

2003

# Kerry L. Knighton v. Vickey A. Bowers : Brief of Appellant

Utah Court of Appeals

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Stephen J. Buhler; Attorneys for Appellees.

Dennis K. Poole; John L. Adams; Poole & Adams; Attorneys for Appellant.

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**IN THE UTAH COURT OF APPEALS**

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KERRY L. KNIGHTON,

Plaintiff/Appellant,

vs.

VICKEY A. BOWERS,

Defendant/Appellee.

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CASE NO. 20030170-CA

PRIORITY NO. 15

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**APPEAL FROM THE JUDGMENT  
OF THE HONORABLE TIMOTHY R. HANSON,  
THIRD DISTRICT COURT ENTERED JANUARY 21, 2003**

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**BRIEF OF APPELLANT**

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DENNIS K. POOLE [2625]  
JOHN L. ADAMS [6160]  
POOLE & ADAMS, L.C.  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84117  
Telephone (801) 263-3344  
ATTORNEYS FOR APPELLANT

Stephen J. Buhler [6502]  
3540 South 4000 West, Suite 245  
West Valley City, Utah 84120  
Telephone (801) 964-6901  
ATTORNEYS FOR APPELLEES

**FILED**  
Utah Court of Appeals

**JUL 18 2003**

Paulette Stagg  
Clerk of the Court

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ATTORNEYS FOR APPELLANT

Stephen J. Buhler [6502]  
3540 South 4000 West, Suite 245  
West Valley City, Utah 84120  
Telephone (801) 964-6901  
ATTORNEYS FOR APPELLEES

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## **JURISDICTIONAL STATEMENT**

This appeal is taken from the Third District Court's grant of judgment to Plaintiff Kerry L. Knighton ("Knighton"), against Defendant Vickey A. Bowers ("Bowers") in the principal amount of \$10,132.23 plus costs, but denying Knighton specific performance. This Court has jurisdiction over this appeal pursuant to Section 78-2a-3 of the *Utah Code Annotated*. This appeal has been assigned to this Court by the Utah Supreme Court.

## **STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

I. The trial court erred in denying Knighton specific performance of the Agreement. The trial court's denial of specific performance is a discretionary ruling that is reviewed under an abuse of discretion standard. Morris v. Sykes, 624 P.2d 681, 684 (Utah 1981); LHIW, Inc. v. Delorean, 753 P.2d 961, 963 (Utah 1988).

II. The trial court erred in holding that Knighton had "unclean hands." The trial court's determination of unclean hands is a discretionary ruling that is reviewed with deference to the findings and judgment of the trial court. Jacobson v. Jacobson, 557 P.2d 156, 158 (Utah 1976).

III. The trial court erred in holding that Bowers had failed to clear title of the Property at the time of trial. The trial court's findings of fact are reviewed under a clearly erroneous standard. The trial court's findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence.

Young v. Young, 979 P.2d 338, 342 (Utah 1999); Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998); Rule 52(a) of the Utah Rules of Civil Procedure.

IV. The trial court erred in failing to award Knighton lost-rent damages. The trial court's decision to not award damages will not be disturbed absent an abuse of discretion. Lysenko v. Sawaya, 1999 Utah Ct. App. 31, ¶ 6, 973 P.2d 445.

### **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES**

The constitutional provisions, statutes, ordinances and rules which pertain to this appeal are fully set forth in the addenda hereto where not fully set forth in the body of this brief.

### **STATEMENT OF THE CASE**

On November 20, 2000, Knighton filed a Complaint against Bowers alleging breach of a real property purchase agreement (the "Agreement") between Knighton and Bowers regarding certain real property, seeking specific performance of the Agreement, including conveyance of good and clear title to the real property to Knighton, or in the alternative, judgment for damages against Bowers caused by Bowers' breach of the Agreement. On December 15, 2000, Bowers filed an Answer and Counterclaim against Knighton alleging Knighton's breach of the Agreement, and illegal placement of a Notice of Interest on the subject real property.

