1972

Corporation Nine, A Utah Corporation v. Ray L. Taylor and Neva W. Taylor, His Wife : Defendants-Respondents Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CORPORATION NINE, a Utah corporation, *Plaintiff-Appellant,*

vs.

RAY L. TAYLOR and NEVA W. TAYLOR, his wife, *Defendants-Respondents.*

RAY L. TAYLOR and NEVA W. TAYLOR, his wife, *Plaintiffs-Respondents,*

vs.

CORPORATION NINE, a Utah corporation, *Defendant-Appellant.*

DEFENDANTS'-RESPON

Appeal from a Judgment of
of Salt Lake
Honorable James S.

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CASES

TEXTS

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vs.

CORPORATION NINE, a Utah corporation, *Defendant-Appellant.*

Case No. 12983

DEFENDANTS'-RESPONDENTS' BRIEF

NATURE OF THE CASE

The actions involved in the two lawsuits joined for trial in the District Court arose out of a real estate contract for 50 acres of land entered into between Corporation Nine, appellant, as buyer, and Ray L. Taylor and Neva W. Taylor, his wife, respondents, as sellers. The Taylors gave notice of termination of the contract claiming default in payment. Corporation Nine filed suit against Taylors for specific perform-

ance and damages, and Taylors filed suit against Corporation Nine and John New to have the title to the property quieted in Taylors and for interest, costs and attorney's fees.

DISPOSITION IN THE LOWER COURT

The trial court entered judgment for Taylors dismissing Corporation Nine's complaint, dismissed John New from the Taylors' action against him, and granted judgment to Taylors against Corporation Nine quieting title in them and awarded interest, costs and attorney's fees to Taylors.

RELIEF SOUGHT ON APPEAL

Taylors, respondents, seek an affirmance of the trial court's judgment except as to the amount awarded for attorney's fees and ask for an order from the Supreme Court remanding the case back to the trial court to take evidence on the amount of attorney fees. Respondents also ask for attorneys fees in connection with the appeal. Corporation Nine, appellant, seeks a reversal of the trial court's decision, for an order requiring specific performance or in the alternative for damages, costs and attorney's fees.

STATEMENT OF FACTS

Both of the lawsuits involved in this appeal arose out of a contract for purchase of land dated the 24th day of January, 1968, in which Ray L. Taylor and Neva W. Taylor, his wife, as sellers, agreed to sell to Corporation Nine, as buyer, 50 acres of land described as:

> The South 120 rds of the W. ½ of the N.W. ¼, and Lot 1, Sec. 36, Twp. 2 S., Range 1 East, S. L. B. & M., and commencing at S.W. ¼ of Sec. 36, E. 792', N. 10 rds, E. 528', N. 70 rds; West 80 rds, S. 80 rds to point of beginning, containing 124.58 acres in total, less the S.W. 30.0 acres and the N. 44.58 acres, making a total net acreage involved in this agreement of 50.0 acres and further described as being a 50.0 acre tract adjoining Esquire Estates No. 1 Subdivision on the South and extending North to form a straight line E. and W. and leaving a remainder of 44.58 acres in the present Taylor property which before this agreement contained 94.58 acres. (See Exhibit 2, Plat of 50 acres)

The contract which was prepared by the attorney for Corporation Nine (R. 104) provided for a purchase price of $240,000.00 with $20,000.00 to be paid down at time of the execution of the contract and $25,000.00 annually thereafter (Exhibit 1). The $25,000.00 annual payment was insisted upon by Mr. Taylor so that he could have an annual income from said contract in that amount (R. 250). The contract called for the accrual of interest on the balance at the rate of 4% per annum commencing March 1, 1969 (Exhibit 1).

The contract further provided that upon the payment of the down payment of $20,000.00 the seller was to convey by warranty deed to the buyer fee title to six acres of land in accordance with the plat (Exhibit 2). On the 1st of March, 1969, the buyer was to receive an additional five acres contiguous to the initial six acres and appropriate to development of the entire parcel by warranty deed in exchange for $25,000.00 and on each succeeding March 1st thereafter in like manner until the full $240,000.00 was paid including interest with each annual payment.

Possession of the land was to be delivered to the buyer as each parcel was paid for and the seller was to continue to pay the taxes and retain possession of all unconveyed land.

The contract further provided that the buyer had no privilege of pre-payment other than consistent with the terms of the agreement, unless prior written consent was obtained from the sellers.

