

2018

**Melanie A. Madsen Thatcher, Plaintiff/Appellee/Cross-Appellant,  
v. Michael Lang, Defendant/Appellant/Cross-Appellee : Reply Brief**

Utah Court of Appeals

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Bryan J. Pattison, Durham Jones & Pinegar P.C.; attorneys for appellant.

Karra J. Porter, Kristen C. Kiburtz, J.D. Lauritzen, Christensen & Jensen P.C.; attorneys for appellee.

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**IN THE UTAH COURT OF APPEALS**

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MELANIE A. MADSEN THATCHER,

Plaintiff/Appellee/Cross-Appellant,  
vs.

MICHAEL LANG,

Defendant/Appellant/Cross-Appellee.

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Case No. 20180009-CA

APPEAL FROM THE FIFTH DISTRICT COURT,  
WASHINGTON COUNTY, STATE OF UTAH  
THE HON. G. MICHAEL WESTFALL, CIVIL NO. 120500520

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**REPLY BRIEF OF CROSS-APPELLANT**

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Karra J. Porter, 5223  
Kristen C. Kiburtz, 12572  
J. D. Lauritzen, 14237  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111-2048  
Telephone: (801) 323-5000

Bryan J. Pattison, 8766  
Durham Jones & Pinegar, P.C.  
192 East 200 North, Third Floor  
St. George, UT 84770  
[bpattison@djplaw.com](mailto:bpattison@djplaw.com)

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## ARGUMENT

### I. THE TRIAL COURT APPLIED THE INCORRECT STANDARD TO LIQUIDATED DAMAGES, AND IN SO DOING, ERRONEOUSLY DETERMINED THAT THATCHER WAS REQUIRED TO GIVE LANG STRICT NOTICE BEFORE RETAINING HIS PRINCIPAL PAYMENTS.

Thatcher's opening brief argued that the trial court failed to apply the correct standard as it related to liquidated damages. (Cross-Aplt. Br., pp. 40-41.) Thatcher asserted that the trial court appeared to have applied a heightened level of judicial scrutiny to the liquidated damages provision at issue in contravention of Utah law. (*Id.*, p. 40.) Liquidated damages provisions are to be reviewed like any other contractual provision. (*Id.*) Such provisions are unenforceable only to the extent the party challenging the provision shows it is unconscionable. (*Id.*, p. 41.) Despite the foregoing, the trial court improperly placed the burden on Thatcher to prove strict compliance with her alleged notice obligations under the Agreement, concluding that even a "technical" violation precluded enforcement of the provision. (*Id.*)

Thatcher contended that the trial court failed to address the separate liquidated damages provision in the Option Agreement. (Cross-Aplt. Br., p. 46.) That provision, by its terms, contains no notice requirement. (*Id.*, pp. 43 and 46.) Thatcher explained that the liquidated damages clause in § 4.4 of the Agreement also contains no notice provision. (*Id.*) The liquidated damages provisions in these two agreements are not inconsistent. (*Id.*, p. 44.) Under the language of either agreement, Lang automatically forfeited his prior payments if he failed to make a scheduled payment within 30 days of

when it was due. (*Id.*) Thatcher therefore asserted that she was entitled to retain Lang's payments after the 30-day grace period expired without notice to Lang. (*Id.*, pp. 46-47.)

In his response, Lang argues that Thatcher's reliance on *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.* is misplaced. (Cross-Aple. Br., p. 23). Lang states that "the issue in this case is not whether the liquidated damages provision was enforceable; it is whether Thatcher properly triggered that provision by complying with the Agreement's notice requirements." (*Id.*, p. 24.) Lang takes the position that, because he does not challenge the enforceability of the liquidated damages provision, the Court should reject application of *Commercial Real Estate*. (*Id.*) Lang also contends that he cannot locate in the record where Thatcher raised in the trial court that *Commercial Real Estate* defines the governing standard. (*Id.*, p.24 n.10.) Lang therefore asserts that Thatcher should be precluded from arguing the correct standard on appeal. (*Id.*) Citing that standard would, according to Lang, allow Thatcher "to exploit her failure to raise the issue below and impermissibly benefit from an error she invited." (*Id.*)

After arguing against Thatcher's reliance on *Commercial Real Estate*, the main thrust of Lang's argument against Thatcher's ability to retain his payments as liquidated damages is that Thatcher is ignoring the purported notice requirements under § 4.4 of the Agreement in an "effort to justify her failure to comply" with those requirements. (Cross-Aple. Br., p. 24.) Thatcher, in Lang's view, incorrectly points to the liquidated damages provision in the Option Agreement to argue that such language "survived, applies, and saves her from her failure to comply with Section 4.4." (*Id.*) Lang contends that § 2 of the Agreement merged the Option Agreement with the Agreement and

“rendered ineffective any inconsistent or conflicting provision of the Option Agreement.” (*Id.*, p. 25.) Lang argues that the liquidated damages provisions in the two agreements are conflicting and, as a result, “[t]he merger provision of the Agreement abrogates and nullifies Section 11.” (*Id.*, p. 27.)