On February 20, 2001, Knighton filed a Motion for Summary Judgment against Bowers. On March 1, 2001, Bowers filed a Motion for Summary Judgment against Knighton. On April 30, 2001, the trial court denied both Motions for



Summary Judgment, holding that the Agreement was ambiguous and required the admission of extrinsic evidence to determine the intent of Knighton and Bowers in entering into the Agreement. On December 4, 2002, the trial court held a bench trial. At the end of the bench trial, the trial court granted judgment in favor of Knighton and against Bowers, awarding Knighton damages, but denying Knighton specific performance of the Agreement. The trial court further held that Defendant did not have clear title to the subject real property as of the date of trial. On January 21, 2003, the trial court entered its Findings of Fact and Conclusions of Law and Judgment in favor of Plaintiff in the principal amount of \$10,132.23 plus costs. On February 19, 2003, Knighton filed a Notice of Appeal.

### **STATEMENT OF THE FACTS**

The parties entered into an agreement on December 22, 1995 (the "Agreement"), whereby Defendant/Appellee Vickey A. Bowers ("Bowers") agreed to sell and Plaintiff/Appellant Kerry L. Knighton ("Knighton") agreed to purchase real property in Salt Lake County, State of Utah, more particularly described as Lot 9 of the Kopperview Mobile Home Park Subdivision (the "Property") subject to certain conditions, including Knighton's due diligence. (R. 77; T. 10-11; Trial Ex. No. 2.) Knighton learned of Bowers' desire to sell the Property because Bowers had advertised the Property for sale in The Salt Lake Tribune. (T. 8; Trial Ex. No. 1.)

When Bowers and Knighton entered into the Agreement, the Property was unimproved and not ready for a mobile home to be used on the Property. (T. 62-63.)

The terms of the Agreement included a purchase price for the Property of \$15,000, with a down payment and deferred payments payable from Knighton to Bowers. (R. 77; T. 11, 15; Trial Ex. No. 2.) The parties agreed that Knighton would pay Bowers \$200.00 per month which would be applied to the purchase price of the Property and would be forfeited only if Knighton subsequently decided not to buy the Property. (R. 77; T. 15, 46; Trial Ex. No. 2.) In signing the Agreement, Bowers represented that she had clear title to the Property. (R. 77; T. 11-12; Trial Ex. No. 2.) Bowers did not, in fact, have clear title to the Property, but she should have known that she did not have clear title before entering into the Agreement based upon the deed that she had received regarding the Property. (R. 77; T. 12, 173-74; Trial Ex. No. 2.)

The parties entered into a subsequent agreement on April 19, 1996 (the "Extension Agreement"), which was entered into after Knighton discovered problems with Bowers' title and after he informed Bowers of those problems, specifically the existence of two trust deeds and one Certificate of Non-Compliance. (R. 79; T. 16-17; Trial Ex. Nos. 4-7.) These were the only title problems raised by Knighton. (T. 16-17.) The Extension Agreement was executed as an extension of the Agreement, adding that closing would be within thirty (30) days of Bowers

clearing title, in anticipation that the liens would be removed within a short time. (R. 79; T. 18; Trial Ex. No. 4.) This Extension Agreement also expressly permitted Knighton to move his mobile home to the Property. (R. 79; T. 21, 114-15; Trial Ex. No. 4.)

Knighton originally intended to live on the Property, but subsequently changed his mind and rented the Property to a third party. (T. 80-81.) In April of 1996, Knighton moved a mobile home he owned onto the Property. (T. 73, 118-19.) Knighton sold the mobile home to a third party to whom he was intending to lease the Property, and made improvements to the Property so that a mobile home could be placed on the Property and be occupied in compliance with regulatory statutes. (T. 90, 92.) During 1996, Knighton improved the Property by obtaining a survey, obtaining a building permit, arranging for off-street parking for two vehicles by installing a concrete pad, installing sewer, water and electrical hookups for a mobile home, installing steps for a mobile home, and installing fenceposts. (T. 74-79, 103, 106, 108.) In April 1996, Knighton rented the Property to a third party for \$200 a month, though no rent was ever paid. (T. 119-20.) In January of 1997, the third party moved the mobile home she had purchased from Knighton from the Property because of the delay in Knighton obtaining title to the Property. (T. 92.)

