

1992

Keith C. Holt and Joyce B. Holt v. Manuel Katsanevas : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEITH C. HOLT and JOYCE S.
HOLT

Plaintiffs/Appellants

MANUEL KATSANEVAS,

Defendant/Appellee

: Case No.: 92-0225 CA
:

Priority No.: 16

**BRIEF OF DEFENDANT/APPELLEE
MANUEL KATSANEVAS**

Appeal from a Judgment of the Third Judicial District
in and for Salt Lake County, State of Utah
The Honorable Pat B. Brian Presiding

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KEITH C. HOLT and JOYCE S.
HOLT

VS.

Defendant/Appellee

Priority No.: 16

Defendant/Appellee, Manuel Katsanevas, hereinafter referred to as "defendant", by and through his attorney of record, hereby respectfully submits the following brief in response to plaintiffs' brief on appeal.

Jurisdiction upon the Court of Appeals is conferred pursuant to the authority vested in the Utah Supreme Court for "pour over" jurisdiction and an accompanying order, dated April 3, 1992.

May the plaintiffs, sellers under the terms of a written Uniform Real Estate Contract, unilaterally, without the agreement or consent of the buyer, vary orally a material term of the written contract ?

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES
RULES AND REGULATIONS WHICH MAY BE
DETERMINATIVE IN THIS ACTION**

Defendant is not aware of any constitutional provision which might be determinative of the issues raised in this appeal. However, defendant believes that the Utah Statute of Frauds, to wit: § 25-5-3 UTAH CODE ANNOTATED, which states that:

"Every contract for . . . the sale, of any land, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom . . . the sale is to be made."

is determinative of all of the issues raised in this appeal.

**STATEMENT OF THE CASE¹
Nature of the Case**

Plaintiffs filed this action in the District Court in and for Salt Lake County, State of Utah, seeking declaratory relief, *inter alia*, that defendant breached the express written terms of the contract "... forbidding [defendant from making] prepayments of principal prior to October 1, 1989; see Addendum exhibit 1, ¶ (b), R-00004.

Course of Proceedings

After considerable discovery, defendant filed a motion for summary judgment. Soon thereafter, plaintiffs also filed their own cross motion for summary judgment.

¹ All references are to the record and are designated as R-_____

Disposition Below

On their briefs for the motions for summary judgment the parties briefed extensively their respective positions. On October 18, 1991, the trial Court, examined the respective motions for summary judgment, reviewed the proffered evidence, exhibits, and the affidavits filed by the parties, and heard argument on behalf of all parties. On November 4, 1991, the trial Court entered its memorandum decision containing its findings of fact and conclusions of law, and entered its orders granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment; see Addendum exhibit 2, R-00175 to 00178. Contemporaneously therewith a judgment was entered thereupon; see Addendum, exhibit 3, R-00187 to 00188.

Thereafter, Appellant filed a series of motions seeking relief from the judgment so entered on November 27, 1992. After briefing the issues and oral argument before the trial Court, the trial Court entered, on January 2, 1992, its order denying the relief from judgment as requested by Appellant and entered its appropriate order; see Addendum exhibit 4, R-00254 to 00257.

Appellant is taking this appeal from the trial Court's judgment (R-00187-00188) as entered on November 27, 1991.

STATEMENT OF FACTS

The following are the material uncontroverted facts as they appear on the record of the proceedings below;

1. On April 2, 1979, plaintiffs, Keith C. Holt and Joyce C. Holt, ("Holt"), as Sellers, entered into a Uniform Real Estate Contract to sell, to Manuel Katsanevas and Steve Katsanevas (the "Katsanevas brothers" or "Katsanevas") certain real property, commonly referred to as 280 West South Temple, (the "South Temple Location") located in Salt Lake City, Utah. Katsanevas agreed to pay to Holt as and for consideration for the sale, the sum of \$ 275,000.00; see Addendum exhibit 5, R-00020 to 00021.

2. The Uniform Real Estate Contract provided *inter alia*, that

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. After the first 120 months of payments ... [T]he Buyer, at his option at anytime, thereafter may pay amounts in excess of the monthly payments upon the unpaid balance subject to (underlying added)... etc. (the remaining language of paragraph 4 is not subject to dispute, and not relevant for purposes of this case)

which paragraph was interpreted and construed by Appellant to mean, that it prohibited Katsanevas from making any prepayments during the first ten (10) years of the term of the

Uniform Real Estate Contract.²

3. Defendants Manuel Katsanevas and Steve Katsanevas entered into possession of the real property subject matter of the contract, and constructed thereupon a restaurant known as Crownburgers Restaurant; see Addendum exhibit 15, R-00098 to 00103.

4. In connection with the building of the restaurant premises upon the Holt property, sometime in late 1979, Holt agreed to, and in fact, subordinated Holt's interest to the interest of the SBA who became Katsanevas' lender; SBA became the holder of a first deed of trust upon the Holt property and the therein constructed restaurant, at the South Temple location; see Addendum exhibit 15, R-00098 to 00103.

5. In approximately October, 1982, the Katsanevas brothers entered into an exchange agreement with the Triad Corporation whereby the Katsanevas brothers agreed to relocate their business - one block north - at the (present) location known as 118 North 300 West, Salt Lake City, Utah (the "North Temple" location); see Addendum exhibit 15, R-00098 to 00103.

6. On or about November 10, 1982, defendant requested and received a letter from plaintiffs, whereby the plaintiffs agreed to the exchange, and the subordination of

² See Addendum - exhibit 6 - Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 9, and ¶ 15;

Holts' interest in the "new" North Temple location, and the payment of the "... indebtedness in the approximate amount of \$ 50,000.00"; see Addendum exhibit 7 and Addendum exhibit 15, R-00098 to 00103.

7. On or about October, 1983, the new restaurant premises at the North Temple location was completed and was occupied by Katsanevas; see Addendum exhibit 15, R-00098 to 00103.

8. As a result of the exchange of the real properties with Triad, and relocation of the restaurant to the North Temple location the then remaining balance due to the sellers (Holts - under the Uniform Real Estate Contract) on the South Temple presently was transferred, on a subordinated position, (same as before), as an encumbrance upon the North Temple location; see Addendum exhibit 8, Addendum exhibit 15, R-00098 to 00103.

9. In connection with the release of the South Temple property and the transfer of the same to the Triad Corporation, Continental Bank required the payment of an obligation of Sellers due to Continental Bank, for which the North Temple was given as security by the Sellers; see Addendum exhibit 15, R-00098 to 00103; see Addendum - exhibit 6 - Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 3, and ¶ 4.

10. Holt received the benefit(s) of the payment in

e sum of \$ 46,386.51) paid to Continental Bank and Trust, by Katsanevas. See Addendum - exhibit 6 - Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 11.

11. By agreement of the parties (Manuel Katsanevas and the Holts), in a letter dated November 7, 1983, Sellers agreed that Katsanevas would pay the Holt obligation to Continental Bank, and the amount so paid would reduce the principal balance owed to sellers (Holts) under the Contract; see Addendum exhibit 15, R-00098 to 00103; see Addendum exhibit 9, R-00114.

12. On December 21, 1983, Manuel Katsanevas borrowed money and paid the Holt loan to Continental Bank in the amount of \$ 46,386.51; see Addendum exhibit 15, R-00098 to 00103; see also Addendum exhibit 10, R-00116; see also Addendum exhibit 6, Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 1.

13. On February 2, 1984, Continental Bank executed and delivered a deed of reconveyance of the South Temple Property, the original of which was recorded and a copy was sent to the Sellers; see Addendum exhibit 11, R-00120; see Addendum exhibit 12, R-00118; see Addendum exhibit 15, R-00098 to 00103.

14. On February 17, 1984, the financial obligation due to Holt was transferred on a subordinated basis and was put upon as an encumbrance upon the North Temple location;

see Addendum exhibit 8, R-00111; see Addendum exhibit 15, R-00098 to 00103; see also, Addendum exhibit 6, Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 18.

15. On February 17, 1984, Katsanevas also recorded for the benefit of the Sellers, an Assignment of Contract (For Security) of the contract of one of the parcels (as additional security) of the North Temple location; see Addendum exhibit 13, R-00122 to 00124; see Addendum exhibit 15, R-00098 to 00103; Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 17.

16. On or about the date of the Assignment of Contract (For Security) [Exhibit 13], the balance due to the Sellers is shown as \$ 172,000.00. see Addendum exhibit 15, R-00098 to 00103; see also Addendum exhibit 13, R-00122 to 00124.

17. Sometime in late 1983, Steve Katsanevas sold his business and partnership interests of and in the Crownburger Restaurant to his brother Manuel Katsanevas; see Addendum exhibit 15, R-00098 to 00103.

18. As a result of the above intra-family transaction Manuel Katsanevas assumed all of the obligation of the business including the obligation due to the Holts. see Addendum exhibit 15, R-00098 to 00103.

19. On or about March, 1984, Steve Katsanevas sought and obtained from the Holts a release from the

obligations due to the Holts under the Trust Deed. The amount claimed to have been due to the Holts (by the Holts) is the sum of \$ 172,000.00, as stated in the Release; see Addendum exhibit 14, R-00126 to 00128; see Addendum exhibit 15, R-00098 to 00103; Plaintiffs' Response to Request for Admissions, dated July 20, 1990, ¶ 16.

20. Applying the payment of \$ 46,386.51, to the amortization schedule, as having been made on December 21, 1982, it would show that the balance due to the Holts was \$ 171,111.36; see Addendum exhibit 15, R-00098 to 00103.

21. There is no writing signed by Katsanevas whereby Katsanevas agrees to apply the \$ 46,386.51, payment for any purpose other than as having been applied by Katsanevas; see Addendum exhibit 15, R-00098 to 00103.

22. Manuel Katsanevas has made timely each and every monthly payment of \$ 2,400.00 pursuant to the terms of the Uniform Real Estate Contract; see Addendum exhibit 15, R-00098 to 00103.

23. Appellant's payment of \$ 46,386.51 should be so calculated so as to reduce the principal due under the real estate contract, applied on the date so made; see Addendum exhibit 15, R-00098 to 00103.

SUMMARY OF ARGUMENT

The defense of the Statute of Frauds has been consistently recognized and upheld in situations similar to

the facts of the case at bar.

Plaintiffs can not now on appeal, through new counsel, complain of the trial court's refusal to find a material issue of fact to be in dispute. Plaintiffs filed their own motion for summary judgment alleging therein that there was no material issue of fact in dispute, and that the court could find, as a matter of law, the issues at bar. See Addendum exhibit 16, R-00142 through 00144, wherein counsel for plaintiffs represents to the trial court that the first seventeen (17) paragraphs are undisputed facts. The facts as presented to the trial court through the various affidavits, depositions, and the responses to the request for admissions, clearly show that there is no material issue of fact in dispute, in that Katsanevas had never agreed to allow the lump sum payment to be applied "to the end of the contract", which would have resulted in unjust windfall to the Holts of approximately \$ 65,000.00. Katsanevas was not obligated contractually or legally, and did not have a duty or an "ethical" obligation to confer such a substantial benefit or "gift" to the Holts. The Holts had agreed to allow the exchange of the collateral from the South Temple location, to the North Temple location, on the same terms and identical lien position (second only to the SBA in both instances) on or about November 10, 1982, without a demand for any other or additional consideration. It is clear from the evidence that

the thought of gaining unfair advantage of Katsanevas did not occur to the Holts until sometime in 1986.