**A. The liquidated damages provisions at issue are not subject to a heightened standard of review, and should be enforced absent mistake, fraud, duress, or unconscionability.**

Lang’s contention that Thatcher’s reliance on *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, 285 P.3d 1193, is misplaced is without merit. As an initial matter, Lang’s assertion that he cannot locate in the record where Thatcher raised the holding in *Commercial Real Estate* as “creating a new standard that [the Court] must apply” is incorrect. (Cross-Aple. Br., p. 24 n.10.) Thatcher is not arguing for the application of a new standard. Rather, as she has consistently argued, the standard applicable to liquidated damages provisions is that articulated in *Commercial Real Estate*. (*See, e.g.*, R.150-51, R.6326-27 (*citing Commercial Real Estate*)). Because she raised the issue before the trial court, there are no issues regarding preservation/waiver, and there is no need to engage in an analysis of invited error.<sup>1</sup>

Turning to the applicability of *Commercial Real Estate*, Lang argues that because that case dealt with the enforceability of liquidated damages provisions generally, and not notice requirements, it has no bearing. That is incorrect. Thatcher by way of her cross-appeal seeks to overturn the trial court’s ruling regarding the enforceability of the

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<sup>1</sup> It is doubtful that application of the correct standard is substantive “argument” subject to waiver in any event. The supreme court has consistently applied the correct legal standards on appeal, limiting preservation issues to application of the standard.

liquidated damages provisions in the agreements. Neither provision required notice as Thatcher has argued elsewhere. The provisions were self-executing. Thus, despite what Lang contends, the issue on appeal is whether those provisions are enforceable, and not whether Thatcher complied with any alleged notice obligations.

Under the standard in *Commercial Real Estate*, liquidated damages provisions should be enforced:

[U]nless enforcement ... would be unconscionable, we should recognize and honor the right of persons to contract freely and to make real and genuine mistakes when the dealings are at arms' length. Courts ... should not interfere except when sharp practice or most unconscionable result[s] are to be prevented. Courts should invalidate liquidated damages clauses only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract ... Liquidated damages clauses are not subject to any form of heightened judicial scrutiny. Instead, courts should begin with the longstanding presumption that liquidated damages clauses are enforceable. A party may challenge the enforceability of a liquidated damages clause only by pursuing one of the general contractual remedies, such as mistake, fraud, duress, or unconscionability.

2012 UT 49, ¶ 40, 285 P.3d 1193.

Lang does not argue against the liquidated damages provisions' enforceability on the grounds of mistake, fraud, duress, or unconscionability. Instead, Lang rests his argument upon two faulty premises. First, he incorrectly states that the liquidated damages provision in the Option Agreement had been invalidated by the Agreement's merger clause. Second, he erroneously contends that the Agreement's liquidated damages provision required Thatcher to provide him with notice to trigger the provision. As shown below, because the liquidated damages provisions in the two agreements are not inconsistent or otherwise conflicting, both provisions remained in effect. Those

provisions were enforceable absent a mistake, fraud, duress, or to prevent an unconscionable result. Even if the liquidated damages provision in the Option Agreement had been abrogated by the Agreement's merger clause, the liquidated damages provision in the Agreement did not require Thatcher to provide Lang with notice to trigger the provision.

As noted above, because there are no notice requirements in either liquidated damages provision, the issue here is the provisions' enforceability and the applicable standard. In short, if Lang's contention that Thatcher was required to provide him with notice to trigger the liquidated damages provision is wrong, then the provision should be enforced. Lang has not argued any of the contractual defenses set forth above. His sole argument is that Thatcher was required to provide him with notice. That argument fails for the reasons set forth elsewhere herein.

In sum, the trial court erred in applying a heightened standard to Thatcher's claim for liquidated damages. The court should have enforced the provisions absent a valid contractual defense. Lang, as noted, offered no such defense in the trial court, and argues none here. Accordingly, the trial court's unjust enrichment judgment should be reversed.

**B. Neither liquidated damages provision required notice.**

Turning to the substantive question of Thatcher's right to retain Lang's payments as liquidated damages, the main thrust of Lang's argument is that the liquidated damages provision in the Option Agreement was abrogated by the merger clause in the Agreement because it is allegedly inconsistent or conflicts with the Agreement's liquidated damages provision. Putting aside for the moment that the liquidated damages provision in the

Agreement contains no notice requirement, Lang's contention that the liquidated damages provision in the Option Agreement was abrogated is incorrect.