The liens and Certificate of Non-Compliance were not timely removed by Bowers as anticipated in April 1996. (R. 25; T. 26-27.) By December 1996,

Knighton was concerned about the money he had been paying to Bowers with the risk of never getting the Property and unilaterally stopped paying Bowers directly, and instead paid the \$200 monthly payment into an escrow account. (R. 25; T. 85-86.) Bowers was notified of but did not object to this procedure. (T. 30-31.) The trial court held that it was reasonable for Knighton to protect himself from Bowers' breach by placing the money in escrow until such time as clear title could be provided. (T. 176.)

Following December 1996, the Property was scheduled for a trustee's sale by the trust deed holder of the Property. (This was part of Knighton's previous concern regarding title.) (T. 29; Trial Ex. Nos. 15-18.) On February 11, 1998, Bowers paid \$4,899.50 to save the Property from the trustee's sale and to obtain a release of the two trust deeds. (R. 60; T. 31; Trial Ex. No. 20.) After paying the money to obtain the release of the trust deeds, Bowers decided she had too much time and money invested into the Property to sell it to Knighton for the agreed sales price of \$15,000.00. (R. 58-61; T. 32, 36-38.) In addition, Bowers paid off the lien in favor of Salt Lake County represented by the Certificate of Non-Compliance. (R. 60; T. 34-35.) Notwithstanding repeated requests to close the purchase by Knighton, Bowers refused to close. (T. 40-42.)

In November of 1999, after Bowers had notified Knighton that she no longer wished to sell the Property to him, she moved her own mobile home onto the Property. (R. 58; T. 41, 147.) Bowers had been paying \$360 per month for lot

rental where her mobile home had previously been located. (T. 41.) She moved her mobile home to the Property because she would no longer have to pay the rent on a lot elsewhere. (T. 41.) On November 20, 2000, Knighton filed the Complaint against Bowers in this action seeking (i) specific performance of the Agreement as modified by the Extension Agreement; and (ii) in the alternative, damages. (R. 1-4.) On December 13, 2000, Bowers filed an Answer and Counterclaim against Knighton seeking removal of Knighton's Notice of Interest recorded on the Property plus damages. (R. 5-10.) On February 14, 2001, Knighton filed a Motion for Summary Judgment. (R. 15-35.) On February 27, 2001, Bowers filed a Motion for Summary Judgment. (R. 36-105.) On April 30, 2001, the trial court denied both Motions for Summary Judgment, ruling that genuine issues of fact regarding the ambiguities contained in the Agreement and the Extension Agreement warranted a trial to hear extrinsic evidence as to the intent of Knighton and Bowers in entering into the Agreement and Extension Agreement. (R. 173-78.)

On December 4, 2002, the trial court held a bench trial in this matter. (R. 213-14; T. 4.) On January 21, 2003, the trial court held that: the Agreement is legally binding between the parties; Bowers did not timely release the liens on the Property to obtain clear title; it was reasonable for Knighton to pay installment payments into an escrow account when Bowers failed to close; Bowers had her attorney write a letter to Knighton stating that Knighton had not performed under the Agreement, which was not true; Bowers did not advise Knighton of the release of

the defects in the title of the Property; Knighton was justified in not preparing closing papers as Bowers was not prepared to close; there is nothing unique about the Property; and entered judgment awarding Knighton damages but denying specific performance of the Agreement and lost-rent damages. (R. 222-27; T. 171-85.) The trial court further held that Bowers did not have clear title to the Property at the time of trial. (R. 222-27; T. 178, 181.) On February 19, 2003, Knighton filed the Notice of Appeal.

