crucial to my clients. Accordingly, Extension Payments were "a credit towards the purchase price" of the property as stated in the REPC and was in no way to be considered "rent" or an interest payment.

(c) The closing deadline was being extended and the Extension Payment reduced in part to account for the fact that, since the sewer was not readily available, it might be some time before the property could be developed as anticipated.

(d) The REPC could be extended, at [NYA's] discretion as stated in the REPC, to allow for the property to be developed to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and

property being economically feasible to develop under zoning ordinance of Springville City and existing market conditions.

31. The August 2009 letter accompanying the Extension Payment stated, "Nothing in this letter should be construed as a demand by [Plaintiff] for any rights or benefits other than those provided under the REPC."
32. The Harrisons refused to accept the August 2009 Extension Payment as presented and in a letter from their counsel to NYA's counsel stated, "[Y]our attempt to modify the terms of the [REPC] and to make the negotiation of the monthly check conditioned upon your client's unilateral and unexpressed intentions and 'understanding' is not only inappropriate, but constitutes a further breach of the parties' [REPC.]"
33. The Harrisons informed NYA that they would "continue to accept the monthly checks so long as [NYA] withdraw [its] inappropriate conditions."
34. NYA has not closed on the Property and has not made or attempted to make any extension payments since August 2009.

ANALYSIS

1. Time of Performance

The Harrisons argue that NYA breached by failing to perform within a reasonable time. "[I]f a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances." *Coulter & Smith Ltd. v. Russell*, 966 P.2d 852, 858 (Utah 1998) (citing *Watson v. Hatch*, 728 P.2d 989, 990 (Utah 1986)). "When the parties to a

bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement (Second) of Contracts* § 204. A court "may allow a contract to be performed within a reasonable time only when the contract is silent as to the time for its performance." *Watson v. Hatch*. 728 P.2d 989, 990 (Utah 1986).

The parties explicitly agreed in the REPC and the addenda that the settlement deadline would be October 31, 2007. They also agreed that NYA "may choose, at its sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline." Therefore, each monthly extension payment extended the settlement deadline to the end of the following month.

The Harrisons use the Tenth Circuit case *Navair, Inc. v. IFR Americas, Inc.* (utilizing Kansas law) to assert that the reasonable time requirement still applies even if the contract contains a specific date for performance that has been extended. 519 F.3d 1131, 1138 (10th Cir. 2008). The *Navair* case is distinguishable from the present case. *Navair* involved a contractual dispute regarding the length of time an oral extension of the contract was valid for. The present case involves a contract which clearly states that extensions will be allowed and each extension will continue the contract monthly after the settlement deadline. Unlike *Navair*, there is no ambiguity regarding the extension of the contract deadline so long as a valid tender of extension

payment was made. Because the contract specified a time for performance, the court cannot impose a reasonable time.

The Harrisons contend that allowing NYA to continue making the extension payments indefinitely would lead to absurd results in that it would allow NYA to make interest-free payments for 40 years until the extension payments amounted to the purchase price. The Harrisons meanwhile would be forced to continue paying the carrying costs including property taxes. The Harrisons further argue that this could not have been the original intention of the parties because the parties did not execute the standard Seller Financing Addendum nor indicate anywhere in the REPC that they intended to create a seller-financed transaction.

The Utah Supreme Court held in, *Café Rio, Inc. v. Larken-Gifford-Overton, LLC*, that “[w]here the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” 207 P.3d 1235, 1240 (Utah 2009). “Only if the language of the contract is ambiguous will we consider extrinsic evidence of the parties’ intent.” *Id.*

The evidence before the court shows that the parties agreed to the extension payment clause of the contract. Addendum #1 of the REPC specifically states that NYA “may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline.” It does not limit the number of times that the extension payments may be made, only that it is in NYA’s sole discretion. The wording is clear

and unambiguous; therefore, NYA was entitled to extend the settlement deadline so long as valid tender of the extension payment was made.

NYA's statements in letters sent to the Harrisons regarding the time frame for settling constitute extrinsic evidence and cannot be considered by the court in determining if the contract contained a specific time for performance.

2. Anticipatory Breach

NYA claims that the Harrisons anticipatorily breached the contract by asserting that NYA was in default and demanding closing occur on August 5, 2009. As evidence of anticipatory breach, NYA points to comments made by Mr. Harrison to the effect that he wanted his \$3 million and that he was not willing to wait around anymore. On March 5, 2009, the Harrisons' attorney sent a letter to NYA stating that it had been 16 months since the original settlement deadline and that any reasonable time for closing had passed. NYA claims that this letter implied that NYA was in breach of its performance under the REPC. The letter also stated that the Harrisons were willing to close on or before August 5, 2009, and that if NYA did not close by that date then the Harrisons reserved all their rights and remedies under the REPC. In addition, NYA points to the Harrisons' answers to the amended complaint in this action. Lastly, NYA points to the Harrisons' refusal to accept the August 31, 2009 Extension Payment as evidence of anticipatory breach.

“An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future.” *Upland Industries Corp. v. P. Gamble Robinson Co.*, 684 P.2d 638, 643 (Utah 1984). An anticipatory breach occurs only if a party to a contract “manifests a positive and unequivocal intent not to render its promised performance.” *Cobabe v. Stanger*, 844 P.2d 298, 303 (Utah 1992).