Lang does not dispute that Section 11 of the Option Agreement entitled Thatcher to automatically retain Lang's prior payments as liquidated damages if he failed to make any scheduled payment under the Option Agreement within 30 days after it was due. Lang instead relies on Section 2 of the Agreement (the merger clause), which provides: "The terms of the Option Agreement have been merged herein and to the extent any terms or conditions of the Option Agreement conflict or are otherwise inconsistent with this Agreement, the terms of the Agreement shall control," to argue that Section 11 was abrogated because it conflicted with § 4.4 of the Agreement. (R.6646, Ex. 8, § 2.)

The problem with Lang's argument is that it presupposes a conflict between the two agreements based upon Lang's reading of § 4.4. According to Lang, because the liquidated damages provision in the Agreement purportedly required Thatcher to provide him with notice to trigger the provision, the Agreement controlled, and notice was required. Lang's view ignores the language of the liquidated damages provisions in both agreements and, instead, attempts to conflate the notice requirements in the first sentence of § 4.4 with Thatcher's right to retain Lang's payments as liquidated damages following a 30-day grace period set forth in § 4.4's second sentence.

Section 4.4 provided the options available to Thatcher upon Lang's default. The first sentence of § 4.4 states: "[Thatcher] may terminate this Agreement by giving written notice to [Lang] if [Lang] materially breaches any covenant or other obligation of [Buyer] under this Agreement and fails to cure such breach within thirty (30) days after

written notice from [Thatcher] is received by [Lang] specifying such breach.” (R. 9396; Ex. 8, § 4.4.) The second sentence of § 4.4 states: “If [Lang] fails to make payment on or before any deadline provided for herein after the expiration of thirty (30) day grace period, all payment previously made shall be forfeited to [Thatcher] as liquidated damages.” (*Id.*) Noticeably absent from the second sentence of § 4.4 is any requirement of notice.

As explained in Thatcher’s opening brief, § 4.4 addresses two distinct concepts, termination of the contract (requiring notice), and retention of payments made prior to expiration of a grace period (not requiring notice). Lang cannot simply ignore that distinction, and instead attempt to conflate the two provisions. Such a reading ignores the intent of the parties as expressly confirmed in the Agreement and by Ms. Thatcher during trial. (R.6869 ln. 10-17; R.7156-7158; R.7237-7238; R.7253 ln. 17-22.) Lang never offered a differing interpretation. (Trial transcript, *passim*.)

As Utah courts have long recognized, there is nothing that prevents a forfeiture provision from being self-executing. *See, e.g., Papodopulos v. Defabrizio*, 125 P.2d 416, 418 (Utah 1942); *Fed. Land Bank of Berkeley v. Sorenson*, 121 P.2d 398, 399-400 (Utah 1942); *Leone v. Zuniga*, 34 P.2d 699 (Utah 1934); *Howorth v. Mills*, 221 P. 165 (Utah 1923). Nothing in the second sentence of § 4.4 required Thatcher to take “some affirmative act ... to notify [Lang] of what specific provision in the contract [she was] proceeding under and ... what [Lang] must [have done] to bring the contract current.” *Grow v. Marwick Development, Inc.*, 621 P.2d 1249, 1251-52 (Utah 1980). Rather, the provision was self-executing; i.e., Thatcher was automatically entitled to retain Lang’s

payments as liquidated damages after a 30-day grace period without regard to the notice requirements in the preceding sentence of § 4.4.

Lang's argument attempts to improperly inject the notice requirements from the first sentence of § 4.4 into the liquidated damages provision in the second sentence. That argument contradicts the express wording of the liquidated damages provisions in both agreements, which automatically entitled Thatcher to retain Lang's prior payments without notice to him. Because the liquidated damages provision in the Agreement required no notice, it did nothing to abrogate the liquidated damages provision in the Option Agreement via the Agreement's merger clause.

**II. EVEN IF THATCHER WAS REQUIRED TO PROVIDE LANG WITH NOTICE TO TRIGGER THE LIQUIDATED DAMAGES PROVISION, THE TRIAL COURT ERRED IN DETERMINING THAT THATCHER FAILED TO MEET HER OBLIGATION.<sup>2</sup>**

Thatcher argued in her opening brief that, even if required to provide Lang with notice to trigger the liquidated damages provision, the trial court erred in determining that she did not meet her obligation. (Cross-Aplt. Br., pp. 47-50.) Thatcher contended that her notice to Lang was sufficient, especially where Lang was previously aware of his default and he had no doubt as to what Thatcher expected through her notice. (*Id.*, pp. 48-50.) Because there was no uncertainty regarding Lang's default, Thatcher asserted that her notice to him was sufficient, and she was therefore entitled to retain Lang's prior payments as liquidated damages. (*Id.*)

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<sup>2</sup> The Court need not reach this issue if it finds that no notice was required to retain payments.