The contract also provided that in the event of failure to comply with the terms by the buyer or upon failure of the buyer to make any payment or payments when the same became due, or within 30 days thereafter, after written notice the seller had the right upon failure of the buyer to remedy the default within five (5) days of the receipt of the written notice to be released from the contract and that time was of the essence of the contract (Exhibit 1).

The contract provided for payment of reasonable attorney's fees by the defaulting party (Exhibit 1).

The land involved in the agreement is located east of Wasatch Boulevard at approximately 7800 South (See Exhibit 2). Within a few days after the execution of the contract Taylor executed a deed for 6.567 acres and received in exchange $20,000.00 cash and a promissory note for $12,835.00. Taylor testified that when the original discussion took place with respect to the sale of the land they discussed only the sum of $5,000.00 per acre (R. 249, 262) with a down payment of $30,000.00 for six acres (R. 245). Taylor was living in California at the time of the execution of the contract (R. 246). New went to Taylor's home in California

to have him sign the contract and at that time New told Taylor he was unable to get the full amount of the $30,000.00, but Valley State Bank would loan him $20,000.00 and that New would give him a note for $10,000.00 and a second mortgage on the land that Taylor had conveyed to him (R. 246, 247). New asked Taylor not to record the mortgage so the bank would not know (R. 248). Taylor objected to taking a note, but New said he would pay it off in a few months. After returning to Salt Lake New called Taylor on the phone and claimed he needed an additional .567 acres to round out the lots so there would not be parts of lots left over (R. 262) (See also Exhibit 2-Plat) New said he would make the note for $12,835.00 (R. 263). The note, (Exhibit D-33), mortgage (Exhibit P. 35), and $20,000.00 were sent to Taylor by Security Title. The note had been made payable in three years instead of six months (R. 248). The contract provided for payment of $240,000.00 for the 50 acres and this was the first occasion Taylor knew of the $240,000.00 purchase price in the contract (R. 247-8).

The note was finally paid in June of 1971 after a lawsuit was filed on the note and to foreclose the mortgage (R. 250). The note did not provide for interest (Exhibit D-33) but when Taylor talked to New about not paying it in six months, New said he would pay interest on the note (R. 282).

New admitted that he and Taylor had agreed upon a payment of $30,000.00 for the initial six acres but claimed that it was on a release of $5,000.00 per acre (R. 118). When his deposition was taken, he admitted that the whole contract was $250,000.00 for the 50 acres (R. 118-119). He denied at

the trial that it was for $250,000.00 (R. 118, 623, 624) but admitted to the following questions and answers given at the deposition:

R. 118, L. 26

Q. Now when I questioned you at the time your deposition was taken you told me that it was ($250,000.00 for 50 acres) didn't you?

119, L. 6

A. Yes.

L 7

Q. And you said it was $250,000.00 for 50 acres, didn't you?

L. 9

A. I said yes, I said yes.

R. 119, L. 23

Q. Now you told me initially also that the agreed price per acre for the 50 acres was $5,000.00 an acre did you not, at the time I took your deposition.

L. 27

A. If I did, it was meant as a release fee.

Q. Just tell me whether or not you did.

A. Then I say negative.

L. 30

Q. Now would you please refer to your deposition at Page 16, L. 10: Q. What was the agreed price per acre of land that you were buying under the contract?

R. 120, L. 3

A. $5,000.00 per acre.

L. 9

Q. And then I asked you, did I not, whether you had paid for any acreage that you had not received, and your answer was "no", was it not?

L. 16

A. Yes.

L. 28

Q. And then on page 17, is it not true at line 9 that I asked you — line 7: "Now then, the contract states, I believe, $240,000.00 but actually the price was not that, was it?"

R. 121, L.

And your answer on line 9: "Well, it was $250,000.00 and then this promissory note made up the difference between the 240 and the 250."

In each instance the witness changed the above answers before filing his deposition with the court but after transcription (R. 119-121).

Early in 1969 New approached Taylor and told him that he was trying to get the Home Show on the land and that the Home Show was interested in having the show on the land. Taylor told New he would be interested in hearing what the financing was, and Mr. Wells of Valley State Bank called Taylor on the phone and talked to him about the transaction (R. 252, 111). New contacted Taylor and told him he needed additional acreage to put on the Home Show. Taylor agreed to sell him some additional land (R. 112). In February, 1969, Taylor sold to New three separate parcels of land to be used in connection with the Home Show. One tract was 8.618 acres, one 4.45 acres and one 1.18 acres. The 1.18 acres was

outside the 50 acre tract (Exhibit P-2, R. 292, 256). The court found as a fact that the sale of the 1.18 acres for the sum of $5,900.00 was not part of the 50 acre tract contemplated in the contract and payment therefor was not a payment on the acreage covered by the contract (R. 48).