The Harrisons did not anticipatorily breach the contract. Although the Harrisons demanded that NYA close on or before August 5, 2009 and Mr. Harrison expressed his desire to either close or have NYA stop payments, these facts, especially viewed in a light most favorable to the Harrisons, do not “manifest a positive and unequivocal intent not to render [their] promised performance.” *Id.* The Harrisons’ statements, the letter and the pleadings are better described as negotiation and litigation techniques, not a manifestation of their intention to refuse future performance.

3. The August 31, 2009 Extension Payment Constituted Valid Tender

The letter accompanying the August 2009 Extension Payment lists the reasons why NYA originally intended to purchase the Property, namely, to develop for single-family residential homes; and the reasons why NYA has faced delays in readying the Property for development, namely, the sewer capabilities and storm drainage. Section (d) of the letter states:

“The REPC could be extended, at my client’s discretion as stated in the REPC, to allow for the property to be developed to its full potential. This

includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinances of Springville City and existing market conditions.”

The Harrisons claim that NYA breached the express terms of the REPC by making the August 2009 Extension Payment contingent on the Harrisons’ acceptance of additional terms and failing to make any subsequent Extension Payments.

“In order to be valid, tender of payment of money due must be ... unconditional.” *PDQ Lube Ctr., Inc. v. Huber* 949 P.2d 792, 800 (Utah Ct. App. 1997). “A tender, to be good, must be free from any condition which the tenderer does not have a right to insist upon.” *Sieverts v. White*, 2 Utah 2d 351, 273 P.2d 974 (Utah 1954). “The tender cannot impose on the other party a new condition or requirement not already imposed by the contract.” *Kelley v. Leucadia Financial Corp.*, 846 P.2d 1238, 1243 (Utah 1992).

The August 2009 Extension Payment only contained conditions that NYA already had a right to insist upon based on the REPC, and therefore the extension payment was unconditional. The REPC does not explicitly state that closing would take place when it is economically feasible to develop, or based on the sewer line availability, storm drainage issues, or when the property could be developed to its maximum potential. The contract does, however, allow for extensions according to the Buyer’s sole discretion. NYA’s letter to the Harrisons noting its reasons for making the Extension Payments was a display of its discretion. The reasons for extending the closing are irrelevant inasmuch as those reasons flesh out NYA’s discretion. The letter did not

add additional terms to the contract because according to the contract, NYA has the right to extend at its discretion. NYA's letter required the Harrisons to acknowledge rights that the contract had already granted to NYA; therefore, the August 2009 Extension Payment cannot be viewed as an invalid tender of payment. The Harrisons therefore breached the contract by refusing the valid tender.

When the Harrisons refused the August extension payment they told NYA that they would accept the extension payments so long as they were not accompanied by additional conditions. They claim that because NYA failed to tender any other payments that NYA was in breach of the REPC. "[U]nder the 'first breach' rule 'a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.'" *CCD, L.C. v. Millsap*, 116 P.3d 366, 373 (Utah 2005) (quoting *Jackson v. Rich*, 28 Utah 2d 134, 499 P.2d 279, 280 (1972)).

Because the Harrisons refused the valid tender of the August 2009 Extension Payment, NYA's refusal to make any further extension payments is not a "failure to perform." The Harrisons were the first party to breach the contract and "cannot complain if the other party (NYA) thereafter refuses to perform." *Id.*

A final note as to the August tender: the court did not give credence to the language in the letter accompanying the August tender which stated "Nothing in this letter should be construed

as a demand by [NYA] for any rights or benefits other than those provided under the REPC.”

Although the court agrees with this statement, the court was not influenced by it. If the letter had in fact required the Harrisons to agree to additional terms, the statement would have carried no weight so the court analyzed the letter without regard to that statement. .

4. Good Faith and Fair Dealing

The Utah Supreme Court, in *U.S. Fidelity v. U.S. Sports Specialty*, defines the covenant of good faith and fair dealing as “a duty not to intentionally or purposely do anything [that] will destroy or injure the other party’s right to receive the fruits of the contract and to ... act consistently with the agreed common purpose and the justified expectations of the other party.” *U.S. Fid. v. U.S. Sports Specialty*, 270 P.3d 464, 470 (Utah 2012).

Utah looks to the justified expectations of the parties to determine breach of good faith and fair dealing. *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 200 (Utah 1991). This requires the court to look beyond the terms of the contract because an examination of contract terms alone is insufficient to determine the justified expectations of the parties. *Id.* However, “[n]o such covenant may be invoked ... if it would create obligations inconsistent with express contractual terms.” *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, ¶ 10 (Utah 2011). “While a covenant of good faith and fair dealing inheres in almost every contract, ... this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante.” *Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, ¶ 45 (Utah 2004).

NYA has presented facts that it intended to extend the contract until it could develop the property and the Harrisons have brought forth facts that show they wanted a speedy closing. Thus there is a fact issue as to the parties' justified expectations. In addition, the Harrison's claim as to breach of the covenant of good faith and fair dealing is denied because the contract granted NYA the right to the extensions according to NYA's sole discretion and to find them in breach of the covenant of good faith and fair dealing would be inconsistent with the express terms of the contract and would be the enforcement of duties to which the parties did not initially agree to.