### **SUMMARY OF THE ARGUMENT**

The trial court erred in denying Knighton specific performance of the Agreement. Because the Property is real property, it is unique and specific performance of the Agreement is the appropriate remedy for Bowers' breach. Evidence at trial was not sufficient to rebut the presumption of uniqueness of the Property. Bowers' decision that she had entered into a bad bargain, and therefore refused to close the sale of the Property, is not sufficient reason to deny Knighton specific performance as a remedy in this matter. Knighton fully performed under the Agreement and therefore does not have "unclean hands" as defined by Utah case law. The trial court erred in holding that Bowers did not have clear title to the Property at the time of trial because only three defects in the title of the Property were introduced into evidence at the time of trial and all three defects were cured by Bowers prior to trial. In addition to specific performance, Knighton is entitled to his lost-rent damages arising from Bowers' breach of the Agreement. Alternatively,

should this Court deny Knighton specific performance, judgment in favor of Knighton should be augmented by lost-rent damages to place Knighton in as good a position as if the Agreement had been performed by Bowers.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN DENYING KNIGHTON SPECIFIC PERFORMANCE OF THE AGREEMENT.**

The trial court erred in its determination to award Knighton damages rather than the remedy of specific performance of the Agreement. The trial court ruled that specific performance is not preferred over monetary damages if monetary damages are sufficient, the Property is not unique, and that Knighton had unclean hands because rather than continue to make payments under the Agreement in December of 1996 he could have declared breach of the Agreement and demanded refund of prior payments to Bowers. (R. 222-27; T. 179-81; Addendum “A” attached hereto.)

A trial court’s denial of specific performance is a discretionary ruling that is reviewed under an abuse of discretion standard. Morris v. Sykes, 624 P.2d 681, 681 (Utah 1981). “Specific performance is an equitable remedy, and accordingly, the trial court is granted wide discretion in applying and formulating it.” LHIW, Inc. v. DeLorean, 753 P.2d 961, 963 (Utah 1988). The Utah Supreme Court has stated as follows regarding the denial of specific performance and its standard of review on appeal:

We decide as we do herein in awareness that, inasmuch as specific performance is an equitable remedy, the trial judge has considerable discretion in determining whether equity in good conscience required

that relief be granted. But it is equally true that when the trial court has based his ruling upon a misunderstanding or misapplication of the law, where a correct one may have produced a different result, the party adversely affected thereby is entitled to have the error rectified in a proper adjudication under correct principles of law.

Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979) (emphasis added).

The Utah Supreme Court has consistently followed the general rule that the right to “an equitable remedy is an exceptional one and absent statutory mandate, equitable relief shall be granted only when a court determines that damages are inadequate and that equitable relief would result in more perfect and complete justice.” Jenkins v. Percival, 962 P.2d 796, 804 (1998).

**A. Because the Property is Real Property, it is Unique and Specific Performance is the Appropriate Remedy.**

Because the Property is real property, it is therefore unique and the remedy that should be awarded to Knighton is specific performance. The Utah Supreme Court has held that in the context of a buyer enforcing a purchase agreement for real property, the “rule has been long established that a vendee has a right to insist upon performance by the vendor to the extent the latter is able to perform.” Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976).

Such a right to specific performance by a buyer of real property is due to the uniqueness of real property. Perron v. Hale, 108 Idaho 578, 701 P.2d 198, 202 (1985). The Idaho Supreme Court has set forth the general common law regarding the remedy of specific performance in the context of real estate purchase agreements as follows:



The general rules of the common law are that: (1) a party is entitled to the equitable remedy of specific performance when damages, the legal remedy, are inadequate; (2) because of the perceived uniqueness of land, it is presumed that damages are inadequate in an action for breach of a land sale contract, and the nonbreaching party need not make a separate showing of the inadequacy of the damages; (3) the remedy is equally available to both vendors and purchasers; and (4) additionally, the appropriateness of specific performance as relief in a particular case lies within the discretion of the trial court.

Id. (citations omitted) (emphasis added).