The 1.18 acres were sold by Taylor to New at the rate of $5,000.00 per acre which Taylor contended was the acre price for all the land sold (R. 262). The 8.618 acres and the 4.45 acres called for payment at the rate of $5,000.00 per acre and the payments were applied and paid as follows:

8.618 acres at $5,000.00 per acre - - -	$43,090.00
4.45 acres - - - - - - - - - - - - - - -	22,250.00
Total - - -	$65,340.00

$25,000.00 was applied to the March 1, 1969 payment. This was paid on February 17, 1969 (R. 123, 124). The balance of the $43,090.00, to wit: $18,090.00 was paid by Valley State Bank to Taylor on January 7, 1970. This payment was guaranteed by Valley State Bank if Taylor released the land so they could have the Home Show (R. 253). Valley State Bank and Security Title were acting as escrow agents (R. 253).

In connection with the sale of the 4.45 acres for $22,250.00 a written "Letter of Instruction" to Security Title Company (Exhibit P-5) dated 2-6-69 was signed by both New on behalf of Corporation Nine and Taylor pertaining only to the 4.45 acres. In addition to other provisions the "Letter of Instructions" provides that for the benefit of Corporation Nine any funds received by Security Title under the terms of this "Letter of Instructions" shall apply to the annual payment re-

quired under the contract of purchase (Exhibit 5, Page 1, Paragraph 3). This was the only authorization for pre-payment between the parties (R. 272) and covered the payment for March 1, 1970, except for the sum of $2,750.00. The payment of the $22,250.00 was made to Taylor by Security Title on October 9, 1969, and applied to the payment due March 1, 1970 (R. 255). Taylor didn't bill New for the $2,750.00 balance for that year (R. 255). He did send him a statement for the interest to become due on March 1, 1970 in the sum of $6,597.12 which was dated February 10, 1970 (Exhibit P-6). The payment was not made on the due date and New wrote Taylor on March 14, 1970, requesting an extension until June 30, 1970, and agreeing to pay 10% on the interest due from March 1, 1970, until June 30, 1970 (Exhibit P-7).

On June 20, 1970 Taylor sent a notice of interest payment due June 30, 1970 for the sum of $6,817.02 (Exhibit P-8). On July 29, 1970 New sent a letter to Taylor advising him he would send payment by August 5, 1970 (Exhibit P-9). On November 19, 1970 New sent a letter and check to Taylor for the sum of $7,025.98 bringing the interest payment current (Exhibit P-10).

On February 25, 1971 Taylor sent notice to New advising him of the interest and principal payment due on March 1, 1971 which was $25,000.00 for the principal payment and $5,837.00 in interest, for a total of $30,837.00 (Exhibit P-13). New failed to make payment and on the 4th day of April New was served with a notice by the constable that if the default was not corrected within five days, the contract was terminated (Exhibit P-14). New tendered a payment of $9,197.00 covering interest of $5,437.00 and principal of $3,760.00

(Exhibit P-15) which Taylor refused and returned (Exhibit P-17, R. 136, 137). No tender was ever made of the $25,000.00 installment due on the 1st of March, 1971 (R. 133).

The trial court found that the contract purchase price was $240,000.00, that the sale of 1.18 acres was not part of the 50 acres and payment not to be credited toward the 50 acres; that the principal balance due on March 1, 1971 was $141,825.00 and that the interest due for the period of March 1, 1970 to March 1, 1971 at 4% was $5,673.00; that Corporation Nine was in default for failure to make tender of the payment, or payment of the same, in the sum of $25,000.00 due on March 1, 1971; that the notice given by Taylor to New of default was proper in all respects and as required by law and gave judgment to Taylor for interest in the sum of $6,099.87 to time of judgment, an attorney's fee in the amount of $1,000.00, quieted title in the property to Taylors and dismissed Corporation Nine's action against Taylor (R. 47). The court by stipulation of counsel agreed to hear evidence pertaining to the reasonableness of the attorney's fee which was to be done after the court made its ruling but awarded Taylor $1,000.00 in attorney's fees in its memorandum decision without hearing evidence on attorney's fees (R. 219).

ARGUMENT

POINT I

THE RESPONDENTS WERE NOT ESTOPPED BY ANY CONDUCT ON THEIR PART TO REFUSE ACCEPTANCE OF PLAINTIFF'S IMPROPER TENDER OF PAYMENT.