5. Additional Earnest Money Deposits Apply to the Purchase Price

NYA seeks a summary declaratory judgment that the Additional Earnest Money Deposits apply to the purchase price. Addendum #2 changed the amount of the monthly extension payment from \$12,500 to \$6,250; nothing in Addendum #2 changed the provision that the Additional Earnest Money Deposits were to be applied to the purchase price at closing. The Harrisons do not dispute this claim and state that they have never disputed this claim during the course of this litigation. NYA is therefore entitled to declaratory judgment that the Additional Earnest Money Deposits be applied to the purchase price.

6. No Limitation on the Number of Extension Payments

The REPC does not expressly limit the number of extension payments that the Buyer is entitled to so long as the \$6,250 extension payment is timely made. "A contract should be reformed only when its terms are so vague that the intention of the parties cannot be ascertained

therefrom.” *Hidden Meadows Dev. Co. v. Mills*, 511 P.2d 737, 739 (Utah 1973). Placing a limit on the number of extension payments allowed would be reforming the contract and thereby rewriting the parties’ agreement. The contract in this case is clear, and NYA is entitled to declaratory judgment that the REPC does not limit the number of extensions to which Plaintiff is entitled when it timely pays the Extension Payments.

7. Motion to Strike

Defendants moved to strike portions of the Steven Kelly affidavit. While the motion was well-taken, the issue is ultimately moot because the court did not rely on paragraphs 4, 5, 7, 10 or 13 of the affidavit in ruling on this matter.

CONCLUSION

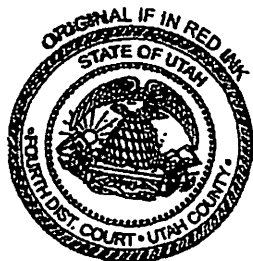
The Supreme Court of Utah in *Carlson v. Hamilton* said, “People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side.” 332 P.2d 989, 990-91 (Utah 1958); *See also Johnston v. Austin*, 748 P.2d 1084, 1089 (Utah 1988) (holding that courts should intervene and alter the contractual provisions only when the enforcement of the terms of the uniform real estate contract would be unconscionable). Though the Harrisons argue that allowing for indefinite extension payments would lead to absurd results, the courts may not step in to alleviate the effects of a bad bargain.

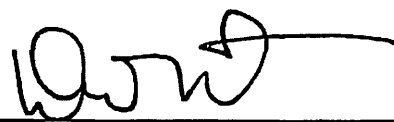
The contract in this case provides for a specific time of performance; therefore, this court cannot imply a reasonable time of performance. While the Harrisons' actions prior to August of 2009 did not manifest anticipatory repudiation of the contract, the Harrisons refusal to accept the August 2009 Extension Payment was an actual breach of the contract. Since the Harrisons breached the contract first by refusing a valid tender, they cannot then claim a breach by NYA in failing to perform. Because the Harrisons breached, NYA is entitled to its contractual remedies.

Plaintiff's motion for summary judgment is granted as to all claims except for the claim that the defendants breached the agreement anticipatorily, and Defendants' motion for summary judgment is denied. Additionally, Plaintiff's motion for partial declaratory summary judgment is granted in that the Additional Earnest Money Deposits apply to the purchase price and Defendants may not limit the number of extensions to which Plaintiff is entitled when it timely pays the Additional Earnest Money Deposits. Plaintiff's counsel will draft an order consistent with this ruling.

Dated this 14th day of June 2012.

BY THE COURT:




Judge David N. Mortensen
Fourth Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090402295 by the method and on the date specified.

MAIL: JASON D BOREN 201 S MAIN ST STE 800 SALT LAKE CITY, UT
84111

MAIL: DAVID D JEFFS 90 N 100 E POB 888 PROVO UT 84603-0888

Date: 06/14/2012

/s/ GEORGIA R SNYDER

Deputy Court Clerk

EXHIBIT 3

FILED
Fourth Judicial District Court
of Utah County, State of Utah
12/31/12 KSD Deputy

DAVID D. JEFFS, #1654
JEFFS & JEFFS, P.C.
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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

NEW YORK AVE., LLC, a Utah limited
liability company,

Plaintiff and
Counterclaim Defendant,

vs.

DAVID D. HARRISON, an individual, and
JAN C. HARRISON, an individual,

Defendants and
Counterclaimants.

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

Case No. 090402295

Judge: David N. Mortensen

This matter having come before the Court for hearing on April 19, 2012 on Plaintiff's Motion for Summary Judgment and on Defendant's Motion for Summary Judgment. The parties were represented by counsel. The Court, having reviewed the pleadings, memoranda, affidavits and other evidence present and on file, having heard the parties arguments, and otherwise being

fully advised in the premises, issued its Ruling on Cross Motions for Summary Judgment. Based on the Court's Ruling on Cross Motions for Summary Judgment the Court now enters the following:

ORDER

1. Defendant's Motion for Summary Judgment is denied.
2. Plaintiff's Motion for Partial Summary Judgment as to NYA's Second Claim for Relief for Breach of REPC is granted, except for the claim of that Defendants anticipatorily breached the REPC, and Plaintiff is entitled to its contractual remedies.
3. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Third Claim for Relief for Declaratory Judgment is granted and it is hereby ordered that the Additional Earnest Money Deposits be applied to the purchase price under the REPC and that the REPC does not limit the number of extensions to which Plaintiff is entitled when it timely pays the Extension Payments..
4. Because the Harrisons breached, Plaintiff is entitled to its contractual remedies. However, the previous ruling of the court did not determine the amount of Plaintiff's damages. The issue of the amount of Plaintiff's damages, costs and attorneys fees is reserved at this time to be the subject of further motions or trial.