ARGUMENT

I

**PLAINTIFFS' CONTENTION THAT THE PARTIES
AGREED THAT THE LUMP SUM PAYMENT WAS TO BE
APPLIED TO THE BOTTOM OF THE CONTRACT
IS UNENFORCEABLE BY VIRTUE OF THE STATUTE
OF FRAUDS.**

The trial court below found that there was no agreement between Katsanevas and the Holts for the application of the lump sum amount other than as applied by Katsanevas, and, further, that Katsanevas did not agree orally or in writing to do otherwise.

The record clearly and unequivocally reflects the undisputed facts, paragraphs 1 through 17 (R-00142 to 00144) as stated in plaintiffs' memorandum in support of their motion for summary judgment. Those facts which were clearly admitted as not in dispute can not now be controverted; the trial Court relied upon the admission of those facts in making and entering its findings.

In order to challenge the trial court's findings of fact "an appellant must first marshall all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below." *Reid v. Mutual of Omaha Ins.*, 776 P.2d 896, at 899 (Utah

1989).

The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable." *Wardley Corp. v. Burgess*, 810 P.2d 476 (Utah Ct.App. 1991); citing *Golden Key Realty, Inc., v. Mantas*, 699 P.2d 730, 732 (Utah 1985). See also *Coombs v. Ouzounian*, 465 P.2d 356, 358 (Utah 1970) (extension of option must be in writing). This rule of law applies especially to transfers of interests in land. *Combined Metals, Inc., v. Bastian*, 71 Utah 535, 267 P 1020 (Utah 1928).

The Uniform Real Estate Contract between the Holts and Katsanevas was entered into on or about April 2, 1979; it involved the transfer of an interest in land. The contract complied and satisfied the requirements of § 25-5-3 UTAH CODE ANNOTATED, which states:

"Every contract for . . . the sale, of any land, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom . . . the sale is to be made."

Utah law requires that any modification or alteration of the original contract between Holts and Katsanevas must also be in writing in order to satisfy the statute of frauds. plaintiffs' contention that the lump sum reduction of \$ 46,386.51 would only be applied at the end of

the contract is, in fact, an attempt to modify and alter a material term of the original contract.

Since the alleged agreement between the Holts and the Katsanevas attempts to modify the original contract, it must also be in writing and must be signed by the parties to be charged. Therefore, without a written memorandum, signed by the party to be charged, the oral agreement altering the terms of the Uniform Real Estate Contract, is unenforceable as it falls within the statute of frauds.

It is respectfully submitted that plaintiffs' claim that the lump sum payment be applied to the bottom of the contract can not be sustained and that the order of the trial Court should be affirmed in its entirety.

II

PLAINTIFFS CAN NOT INTRODUCE PAROL EVIDENCE IN ORDER TO PROVE THE MODIFICATION OF A WRITTEN CONTRACT.

Plaintiffs' contention that there was a separate subsequent oral agreement between the Holts and Katsanevas, whereby Katsanevas agreed to apply the \$ 46,386.51 lump sum loan payment at the end of the contract is unenforceable in that it violates the parol evidence rule.

Absent fraud or other invalidating causes, the integrity of a written contract is maintained by not admitting parol evidence to vary or contradict the terms of the written agreement(s) of the parties. The November 10, 1982, letter

from Holt to Katsanevas, wherein the Holts agreed to a substitution of collateral upon the payment of an approximate sum of \$ 50,000.00, and the November 7, 1983 letter agreement (R-00114), wherein the Holts affirmatively agree that "... the amount of \$ 48,000.00 or such lesser amount shall reduce the principal sum, owed to you under the real estate contract, by the same amount ...", are the basis of the defenses of this lawsuit; both of those documents reflect a clear and unambiguous agreement. In their complaint the Holts attempt to alter the clear terms of the written agreement(s) through the assertion that "...[b]y reason of Manuel Katsanevas' claim, the Plaintiff is in great doubt as to whether the 1983/1984 payment should be applied as agreed ..." (complaint paragraph 9, R-00003); this assertion is directly contrary to the terms of the written documents which provide for the application of the \$ 46,386.41 payment.

The plaintiffs have offered no written instruments signed by Katsanevas, which would alter the terms of Uniform Real Estate Contract; thus plaintiffs failed to create a genuine issue as to any material fact relating to the oral agreement which they are seeking to impose upon Katsanevas, which would in turn would require the reversal of the trial Court.

Plaintiffs attempt to bootstrap the validity of their claim and seek to overcome the prohibition of the parol

evidence rule, by the use of a letter (allegedly dated March 17, 1986), which they claim they mailed to Manuel Katsanevas, almost twenty eight (28) months after the \$ 46,386.51 payment was made to Continental Bank by Katsanevas. There is no evidence in the record that Katsanevas ever received that letter, or that he ever saw it before the letter was presented to him during the legal proceeding. Assuming *arguendo* that the letter was in fact seen by Katsanevas at the time it was allegedly mailed, for that letter to be considered by the Court, and to be juxtaposed against all other written instruments, it must have been written and mailed contemporaneously with or on or about the time the payment was made by Katsanevas, and not so long thereafter.

Plaintiffs' contention that there was an oral agreement between themselves and Katsanevas, whereby the Katsanevas brothers agreed to apply the \$ 46,386.51 lump sum loan payment at the end of the contract is also unenforceable in that it violates the statute of frauds.

III
DEFENDANT OBJECTED TO AND MOVED THAT
PLAINTIFFS' "NEW" PROPOSED AFFIDAVITS BE
STRICKEN BY THE TRIAL COURT ON THE BASIS THAT
THE SAME DID NOT COMPLY WITH RULE 56(e)
OF THE UTAH RULES OF CIVIL PROCEDURE

After the entry by the trial court of its order and judgment granting defendant's motion for summary judgment and denying plaintiffs' cross motion for summary judgment,

plaintiffs in support of their various motions, before the trial Court, submitted an affidavit by Robert A. Bailey, the "Bailey Affidavit". Defendant moved timely, and objected to the Bailey Affidavit, and asked the trial Court to strike the same³. The basis for defendant's request that the Bailey Affidavit should be stricken were two: first, the affidavit was not "newly" discovered evidence, and even if it were, it contained inadmissible, irrelevant and hearsay evidence; in any event, even if, assuming *arguendo*, that the Bailey Affidavit was properly made and properly submitted to the trial Court, in accordance with Rule 56(e) of the *Utah Rules of Civil Procedure*, the affidavit speaks of the creation of an oral agreement, modifying the written terms of the real estate contract. For purposes of this analysis an examination of the Bailey Affidavit shows the following; the Bailey Affidavit states that

8. Keith's third plan was to apply the payment to Continental Bank to the end of the contract. They [Katsanevas] would continue making their regular payments until the principal balance was reduced to the amount of their payment to Continental Bank. At that time, their payment would be credited to the contract which would then be paid in full. ¶ 8 of Bailey Affidavit.

9. Keith and the Katsanevas brothers agreed to the third plan. I remember them standing and shaking

³ See Addendum, exhibits 17 and 18, which are defendant's objections to the proposed affidavits, and to the various other motions for relief made by defendants' new counsel.

hands on the deal. ¶ 9 of Bailey Affidavit.

Even as Bailey suggests that the Appellant [Keith Holt] may have come out "smelling like a rose" (¶ 10 Bailey Affidavit), Bailey is merely testifying that he witnessed an event whereby a material term of the real estate contract (the application of payment proceeds) was orally being changed to support the now "new" espoused position of plaintiffs.

Regardless of the outcome of the subsequent lunch celebration at Diamond Lil's, and the relevance of the lunch, as had by all of the participants (¶ 10 Bailey Affidavit), the fundamental issues in this case have not changed. The statute of frauds was specifically enacted in order to prevent this type of posturing.

The Bailey Affidavit attempts to create a material issue of fact in dispute so that the trial Court's disposition on a summary judgment basis may be reversed by this reviewing Court. However, the trial Court properly excluded the irrelevant and inadmissible evidence of the Bailey Affidavit, and there was no basis for a finding that a genuine issue as to any material fact, remained in dispute.

An analysis of the Second Affidavit of Keith C. Holt, the "Second Holt Affidavit" would also show that it contained numerous irrelevant, immaterial, and inadmissible "facts", which were allegedly made, after the trial Court granted defendant's Motion for Summary Judgment. Objections

to the Second Holt Affidavit were timely and properly made by defendant. In the interest of time and space, and wishing not to burden this Court with repetitive arguments, defendant respectfully submits, that the trial Court properly excluded the irrelevant, and inadmissible parts of the Second Holt Affidavit, and refused to grant relief to Appellant, pursuant to plaintiffs' various motions. Therefore, the trial Court did not abuse its authority, in refusing to grant to plaintiffs relief pursuant to their various and sundry motions.

Furthermore, plaintiffs have failed to adequately marshall the evidence in order to challenge the sufficiency of the evidence which fully support the findings of fact as entered by the trial Court in its memorandum decision. It is the plaintiffs' burden, in order to successfully challenge the detailed findings of fact of the trial Court, to find and produce to this Court the fatal flaw in the evidence which would support the reversal of the trial Court's decision. See: *West Valley City, v. Majestic Inv. Co.*, 818 P.2d 1311 (Utah App. 1991). This heavy burden has not been met by the plaintiffs as they appear before this Court.

IV
PLAINTIFFS BY THEIR ACTIONS
AND CONDUCT, WAIVED THE PROHIBITION
AGAINST EARLY PREPAYMENT.

Plaintiffs' actions prior to the December 21, 1983,

payment, along with their subsequent conduct, evidenced an intent to waive the contractual provision against early prepayment contained in the real estate contract.

It is an established rule of law that "[a] party to a contract may waive provisions for his benefit." 17A C.J.S. § 491. Waiver has been defined as "the intentional relinquishment of a known right." *Barnes v. Wood*, 750 P.2d 1226 (Utah Ct.App. 1988). To waive a right, there must be an existing right, benefit, or advantage; knowledge of its existence; and an intention to relinquish it. *Id.* at 1230.

In the present case, plaintiffs received a benefit from the contractual provision. The prohibition against prepayment of interest or principal before 120 months allowed the Holts to extend the contract and gain revenue from the interest payments. Secondly, the Holts knew intimately of the contractual provision since it was placed in the contract for their benefit and at their direction.

However, through plaintiffs' expressed consent and conduct, plaintiffs relinquished their right and waived the contractual provision against early prepayment. plaintiffs' actions, viewed in sequence, illustrate that they did not intend or desire to enforce the contractual provision against early prepayment of principal or interest, and as such they waived their right to this benefit. Not only may waiver be expressed, also "[w]aiver can be implied from conduct."

Andersen v. Brinkerhoff, 756 P.2d 95, 98 (Utah Ct.App. 1988).