The trial court found that appellant, Corporation Nine, was in default in failing to tender or make the scheduled 1971 payment of $25,000.00 and that the Taylors were not in default in any way on the contract and gave judgment quieting title to the property in Taylors (R. 49).

The review by the Supreme Court is in light most favorable to the findings of the trial court. *Coombs v. Ouzanian,* 24 Utah 2d 39, 465 P.2d 356.

It is obvious from reading the provisions of the contract that Taylor's intention in entering into the terms thereof was to provide himself with an annual income of $25,000.00 per year and that that sum was to be paid each year in exchange for five acres of land unless written permission or consent was obtained from the sellers granting the buyer the privilege of prepayment (Exhibit I). Taylor testified that he had insisted that an annual payment of $25,000.00 be made so that he could depend on it as an income (R. 250).

The contract was actually prepared by the attorney for Corporation Nine (R. 104) and in construing the contract it must be construed most strongly against the party preparing it.

There was, in fact, only two sales of property between the parties. The original sale was of 6.567 acres when the contract was initiated in January of 1968 and again in February

of 1969 when the buyer wanted some extra land so that the Home Show could be sponsored. In the first instance .567 acres were requested by the buyer and Taylors agreed at the buyer's request to allow the Corporation to have .567 acres of land to round out some lots that would otherwise only be partially included in the initial 6 acres (See Exhibit 2). This additional land was paid for by a promissory note in the sum of $12,835.00.

In the second instance Corporation Nine obtained, at its request, two tracts of land within the 50 acre tract, one of 8.618 acres and one of 4.45 acres and also purchased 1.18 acres outside of the 50 acre tract. The 8.618 acres was paid for at $5,000.00 per acre, with $25,000.00 being credited to the 1969 installment due on March 1, 1969 and the balance of the payment for that acreage, $18,090.00, was paid by Valley State Bank to Taylor on January 7, 1970. This payment was guaranteed to Taylors by Valley State Bank if Taylor released the land so Corporation Nine, which was being financed by Valley State Bank, could have the Home Show. Valley State Bank along with Security Title were acting as escrow agents (R. 253). Permission was not given Corporation Nine to credit the $18,090.00 as a pre-payment, but it is significant that Taylors did agree to allow Corporation Nine to use payment of the $22,250.00 for the 4.45 acres as a pre-payment for the 1970 payment and pursuant to the provisions of the contract of January 24, 1968, a "Letter of Instructions" was signed by Taylor and also by New on behalf of Corporation Nine authorizing the payment of the $22,250.00 to be credited to the March 1, 1970 payment (Exhibit 5, Page 1, Paragraph 3). Actually this payment was made through Security Title to Taylors in October, 1969.

Counsel for Corporation Nine contends that the sale of the acreage in 1969 was an amendment to the contract, but the very fact that there was a provision in the contract pertaining to a requirement that pre-payment could not be made without permission in writing naturally infers that the parties anticipated there would or could be some transfers of property over and above the five acres provided for annually but that the annual payment would still have to be made unless written permission was otherwise granted. This is, in fact, what happened on this occasion and the "Letter of Instructions" is in accordance with the provision of the contract and the intent of the parties under the contract.

There was no basis whatever for Corporation Nine to make claim that it did not owe a payment of $25,000.00 on March 1, 1971. Plaintiff produced no evidence to show a waiver of that payment.

Appellant has cited many rules pertaining to equitable estoppel, that a written contract may be changed, modified or waived in whole or in part by a subsequent one, express, written, oral or implied, promissory estoppel, and estoppel in pais, and resondent acknowledges these general rules, but they do not fit the facts of the case before this court. There is also a well known rule of law that he who would have equity must do equity.

The contract between these parties provided that upon payment of $5,000.00 per acre a deed would be executed by Taylors to Corporation Nine of that particular acreage paid for and possession of the land would be delivered to the buyer of the actual acreage paid for with the seller to retain posses-

sion of and pay the taxes on the unconveyed land. The contract was more on the order of a divisible contract. As is stated in 17 Am. Jur. 2d at page 760:

> If it appears that the purpose is to take the whole or none, the contract is entire; otherwise, it is severable. Another test is the possibility or impossibility of a certain apportionment of benefits, according to the compensation in the contract, in case of part performance only. If the consideration is expressly or by necessary implication apportioned the contract is severable.