Dated and signed this 31st day of Dec., 2012.



Judge David Mortensen

APPROVED AS TO FORM:

Mark Gaylord
Jason D. Boren
BALLARD SPAHR, LLP

EXHIBIT 4



Utah Association
of REALTORS

REAL ESTATE PURCHASE CONTRACT FOR LAND



This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer New York Ave. LLC offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$10,000.00 in the form of Check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
Signature of agent/broker accepting receipt of Earnest Money

Brokerage: N/A Phone Number: 801-477-3516

OFFER TO PURCHASE

1. PROPERTY: 20.27 Acres off 950 W and approximately 700 S in Springville, UT - Parcel #26-041-0031, also described as: CDM S 642.88 FT & E 356.49 FT FR N 1/4 COR. SEC. 6 T8S R3E SLB&M; S 1 DEG 19'0"W 1328.54 FT; N 87 DEG 47'0"W 683.27 FT; N 0 DEG 53'30"E 1317.09 FT; S 88 DEG 36'14"E 672.98 FT TO BEG. AREA 20.272 AC. City of Springville, County of Utah State of Utah. ZIP 84863 (the "Property").

1.1 Included Items. (specify) _____

1.2 Water Rights/Water Shares. The following water rights and/or water shares are included in the Purchase Price.

[] 0 Shares of Stock in the _____ (Name of Water Company)

No [X] Other (specify) All water rights attached to property and necessary for development

2. PURCHASE PRICE The purchase price for the Property is \$3,000,000.00

The purchase price will be paid as follows:

\$10,000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ _____ (b) New Loan. Buyer agrees to apply for one or more of the following loans:

[] CONVENTIONAL [] OTHER (specify) _____

If the loan is to include any particular terms, then check below and give details:

[] SPECIFIC LOAN TERMS _____

\$ _____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)

\$ _____ (d) Other (specify). _____

\$2,990,000.00 (a) Balance of Purchase Price in Cash at Settlement

\$3,000,000.00 PURCHASE PRICE. Total of lines (a) through (e)

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Provisions set forth in this Section shall be made of of the Settlement Deadline date referenced in Section 24(c), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered to the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

D.H.
J.H.

J.H.

4. **POSSESSION.** Seller shall deliver physical possession to Buyer within: ☒ Upon Closing ☐ Other (specify)

5. **CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this contract:

☐ Seller's Initials ☒ Buyer's Initials

Listing Agent n/a represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

Listing Broker for n/a represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller

(Company Name)

as a Limited Agent;

Buyer's Agent n/a represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

Buyer's Broker for n/a represents ☐ Seller ☐ Buyer ☐ both Buyer and Seller

(Company Name)

as a Limited Agent;

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(a), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

(a) a Seller property condition disclosure for the Property, signed and dated by Seller;

(b) a commitment for the policy of title insurance;

(c) a copy of any leases affecting the Property not expiring prior to Closing;

(d) written notice of any claims and/or conditions known to Seller relating to environmental problems;

(e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and

(f) Other (specify) See addenda.

8. **BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE.** Buyer's obligation to purchase under this Contract (check applicable boxes):

(a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;

(b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;

(c) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;

(d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;

(e) ☐ IS ☒ IS NOT conditioned upon the Property appraising for not less than the Purchase Price;

(f) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;

(g) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

See addenda.

If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 **Due Diligence Deadline.** No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 **Failure to Respond.** If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence. The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

8.4 **Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's

J.H.

objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not cancelled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addenda No.'s 1 ☐ Seller Financing Addendum ☐ Other (specify) _____

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 **Condition of Title.** Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and right-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

☐ SELLER ☒ BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.

10.2 **Condition of Property.** Seller warrants that the Property will be in the following condition ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:

- (a) the Property shall be free of debris and personal property;
- (b) the Property will be in the same general condition as it was on the date of Acceptance.

11. **FINAL PRE-CLOSING INSPECTION.** Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine only that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property, and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the Property as represented.

12. **CHANGES DURING TRANSACTION.** Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances affecting the Property shall be made.

13. **AUTHORITY OF SIGNERS.** If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. **COMPLETE CONTRACT.** This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. **DISPUTE RESOLUTION.** The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. **DEFAULT.** If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest

[Handwritten signature]

Money Deposit or Equidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand.

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABBREVIATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Seller Disclosure Deadline SEE ADDENDUM #1 (Date)

(b) Due Diligence Deadline SEE ADDENDUM #1 (Date)

(c) Settlement Deadline SEE ADDENDUM #1 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by 5:00 PM 11 AM [X] PM Mountain Time on November 18, 2006 (Date), this offer shall lapse, and the Brokerage shall return the Earnest Money Deposit to Buyer.