The Utah Supreme Court has repeatedly upheld a purchaser's claim to the remedy of specific performance regarding real property purchase agreements, even if there are defects in the title of the subject real property. If there is a defect in the real property that the seller was aware of, but the buyer was not, the appropriate remedy is specific performance of the purchase agreement "with an abatement in the purchase price equal to the value of the deficiency or defect." Castagno at 1284. Even if the defect in the real property is a defect in title, the appropriate remedy is still specific performance, because to hold contrary would allow a seller to breach a purchase agreement without consequence; "[n]ot only would a seller have no motivation to clear title, but the cost of clearing title would be shifted to a buyer determined to purchase the property." Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1242 (Utah 1993). The Utah Supreme Court further held that "[s]pecific performance with an abatement in the purchase price has long been recognized as an appropriate remedy when a seller refuses to convey." Id.

The trial court held that Knighton “is entitled to recover from the defendant’s failure to get clear title.” (T. 179.) The court then posed the question of what Knighton ought to recover. (T. 179.) The court stated the general rule that “if the court can grant an adequate remedy at law, it should not resort to equity.” (T. 179-80.) The court then reasoned that the Property is not “unique” to Knighton because it is a mobile home lot that is “not all that special.” (T. 180.) The trial court also noted that the Property was the residence of Bowers at the time of trial. (T. 180.)

The trial court’s reasoning that the Property is not unique because it is a mobile home lot that is “not all that special” is not sufficient to rebut the presumption that each piece of real property is unique. Merely because a piece of real property is not of seemingly high value, or is a lot among other similar lots, its uniqueness as real property is not defeated. Such reasoning is insufficient to deny Knighton specific performance which is the appropriate remedy when a seller breaches a real property purchase agreement.

This situation is akin to that of Dean v. Gregg, 34 Wash. App. 684, 663 P.2d 502 (1983). (See Addendum “B” attached hereto.) In Dean, the Washington Court of Appeals reversed a trial court’s refusal to grant a purchaser specific performance of a real property purchase agreement. Id. at 503. The seller refused to sell the subject real property because “costs started mounting up” after the agreement was signed. Id. at 502. The seller had to survey the subject property and due to the survey costs, the seller would not make as much money selling the subject property

as he had originally thought. Id. at 502. The court held that seller's decision to enter into a bad bargain does not defeat specific performance as a remedy for the buyer. Id. at 503. The court reasoned that failing to sell a piece of real property because too much has been spent in preparing the property for sale "[i]n the absence of fraud (and none is charged in this case), that is not a sufficient reason to deny specific performance." Id. In the case at hand, Bowers similarly testified that "I did not intend on selling it to [Knighton] for the original \$15,000 once I started having to put money into it." (T. 32.) Bowers further testified "I put so much money into it paying taxes and – yes, I changed my mind. I didn't want to sell it for the price I quoted [Knighton]." As in Dean, Bowers' decision that the Agreement was a bad bargain is not sufficient to deny Knighton specific performance as a remedy in this matter.

As a matter of public policy, the ruling of the trial court would question the enforceability of any real property purchase agreement regarding the purchase of a lot in a mobile home park or, for that matter, a lot in any subdivision where such lots are seemingly inexpensive or there are numerous other lots in the same subdivision of a similar nature. When Knighton entered into the Agreement with Bowers, he intended to live on the Property and make it his primary residence, which evidences the uniqueness of the Property to Knighton. (T. 80-81.)

The fact that Bowers used the Property as a personal residence at the time of trial should not result in a denial of specific performance of the Agreement. At

the time Bowers entered into the Agreement, the Property was unimproved and not the residence of Bowers. (R. 58; T. 62-63.) In fact, Knighton intended to live on the Property when he entered into the Agreement. (T. 80-81.) After Bowers decided that she would not sell the Property to Knighton, she moved her mobile home onto the Property and it then became her personal residence in November of 1999. (R. 58; T. 41, 147.) Bowers was only able to move her mobile home onto the Property because Knighton had performed numerous improvements to the Property, including obtaining a building permit, pouring a concrete slab for off-street parking of two vehicles, installing sewer, water and electrical hookups at the Property for a mobile home, installing steps for a mobile home on the Property, and installing fenceposts. (T. 74-79, 103, 106, 108.) The Property became Bowers' residence after Bowers breached the Agreement with Knighton by deciding not to sell the Property to Knighton. Bowers benefitted from Knighton's improvements to the Property and should not benefit from the Property being her residence at the time of trial because that was only possible due to her breach of the Agreement.