When one examines plaintiffs' subsequent conduct, after they had sent their consent to the loan payoff to Manuel Katsanevas, we find that their conduct also evidenced an intent to waive the prepayment provision. "[W]aiver exists where a party ... through its objective conduct evidences an intent to waive that right regardless of some privately-held intention to the contrary. *Vali Convalescent & Care Inst. v. DOH*, 797 P.2d 438, n.18 p. 447 (Utah Ct.App. 1990) (emphasis in the original); citing *B. R. Woodward Mktg., Inc., v. Collins Food Serv., Inc.*, 754 P.2d at 101-04 (Utah Ct.App. 1988).

Defendant, through his attorney, sent a letter dated November 7, 1982, (R-109) to the Holts delineating that the sum (approximately \$ 50,000.00) to be paid to Continental Bank and Trust Company to cancel plaintiffs' obligation to Citizens National Bank should/would be applied to the principal balance immediately upon receipt of the amount by Continental Bank and Trust Company. Through plaintiffs' actions at that time, and plaintiffs subsequent conduct, plaintiffs waived the provisions against early prepayment.

For at least twenty eight months following the payment by Katsanevas to Continental Bank & Trust, at no time after receipt of the November 7, 1983, letter, or in any of the subsequent transaction between Katsanevas and the Holts,

did the Holts alert or notify Katsanevas that the contractual provision was violated or that the Holts would seek enforcement of the contractual provision prohibiting early pre-payment.

Furthermore, on February 13, 1984, pursuant to the collateral exchange agreement, (only days after the payment by Katsanevas to the bank), the Katsanevas brothers executed an "Assignment of Contract (For Security)" (R-122 to 124) of the North Temple property as collateral against the then remaining principal balance of their debt to the Holts which was stated in the document as approximately \$ 172,000.00. The plaintiff's received this "Assignment of Contract" and did not controvert nor dispute the principal amount owing by the Katsanevas brothers. The \$ 172,000.00 amount in the "Assignment of Contract" represented the application of the \$ 46,386.51 to the principal balance at the time the payment was in fact made. This instrument was properly recorded on February 17, 1984.

Then, the Holts themselves executed and signed a written "Release" on March 15, 1984, (R-126) (less than three months from the day that Katsanevas made the payment to the bank), whereby they discharged Steve Katsanevas from his obligation under the Uniform Real Estate Contract. In the Release, plaintiffs allowed Manuel Katsanevas to assume the entire obligation then due to the plaintiff's which was stated

as approximately the sum of \$ 172,000.00. Again, the \$ 172,000.00 amount represents the principal amount owing with the \$ 46,386.51 [payment to Continental Bank] payment calculated as having been made ... when in fact made, on December 21, 1983.

Based upon plaintiffs' consent that Katsanevas pay off the Citizens National Bank loan #1-6566 to Continental Bank and Trust Company (R-114) along with their subsequent actions confirming that the principal amount was calculated by subtracting the \$ 46,386.51 off the contract (when made) on December 21, 1983, the Holts by and through their actions waived the contractual provision against early principal prepayment(s).

"[I]t is perhaps more accurate to view the ultimate conclusion whether waiver has occurred, given particular facts, as a question of law." *B.R. Woodward Marketing, Inc., v. Collins Food Service, Inc.*, 754 P.2d 99, 101 (Utah Ct.App. 1988); see *Diversified Equities, Inc., v. American Savings & Loan Ass'n*, 739 P.2d 1133, 1136 (Utah Ct.App. 1987) ("Where the facts are not in material dispute, interpretation placed thereon by trial court becomes a question of law...."). Therefore, Holts' conduct, viewed objectively by the court, only lends itself to only one conclusion and the interpretation that the Holts waived the contractual provision against early principal prepayments. Therefore, since there

are no material facts in dispute, Katsanevas' motion for summary judgment was properly granted by the trial Court.

V
**PLAINTIFFS ARE ESTOPPED BY THEIR ACTIONS
IN DENYING THAT THE \$ 46,386.51 LUMP SUM
PAYMENT WAS NOT APPLICABLE AT THE TOP OF
THE REAL ESTATE CONTRACT**

Due to the Holts' actions and conduct, the Holts are estopped from claiming that the lump sum payment of \$ 46,386.51, could not be applied to the principal balance on December 21, 1983.

The elements of estoppel are as follows:

(i) [A] statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Avila v. Winn, 794 P.2d 20, 22 (Utah 1990); see also *CECO v. Concrete Specialists, Inc.*, 772 P.2d 967, 969-70 (Utah 1989); *United American Life Ins. Co. v. Zions First Nat'l Bank*, 641 P.2d 158, 161 (Utah 1982); *Celebrity Club, Inc., v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979); *J.P. Koch, Inc., v. J.C. Penney Co.*, 534 P.2d 903, 905 (Utah 1975).

On or about October 25, 1983, the Holts consented to the Katsanevas paying off the Holts' loan #1-6566. This payment made by the Katsanevas was not a voluntary principal prepayment. The \$ 46,386.51 payment was requested by the

Continental Bank and Trust Company, Holts' lender. On or about November 7, 1983, Katsanevas, through his attorney, sent to the Holts a letter whereby Katsanevas confirmed the terms and conditions of the collateral agreement as he understood them to be based upon the discussions between the Katsanevas brothers and the Holts. At no time after receiving this letter, until the initiation of this suit, did the Holts notify the Katsanevas, or his attorney, that any discrepancy existed between the terms set forth in the letter and the terms reached in the agreement between the Katsanevas and the Holts.

The November 7, 1983 letter, in conjunction with the October 25, 1983, letter induced Katsanevas to go in debt himself in the sum of \$ 46,386.51 in order to satisfy the Holts' loan #1-6566 on the belief that the \$ 46,386.51 would reduce the principal amount by the same amount.

Due to Holts' actions in agreeing with Katsanevas that the application of the lump sum would be applied to the principal (when made), and the inaction taken by the Holts in response to the confirmation letter sent to the Holts on November 7, 1983, Katsanevas borrowed the funds needed for the payoff and made the payment to Continental bank; thus Katsanevas's actions in securing a loan for the loan balance amount was a reasonable and foreseeable action. This action was induced and was based upon Holts' representations, both

expressed and implied, that the lump sum payment made to cover the loan would be deducted from the principal amount owing at that time.

Furthermore, if the Holts were allowed to repudiate their initial representations, and have a change of mind as to the application of the lump sum payment, Katsanevas would suffer damages amounting to approximately \$ 65,000.00. Since Katsanevas has satisfied all of the requirements necessary for the defense of estoppel, Katsanevas' motion for summary judgment was properly granted.

VI
THE TRIAL COURT'S ORDER GRANTING
SUMMARY JUDGMENT TO DEFENDANT
SHOULD BE AFFIRMED

Defendant respectfully submits that it plainly appears from the record before this Court, that the proposed grounds for review are very insubstantial; there is no substantial question being presented to this Court, and therefore, this Court should affirm the judgment of the trial court.

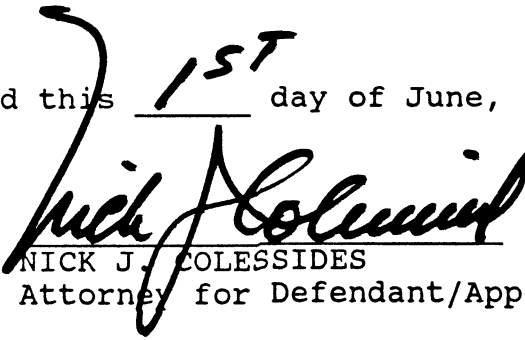
A review of the entire record including appellants' brief clearly reveals that plaintiffs have failed to demonstrate to this Court, that the trial Court has committed manifest error; therefore, there is no reason for the Utah Court of Appeals to reverse the granting of the summary judgment to the defendant by the trial Court.

The one basic issue presented to this Court, is whether or not, the trial Court properly granted defendant's motion for summary judgment, when it ruled that defendant did not breach his obligations pursuant to the written contract, and that the payment of the \$ 46,386.51 to the Continental Bank & Trust Company, by defendant for the benefit of Appellant, was properly credited to defendant's account upon the Uniform Real Estate contract, upon the date the payment was made, to wit, December 21, 1983.

CONCLUSION

Based upon the foregoing it is respectfully submitted that the Court enter its order affirming the judgment of the trial Court, and for an award to the defendant for his costs and attorney's fees incurred by defendant in connection with these proceedings, and in connection with the proceedings below.

Dated this 1ST day of June, 1992.

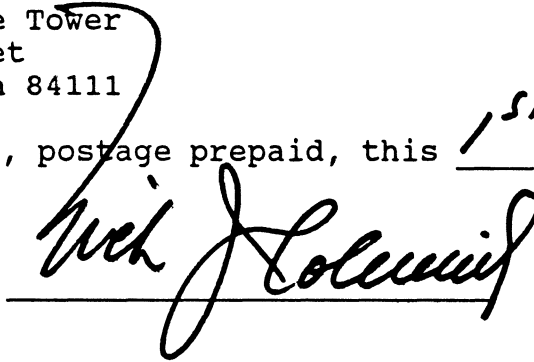

NICK J. COLESSIDES
Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing
were served upon:

Mr. Earl D. Tanner, Jr., Esq.
Attorney at Law
TANNER, BOWEN & TANNER
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

via first class mail, postage prepaid, this 1st day of June,
1992.

A handwritten signature in cursive script, reading "Vicki J. Holt", is written over a horizontal line. The signature is fluid and stylized, with the first name "Vicki" and last name "Holt" clearly legible.

k\katsholt.502

Exhibit 1

Paul D. Lyman #4522
Attorney for Plaintiffs
250 North Main Street
Richfield, Utah 84701
Telephone: 896-6812

FILED
DISTRICT COURT

JUL 13 10 02 AM '90

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

1CT

STATE OF UTAH

Tracy Bastian

KEITH C. HOLT and JOYCE S. HOLT,

:

Plaintiff,

:

vs.

:

MANUEL KATSANEVAS,

:

Defendant.

:

COMPLAINT
JUDGE PAT BIRN

Civil No.

900903536CN

15-50
2010
Come now the Plaintiffs and, for a cause of action against the
Defendant sufficient to seek declaratory relief, aver as follows:

1. On or about April 2, 1979, in Salt Lake County, Utah, the
Plaintiffs entered into a Uniform Real Estate Contract whereby Manuel
Katsanevas and Steven Katsanevas agreed to pay to the Plaintiffs \$275,000.00,
which contract was secured by certain real property.

2. Pursuant to said contract, Manuel Katsanevas and Steven
Katsanevas agreed to pay consecutive equal monthly payments of \$2,400.00 to
the Plaintiffs beginning October 1, 1979, and continuing for 10 years, without
the right to make prepayments of principal or interest.

3. On or about September 7, 1979, the parties entered into an
Escrow Agreement at the Continental Bank and Trust Company, which contained
terms that were identical to the underlying contract's terms.

4. At some time in late 1983 or early 1984, Manuel Katsanevas and
Steven Katsanevas approached the Plaintiffs and requested that the Plaintiffs
allow the collateral underlying the parties' contract to be exchanged and

further requesting that an obligation of the Plaintiffs be paid in full in order to allow the collateral exchange.

5. The Plaintiffs and Manuel Katsanevas and Steven Katsanevas agreed to said collateral exchange on the basis that the money paid by the Katsanevas' would be deducted off the bottom of the contract, i.e., when the principal amount owing reached \$45,313.92, the Katsanevas' contractual obligations would be extinguished.