[Signature] 11/9/06

(Buyer's Signature)

(Offer Date)

(Buyer's Signature)

(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

New York Ave. LLC
(Buyers' Names) (PLEASE PRINT)

1818 S 100 W, Orem, UT
(Notbo Address)

84058
(Zip Code)

801-427-3516
(Phone)

[Signature]

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

David D. Harrison 10/10/06 1:00 David D. Harrison 11/10/06
 (Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DAVID D. HARRISON P.O. Box 4500, STATELINE, NV. 89449
 (Seller's Name) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ REJECTION: Seller rejects the foregoing offer.

 (Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

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UAB FORM 10

Page 5 of 5 pages Seller's Initials DH Date _____ Buyer's Initials CK Date 11/9/06

GH

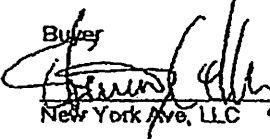
EXHIBIT 5

ADDENDUM NO. 1 TO REAL ESTATE PURCHASE CONTRACT

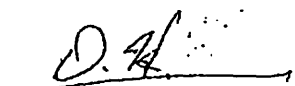
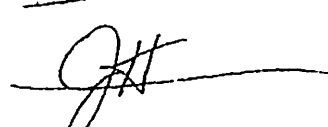
THIS IS AN ADDENDUM to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of November 9, 2006 between New York Ave. LLC, as Buyer, and Harrison, David & Jan, as Seller, regarding the Property, 20.27 Acres off 950 W and approximately 700 S in Springville, UT Parcel #26:041:0031, Springville, Utah 84663. The following terms are hereby incorporated as part of the REPC:

1. Seller disclosure deadline to be 14 days from date of fully executed contract.
2. Due diligence deadline to be 90 days from date of fully executed contract to do any and all due diligence that the buyer deems necessary or prudent to determine that the property is satisfactory for Buyer's intended use. The due diligence approval shall be at the buyer's sole and absolute discretion.
3. Settlement deadline to be 180 days from date of fully executed contract.
4. \$3,000,000 purchase price is based on the assumption that the property contains 20.27 Acres, which equates to \$148,002 per acre. If the exact acreage is more or less than 20.27 acres the purchase price will increase or decrease accordingly based on \$148,002 per acre.
5. Buyer will deposit the earnest money with First American Title Company located in Orem, Utah, within 5 business days from the date of a fully executed contract.
6. Buyer to pay Seller's closing costs not to exceed \$10,000.
7. Seller agrees to sign within a reasonable time period all pertinent applications and documents required for governmental approval of Buyer's proposed development.
8. Seller agrees to give access to the Property during daylight hours for any testing, inspections, surveying, and other similar services for developing the Property, as the Buyer deems necessary. If any type of large motorized equipment will be brought onto the property it will be coordinated through the current lessee of the property as to minimize the impact on the current crop.
9. Buyer will be deemed to have approved the Property if the Buyer has not terminated this agreement by the Due Diligence Deadline. The day following the Due Diligence Deadline, the title company will disperse the earnest money to the Seller. This earnest money will then be deemed earned and non-refundable thereafter if Buyer fails to close for any reason. Released earnest money is the sole remedy to the Seller if the Buyer fails to close for any reason.
10. The Buyer may choose, at his sole discretion, to pay an additional amount of non-refundable earnest money to continue the contract monthly after the settlement deadline. This additional money will be paid monthly at a rate of \$12,500 per month, and will be a credit towards the purchase price at closing.
11. If Buyer terminates this transaction for any reason, Buyer will turn over all surveys, engineering, soils reports, phase I reports, etc. that may have been completed at no additional cost to the Seller.

Seller shall have until 5:00 PM Mountain Time, November 18, 2006, to accept the terms of this ADDENDUM NO. 1 in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM NO. 1 shall lapse.

Buyer

 New York Ave, LLC Date Time 3:13 pm

A PLEASE
INITIAL

→ 


Nov 10 08 08:28p

Nov 09 05 03:28p

STEVEN KELLY

004-313-7617

p1
p.u.

Page 3 of 2

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ ACCEPTANCE: Seller hereby accepts the terms of this ADDENDUM NO. 1.

☐ COUNTEROFFER: Seller hereby presents as a counteroffer the terms of attached ADDENDUM NO. _____.

Seller
David D Harrison 11/10/06 Jan C Harrison 11/10/06
Harrison, David Date Time Harrison, Jan Date Time

☐ REJECTION: Seller hereby rejects the terms of this ADDENDUM NO. 1.

Seller

Harrison, David Date Time Harrison, Jan Date Time

010829

D.H.
GH

9/6 11/9/06 3:13 PM

EXHIBIT 6



ADDENDUM NO. 2

TO

REAL ESTATE PURCHASE CONTRACT

Page 1 of 1



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of November 9, 2006 including all prior addenda and counteroffers, between New York Ave. LLC as Buyer, and Harrison, David & Jan as Seller, regarding the Property located at Approx. 700 S 950 W, Springville, 84663, 28-041-0031. The following terms are hereby incorporated as part of the REPC:

1. Purchase is to include approximately 20.27 water shares, which will be transferred by Seller to Springville City per their requirement for Buyer's proposed development.

2. Buyer is to pay Seller's closing costs which include and are limited to title insurance, title fees, escrow fees, and greenbelt rollback taxes. Seller is to net \$3 million for property after these fees are paid.