Lang does not dispute that Thatcher provided him with notice. Instead, he argues that Thatcher's notice was insufficient because, as the trial court found, it failed to strictly comply with the Agreement's notice requirements. (Cross-Aple. Br., pp. 28-30.) Lang states that whether he was aware of the nature of his default is irrelevant. (*Id.*, p. 28.) Even if relevant, Lang claims that the trial court never made a finding about what he did or did not know, and Thatcher should be required to marshal the evidence to demonstrate that the trial court's ruling was in error. (*Id.*, pp. 28-29.)

**A. Lang's admitted knowledge of his default is relevant in the context of Thatcher's notice of default.**

In support of the contention that his knowledge of his default is irrelevant, Lang relies on *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct. App. 1997). (Lang Br., p. 28.) In *Siggard*, Commercial Investment Corp. entered into a real estate purchase contract with the Siggards for the sale of twenty acres of a thirty-eight acre parcel of undeveloped land. *Siggard*, 936 P.2d at 1107. The contract provided for annual interest payments on March 3<sup>rd</sup> of every year beginning in 1989 and ending in 1998 when the entire unpaid principal became due. *Id.* Commercial Investment Corp. failed to make its second interest payment owing on March 3, 1990. *Id.* On March 5, 1990, the Siggards sent Commercial Investment Corp. a notice of default pursuant to the contract. *Id.* Commercial Investment Corp. received the notice on March 6, 1990, triggering its 30-day cure period under the contract. On April 2, 1990, the Siggards sent Commercial Investment Corp. a notice of forfeiture dated April 3, 1990. *Id.* Commercial Investment Corp. received the notice of forfeiture on April 3<sup>rd</sup>, two days before the 30-day cure

period had elapsed. *Id.* at 1107-1108. On April 4, 1990, Commercial Investment Corp. filed a Notice of Interest against the entire thirty-eight acre parcel. Two years later, Commercial Investment Corp. sued the Siggards for specific performance. *Id.* at 1108. The Siggards counterclaimed for breach of contract and wrongful lien.

At trial, the jury found, among other things, that the Siggards performed all steps necessary to forfeit Commercial Investment Corp.'s interest in the contract. *Id.* On Appeal, Commercial Investment Corp. challenged that finding. *Id.* This Court framed the issue on appeal as follows: "Buyer argues that there was insufficient evidence to support the jury's verdict that Sellers performed all the necessary steps to forfeit Buyer's interest in the property." *Id.* As part of its analysis, the court focused on the premature nature of the notice. *Id.* at 1109-10. The Siggards argued that "because Buyer clearly understood its rights and knew it had thirty days to cure the default but failed to do so, the premature notice was just a technicality that can be ignored." *Id.* at 1109. Ultimately, the court overturned the jury's finding, rejecting "Seller's contention that Buyer's nonperformance in those last two days somehow legitimized the premature notice." *Id.* at 1110.

The issue in *Siggard* was not whether a buyer's prior knowledge of his default is relevant to the notice issue. Rather, the issue was whether a premature notice was sufficient under the contract at issue. In that case, the "Buyer's knowledge of its default and its failure to tender performance in those last two remaining days [did] not validate Sellers' otherwise defective forfeiture." *Id.* at 1110. Lang contends that the foregoing quoted language forecloses any argument that his prior knowledge of his default is

relevant to the notice issue, but *Siggard* addresses a different issue and its holding has no bearing on Thatcher's argument. Furthermore, Lang ignores the cases cited by Thatcher setting forth the reasoning and application of notice requirements under Utah law. Forfeitures are disfavored in Utah only "where the notice to the buyer of the impending forfeiture is uncertain as to the performance demanded, or misleads the buyer into thinking that the forfeiture provision will not be strictly enforced." *Madsen v. Anderson*, 667 P.2d 44, 47 (Utah 1983); *see also*, *First Sec. Bank of Utah v. Maxwell*, 659 P.2d 1078, 1081-82 (Utah 1983); *Grow v. Marwick Development, Inc.*, 621 P.2d 1249, 1252 (Utah 1980).