6. At some time during 1985 or 1986 Steven Katsanevas was released from all obligations to the Plaintiffs and Manuel Katsanevas assumed full responsibility for all obligations to the Plaintiffs.

7. On February 2, 1990, Manuel Katsanevas, through his attorney, Nick J. Colessides, sent a letter to the Plaintiffs, which letter included amortization schedules demonstrating a claim by Manuel Katsanevas that the money paid in 1983/1984 should have been applied at that time to the principal of the contract.

8. Contrary to the parties' agreement and the written contract, Manuel Katsanevas has persisted in this theory that the money paid in 1983/1984 should have been applied at that time to the principal of the contract.

9. By reason of Manuel Katsanevas' claim, the Plaintiff is in great doubt as to whether the 1983/1984 payment should be applied as agreed and in conformance with the contract, or as Manuel Katsanevas now claims.

9. Pursuant to said contract, any defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, and, therefore, the

Plaintiffs are entitled to said costs, expenses and fees due to Manuel Katsanevas' actions.

WHEREFORE, Plaintiffs pray for the following relief:

- a. A determination that the parties agreed to deduct the money paid from the bottom of the contract;
- b. A determination that Manuel Katsanevas' claim violates the express written terms of the contract forbidding prepayments of principal prior to October 1, 1989;
- c. An award of the Plaintiffs' costs, expenses and fees; and
- d. Such other and further relief as the court finds just and equitable.

DATED this 11 day of June, 1990.

PAUL D. LYMAN
Attorney for Plaintiff

Exhibit 2

NOV 04 1991

Amey Pastern

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

KEITH C. HOLT and JOYCE	:	MEMORANDUM DECISION
C. HOLT,	:	
	:	Case No. 900903536 CN
Plaintiffs,	:	
	:	Judge Pat B. Brian
vs.	:	
	:	
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	

Defendant's motion for summary judgment and plaintiff's motion for summary judgment came on regularly for hearing, pursuant to notice, on the 18th day of October, 1991, before the Honorable Pat Brian, Judge. Plaintiffs were represented by their attorney Paul Lyman, and defendant was represented by his attorney Nick J. Colessides. The Court, having reviewed the memoranda, affidavits, and exhibits, submitted by the parties, and having heard argument of counsel on behalf of both parties, makes the following Findings of Fact and Conclusions of Law:

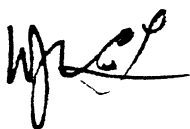
FINDINGS OF FACT

1. On or about April 2, 1979, in Salt Lake County, Utah plaintiffs and defendant entered into a Uniform Real Estate Contract, (the "Contract"), whereby Manuel Katsanevas and Steven Katsanevas

agreed to purchase from plaintiffs certain real property, located in Salt Lake County, Utah, the ("Holt property") and agreed to pay to plaintiffs, in consideration thereof, the sum of \$275,000.00.

2. Pursuant to said Contract, Manuel Katsanevas and Steven Katsanevas agreed to pay consecutive equal monthly payments of \$2,400.00 to the plaintiffs beginning October 1, 1979, and continuing thereafter until the entire principal balance of the contract was paid in full. Defendant has made timely each and every monthly payment due to the plaintiffs under the Contract.
3. Sometime in late 1982, while Katsanevas was involved with Triad Corporation for the exchange of real properties, including the "Holt property", Katsanevas asked and received from plaintiffs, permission to enter into the exchange and transfer the security interest to the new property, and for Katsanevas to pay the "approximately \$50,000.00 indebtedness".
4. Sometime in late 1983, defendant approached the plaintiffs requesting that the plaintiffs allow the collateral, subject matter of the parties' Contract, to be exchanged.
5. The plaintiffs agreed to the transfer in the collateral exchange agreement whereby the collateral, subject matter of the Contract, would be transferred from the South Temple property (280 West South Temple) to the North Temple property.
6. In order to release the South Temple property, plaintiffs informed the defendant Manuel Katsanevas that plaintiffs' bank, Continental Bank and Trust Company (the "Bank")

required that a pre-existing loan (loan #1-6566) needed to be paid off before the collateral could be transferred.

- 
7. As requested by plaintiffs and plaintiffs' Bank, defendant Manuel Katsanevas paid on December 21, 1983, plaintiffs' loan #1-6566 to the plaintiff's Bank. Plaintiffs by letter dated November 7, 1983, authorized and consented that the defendant Manuel Katsanevas pay off the loan #1-6566 to plaintiffs' Bank.
 8. Plaintiffs agreed to reduce the principal sum due under the contract by the sum of \$46,386.51.
 9. The plaintiffs and defendants executed and delivered to each other various documents including a Release, an Assignment of Contract, and a short form Trust Deed, wherein they recited that the then existing indebtedness was the sum of approximately \$172,000.00, which balance assumes that the payment of \$46,386.51 was applied to the then balance of the contract, at the time that it was made.
 10. It was necessary for defendant Manuel Katsanevas to borrow the \$46,386.51 in order to pay off the plaintiffs' loan #1-6566.
 11. The payment of plaintiffs' loan #1-6566 was not a gift, nor was it intended to plaintiff to bestow any other financial benefit upon plaintiffs; the payment was made at the request of plaintiffs' Bank, for the benefit of the plaintiffs, and thus plaintiffs' Bank allowed the exchange of the collateral.
 12. There is no writing or other agreement requiring defendant to apply the \$46,386.51 payment for any purpose other than

as having been applied when made. There was no agreement whereby defendant agreed to apply the payment of \$46,386.51 to the bottom of the Contract.

CONCLUSIONS OF LAW

1. Plaintiffs are required to apply the \$46,386.51 payment to the then balance of the Contract, as of the date the same was made to plaintiffs' Bank, to-wit December 21, 1983.
2. Plaintiffs are not entitled to a windfall.

ORDER

The Court having made it's Findings of Fact and Conclusions of Law, now therefore,

IT IS ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiffs' Motion for Summary Judgment is denied.
2. Defendant's Motion for Summary Judgment is granted.

DATED this 14 day of November, 1991.

BY THE COURT:

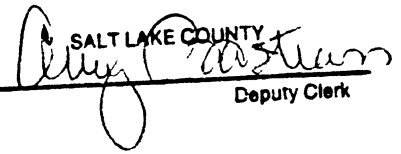
A handwritten signature in cursive script, appearing to read "Pat B. Brian", is written over a horizontal line.

PAT B. BRIAN
DISTRICT COURT JUDGE

Exhibit 3

NOV 27 1991

NICK J. COLESSIDES (# 696)
Attorney for defendant
466 South 400 East
Salt Lake City, Utah 84111-3303
Tele: (801) 521-4441

By  SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KEITH C. HOLT and JOYCE	:	
C. HOLT	:	JUDGMENT
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	Case No. 90 09 03536
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	Judge: Pat Brian

The Court having ruled upon the respective motions for summary judgment made by both parties, and the Court having entered its findings of fact, conclusions of law, and order, now upon motion of Nick J. Colessides, attorney for defendant, and good cause otherwise appearing therefor

IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

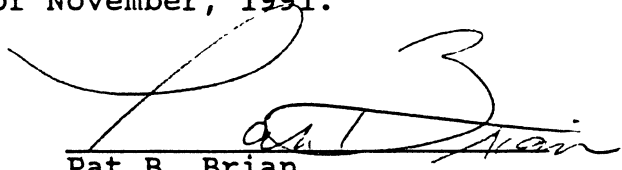
1. Declaratory judgment is hereby granted in favor of the defendant Manuel Katsanevas and against plaintiffs, and it is adjudged that the payment to Continental Bank & Trust in the sum of \$ 46,386.51, made on December 21, 1983, is hereby ordered applied to the balance of the amounts due to plaintiffs, under the terms of the April 2, 1979, real estate contract (between plaintiffs as sellers and defendant as

buyer), and shall be deemed applied as of the date that said payment was made, to-wit December 21, 1983; and

FURTHER, ORDERED, that the records of all parties and the escrow agent shall be so modified and amended, so as to reflect that the balance, of the above referenced real estate contract amount due to plaintiffs as of November 1, 1991, is the sum of \$ 17,220.46;

FURTHER, ORDERED, that this action shall be and is hereby dismissed with prejudice.

DATED this 27 day of November, 1991.


Pat B. Brian
District Court Judge

MAILING CERTIFICATE

Mailed a copy of the foregoing to:

Mr. Paul D. Lyman
Attorney at Law
250 North Main
Richfield, Utah 84701

postage pre-paid, first class mail, this 8th day of November, 1991.

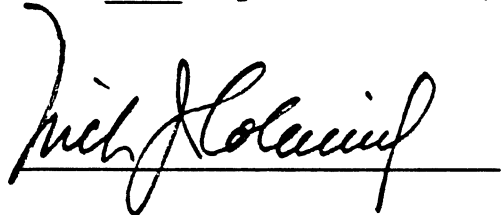


Exhibit 4

FILED DISTRICT COURT
Third Judicial District

JAN 02 1992

NICK J. COLESSIDES (# 696)
Attorney for defendant
466 South 400 East
Salt Lake City, Utah 84111-3303
Tele: (801) 521-4441

By *Aug Bastian* SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KEITH C. HOLT and JOYCE	:	ORDER
C. HOLT	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	Case No. 90 09 03536
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	Judge: Pat Brian

Plaintiffs' several motions, to-wit:

- a) Motion for Reconsideration; and
- b) Motion to Publish ^{AND FILE} Depositions; and
- c) Motion for a new trial pursuant to Rule 59 of the Utah Rules of Civil procedure, for the taking of additional testimony, to enter new Findings of Fact and Conclusions of Law, and for a new trial; and
- d) Motion to Amend Judgment pursuant to Rule 59 (e) of the Utah Rules of Civil Procedure, and Motion to amend the Judgment to deny the Motion for Summary Judgment in favor of defendant Manuel Katsanevas; and
- e) Motion for Relief from Judgment under Rule 60(b)

of the Utah Rules of Civil Procedure; and

f) Motion to Amend Findings of Fact and Conclusions of Law under Rule 52 (b) of the Utah Rules of Civil Procedure,

having come regularly for hearing before the Honorable Pat Brian, pursuant to notice, plaintiffs being represented by their attorney Earl D. Tanner Jr., and defendant being represented by his attorney Nick J. Colessides, and the Court having consider the various submissions of the parties, including the various affidavits, objections to affidavits, memoranda, and other filings of record, and the Court having heard argument from counsel on behalf of both parties, and good cause otherwise appearing therefor

IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

a) Motion for Reconsideration be and the same is hereby granted; and

b) Motion to Publish Depositions be and the same is hereby granted; and

c) Motion for a new trial pursuant to Rule 59 of the Utah Rules of Civil procedure, for the taking of additional testimony, to enter new Findings of Fact and Conclusions of Law, and for a new trial, be and the same is hereby denied; and

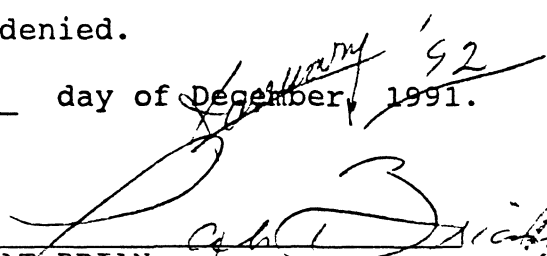
d) Motion to Amend Judgment pursuant to Rule 59 (e)

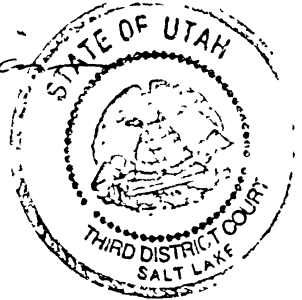
of the Utah Rules of Civil Procedure, and Motion to amend the Judgment to deny the Motion for Summary Judgment in favor of defendant Manuel Katsanevas be and the same is hereby denied; and

e) Motion for Relief from Judgment under Rule 60(b) of the Utah Rules of Civil Procedure be and the same is hereby denied; and

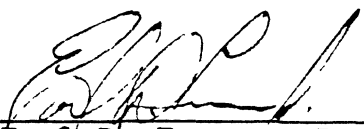
f) Motion to Amend Findings of Fact and Conclusions of Law under Rule 52 (b) of the Utah Rules of Civil Procedure be and the same is hereby denied.