Until the buyer paid the sum of $25,000.00 the seller had no obligation to convey any land and had, in fact, no equity whatsoever in the land not paid for and conveyed. It was more in the nature of a divisible option. Until the payment was made each year the seller had no obligation to convey. The interest paid was the consideration for the continuance of the option. Interest didn't start to accrue until March 1, 1969.

On page 18 of its brief appellant stated that it had expended large sums of money to develop the subdivision with installation of water, sewer, gas, power, drainage and other off-site improvements, sufficient to develop the balance of the ground. No place in appellant's brief does it refer to any place in the record where such evidence or testimony is shown or can be found. The only expenditures made by the appellant were on the land actually paid for and conveyed. There was some storm drainage consisting of an open ditch installed (R. 237) and the 1.18 acres was purchased for that purpose (R. 166). The drainage was, in fact, not on the Taylor property (R. 286, See Exhibit P-2). A preliminary subdivision

plot was prepared by Bush and Gudgell of the whole area (Exhibit P-2), but there is no evidence in the record of any other expenditure by appellant on the unpaid for and undeeded land.

Appellant claims that he spent money for engineering and re-zoning of the land and did, in fact, have not only the balance of the 50 acres re-zoned but an additional seven acres also extending beyond the 50 acre line. In doing so, the appellant in its application (Exhibit P-18) through John New its agent falsely swore that it was the owner of the property and then in connection with the hearing failed to give the Taylors any notice whatever or to list them as a property owner. (See last page of Exhibit P-18). It is interesting to note that New stated he planned to have the area built within five years. His oaths meant no more to him than his verbal or written promises. The property was, in fact, re-zoned on March 6, 1970. (See Exhibit P-31, R. 148-150). The re-zoning was without the knowledge or authority of Taylor.

The respondent has not at any time misled appellant with respect to the payments that were to be made. Prior to March 1, 1970 Taylor sent a notice of interest payment due on March 1, 1970. This notice was dated February 10, 1970 (Exhibit P-6). However, the payment was not made on the due date and on March 14, 1970 New on behalf of Corporation Nine wrote Taylor requesting an extension until June 30, 1970 and agreed to pay 10 percent interest on the interest due from March 1, 1970 until June 30, 1970 (Exhibit P-7). On June 20, 1970, Taylor sent a notice of interest payment due June 30, 1970 for the sum of $6,817.02 (Exhibit P-8). On July 29, 1970 New again wrote advising Taylor he would send the payment on August 5, 1970 (Exhibit P-9). In October of

1970 Taylor made a trip from his home in California to Salt Lake to try to collect the interest payment due on March 1, 1970 (R. 270). New promised that the payment would be made and Taylor gave him 24 or 48 hours to raise the money which was not done (R. 270). On November 24, 1970 Taylor wrote New a letter reviewing the matter with him and advised him that he was irrevocably defaulted (Exhibit R. 11).

On November 19, 1970 New forwarded a letter and a check in the amount of $7,025.28 covering the interest due on March 1, 1970, with the accrued interest on interest.

On February 25, 1971 Taylor sent notice to New advising him of the principal and interest due on March 1, 1971 which was $25,000.00 for the principal payment and interest in the amount of $5,837.00 covering the period March 1, 1970 to March 1, 1971. New failed to make payment, and notice of the termination in accordance with the provisions of the contract was given (Exhibit P-14). The court found the notice to be proper in all respects and no claim has been made by appellant that it was defective.

It is obvious from the evidence that the respondent gave appellant ample opportunity to comply with the terms of the agreement by giving him notice of the various payments and by giving him extensions and that he was justified in terminating the agreement. The equities are all in favor of the respondent. Taylors were certainly not required to continue indefinitely making concessions to the appellant which continued to ignore the same and the trial court so found.

Appellant contends it made a proper tender of interest and principal payment in submiting its check for the sum of $9,197.00 which was dated March 24, 1971 (Exhibit P-15). The check was submitted as payment in full for the 1971 payment and annual interest. This was accompanied by a demand for conveyance of .752 of an acre of ground which appellant selected without discussion with respondent.

Whereas, the previous conveyances had all been along the lot lines of the proposed subdivision, this request cut four lots into segments and would leave some partial lots on the west end of the property that would have limited, if any, use or value for home construction (Exhibit P-2).

The tender was, therefore, not only improper with respect to the amount of the principal and interest payment due but also the appellant had no right under the terms of the contract to select or have conveyed to him, if the tender of payment had been proper, the acreage as requested.