**B. Knighton did not Have "Unclean Hands" as Defined in Utah Law.**

Knighton did not have "unclean hands" as defined by Utah case law. A party seeking specific performance must do so with clean hands. DeLorean at 963. The Utah Supreme Court has defined someone without clean hands as someone "who is unable or unwilling to perform." Id. A party seeking specific performance "must have clean hands in having done equity himself . . . [t]hat is, he must take care to

discharge his own duties under the contract; and he cannot rely on any mere inconvenience as an excuse for his failure to do so.” Fischer v. Johnson, 525 P.2d 45, 46 (Utah 1974) (where plaintiff failed to tender \$3,000 payment prerequisite to entering into the contract of sale, denial of specific performance was upheld on appeal). This Court has held that a buyer failing to obtain a loan required by the Agreement, failing to communicate with seller during the course of the construction of a home on the subject property, and failure to visit and inspect progress of construction were indicative that the plaintiff buyer did not have clean hands and specific performance was correctly denied him. Carr v. Enoch Smith Co., 781 P.2d 1292, 1295 (Utah Ct. App. 1989).

The Utah Supreme Court has further ruled that “[a]lthough the clean hands doctrine states a fundamental principle of equity juris prudence, this principle is not, in its application, so much an absolute rule to be followed by the courts as it is a guide for determining whether in a suit between two or more wrongdoers relief should be granted.” Park v. Jamison, 12 Utah 2d 141, 364 P.2d 1, 3 (Utah 1961). In so ruling, the Utah Supreme Court specifically stated that there are many “qualifications and exceptions” to the clean hands doctrine, including “granting relief to an alleged wrongdoer having considered the fact that no injuries resulted from his acts or omissions.” Id.

In the case at hand, the trial court held that Knighton had effectively tendered performance under the Agreement. (R. 222-29; T. 176.) In December of 1996,

Knighton became concerned that Bowers would ever perform under the Agreement and deliver good title to the Property. (T. 176.) Knighton therefore began paying the \$200 monthly payments into an escrow account. (T. 176.) The trial court approved of Knighton's actions, stating from the bench that "it was reasonable for Mr. Knighton to do that . . . [h]e was entitled to protect – protect the money that he was paying." (T. 176.) The court further ruled that "because Ms. Bowers in this matter could not deliver clear title, there was never any need on the part of Mr. Knighton to pay the down payment, never any need to have any final closing papers." (T. 178.)

The trial court went on to rule that because Knighton sufficiently aware that Bowers may never close the sale of the Property to Knighton in December of 1996, he was not entitled to specific performance. The trial court stated in its ruling:

At that point in time, he easily could have declared breach and demanded his money back and gone on with life. But he chose not to do that for reasons I've already talked about. And that's fine. But to get equity, you've got to do equity and I can't say here that the plaintiff comes to this – comes to this court seeking equity with clean hands. And that, of course, is required before I can grant equity.

(T. 180.)

Such ruling by the court is a misinterpretation of the clean hands doctrine set forth in Utah law. The trial court specifically held that Knighton performed under the Agreement and need not have prepared final closing papers due to Bowers' refusal to close. (T.176-78.) Failing to demand monetary damages earlier in time rather than pursuing specific performance of a real property purchase agreement does not

equate to having “unclean hands.” The trial court holding punishes Knighton for failing to rush to the remedy of the court system rather than trying to resolve his dispute with Bowers through other means prior to commencement of litigation. After December of 1996, not only did Knighton continue to make payments of \$200 into an escrow account, he engaged in significant communications with Bowers and her attorney, and attempted to close the Property on numerous occasions. (R. 25-26, 119-20; T. 72-74, 83; Trial Ex. Nos. 14, 19, 22, 23, 24, 25, 26.) In fact, on December 21, 1997, a full year after the date the trial court ruled Knighton should have declared breach, Bowers, through her counsel, indicated that she was still willing to sell the Property to Knighton. (Trial Ex. No. 19; See Addendum “C” attached hereto.) In addition, in December of 1996, Knighton had made significant improvements to the Property and his mobile home was located on the Property. (T. 74-79, 103, 106, 108, 120.) There is no “wrongdoing” or failure to perform on Knighton’s part in this matter, but rather an ongoing interest in the Property and attempts to force the closing of the purchase.