Dated this 2 day of ~~December~~ ^{January} 1991.


PAT BRIAN
District Court Judge



Approved as to Form:


Earl D. Tanner, Jr.
Attorney for Plaintiffs


Nick J. Colessides
Attorney for Defendant

CERTIFICATE OF SERVICE

In accordance with Rule 4-504 of the Utah Code of Judicial Administration, the undersigned hereby certifies that I served a copy of the foregoing order, by mailing a copy to:

Mr. Earl D. Tanner, Jr., Esq.
Attorney at Law
TANNER, BOWEN & WILLIAMS
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

postage pre-paid, first class mail, this 21st day of December, 1991.

Rich Holcomb

k\katsholt.39

Exhibit 5

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 2nd day of April, A. D., 19 79,
by and between Keith C. Holt and Joyce S. Holt, husband and wife,
hereinafter designated as the Seller, and Manuel Katsanevas and Steve Katsanevas,

hereinafter designated as the Buyer, of the City and County of Salt Lake,
State of Utah,

2. WITNESSETH. That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer,
and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in
the county of Salt Lake, State of Utah, to-wit 280 West South Temple
More particularly described as follows: ADDRESS

Beginning at the Southwest Corner of Lot 2, Block 85,
Plat "A", Salt Lake City Survey, and running thence
East 8 rods; thence North 10 rods; thence West 8 rods;
thence South 10 rods to the point of beginning.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Two
Hundred Seventy-Five Thousand----- Dollars (\$ 275,000.00)

payable at the office of Seller, his assigns or order _____
strictly within the following times, to-wit: Twenty-Five Thousand Dollars (\$ 25,000.00)

cash, the receipt of which is hereby acknowledged, and the balance of \$ 250,000.00 shall be paid as follows:
consecutive equal monthly payments of \$ 2400.00, the first of which shall
be due on October 1, 1979, and a like amount on the 1st day of each
month thereafter, until the balance together with interest is paid in
full. Interest shall be charged from September 1, 1979, on all unpaid
portions of the purchase price at the rate of nine (9) percent per
annum for the first 120 monthly payments, and then at a rate which shall
be the greater of eight (8) percent per annum or not more than two (2)
percentage points below the then current prime interest rate of
Banker's Trust.

Possession of said premises shall be delivered to buyer by the 1st day of May, 19 79

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the
principal ~~XXXXXXXXXXXXXXXXXXXX~~ After the first 120 months ~~XXXXXXXXXXXXXXXXXXXX~~

~~XXXXXXXXXXXXXXXXXXXX~~ of payments. ~~XXXXXXXXXXXXXXXXXXXX~~ The Buyer, at his option at anytime, there
after may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage
or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future
installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according
to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture
hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of Citizens
National Bank with an unpaid balance of
\$ 71,287.18, as of April 1, 1979.

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said prem-
ises now in the process of being installed, or which have been completed and not paid for, outstanding against said prop-
erty, except the following None

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the
then unpaid contract balance hereunder, bearing interest at the rate of not to exceed nine percent
(9%) per annum and payable in regular monthly installments provided that the aggregate monthly installment
payments required to be made by Seller on said loans shall not be greater than each installment payment required to be
made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such
loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property
subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obli-
gations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and
pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect
to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless
said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such
amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon
the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in ob-
taining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and
interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed
and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees
that there are no assessments against said premises except the following

Property is within Salt Lake City and is subject to assessments
made thereby. There are no assessments as of the date hereof.

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

Exhibit 6

Paul D. Lyman #4522
Attorney for Plaintiffs
250 North Main Street
Richfield, Utah 84701
Telephone: 896-6812

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KEITH C. HOLT and JOYCE S. HOLT,	:	
	:	
Plaintiff,	:	PLAINTIFFS' RESPONSES
	:	TO DEFENDANT'S
vs.	:	REQUEST FOR ADMISSION
	:	
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	Civil No. 90 30 03536
	:	Judge Pat Brian

Plaintiffs respond as follows to the Defendant's Request for Admissions:

REQUEST NO. 1: Admit that on or about December 21, 1983, Defendant made a payment in the sum of \$46,386.51, to Continental Bank and Trust.

RESPONSE: Admit.

REQUEST NO. 2: Admit the genuineness of the attached Exhibit "A" - Receipt dated 12/31/83, for the sum of \$46,386.51.

RESPONSE: Admit.

REQUEST NO. 3: Admit that Continental Bank and Trust Company ("Continental") was the entity to whom Plaintiffs owed money on account of previous dealings between Plaintiff and Continental.

RESPONSE: Admit.

REQUEST NO. 4: Admit that Continental Bank and Trust demanded of Plaintiffs that Plaintiffs pay the sum of \$46,386.51 on account of the indebtedness owed by Plaintiffs.

RESPONSE: Deny. The Continental Bank demanded payment prior to allowing the release of the property that the Defendant sought to free up, which property was collateral for the Defendant's obligation to the Plaintiffs. The bank never demanded anything, until the Defendant sought the release of the property.

REQUEST NO. 5: Admit that Plaintiffs informed Defendant that Continental Bank and Trust demanded that a payment in the sum of \$46,386.51 be made, prior to Continental's allowing the transfer of collateral to the newly acquired (by Defendant) property.

RESPONSE: Deny. The Defendant requested the change in collateral and the Defendant informed the Plaintiff that the Defendant's requested collateral transfer could only occur if a certain sum of money were paid to the bank.

REQUEST NO. 6: Admit that Plaintiff(s) requested that Defendant should make the payment demanded by Continental Bank and Trust.

RESPONSE: Deny. See Response to Request No. 5.

REQUEST NO. 7: Admit that Defendant was not obligated to make the \$46,386.51 payment to Continental Bank and Trust.

RESPONSE: Deny. The Defendant only became obligated to make the payment, if the Defendant wanted to be able to do the Defendant's own collateral transfer.

REQUEST NO. 8: Admit that Defendant did not make a gift of \$46,386.51 to Plaintiffs.

RESPONSE: Admit.

REQUEST NO. 9: Admit that the discussion between Plaintiffs and Defendant relating to prepayment provisions under the real estate contract, did not contemplate the demand by Continental Bank and Trust.

RESPONSE: Deny. The demand by the bank came only after the Defendant sought the personal benefits he would receive by the collateral transfer. The Plaintiffs absolutely did not want any of the principal prepaid for any purpose for 10 years, which is why the no-prepayment provision was in the real estate contract.

REQUEST NO. 10: Admit that the discussion between Plaintiffs and Defendant relating to prepayment provisions under the real estate contract, did not include the demand by Continental Bank and Trust.

RESPONSE: Deny. See Response to Request No. 9.

REQUEST NO. 11: Admit that Plaintiffs received the benefit(s) of the payment (in the sum of \$46,386.51) paid to Continental Bank and Trust by the Defendant.

RESPONSE: Admit.

REQUEST NO. 12: Admit that the balance due (under the Real Estate Contract) to Plaintiffs as of the date hereof (assuming that the payment due June 1, 1990, has been made) is not more than \$53,584.96.

RESPONSE: Deny. The escrow agent's records show the correct balance due as of June 1, 1990.

RESPONSE NO. 13: Admit that on or about December 20, 1983, the balance due to Plaintiffs (under the provisions of the Real Estate Contract) was about \$217,528.37.

RESPONSE: Deny. However, the correct balance due on December 1, 1983 was \$217,497.87, according to the escrow agent's records.

REQUEST NO. 14: Admit the genuineness of the attached Exhibit "B" - Real Estate Contract, dated April 2, 1979.

RESPONSE: Admit.

REQUEST NO. 15: Admit that on or about December 22, 1983, the balance due to Plaintiffs (under the provision of the Real Estate Contract) was about \$171,000.00.

RESPONSE: Deny. The Uniform Real Estate Contract did not allow prepayments of principal during 1983 and the parties did not agree to any prepayments during 1983.

REQUEST NO. 16: Admit the genuineness of the attached Exhibit "C" - Release dated March 15, 1984.

RESPONSE: Admit, but point out that the Plaintiffs relied on the Defendant and his attorney, Nick J. Colessides, to accurately represent the "approximate" balance due on the underlying contract, which representations were not accurate.

REQUEST NO. 17: Admit the genuineness of the attached Exhibit "D" - Assignment of Contract, dated 2/13/84, recorded as entry number 3906635, and recorded 2/17/84.

RESPONSE: Admit, but see Response to Request No. 16.

REQUEST NO. 18: Admit the genuineness of the attached Exhibit "E" - Trust Deed dated 2/13/84, recorded as Entry Number 3906636.

RESPONSE: Admit.

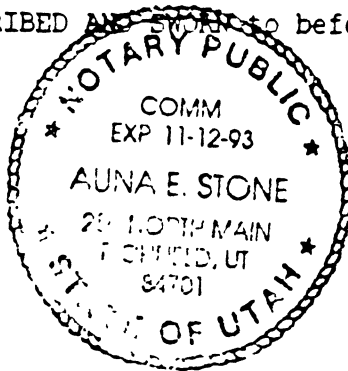
Page 5--Plaintiffs' Responses to Defendant's
Request for Admission
Keith C. Holt and Joyce S. Holt vs. Manuel Katsanevas

DATED this _____ day of July, 1990.

Keith C. Holt
KEITH C. HOLT
Plaintiff

Joyce S. Holt
JOYCE S. HOLT
Plaintiff

SUBSCRIBED AND SWORN to before me this 20th day of July, 1990.



Auna E. Stone
NOTARY PUBLIC
Residing at Richfield, Utah
My Commission Expires 11-12-93

Exhibit 7

November 10, 1982

Manuel & Steve Katsanevas
278 West South Temple
Salt Lake City, Utah 84101

Re: Contract of purchase for the
property known as Crownburger #2,
South Temple and 300 West Streets,
Salt Lake City, Utah

Gentlemen:

We understand that you are contemplating to or have entered into an Exchange Agreement with Triad Utah in order to exchange the property which you now occupy, and which you are purchasing from us on a real estate contract, for another piece of property.