The purpose of notice requirements in the context of a forfeiture is to prevent uncertainty or to otherwise prevent a defaulting party from being misled. Thus, by its very nature, the notice inquiry involves the knowledge of the defaulting party, and such knowledge should be considered in analyzing the sufficiency of a notice of default/forfeiture. *Siggard* is not determinative. Thatcher's notice should have been read in the context of the communications between Lang and Thatcher's counsel. Those communications show an undisputed awareness by Lang of his default. The trial court erred by failing to analyze Thatcher's notice in the context of Lang's admissions. Accordingly, the trial court's unjust enrichment judgment should be reversed.

**B. The trial court made several findings regarding Lang's prior knowledge of his default.**

Lang next asserts that the trial court never made a finding "about what Lang knew or did not know." (Lang Br., p. 28.) That is incorrect. The court made a number of

findings that Lang was previously aware of his default. (R.9395-96, ¶¶ 44 and 47, R.9397, ¶ 52, R.9398, ¶¶ 56, 58-59, R.9401, ¶ 68, R.9402, ¶ 74, R.9407, ¶ 88 and n.5, R.9412, ¶ 107.) The trial court's findings were supported by the evidence at trial (*See, e.g.,* Exs. 107, 117, 122, 124, 195 & B-47), and Lang has not challenged them on appeal.

**III. THE TRIAL COURT'S UNJUST ENRICHMENT RULING SHOULD BE REVERSED WHERE THE AGREEMENT COVERED THE SUBJECT MATTER OF THE LITIGATION, AND THE COURT OTHERWISE FOUND THAT LANG BREACHED THE AGREEMENT.**

Thatcher argued in her opening brief that the trial court erroneously ruled that, since it believed that Thatcher had not “strictly” met the conditions necessary to enforce the forfeiture provision, the Agreement should be treated as lacking any such provision. (Cross-Aplt. Br., pp. 51-53). Under Utah law, a claim for unjust enrichment is not allowed in cases such as this where an enforceable contract exists that governs the remedies available to an injured party. (*Id.*, pp. 51-52). The Agreement addressed the disposition of payments previously made by Lang in the event of his failure to make later payments. (*Id.*, p. 53.) Any remedy available to Lang for his failure to pay is controlled by the Agreement. (*Id.*) The trial court was not entitled to read the liquidated damages provision out of the Agreement entirely where the clause was self-executing and/or Thatcher complied with any notice obligations. (*Id.*)

Thatcher further asserted that the trial court erroneously concluded that Lang's unjust enrichment claim could proceed despite the court's finding that Lang breached the Agreement. (Cross-Aplt. Br., pp. 53-55). A breaching party, such as Lang, should not be afforded a premium where he fails to comply with contractual obligations. (*Id.*, p. 53). If

breaching parties were awarded such a windfall, it would improperly allow those parties to fulfill their obligations under a contract only when it suited them. (*Id.*, p. 54.) If it did not suit them, they could sue to recover the money they paid. (*Id.*) Even if such a result were allowed, it is not allowed in cases such as this where the Agreement was controlling, and Lang's own inequitable conduct precludes restitution. (*Id.*, p. 55.)

Lang contends in response that the trial court's unjust enrichment determination was correct, and that Thatcher has "failed to establish any error in the trial court's findings and reasoned analysis." (Cross-Aple. Br., p. 30.) Lang initially notes that, if the Court rules in his favor on his direct appeal, it moots the unjust enrichment award. (*Id.*) If the Court affirms in that appeal, Lang urges that the Court should nevertheless uphold the trial court's unjust enrichment award. (*Id.*) Lang states that, "[i]f the Court turns away Lang's appeal, we have a situation not addressed in the Agreement: What happens to the payments if the transaction never closes." (*Id.*, p. 31). Lang contends that, given the foregoing, the trial court appropriately applied "the principles of equity since no contractual provisions governed the remedies available to Lang," and awarded Lang the principal payments he had made under the contract. (*Id.*, pp. 32-34).

Lang next asserts that, because the trial court dismissed Thatcher's breach of contract claim, she "cannot claim refuge in a failed cause of action" to argue against the trial court's unjust enrichment ruling. (Cross-Aple. Br., pp. 34-35.) Lang disputes Thatcher's contention that Lang "was the instigator of inequitable conduct." (*Id.*, p. 35.) Lang says that such a contention contradicts the trial court's findings. (*Id.*) Lang claims that Thatcher does not sufficiently challenge the trial court's findings, and therefore she

“cannot overcome the considerable discretion afforded the trial court and should result in summary affirmance.” (*Id.*, p. 36).