3. Date of fully executed contract is to be the latest signature date on this Addendum #2.

4. Settlement deadline is to be extended until after the harvest season 2007 which will be October 31, 2007.

5. Extension fees that are noted on addendum #1 are to be reduced from \$12,500 per month to \$8,250 per month.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 5:00 ☐ AM ☒ PM Mountain Time on November 24, 2008 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

☒ Buyer ☐ Seller Signature _____ (Date) (Time) ☐ Buyer ☐ Seller Signature _____ (Date) (Time)

CHECK ONE: ☒ ACCEPTANCE ☐ COUNTEROFFER ☐ REJECTION

☒ ACCEPTANCE: ☒ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

→ David P. Harrison 11/22/06 Jan P. Harrison 11/22/06
(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL EFFECTIVE AUGUST 5, 2002. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

→ Page 1 of 1 Seller's Initials DH Buyer's Initials JK Addendum No. 2 to REPC

JH

EXHIBIT 7

ATLANTA, GA
BALTIMORE, MD
BETHESDA, MD
DENVER, CO
LAS VEGAS, NV
LOS ANGELES, CA
PHILADELPHIA, PA
PHOENIX, AZ
SALT LAKE CITY, UT
VOORHEES, NJ
WASHINGTON, DC
WILMINGTON, DE

STEVEN J. NEWMAN
DIRECT DIAL: (801) 517-6878
PERSONAL FAX: (801) 596-6878
E-MAIL: NEWMANS@BALLARDSPAHR.COM

March 5, 2009

Via Federal Express and E-mail kkelly@rqn.com

Keith A. Kelly, Esq.
Ray Quinney & Nebeker
PO Box 45385
Salt Lake City, Utah 84111

Re: Real Estate Purchase Contract ("REPC") between David and Jan Harrison
("Seller") and New York Ave., LLC ("Buyer")

Dear Mr. Kelly:

My firm has been retained to represent the Seller in connection with the matter referenced above. Please advise the Buyer that the Seller: (i) is not willing to terminate the contract pursuant to the terms set forth in your letter to Seller dated February 17, 2009; and (ii) does not agree with your characterization of the facts concerning the REPC as set forth in your letter.

After reviewing the REPC, we have determined that the Due Diligence Deadline has expired and, while the Buyer has the right to extend the Settlement Date by making an Extension Payment each month, the REPC is silent as to an outside Settlement Date and is therefore silent as to when Buyer's performance under the REPC must occur. It is unreasonable to interpret the extension provision in the REPC as allowing the Buyer to extend the Settlement indefinitely. It is well established in Utah that when a contract fails to specify a time by which a certain act must be performed, law implies that the act must be done within a reasonable time under the circumstances. See Bradford v. Alvey & Sons, 621 P.2d 1240 at 1242. It has been over 16 months since the original Settlement Deadline, Buyer has not closed on the purchase of the property, and any reasonable time for closing has already passed.

We view Buyer's failure to close as a breach of the implied covenant of good faith and fair dealing. Notwithstanding this breach, Seller is willing to close on or before August 5, 2009. Otherwise, Seller reserves all of Seller's rights and remedies set forth in the REPC.

Keith A. Kelly, Esq.
March 5, 2009
Page 2

At your earliest convenience, please call me to discuss a reasonable Settlement
Deadline.

Very truly yours,

Steven J. Newman

SJN/sjn

cc: David and Jan Harrison (via fax)
Chris Anderson (via e-mail)
Steven Kelly (via fed-ex)

EXHIBIT 8

RAY QUINNEY & NEBEKER

August 31, 2009

Via Hand-Delivery, Email & Telefax

Mark R. Gaylord
Jason D. Boren
Steven J. Newman
Ballard Spahr Andrews & Ingersoll, LLP
Suite 800
One Utah Center
201 South Main Street
Salt Lake City, UT 84111-2221

SALT LAKE CITY OFFICE
PO Box 45385
Salt Lake City, Utah
84145-0385

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Suite 1400
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84111

801 532-1500 TEL
801 532-7543 FAX
www.rqn.com

PROVO OFFICE
86 North University Ave.
Suite 430
Provo, Utah
84601-4420

801 342-2400 TEL
801 375-8379 FAX

Re: *Real Estate Purchase Contract between
David and Jan Harrison, and New York Ave., LLC
Extension Payment for August of 2009*

Dear Mark, Jason & Steven:

As you are aware, I represent New York Ave, LLC, regarding the Real Estate Purchase Contract for Land ("REPC"), between your clients, David and Jan Harrison ("the Harrisons" or "Sellers"), and New York Ave, LLC ("my client" or "Buyer"). Originally, your clients the Harrisons signed the REPC on November 10, 2006, and they signed addenda #1 and #2 on November 10, 2006 and November 22, 2006, respectively. The REPC involved the sale of your clients' property located at approximately 950 W. and 700 S., Springville, UT, also known as parcel #26-041-0031, on November 10, 2006. This REPC is the subject of a lawsuit entitled *New York Ave., LLC v. David D. & Jan. C. Harrison*, Case No. 090402295 (Utah 4th D. Court) ("NY v. Harrison").

The REPC contains a clause with a due diligence period of 90 days in which my client had the ability to cancel the REPC at its discretion. The REPC also contains a clause, paragraph 10 in Addendum No. 1, that allows my client to extend the settlement deadline at monthly increments by paying an "additional amount of non-refundable earnest money" ("Extension Payment(s)") that would "be a credit towards the purchase price at closing."