This is to confirm our agreement whereby we, as sellers, have agreed, that in the event the contemplated exchange of properties takes place, we will execute and deliver to you whatever documents are deemed to be necessary, in order to transfer our security interest to the new property to be exchanged, subject to a first trust deed or mortgage to the fee owner, and to the SBA loan, thus effecting a substitution of collateral. In that event you will make whatever arrangements are satisfactory to Continental Bank & Trust to take care of the first mortgage indebtedness in the approximate amount of \$50,000.00.

Sincerely,

Keith C. Holt
Seller

Joyce S. Holt
Seller

cn

Exhibit 8

WESTERN STATES TITLE COMPANY

Western States Title Company

WHEN RECORDED, MAIL TO

NICK J. COLESSIDES
466 South 4th East
Salt Lake City, Utah 84111

Space Above This Line for Recorder's Use

6.50
FEB 17 3 12 PM '84
NICK J. COLESSIDES
RECORDED
SALT LAKE COUNTY, UTAH

3906636

TRUST DEED

THIS TRUST DEED is made this 13th day of February, 19 84,
between MANUEL KATSANEVAS and STEVE KATSANEVAS, as Trustor,
whose address is 118 North 300 West, Salt Lake City, Utah 84103
(Street and Number) (City) (State)
WESTERN STATES TITLE COMPANY, as Trustee,* and
KEITH C. HOLT and JOYCE S. HOLT
721 North 300 East, Richfield, Utah 84701, as Beneficiary.

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER
OF SALE, the following described property situated in Salt Lake County, Utah

SEE ATTACHED EXHIBIT "A"
WHICH BY REFERENCE IS
INCORPORATED HEREIN AND
MADE A PART HEREOF.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way,
easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances
thereunto now or hereafter used or enjoyed with said property, or any part thereof.

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a ~~promissory note~~
~~note of purchase money~~ in the principal sum of \$ 210,000.00, payable to the order of
Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any
sums expended or advanced by Beneficiary to protect the security hereof

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and
assessments on water or water stock used on or with said property, not to commit waste, to maintain
adequate fire insurance on improvements on said property, to pay all costs and expenses of collec-
tion (including Trustee's and attorney's fees in event of default in payment of the indebtedness se-
cured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee
hereunder, including a reconveyance hereof

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale
hereunder be mailed to him at the address hereinbefore set forth.

real estate contract dated April 2, 1979.

Manuel Katsanevas
Steve Katsanevas

STATE OF UTAH

COUNTY OF

On the 13th day of February, 19 84, personally appeared before me
MANUEL KATSANEVAS and STEVE KATSANEVAS, the signers

of the foregoing instrument, who duly acknowledged to me that they executed the same.

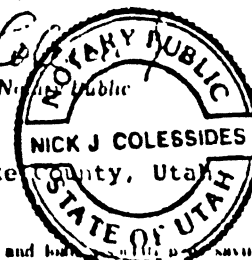
EXHIBIT: 9 DATE: 2-27-91
WITNESS: Keith C. Holt
NED A. GREENIG RPR/CSR

My Commission Expires

2-23-87

Reading at

Salt Lake County, Utah



*NOTE: Trustee must be a member of the Utah State Bar, a bank, building and loan association, savings and loan association authorized to do such business in Utah, a corporation authorized to do trust business in Utah, or a title insurance or abstract company authorized to do such business in Utah.

5532 1633

EXHIBIT

A

PARCEL NO. 2.

BEGINNING at the Southwest corner of Lot 4, Block 96, Plat "A", Salt Lake City Survey, and running thence North 130 feet; thence East 49.5 feet; thence South 7 feet; thence East 97 feet; thence South 47 feet; thence West 83 feet; thence South 76 feet; thence West 63.5 feet to the point of BEGINNING.

TOGETHER WITH AND SUBJECT TO a right of way described as follows:

BEGINNING at a point 116 feet North from the Southwest corner of Lot 4, aforesaid, and running thence North 14 feet; thence East 15 rods; thence South 14 feet; thence West 101 feet; thence South 40 feet; thence West 20 feet; thence North 40 feet; thence West 126.5 feet to the point of BEGINNING.

* * *

EXHIBIT
E-4

REC-5532
1632

Exhibit 9

NICK J. COLESSIDES

466 SOUTH 400 EAST
SALT LAKE CITY, UTAH 84111
801 521-4441

November 7, 1983


Mr. & Mrs. Keith Holt
721 North 300 East
Richfield, Utah 84701

Re: Crownburger II - Continental Bank Loan

Dear Mr. & Mrs. Holt,

Confirming our telephone conversation today this will acknowledge (as per the agreement made by you and Manuel Katsanevas on September 27, 1983) that Manuel Katsanevas is given the right to pay in full the promissory note payable to Continental Bank & Trust Company in the approximate amount of \$48,000.00 or such lesser amount as due to the bank and thus obtain a release of the first mortgage upon the "old" Crownburger property, which release of mortgage shall be filed or recorded with the Salt Lake County Recorder's Office. The amount paid to the Bank by Katsanevas shall reduce the principal sum, owed to you under the real estate contract, by the same amount.

Sincerely


NICK J. COLESSIDES
Attorney at Law

NJC:ssc

cc: Manuel Katsanevas

EXHIBIT: 1- DATE: 2-27-91
WITNESS: Holt
NED A. GREENIG: RPR/CSR

EXHIBIT
"C"

Exhibit 10

Salt Lake City, Utah, 21 December, 19 83

\$ 46,386.51

Received of Steve & Georgia Katsanevas Doll

--Forty six thousand three hundred eighty six dollars and 51/100-----

For payoff on Keith Holt's loan #1-6566

The Continental Bank and Trust Company

Mis 094

By

Juanie Lopez

EXHIBIT: 3

DATE: 2-27-91

WITNESS: Holt

RED A GREENIG: RFR/CSR

EXHIBIT

"D"

00116

Exhibit 11

February 2, 1984

Nick J. Colessides
Attorney at Law
466 South 400 East
Salt Lake City, UT 84111


Re: Keith Molt SBA loan

Dear Mr. Colessides:

As per the agreement made in August of 1982 that when our loan #1-6566, land loan wherein the Crown Burger was currently located, would be paid in full, we had agreed to release that particular property from the SBA loan that Mr. Molt has with the property as addition collateral.

Enclosed is the deed of reconveyance releasing 280 West South Temple.

Yours truly,


Robert A. Bailey
Vice President

ehd

Enclosure

cc: Keith Molt

EXHIBIT:

DATE:

WITNESS:

WFO A. GREENIG: RFR/CSR

10
00120

Exhibit 12

FOR YOUR FILES

RED-511

DEED OF RECONVEYANCE

THE CONTINENTAL BANK AND TRUST COMPANY, as Trustee under a Trust

Deed dated 15 August, 19 79, executed by Keith C. Holt and

Joyce S. Holt, husband and wife, as Trustor, and recorded on

17 August, 19 79, as Entry No. 3324140, in Book 4925,

Page 873 of the records of the County Recorder of Salt Lake County, Utah, pursuant to a written request of the Beneficiary thereunder, does hereby reconvey, without warranty, to the person or persons entitled thereto, the trust property now held by it as Trustee under said Trust Deed, which Trust Deed covers

real property situated in Salt Lake County, State of Utah, described as follows:

Commencing at the Southwest corner of Lot 2, Block 85, Plat "A", Salt Lake City Survey, and running thence East 132 feet; thence North 165 feet; thence West 132 feet; thence South 165 feet to the place of beginning.

ADDRESS: 280 West South Temple, SLC, Utah.

Dated this 1st day of February, 19 84.

THE CONTINENTAL BANK AND TRUST COMPANY,
TRUSTEE

By Robert A. Bailey
Robert A. Bailey, Vice President

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

On the 1st day of February, 19 84, personally appeared before me Robert A. Bailey, who being by me duly sworn, did say that he is Vice President of The Continental Bank and Trust Company, a corporation, and that the foregoing instrument was signed in behalf of said corporation,

by authority of a resolution of its Board of Directors, and said Robert A. Bailey acknowledged to me that said corporation executed the same as Trustee.

James J. [Signature]
Notary Public
Residing at Salt Lake City, Utah

My commission expires:

EXHIBIT: 6 DATE: 2-27-84
WITNESS: Holt
NEED A. GREENIG: RFR/CSR

Exhibit 13

17 3 12 PM '84
J. Celestides
OF
DEP
Shell Trust
Lowell Hurst

3906635

ASSIGNMENT OF CONTRACT
(FOR SECURITY)

This Assignment, made and entered into this 13th day of February, 1984, by and between MANUEL KATSANEVAS and STEVE KATSANEVAS, 118 North 300 West, Salt Lake City, Utah 84103, hereinafter referred to as "ASSIGNOR", and KEITH C. HOLT and JOYCE HOLT, hereinafter referred to as "ASSIGNEE".

WITNESSETH:

WHEREAS, under date March 7, 1966, the within described land was sold on a Uniform Real Estate Contract to Wilson Hotel Corporation, a Utah Corporation, said contract having been recorded on March 6, 1966, as Entry No. 2145298, in Book 2436 at page 217 of the official records of Salt Lake County Recorder's Office; and

WHEREAS, the said contract through subsequent assignments, has been assigned to Assignor; and

WHEREAS, the parcel of land subject matter of this Assignment is more particularly described in the attached Exhibit "A" which by reference is incorporated herein and made a part hereof; and

WHEREAS, reference is hereby made to the Uniform Real Estate Contract for all of the terms, conditions, and provisions thereof, and

EXHIBIT
E-1

EXHIBIT: 8 DATE 2-27-91
Holt

REC-5532 REC-1623

WHEREAS, the Assignees desire to acquire from the Assignors all of the right, title and interest of the Assignors in and to the said written agreement as and for purposes of security for the indebtedness due to Assignees.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the Assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledge, assign to the Assignees, all their right, title and interest in and to the aforesaid Uniform Real Estate Contract of March, 1984, concerning the above described property.

2. That to induce the Assignees to pay the said sum of money and to accept the said contract as and for Security, the Assignors hereby represent to the Assignees as follows:

a. That the Assignors have duly performed all the conditions of the said contract.

b. That the contract is now in full force and effect and that the unpaid balance of said contract is approximately \$29,000.00, with interest paid to the 1st day of February, 1984.

c. That said contract is assignable.

THIS ASSIGNMENT is given for the purpose of securing payment of an indebtedness, in the principal balance sum of approximately \$172,000.00 owed by the Assignor, payable to the order of the Assignee pursuant to an agreement between the Assignor and Assignee.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and year first above written.

M. J. Coleman
Steve J. Coleman
(Assignor)

STATE OF UTAH)
: SS
COUNTY OF SALT LAKE)

On the 13th day of February, 1984, personally appeared before me the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.