**A. Lang is unlikely to prevail on appeal.**

As noted, Lang contends that, if the Court agrees with Lang on his direct appeal, it moots the trial court’s unjust enrichment award. While this is self-evident, it ignores the fact that trial court correctly found that he was not entitled to specific performance on the grounds that Thatcher never repudiated the contract, and finding that:

Lang not only failed to tender the principal amount which he knew was due, he failed to tender any interest payments that he knew were due until the deadline for his performance in January 2013. His failure to tender anything, under the circumstances of this case, precludes his recovery against Thatcher.

(R.9417.)

Thatcher argued in her opening brief that the trial court found, regardless of any claimed repudiation by Thatcher, Lang did not have the financial ability to perform. (Cross-Aplt. Br., pp. 23-31.) Lang has not challenged this finding on appeal, conceding his inability to perform under the contract. (*Id.*, p. 28.) Alternatively, Thatcher argued for affirmance on two additional grounds. First, she argued the trial court’s judgment may be affirmed where, “under the circumstances of this case,” the trial court determined that Lang needed to tender performance to avail himself of specific performance. (*Id.*, pp. 31-39.) Second, she argued that the judgment may also be affirmed where the trial court did not abuse its discretion in weighing the equities. (*Id.*, pp. 37-39.) Lang does not challenge the trial court’s findings that support its decision, and therefore has conceded

those findings. (*Id.*, p. 38-39.) Considering the foregoing, Lang cannot succeed on his direct appeal.

**B. Lang’s unjust enrichment claim is foreclosed by the existence of an enforceable contract.**

Lang contends that the trial court properly allowed his unjust enrichment claim to go forward, despite the existence of the Agreement. Lang acknowledges that unjust enrichment claims are disallowed where an enforceable contract covers the subject matter of the litigation. (*Id.*, p. 31.); *see also, Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶ 69, 361 P.3d 63; *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 30, 266 P.3d 691; *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246; *TruGreen Cos., LLC, v. Mower Bros., Inc.*, 2008 UT 81, ¶ 18, 199 P.3d 929; *Mann v. Am. W. Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978); *E&M Sales West, Inc. v. Diversified Metal Products, Inc.*, 2009 UT App 299, ¶ 8, 221 P.3d 838; *Davies v. Olson*, 746 P.2d 264, 268 (Utah Ct. App. 1987). Lang nonetheless contends that the trial court appropriately applied an exception to the general rule.

Lang argues that, “even where there is an express contract, an equitable claim may be viable, under specific factual circumstances, if the equitable claim is based on a separate representation or misleading act arising independently of the express contract.” (Cross-Aple. Br., p. 31 (*quoting E & M Sales W., Inc.*, 2009 UT App 299, ¶ 8).) Thatcher does not dispute that equity may step in where a “separate representation” is made, or a “misleading act” is done, independent of the contract. However, that is not the case here. Lang points to no finding by the trial court that would justify his claim for unjust enrichment. Reliance on *E.M. Sales W., Inc.* is therefore misplaced. The fact remains

that an enforceable contract existed between the parties, which forecloses Lang's unjust enrichment claim.

**1. The Agreement addresses the remedies available to Lang in the event he failed to make timely payments.**

Lang next contends that "the Agreement did not address what would happen to payments if proper notice of default was not given" and, as a result, "it was appropriate for the trial court to address this issue through principles of equity since no contractual provisions governed the remedies available to Lang." (Cross-Aple. Br., pp. 31-32.) However, Lang's argument continues to incorrectly presuppose that Thatcher was required to provide Lang with notice to trigger the liquidated damages provision. As set forth above, the liquidated damages provisions were self-executing and were triggered upon Lang's failure to make any scheduled payment within 30-days of when it was due. Lang does not dispute that he did not make the February 2012 interest payment before the expiration of the 30-day grace period (or any thereafter).

By the express terms of the agreements, Thatcher was automatically entitled to keep Lang's prior payments as liquidated damages. Any remedies available to Lang were governed by the liquidated damages provisions. If Lang wished to avoid forfeiting his prior payments, the agreements provided him with a 30-day grace period within which to make his scheduled payment. Lang did not avail himself of the grace period, and therefore gave up his right to his prior payments. The trial court erred in ruling to the contrary.

**2. The trial court erred by reading the liquidated damages provision out of the Agreement where the provision was self-executing, or Thatcher otherwise complied with any notice obligations.**

Lang asserts that, despite Thatcher's arguments to the contrary, "the trial court did not ignore the existence of the Agreement," rather, "[i]t confronted it." (Cross-Aple. Br., p. 33.) As Thatcher points out above, while the court cited to the wording of the Agreement in analyzing Lang's unjust enrichment claim, it failed to recognize (as Lang does on appeal) that the liquidated damages provisions in the agreements did not require Thatcher to provide Lang with notice to trigger the provision. *See pp. 7-10, supra.* The trial court therefore erred by determining that, "[s]ince the conditions necessary for the enforcement of the forfeiture provision are not met here, the court concludes that the Agreement should be treated as one lacking such a provision, and that the unjust enrichment claim is viable." (R.9419-20.)