The trial court's findings with respect to the default of the appellant and no default whatever upon the part of the respondent is well supported by the evidence and should be affirmed by the appellate court.

POINT II

THE APPELLANT'S BREACH WAS SUBSTANTIAL AND DID WARRANT A TERMINATION OF THE CONTRACT.

There was no forfeiture involved in the termination of the contract. The appellant received all the land he paid for under the contract and, in fact, received the choicest part of the land to put on the Home Show (R. 273).

There was no forfeiture of any land which had been paid for and no forfeiture of any money which had been paid by Corporation Nine to Taylor. The termination was for failure to pay for land which was scheduled to be taken and actually refused by the appellant by failure to make its payment. The interest to be paid was interest already accrued and owing to respondent as of March 1, 1971. Respondent had strictly performed his contractual obligations according to the letter and was prepared to deliver a deed to Corporation Nine upon payment of the principal payment of $25,000.00 and interest. Mr. Taylor still holds the title to the land that had not been conveyed to Corporation Nine (R. 250). He was at all times able to convey title to the appellant even though he had entered into a contract for sale of part of the property to Jerry Young. The contract with Corporation Nine had been recorded prior to the recording of the contract with Jerry Young. As a matter of fact, the court excluded this issue from the trial (R. 220). Respondent after payment of the interest by Corporation Nine gave the appellant an additional opportunity to keep the contract in effect even though he had been substantially in default on his interest payment for March 1, 1970 and gave him notice of the principal and interest payment due on March 1, 1971, but with full knowledge of the consequences appellant elected to forego payment of the principal sum which was the very heart of the contract as far as Taylor was concerned. If Mr. New, the manager of Corporation Nine, was misled, it was by his own failure to use reasonable diligence to acquire knowledge of the facts and not by any misrepresentation or trickery on Taylor's part. The contract provided that "time is the essence of the agreement" (Page 5, Exhibit P-1).

In the case of *Woodard v. Allen,* 1 Utah 2d 220, 265 P.2d 398 our court affirmed the well known doctrine that marketability of title need only be determined as of the time purchaser tenders that which, under contract, would require vendor to transfer title which he agreed to convey. See also *Walker v. Bintz and Shaw,* 3 Utah 2d 162, 280 P.2d 767. The purchaser is not entitled to specific performance until he himself has complied with his promises, the seller's duty to convey being contingent upon the buyer's performance of his obligation to make a proper tender of the purchase price. It would appear that Corporation Nine did not have the money to make a proper tender, based on the difficulty it had in paying the interest installment, and that it could not raise it.

If it were shown that Taylor's contract with Young was valid and binding, Taylor might be subject to an action by Young for failure to convey to him, but, nevertheless, he did still have title to convey to appellant and even up to the final default of appellant stood ready to do so.

The record does not support appellant's claim that there was insufficient breach of the contract to warrant a termination.

POINT III

THE COURT ERRED IN FAILING TO TAKE EVIDENCE ON THE AMOUNT OF THE ATTORNEY'S FEE TO BE AWARDED.

The court during the course of the trial and pursuant to stipulation of counsel agreed to hear evidence pertaining to the amount and reasonableness of the attorney's fee to be awarded to the prevailing party which was to be done after the court made its ruling (R. 219). The court made an award

of $1,000.00 as an attorney's fee without taking evidence but acknowledged at the time of the argument of appellant's motion for an order to amend findings and conclusions of law or in the alternative for a new trial that it had overlooked this stipulation. Counsel for respondent feels confident that the trial court will hear evidence on the question of attorney's fees on remand of the case back to the District Court but to protect itself on the record raises that matter on appeal. The case of *Provo City Corporation v. Cropper,* 28 Utah 2d 1, 497 P.2d 629, is authority for the principle that it is improper to make an award, in the absence of a stipulation as to the amount, without taking evidence as to the reasonableness of the fees.

Respondent should be allowed to put on evidence of his attorney's fees.

Respondent also requests that the Supreme Court award reasonable attorney's fees in connection with the handling of the appeal in this case.

CONCLUSION

The trial court correctly ruled that the respondent Taylor was not in default in any way in connection with its performance under the contract, that appellant clearly was in default in failing to make the March 1, 1971 payment or proper tender thereof. The Supreme Court should award reasonable attorney's fees to the respondent in connection with the ser-

vice pertaining to the appeal, affirm the trial court's judgment except as to the amount awarded as attorney's fees and remand the case back to the trial court for hearing of evidence as to the amount and reasonableness of the attorney's fee to be awarded.

Respectfully submitted,

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