My commission expires:

2-23-87

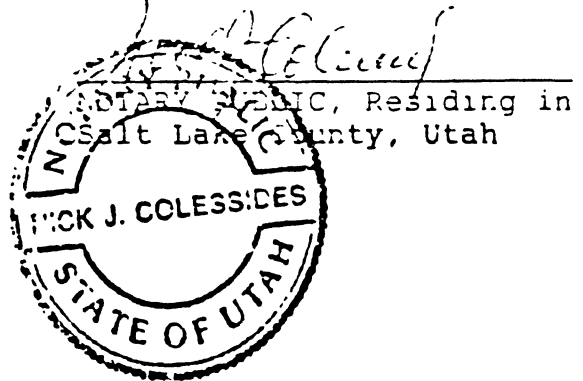


EXHIBIT
E-3

Exhibit 14

RELEASE

WHEREAS, MANUEL KATSANEVAS and STEVE KATSANEVAS have entered into an agreement to purchase certain land from the undersigned; and

WHEREAS, the undersigned is owed approximately the sum of \$172,000.00 as of the date hereof; and

WHEREAS, the undersigned is the Beneficiary under a certain Trust Deed recorded February 17, 1984, and an Assignment of Contract (For Security) recorded February 17, 1984; and

WHEREAS, the above referred to obligation due to the undersigned in the sum of \$172,000.00 (as more particularly described in the Trust Deed and Assignment of Contract) has been assumed by Manuel Katsanevas.

NOW, THEREFORE, in consideration of Ten Dollars and other good and valuable consideration

The undersigned KEITH C. HOLT and JOYCE HOLT, jointly and severally, hereby release and discharge STEVE KATSANEVAS and only STEVE KATSANEVAS, and his heirs, executors and personal representatives from the obligation to pay to the undersigned any and all remaining balance of the sum which is due and payable to the undersigned as a result of the Trust Deed and

EXHIBIT

F-1

EXHIBIT: 10 DATE 2-27-91
J.T. O +

Assignment of Contract (For Security) as aforesaid.

DATED this 15th day of March, 1984.



KEITH C. HOLT



JOYCE HOLT

EXHIBIT 'A'

Plat 4

PARCEL NO. 2:

BEGINNING at the Southwest corner of Lot 4, Block 96, Plat "A", Salt Lake City Survey, and running thence North 130 feet; thence East 49.5 feet; thence South 7 feet; thence East 97 feet; thence South 47 feet; thence West 83 feet; thence South 76 feet; thence West 63.5 feet to the point of BEGINNING.

Plat 5

TOGETHER WITH AND SUBJECT TO a right of way described as follows:

BEGINNING at a point 116 feet North from the Southwest corner of Lot 4, aforesaid, and running thence North 14 feet; thence East 15 rods; thence South 14 feet; thence West 101 feet; thence South 40 feet; thence West 20 feet; thence North 40 feet; thence West 126.5 feet to the point of BEGINNING.

* * *

EXHIBIT B-2

REC-5532 EX-1634

Assignment of Contract (For Security) as aforesaid.

DATED this 15th day of March, 1984.

Keith C. Holt
KEITH C. HOLT

Joyce Holt
JOYCE HOLT

Exhibit 15

NICK J. COLESSIDES (# 696)
Attorney for Defendant
466 South 400 East
Salt Lake City, Utah 84111-3303
Tele: (801) 521-4441

Patricia K. Klammer

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KEITH C. HOLT and JOYCE
S. HOLT,

Plaintiffs,

vs.

MANUEL KATSANEVAS,

Defendant.

: AFFIDAVIT OF
: MANUEL KATSANEVAS
: IN SUPPORT OF MOTION ✓
: FOR SUMMARY JUDGMENT

: Case No.: 90 09 03536

: Judge: Pat Brian
:

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

MANUEL KATSANEVAS, first duly sworn upon his oath
deposes and says;

1. He is the defendant above named.
2. That the facts recited herein are made on
affiant's personal knowledge, and that the same are admissible
in evidence, and that affiant is competent to testify as to
the matters stated herein.
3. On April 2, 1979, plaintiffs, (as "Sellers")
entered into a contract to sell, to Manuel Katsanevas and
Steve Katsanevas certain real property, commonly referred to
as 280 West South Temple, (the "Real Property") located in

Salt Lake City, Utah. A copy of the Uniform Real Estate Contract form is marked Exhibit "A" and by this reference is incorporated and made a part hereof.

4. Defendants Manuel Katsanevas and Steve Katsanevas entered into possession of the real property subject matter of the contract, and constructed thereupon a restaurant known as Crownburgers Restaurant.

5. In connection with the building of the restaurant premises upon the Real Property, Sellers agreed to and in fact subordinated Sellers' interest to the interest of the SBA who became Katsanevas' lender, for purposes of building the restaurant.

6. In approximately October, 1982, Katsanevas' entered into an exchange agreement with the Trial Corporation whereby Katsanevas' agreed to relocate their business - one block north - at the (present) location known as 118 North 300 West, Salt Lake City, Utah (the "North Temple" location). A copy of the said letter is marked Exhibit "B" and by this reference is incorporated and made a part hereof.

7. On or about November 10, 1982, defendant requested and received a letter agreement from the plaintiffs whereby plaintiffs agreed to the exchange, the subordination of plaintiffs' interest in the "new" North Temple location, and the payment of the "... indebtedness in the approximate amount of \$50,000.00".

8. On or about October, 1983, the new restaurant premises at the North Temple location was completed and was occupied by Katsanevas.

9. As a result of the exchange and relocation of the Restaurant to the North Temple location the remaining balance due to the Sellers on the South Temple presently was transferred, on a subordinated position, as an encumbrance upon the North Temple location. A copy of the Trust Deed is marked Exhibit "C" and by this reference is incorporated and made a part hereof.

10. In connection with the release of the South Temple property and the transfer of the same to the Triad Corporation, Continental Bank required the payment of an obligation of Sellers due to Continental Bank, for which the North Temple was given as security by the Sellers.

11. By agreement of the parties (Manuel Katsanevas and the Holts), in a letter dated November 7, 1983, Sellers agreed that Katsanevas would pay the Holt obligation to Continental Bank, and the amount so paid would reduce the principal balance owed to Sellers (Holts) under the Contract. A copy of the letter is marked Exhibit "D" and by this reference is incorporated and made a part hereof.

12. On December 21, 1983, the undersigned affiant borrowed the money and paid the Holt loan to Continental Bank in the amount of \$ 46,386.51. A copy of the receipt for the

payment so made is marked Exhibit "E, and by this reference is incorporated and made a part hereof.

13. On February 2, 1984, Continental Bank executed and delivered a deed of reconveyance of the South Temple Property, the original of which was recorded and a copy was sent to the Sellers; a copy of the Deed of Reconveyance is marked Exhibit "F-1", and the Bank's transmittal letter is marked Exhibit "F-2" and by this reference are incorporated and made a part hereof.

14. On February 17, 1984, the financial obligation due to Sellers was transferred on a subordinated basis and was put upon as an encumbrance upon the North Temple location. See Exhibit "C".

15. On February 17, 1984, Katsanevas also recorded an Assignment of Contract (For Security) of the contract of one of the parcels (as additional security) of the North Temple location. A copy of the Contract is marked Exhibit "G", and by this reference is incorporated and made a part hereof.

16. In Exhibit "G", the balance due to the Sellers on or about the date of said exhibit is shown as \$ 172,000.00.

17. Sometime in late 1983, Steve Katsanevas sold his business and partnership interests of and in the Crownburger Restaurant to his brother Manuel Katsanevas.

18. As a result of the above intra-family

transaction Manuel Katsanevas assumed all of the obligation of the business including the obligation due to the Sellers (Holts).

19. On or about March, 1984, Steve Katsanevas sought and obtained from the Sellers (Holts) a release from the obligations due to the Holts under the Trust Deed. The amount claimed to have been due to the Holts is the sum of \$ 172,000.00, as stated in the Release. A copy of the Release is marked Exhibit "H", and by this reference is incorporated and made a part hereof.

20. Applying the payment of \$ 46,386.51, to the amortization schedule, as having been made on December 21, 1982, it would show that the balance due to the Sellers (Holts) was \$ 171,111.36.

21. There is no writing signed by Katsanevas whereby Katsanevas agrees to apply the \$ 46,386.51, payment for any purpose other than as having been applied by Katsanevas.

22. The undersigned has made timely each and every monthly payment of \$ 2,400.00 pursuant to the terms of the real estate contract.

23. Affiant did not intent at any time to make a gift or bestow any other monetary benefit to the plaintiffs, nor affiant was obligated, legally or morally, to do so.

24. At the time of the payment of the \$ 46,386.51

Exhibit 16

As is outlined below, on the legal issues necessary for decision, there are no factual issues in dispute and, therefore, summary judgment in favor of the Plaintiffs is appropriate.

STATEMENT OF UNDISPUTED FACTS

Paragraph 1 to 17 below are quoted word for word as they appear in the Defendant's Memorandum of Points and Authorities. They represent undisputed facts.

1. On or about April 2, 1979, in Salt Lake County, Utah, the plaintiffs entered into a Uniform Real Estate Contract whereby Manuel Katsanevas and Steven Katsanevas agreed to purchase from plaintiffs certain real property, located in Salt Lake County, Utah and agreed to pay to plaintiffs, in consideration thereof, the sum of \$275,000.00; the contract was secured by the real property, subject matter of the real estate contract. (Katsanevas Affidavit #3; see also exhibit "A"). (Katsanevas Memo paragraph 1)

2. Pursuant to said contract, Manuel Katsanevas and Steven Katsanevas agreed to pay consecutive equal monthly payments of \$2,400.00 to the plaintiffs beginning October 1, 1979, and continuing thereafter until the entire principal balance of the contract was paid in full. (Exhibit "A"). (Katsanevas Memo paragraph 2)

3. Defendant has made timely each and every monthly payment due to the plaintiffs under the contract. (Katsanevas Affidavit #22). (Katsanevas Memo paragraph 3)

4. At some time in late 1983, defendant Manuel Katsanevas and Steven Katsanevas approached the plaintiffs requesting that the plaintiffs allow the collateral under the parties' contract to be exchanged. (Manuel Katsanevas Depo. p. 17-19)(Katsanevas Memo paragraph 4 (#2))

5. The plaintiffs agreed to the transfer in the collateral exchange agreement whereby the collateral supporting the Uniform Real Estate Contract would be transferred from the South Temple property (280 West South Temple) to the North Temple Property. (Holt Depo. p. 32, 43-44; Katsanevas Depo. p 20) (Katsanevas Memo paragraph 5)

6. In order to release the South Temple property, plaintiffs informed the defendant Manuel Katsanevas and Steve Katsanevas that Continental Bank and Trust Company required that a pre-existing loan ((#1-6566) needed to be paid off before the collateral could be transferred. (Holt Depo. p. 33-4, 38; Katsanevas Affidavit #10). (Katsanevas Memo paragraph 6)

7. Defendants Manuel Katsanevas and Steven Katsanevas proposed that they would pay off the plaintiffs loan #1-6566 at the Continental Bank and Trust Company. (Katsanevas Depo. p. 23) (Katsanevas Memo paragraph 7)

8. Plaintiffs authorized and consented that the defendants Manuel Katsanevas and Steven Katsanevas be allowed to pay off the loan #1-6566. (Katsanevas Memo paragraph 8)

9. On December 21, 1983, Steve Katsanevas, on behalf of Manuel Katsanevas, paid to The Continental Bank and Trust Company the sum of \$46,386.51 for the payoff on Keith Holt's loan #1-6566. (Exhibit "E"; Katsanevas Affidavit #12). (Katsanevas Memo paragraph 13)