Even assuming that Thatcher was required to provide Lang with notice, she met her obligation. This is especially true where Lang was keenly aware of his default. He has never claimed that he was uncertain about the nature of his default or that Thatcher attempted to mislead him. Because Thatcher met her purported notice obligations, the trial court erred by reading the forfeiture provision out of the Agreement. *See pp. 10-14, supra.*

**3. The existence of a valid liquidated damages provision forecloses Lang's unjust enrichment claim.**

Only after reading the liquidated damages provision out of the Agreement, Lang says the trial court correctly concluded it could resort to equity to return Lang's prior

payments to him. (Cross-Aple. Br., pp. 33-34.) However, the sources cited by the trial court in its decision (and by Lang in his response) recognize the general rule that “a vendee in default cannot recover back the money he has paid on an executory contract to his vendor who is not himself in default.” 4 A.L.R.4th 993, Part I § 2 (1981). As the commentator noted, this is true even in cases where the contract at issue “did not involve a provision specifically allowing the vendor to retain as forfeited the payments made by the vendee prior to his breach.” *Id.* In those decisions, the courts have often explained that the vendee was precluded from any recovery “even though the amount retained exceeded the damages caused to the vendor by the default.” *Id.* Thus, the general rule is that, even if a contract does not contain a valid forfeiture provision, a defaulting vendee is not entitled to recover his prior payments under theory of unjust enrichment/restitution.

As a corollary, even in cases (such as this) involving “a contract containing a forfeiture provision, the courts have been principally concerned with whether the provision was an enforceable liquidated damages provision or an unenforceable penalty.” *Id.* “Since this determination involves, in part, a consideration of the reasonableness of the amount forfeited in relation to the damages actually or likely to be suffered, equitable considerations necessarily come into play,” but only to the extent the liquidated damages provision is determined to be an unenforceable penalty. *Id.* Neither the trial court, nor Lang, has pointed to any Utah case law refuting the general rule set forth above, which is consistent with the ordinary principles of contract interpretation governing liquidated damages provisions in Utah. *See Commercial Real Estate, supra.*

The trial court did not find (and Lang does not argue on appeal) that enforcing the liquidated damages provision as written would amount to an unenforceable penalty. Rather, the trial court's ruling rested on its application of the elements of unjust enrichment: "[T]he evidence shows that Lang has conferred a net benefit upon Thatcher, and that the circumstances are such as to make it unjust for her to retain the amount paid toward the purchase price, \$800,000." (R.9421.) However, given that an unjust enrichment claim cannot be sustained where an enforceable contract exists, the trial court's determination was in error and should be reversed.

**C. Lang cannot make a claim for unjust enrichment where he himself breached the Agreement.**

Lang disputes that the trial court found that he breached the Agreement, contending that "[t]he trial court expressly dismissed Thatcher's claim for breach." (Cross-Aple. Br., pp. 33-34.) According to Lang, the point of the trial court's unjust enrichment ruling is that, because Thatcher never validly put Lang in default, it was unjust for her to retain Lang's payments as liquidated damages. Lang's assertions are incorrect for two reasons.

As set forth above, the trial court erroneously determined that the Agreement required Thatcher to provide Lang with notice before she could retain his principal payments as liquidated damages. It was upon that faulty conclusion that the trial court dismissed Thatcher's first cause of action for breach of contract. (R.9421-22.) Moreover, although the court dismissed Thatcher's first cause of action for breach of contract, it granted her quiet title claim on the grounds that "Lang is not entitled to an

award of specific performance due to his unexcused failure to tender his own performance at any time prior to the January 10, 2013 deadline.” (R.9422-23.) Given that failure, the trial court concluded that Lang “lack[ed] any enforceable right to Parcel A under the Agreement.” (R.9423.) The trial court also found that Lang engaged in other inequitable conduct, including threatening to sue Thatcher, refusing to respond to Thatcher’s attempts to obtain compliance, making misrepresentations about his ability to close, and engaging in other conduct the trial court found to be unreasonable. (R.9405, ¶¶ 80-81, R.9409-10, ¶96, R.9411, ¶ 102, R.9412-13, ¶¶ 107-108.) In light of these unchallenged findings, Lang cannot argue that he did not engage in inequitable conduct, or that Thatcher’s arguments “aimed at claiming Lang was the instigator of inequitable conduct contradict the trial court’s findings that allowing Thatcher to retain all payments would be inequitable.” (Cross-Aple. Br., p. 35.)