ATTORNEYS AT LAW

Clark P. Giles
Narvel E. Hall
Douglas W. Morrison
Herbert C. Livsey
D. Jay Curtis
Gerald T. Snow
Jonathan A. Dibble
Scott Hancock Clark
Steven H. Gunn
James S. Jardine
Janet Huggie Smith
Douglas Matsumori
Larry G. Moore
Bruce L. Olson
John A. Adams
Douglas M. Monson
Craig Carlile
Jeffrey W. Appel
Ellen J. D. Toscano
Kevin G. Glade
Lester K. Essig
Ira B. Rubinfield
Stephen C. Tingey
John R. Madsen
Keith A. Kelly
Michael W. Spence
Scott A. Hagen
Mark M. Belliloyon
Rick L. Rose
Rick B. Haggard
Lisa A. Yerkovich
Brent D. Wilde
Michael C. Blue
Steven W. Call
Elaine A. Monson
Mark A. Cotler
Gregory J. Savage
R. Gary Winger
Kelly J. Applegate
Justin T. Toth
Liesel B. Stevens
Robert D. Rice
Arthur B. Burger
Frederick R. Thaler, Jr.
John W. Mackay
McKay M. Pearson
Mark W. Pugsley
Matthew N. Evans
Gary L. Longmore
John P. Wunderli
Samuel C. Straight
Matthew R. Lewis
Paul C. Burke
Elaina M. Moragakis
D. Zachary Wiseman
Michael D. Mayfield
Scott B. Finlinson
Bryan K. Bassett
Janelle P. Eurick
Gregg D. Stephenson
Kirstine M. Larsen
Gregory S. Roberts
Christopher N. Nelson
Samuel A. Lambert
Richard H. Madsen, II
Jonathan G. Pappasideris
Ryan B. Bell
Charles H. Livsey
David B. Dibble
Maria E. Heckel
Blake R. Bauman
Elizabeth Bennion
Michael K. Crickson
Matthew M. Cannon
Erin Bergeson Hull
Tatyana S. Feilbach
J. Spencer Viernes
Caleb J. Frischknecht
James A. Sorenson

OF COUNSEL
Stephen B. Nebeker
Robert M. Graham
M. John Ashton
Katie A. Eccles

Mark R. Gaylord
Jason D. Boren
Steven J. Newman
August 31, 2009
Page 2

As you know, during the due diligence period, my client learned that the city sewer was not available to service this property, thus making development of this property not economically feasible at the time at the current purchase price. It was possible that development would not be economically feasible for a number of years at the current purchase price. Therefore, prior to the end of the 90 day due diligence period, the REPC was renegotiated as memorialized in Addendum No. 2, dated November 22, 2006. At the time of the signing of addendum #2, my client made your clients aware that the sewer was not available to the property as originally anticipated. Therefore, the contract was amended due to the fact that the property could not be developed as originally anticipated.

Addendum No. 2, among other things, extended the settlement deadline to October 31, 2007, included 20.27 water shares in the sale, and reduced the monthly Extension Payment from \$12,500 to \$6,250, based on the understanding that it could take several years before this deal could be closed. This amendment was also based upon my client's understanding that:

- (a) The purchase price for the property was based on the assumption that it could be developed as single family residential that would maximize the development potential of the land based on the zoning laws in place that govern the subject property. With the lack of sewer capabilities, and through further information garnered through the development process that showed insufficient storm drainage capacity, the property could not (at the time) be developed to its maximum potential.
- (b) The ability to postpone closing on the property until it could be developed to its maximum potential was crucial to my clients. Accordingly, Extension Payments were "a credit towards the purchase price" of the property as stated in the REPC and was in no way to be considered "rent" or an interest payment.
- (c) The closing deadline was being extended and Extension Payment reduced in part to account for the fact that, since the sewer was not readily available, it might be some time before the property could be developed as anticipated.
- (d) The REPC could be extended, at my client's discretion as stated in the REPC, to allow for the property to be developed

Mark R. Gaylord
Jason D. Boren
Steven J. Newman
August 31, 2009
Page 3

to its full potential. This includes, but is not limited to: sewer line extension installed to the property, storm drainage readily available, and property being economically feasible to develop under zoning ordinances of Springville city and existing market conditions.

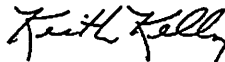
My client has deposited \$6,250 with First American Title Company on or before the last day of each and every month since the settlement deadline noted in Addendum No. 2, thereby extending the settlement deadline every month since that settlement deadline. You have denied this point, apparently claiming each such payment has not been made. This denial is found in paragraph 19 of your Answer ("Answer") filed in *NY v. Harrison*.

My client has performed and is continuing to perform under the parties' REPC. Accordingly, my client hereby provides you with the \$6,250 August 2009 Extension Payment. We invite you to carefully discuss with your clients what they understood was the purpose of Amendment No. 2 to the REPC. By negotiating this \$6,250 check, you are agreeing with my client that it is entitled under the REPC to make these payments in order to postpone closing in accordance with the express terms of the REPC until it is economically feasible to move forward with a residential development of the property as discussed above, including in paragraphs (a) through (d). My client is simply seeking the benefit of its bargain under the REPC, and nothing more – in light of your claims that my client may not now close under the REPC. Nothing in this letter should be construed as a demand by my clients for any rights or benefits other than those provided under the REPC.