10. The payment of Keith Holt's loan #1-6566 was not a gift nor intended to bestow any benefit upon Keith Holt other than the release of the South Temple property in order to complete the collateral exchange agreement. (Katsanevas Affidavit #23) (Katsanevas Memo paragraph 14)

11. On February 13, 1984, the defendant Manuel Katsanevas and Steve Katsanevas executed an "Assignment of Contract (For Security)" of the property located at the North Temple location as security against the amount that defendant Manuel Katsanevas and Steve Katsanevas owed to the plaintiffs. (Exhibit "G"). (Katsanevas Memo paragraph 16)

12. The "Assignment of Contract" reads as follows:

THIS ASSIGNMENT is given for the purpose of securing payment of an indebtedness, in the principal balance sum of approximately \$172,000.00 owed by the Assignor, payable to the order of the Assignee pursuant to an agreement between the Assignor and Assignee. (Exhibit "G", page

(Katsanevas Memo paragraph 17)

13. The principal balance stated in the Assignment of Contract which was sent to the plaintiffs represented the application of the \$46,386.51 as applied to the balance at the top of the contract as if the \$46,386.51 was applied on December 21, 1983. (Katsanevas Depo. p. 33). (Katsanevas Memo paragraph 18)

Exhibit 17

NICK J. COLESSIDES (# 696)
Attorney for defendant
466 South 400 East
Salt Lake City, Utah 84111-3303
Tele: (801) 521-4441

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KEITH C. HOLT and JOYCE	:	DEFENDANT'S OBJECTION
C. HOLT	:	TO THE AFFIDAVITS
	:	BY ROBERT A. BAILEY AND BY
Plaintiffs,	:	KEITH HOLT; MOTION
	:	TO STRIKE
vs.	:	
	:	Case No. 90 09 03536
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	Judge: Pat Brian

Defendant above named hereby objects to the admission of the affidavits submitted by Robert A. Bailey, the "Bailey Affidavit", and the second affidavit of co-plaintiff Keith Holt, the "Holt Affidavit"; defendant hereby moves the Court for an order that the same be stricken.


Defendant respectfully submits that the affidavit of Robert A. Bailey should be stricken because it does not comply with the requirements of Rule 56(e), of the Utah Rules of Civil Procedure, in that, it contains conclusionary reiterations of the allegations of the complaint, not made on the basis of personal knowledge, it contains matters which are not admissible in evidence, and, further, said affidavit contains conclusions of law, ultimate facts, assertions, arguments and inferences derived from the other pleadings, and

thus should be disregarded by the Court. Furthermore, it is not newly discovered evidence, in that both the identity of Mr. Bailey and his purported testimony was known to the plaintiffs at the time this case was filed by the Plaintiffs, and substantially discovery was had, by both parties, in connection with this case.

Defendant further objects to the second affidavit of plaintiff Keith Holt, and moves that the same be stricken, in that the same contains inadmissible matter, and, further, the Holt Affidavit should be stricken based upon the same basis and for the same reasons as advanced by defendant in connection with the defendant's motion to strike the Bailey Affidavit; see above paragraph. Furthermore, the purported evidence contained in the Holt Affidavit are not "newly discovered evidence"; it is merely an effort by plaintiff to have the heretofore ruled upon motion for summary judgment be re-heard and re-argued before the trial Court, thus enabling plaintiff to have a second "bite" at the proverbial apple.

It is respectfully submitted that both affidavits be stricken and/or their contents be disregarded in the Court's determination of the plaintiff's various motions.

Dated this 17 th day of December, 1991.

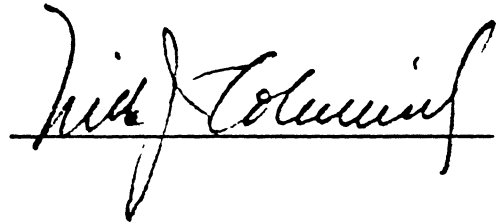

NICK J. COLESSIDES
Attorney for Defendant

MAILING CERTIFICATE

Mailed a copy of the foregoing to:

Mr. Earl D. Tanner, Esq.
Attorney at Law
TANNER, BOWEN & WILLIAMS
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

postage pre-paid, first class mail, this 17th day of December,
1991.

A handwritten signature in cursive script, reading "Rick Coleman", is written over a horizontal line.

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Exhibit 18

NICK J. COLESSIDES (# 696)
Attorney for defendant
466 South 400 East
Salt Lake City, Utah 84111-3303
Tele: (801) 521-4441

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KEITH C. HOLT and JOYCE	:	DEFENDANT'S OBJECTION
C. HOLT	:	TO PLAINTIFFS'
	:	VARIOUS MOTIONS FOR
Plaintiffs,	:	RELIEF FROM JUDGMENT
	:	ETC..
vs.	:	
	:	Case No. 90 09 03536
MANUEL KATSANEVAS,	:	
	:	
Defendant.	:	Judge: Pat Brian

Defendant above named by and through his attorney of record hereby objects to plaintiffs' various motions for relief from the judgment heretofore entered on November 27, 1991, and in support thereof, submits the following:

I. DEFENDANT OBJECTS TO PLAINTIFFS'
MOTION FOR RELIEF FROM JUDGMENT
IN SO FAR AS THE SAID MOTION IS
PREDICATED UPON RULE 60 (b) OF
THE UTAH RULES OF CIVIL PROCEDURE

Plaintiffs' part of their motion "... for relief from judgment under U. R. C. P. Rule 60 (b) ..." as presented to the Court does not specify the exact grounds (subdivision 60(b)1 through 60(b)7) upon which plaintiffs rely in order to ask for the requested relief. Thus, in defendant's view, based upon defendant's review of Rule 60(b), and plaintiffs'

accompanying motion and memorandum, it appears that it is plaintiff's wish to proceed on the basis of either subdivision (b)2 or subdivision (b)7 of Rule 60.

As it relates to plaintiffs' position, that they are proceeding under Rule 60(b)2, plaintiffs suggest in their motion and the accompanying memorandum that they are entitled to a "new trial" or "for consideration" on the basis of newly discovered evidence. In support of this contention plaintiffs submit a second affidavit by plaintiff Keith Holt and an affidavit by a "new" witness, to wit, Robert A. Bailey.

Defendant respectfully submits that any and all testimony allegedly deduced from the two "new" affidavits, if allowed to be introduced, do not come within the ambit of the legal standard "of newly discovered evidence". All alleged purported evidence, both as to identity of witnesses, content, and substance was well known to the plaintiffs at the time they responded to defendant's motion for summary judgment and at the time defendants filed their own cross motion for summary judgment. As a matter of fact, a close examination and comparison of the two affidavits of Keith Holt, clearly show, merely stylistic differences and not substantive differences, in that the substance of the claims are the same.

It is obvious, that the affidavit of Robert A. Bailey (the "Bailey Affidavit"), if not otherwise objectionable and subject to defendant's motion to strike, is

not newly discoverable evidence. Plaintiffs have failed to make a prima facie case as to why the Bailey Affidavit is newly discovered evidence which "... by due diligence could not have been discovered in time ...", and, thus, it could not have been presented to the Court earlier, during the time the original motions for summary judgment (on behalf of both parties) were made.

Plaintiffs' second attempt to see that they come within the purview of 60(b)7, is nothing more than an effort to re-argue, under a partially different "legal" theory, and a different claim, plaintiffs' prior objections to defendant's motion for summary judgment, and support for plaintiffs' own cross-motion for summary judgment, which was denied by the trial court. It is merely a rehash of old arguments which have been rightfully rejected by this Court.

Plaintiffs are not entitled to challenge the granting of defendant's motion for summary judgment and the dismissal of the action on a separate and distinct claim, different than that which was asserted by plaintiffs during the proceedings in this matter.

It is respectfully submitted that the appropriate forum to decide the correctness of the trial court's entry of judgment is the appellate court and, therefore plaintiffs' motion for relief from judgment as made should be denied.

II. PLAINTIFFS' REQUEST FOR A NEW TRIAL SHOULD BE DENIED IN THAT PLAINTIFFS' REQUEST DOES NOT COME WITHIN THE AMBIT OF RULE 59, AS PRAYED FOR BY PLAINTIFFS.

Plaintiff in their request, purportedly made pursuant to Rule 59 of the Utah Rules of Civil Procedure, seek a new trial in lieu of a trial which was never held; the judgment from which relief is sought was entered by the Court on the basis of the respective motions for summary judgment, made by both parties and duly considered by the trial court.

Additionally, plaintiffs have failed to produce and submit to the Court, the affidavits contemplated and required under 59(c) of the Rule.

It is respectfully submitted that plaintiffs reliance upon Rule 59 or any of its subdivisions is clearly misplaced, and thus plaintiffs' motion for a new trial is in fact spurious and frivolous, and should be denied; defendant should be awarded his attorney's fees and costs in connection with the defense thereof.

III. PLAINTIFF MOTION TO AMEND THE FINDINGS ENUMERATED 7, 9, 10, 11, AND 12, IS NOT WELL TAKEN, IN THAT ALL OF THE ABOVE REFERENCED FACTS ARE FULLY SUPPORTED BY THE EVIDENCE.

The findings which plaintiffs seek to amend or alter are fully supported by the evidence which were presented to the Court during the briefing and argument of the case. The fact of the matter is that plaintiffs disagree with the

findings because the Court found the facts against the interest of the plaintiff; it is interesting to note that plaintiffs contention is merely their conclusion that "... [T]he Conclusions of Law are erroneous, having been based on faulty Findings ..." ; see paragraph 3, page 5, of plaintiffs' motion.

The standard for amending or altering findings of fact is whether or not the findings as entered by the Court are supported by admissible evidence. It is clear from the pleadings and parers in the instant case all findings as entered by the Court are fully and conclusively supported by the evidence.

IV. PLAINTIFFS' REQUEST TO AMEND THE
JUDGMENT PURSUANT TO RULE 59(e)
SHOULD BE DENIED IN THAT SAID
MOTION DOES NOT COME
WITHIN THE AMBIT OF RULE 59(e), AS
PRAYED FOR BY PLAINTIFFS.

If plaintiffs are making a motion to "... amend the Judgment pursuant to U. R. C. P. Rule 59(e), specifically to amend the judgment to deny the Motion for Summary Judgment of defendant Manuel Katsanevas ..." [sic], said motion is not timely made, and must be denied. It appears, that plaintiffs seek to amend the Order of this Court entered on November 4, 1991; it is the only order (judgment) of this Court that granted Manuel Katsanevas' motion for summary judgment; It was entered on November 4, 1991, and plaintiffs, if they are


to seek the protection of Rule 59(e), and wish to amend the judgment they should have made their motion on or before November 14, 1991. See also discussion of issue discussed under II above.

Plaintiffs' motion having been made untimely, should be denied by this Court.

CONCLUSION

It is respectfully submitted that plaintiffs not having met their burden of persuasion to the Court for vacating the judgment heretofore entered, that their various motions be denied.

Dated this 17th day of December, 1991.



NICK J. COLESSIDES
Attorney for Defendant

MAILING CERTIFICATE

Mailed a copy of the foregoing to:

Mr. Earl D. Tanner, Esq.
Attorney at Law
TANNER, BOWEN & WILLIAMS
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postage pre-paid, first class mail, this 17th day of December, 1991.

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