Lang also fails to recognize that his own inequitable conduct precludes his unjust enrichment claim. As part of its decision, the trial court relied in part on the Restatement (Third) of Restitution and Unjust Enrichment. (R.9420.) As the court stated: “A performing party whose material breach prevents a recovery on the contract has a claim in restitution against the recipient of performance, as necessary to prevent unjust enrichment.” (*Id.* (*citing* Restatement (Third) of Restitution and Unjust Enrichment § 36(1)).) Lang’s response cites the foregoing language to support his argument that the trial court was within its discretion to return his principal payments to him even if he breached the Agreement.

The trial court's decision and Lang's response both ignore other pertinent portions of the Restatement. Under § 36(3), "[a] claim under this section may be displaced by a valid agreement of the parties establishing the rights and remedies in the event of default." (Cross-Aplt. Br. p., 55 (*citing* Restatement (Third) of Restitution and Unjust Enrichment § 36(2)).) As argued above, the Agreement between the parties covers the subject matter of this litigation—namely what happened to Lang's prior payments in the event he failed to make a later payment. The trial court erred by failing to address § 36(3).

The trial court's decision and Lang's response also fail to address § 36(4) and cmt. b thereto, which provide that "[i]f the claimant's default involves fraud or other inequitable conduct, restitution may on that account be denied." (*Id.* (*citing* Restatement (Third) of Restitution and Unjust Enrichment § 36(4) and cmt. b).) Given the court's findings that Lang engaged in inequitable conduct, the trial court erred by failing to address § 36(4) and cmt. b. Lang does not discuss these provisions in his response, or otherwise address the trial court's failure to analyze the provisions as part of its decision.

Finally, Lang takes issue with Thatcher's reliance on the Utah Supreme Court's holding in *Foxley v. Rich*, 99 P. 666 (Utah 1909), as well as a host of other similar rulings from other jurisdictions across the country. Lang contends that Thatcher fails to acknowledge that the reasoning in *Foxley* was dependent solely upon the facts of that case, urging that, because the facts do not demonstrate that Thatcher was willing to convey title to Lang, *Foxley* has no applicability. (Lang Br., pp. 35-36.) That is simply not true and is belied by the trial court's findings.

As Thatcher argued in her opening brief, the trial court rejected Lang's arguments regarding repudiation. (Cross-Aplt. Br., pp. 23-24.) Lang points to no other findings by the trial court to support his contention that Thatcher was unwilling to convey title of the property to him. To the contrary, Thatcher continued working with Lang up and until the closing date set forth in the Agreement. (R.9408-9409, ¶¶ 90-95.) Given her continued efforts to close on the sale of the property, Lang's contrary assertion is without merit. Thatcher stood willing and able to perform, and it was Lang (not Thatcher) who was unable to close on the property by the date indicated in the Agreement.

As the supreme court explained in *Foxley*, "To permit [Lang] to recover back his payments under the facts and circumstances of this case would, in effect, offer a premium to [Lang as a] purchaser[ ] of real estate to refuse to comply with [the Agreement]." *Foxley*, 99 P. at 672. If Lang was permitted to recover his principal payments, then it would promote inequitable conduct by purchasers of real estate, who could, "[i]f the bargain suited them, ... insist on the completion of the purchase; but if it did not, they [could] refuse to complete it, and sue to recover back the money paid by them." *Id.* Certainly, Utah law would not stand for such a result. *Foxley* remains good law, and its policy of not rewarding defaulting parties remains a recognized principal in the law across the country. For those reasons, its holding applies, and Lang's attempt to distinguish it should be ignored.

## CONCLUSION

For the reasons set forth above, the judgment should be reversed on Lang's unjust enrichment claim.

DATED this 31st day of December, 2018.

**CHRISTENSEN & JENSEN, P.C.**



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Karra J. Porter  
Kristen C. Kiburtz  
J. D. Lauritzen  
*Attorneys for Plaintiff/Appellee/Cross-  
Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of December, 2018, I caused to be sent via email a true and correct copy of the foregoing, **REPLY BRIEF OF CROSS-APPELLANT** to the following:

Bryan J. Pattison  
Durham Jones & Pinegar, P.C.  
192 East 200 North, Third Floor  
St. George, UT 84770  
[bpattison@djplaw.com](mailto:bpattison@djplaw.com)



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## CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 13-point typeface and contains 6,165 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

Pursuant to U.R.A.P. 21(g), counsel for Appellees/Cross-Appellant certifies that the foregoing brief contains no non-public information.



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Karra J. Porter  
*Attorneys for Plaintiff/Appellee/Cross-Appellant*