Knighton did everything within his power to complete the purchase of the real property and further testified at trial that he was willing to accept the Property with any defects in title that still might exist, although the record is clear that of the three exceptions he complained of, all three were cured. (T.88-89.) The trial court’s ruling that the Property is not unique because it is merely a mobile home lot, it is Bower’s residence, and Knighton did not seek to enforce his rights to specific

performance under the Agreement earlier in time is a misapplication of the law of the State of Utah as to be an abuse of discretion and should be overturned by this Court.

## **II. THE TRIAL COURT ERRED IN HOLDING THAT BOWERS DID NOT HAVE CLEAR TITLE TO THE PROPERTY AT THE TIME OF TRIAL.**

The trial court erred in holding that Bowers did not have clear title to the Property at the time of trial because all defects to the title of the Property objected to by Knighton were satisfied prior to trial and there was no evidence at trial by either party that any other defects to the title of the Property existed. A trial court's finding of facts are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. Young v. Young, 979 P.2d 338, 342 (Utah 1999); Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998).

In order to allow this Court to conduct a meaningful and expedient review of the evidence, the challenging party "must marshal all the evidence in support of the findings." Robb v. Anderton, 863 P.2d 1322, 1328 (Ut. Ct App. 1993). In marshaling the evidence, the challenging party "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial." Moon v. Moon, 973 P.2d 431, 437 (Utah Ct. App. 1999). After constructing this array of competent evidence, the challenging party "must ferret out a fatal flaw in the evidence . . . sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).



Following is the marshaled evidence regarding title to the Property. Only the parties testified in this matter. Bowers testified at the time the Agreement was entered into, she was attempting to obtain clear title from the previous owners, though she had already received a deed to the Property. (R. 56-57; T. 11.) The warranty deed received by Bowers noted that there was an outstanding trust deed and note on the Property, though Bowers did not realize it at the time she received the warranty deed. (T. 12; Trial Ex. No. 8.) On March 21, 1996, the previous owner issued a quit claim deed to Bowers clearing the title problem. (T. 22-26; Trial Ex. No. 28.) Bowers further testified that a trust deed in favor of Paul Frampton, a trust deed in favor of AMTRA, Inc., and a Salt Lake County Certificate of Non-Compliance recorded on the Property were the three defects in title that concerned Knighton. (T. 26-27; Trial Ex. Nos. 5-7.) Bowers testified that she paid Frampton \$4,899.50 to obtain a release of the two trust deeds to prevent the Property from being sold at a trustee's sale scheduled for February of 1998. (R. 60; T. 30-31; Trial Ex. Nos. 15-18.) Bowers also testified that she paid Salt Lake County regarding the Salt Lake County Certificate of Non-Compliance for cleanup of the Property. (R. 60; T. 34-35.) Bowers also repeatedly testified that she did not understand there were encumbrances on the title to the Property at the time she purchased it, nor did she understand at any given time whether or not she had clear title to the Property, even at trial. (T. 11-13, 18-19, 26-27, 44, 47, 53-54, 58-59.)

Knighton testified that after entering into the Agreement with Bowers, he researched the title of the Property. (T. 66.) He learned that there were three defects to the title of the Property: the Frampton Trust Deed, the AMTRA Trust Deed, and the Salt Lake County Certificate of Non-Compliance, noted as Exhibit Nos. 5, 6, and 7 at trial. (T. 67; Trial Ex. Nos. 5-7.) Knighton testified during trial that he was still willing to purchase the Property under the terms of the Agreement, even if there might be any other undisclosed defects in the title to the Property. (T. 88-89.)