I look forward to discussing this matter with you further in an attempt to resolve your clients' concerns. Nothing herein constitutes a waiver or election of any remedies or rights by my client.

Sincerely,

RAY QUINNEY & NEBEKER P.C.



Keith A. Kelly

Attorneys for Buyer New York Ave, LLC

EXHIBIT 9

LAW OFFICES
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

ONE UTAH CENTER, SUITE 800
201 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111-2221
801-531-3000
FAX: 801-531-3001
WWW.BALLARDSPAHR.COM

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BETHESDA, MD
DENVER, CO
LAS VEGAS, NV
LOS ANGELES, CA
PHOENIX, AZ
VOORHEES, NJ
WASHINGTON, DC
WILMINGTON, DE

JASON D. BOREN
DIRECT DIAL: 801-517-6827
PERSONAL FAX: 801-596-6827
BORENJ@BALLARDSPAHR.COM

September 2, 2009

VIA FACSIMILE AND HAND DELIVERY

Keith A. Kelly, Esq.
RAY QUINNEY & NEBEKER
36 S State Street #1400
Salt Lake City, Utah 84111

Re: **New York Ave, L.L.C. v. David and Jan Harrison**
Civil No. 090402295

Dear Keith:

We are in receipt of your letter dated August 31, 2009, in the above-referenced matter. Like your previous correspondence, your letter attempts to insert conditions and other terms which are not part of the Real Estate Purchase Contract between New York Ave, LLC and David and Jan Harrison.

Contrary to your assertions, the contract was not amended due to the alleged unavailability of the sewer. If your client was not satisfied with what it discovered during the due diligence period, the Real Estate Purchase Contract provided for specific procedures to address such concerns. Your client failed to provide any written objections pursuant to the Real Estate Purchase Contract and cannot now claim that it was dissatisfied with what it discovered in the due diligence period.

Despite your client's claims that it cannot develop the property as originally anticipated, it has done nothing, to our knowledge, to obtain sewer, or any other development rights or other entitlements that may affect development of the property. Your client cannot sit idly by and wait for someone else to accomplish what is solely within its ability and control. To do so constitutes a breach of the implied covenant of good faith and fair dealing.

Moreover, your client's unexpressed intentions and "understanding" are simply irrelevant to the express language of the Real Estate Purchase Contract. See *Jaramillo v. Farmers Ins.*

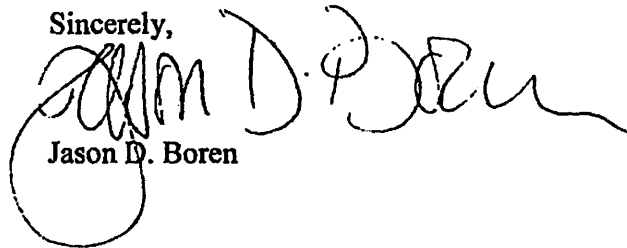
Group, 669 P.2d 1231, 1233 (Utah 1983) ("It is well established in the law that unexpressed intentions do not affect the validity of a contract").

In short, your attempt to modify the terms of the Real Estate Purchase Contract and to make the negotiation of the monthly check conditioned upon your client's unilateral and unexpressed intentions and "understanding" is not only inappropriate, but constitutes a further breach of the parties' Real Estate Purchase Contract. See *Shields v. Harris*, 934 P.2d 653 (Utah App. 1997) (valid tender requires buyer to make bona fide unconditional offer of payment). Accordingly, we enclose and return the check that you hand delivered to our offices. Please be advised that we will continue to accept the monthly checks so long as you withdraw your inappropriate conditions.

By reason of your inappropriate and conditional tender of these monies, my clients intend to amend their counterclaim to assert a claim for your client's latest breach. Please notify me by the end of the week whether you will stipulate to allow the Harrisons to amend their counterclaim. In the event you refuse to do so, we will file a motion to amend with the Court. We look forward to your response.

Additionally, as you know, it has always been our position that the transaction should be closed within a reasonable time. See *Bradford v. Alvey & Sons*, 621 P.2d 1240 (It is well established in Utah that when a contract fails to specify a time by which a certain act must be performed, the law implies that the act must be done within a reasonable time). We have always been willing to discuss and negotiate a reasonable closing date. You have rejected our offers and attempts. We continue to be willing to discuss this matter. However, we believe the ball is in your court. Please let me know if you have any interest in discussing this matter further.

Sincerely,



Jason D. Boren

JDB/ldi
Enclosure

cc: Mark R. Gaylord, Esq.
Steven J. Newman, Esq.
Michael D. Mayfield, Esq.
Mr. David Harrison

NEW YORK AVE., LLC 03-07
BUSINESS ACCOUNT
1818 S 100 W
OREM, UT 84058

97-32/1243
071118590

869

DATE 8/31/9

PAY TO DAVID + JAN HARRISON \$ 6,250⁰⁰
THE ORDER OF

SIX THOUSAND TWO HUNDRED FIFTY and no/100's DOLLARS

Provo Riverside Plaza
Central Bank
1300 North State St. 378-5963
Provo, Utah 84604

MEMO SPRINKLER CONTRACT
EXT.

Samuel

⑆124300327⑆07111859 011 0869

SPC00177 BLUE