Relying on this evidence and no other, the court held that because Bowers does not have clear title, the trial court did “not believe that Ms. Bowers can perform today.” (T. 178.) The court further held in denying Knighton specific performance that it would “not require the defendant to deliver title to the plaintiff, even if she could, which I don’t think she can.” (T. 181.) These factual holdings by the court are not supported by any evidence as noted above. Even though Bowers did not have a very clear understanding as to defects in the title of the Property at any given time during the length of the dispute or at trial, she presented no evidence of additional defects in the title to the Property other than the three items discovered by Knighton during his due diligence review of the title of the Property (the Frampton Trust Deed, the AMTRA Trust Deed, and the Salt Lake County Certificate of Non-Compliance) which were all satisfied by Bowers prior to trial, as established by her own testimony. (R. 60; T. 30-31, 34-35.) It is undisputed that she cured

these defects in title, and there was no evidence of any other defects presented at trial. The trial court's finding that Bowers did not have clear title at the time of trial is against the clear weight of the evidence and therefore clearly erroneous. This Court should overturn the trial court's holding and grant Knighton specific performance. Even if there are still defects in the title to the Property, pursuant to Kelley, Knighton is still entitled to specific performance of the Agreement. Because no evidence was presented regarding any lingering defects in title to the Property, there would be no abatement in the purchase price pursuant to Kelley. Kelley at ¶ 1242.

### **III. THE TRIAL COURT ERRED IN DENYING LOST-RENT DAMAGES TO KNIGHTON.**

The trial court erred in denying Knighton lost-rent damages in this matter. The trial court ruled from the bench in response to counsel for Knighton's request that the trial speak to the issue of lost-rent damages as follows:

I intentionally have not. I just can't find anything here that would suggest that there's any lost rents or damages in that regard on the part of either party. Again, I'm satisfied that any lost rents occurred after, I think, a breach had been declared in December of 1996. So there is no – neither party's claimed for loss of rents and I just can't find any basis for damages either way there. Any set offs or additions.

(T. 184-85.)

A trial court's decision to award damages is reviewed under an abuse of discretion standard. Lysenko v. Sawaya, 1999 Utah Ct. App. 31, ¶ 6, 973 P.2d 445.

**A. In Addition to Specific Performance, Knighton is Entitled to Lost-Rent Damages.**

In addition to specific performance, Knighton is entitled to lost-rent damages in this matter. When specific performance is in order, “the buyer may be entitled to an award of lost rents or profits, while the seller may be entitled to interest on the purchase money withheld by the purchaser.” Eliason v. Watts, 615 P.2d 427, 431 (Utah 1980) (citations omitted). A seller is only entitled to “actual interest earned on the purchase money retained by the purchaser, if any.” Id. (citations omitted) (emphasis added).

In the case at hand, Knighton testified that he had successfully leased the Property to a third party for \$200 per month, commencing April of 1996. (T. 119-20.) He was thwarted in his efforts to complete the rental of the Property due to Bowers’ breach of the Agreement. (T. 178-79.) In addition, Bowers testified that she had been paying \$360 per month for lot rental elsewhere when she moved her mobile home on to the Property. (T. 41.) Knighton placed the payments he withheld from Bowers in a non-interest bearing escrow account. (Trial Ex. No. 27.)

Knighton is entitled to specific performance of the Agreement and lost-rent damages pursuant to Eliason. Furthermore, Bowers is not entitled to interest on the installment payments placed by Knighton into the escrow account because it was a non-interest bearing account so there is no “actual interest” as required for an award of such interest pursuant to Eliason. (Trial Ex. No. 27.) Id. at 431. This matter should be remanded to the trial court to grant Knighton specific performance

and augment the amount of judgment in the amount of lost rents accruing from January 1997, when the Property was improved sufficiently to allow a mobile home to be installed pursuant to the West Valley City inspection, until the date of trial in the amount of \$200 per month. (Trial Ex. No. 36.)

**B. Alternatively, Knighton's Damages Should be Increased by his Lost-Rent Damages.**

Should this Court deny Knighton specific performance of the Agreement, Knighton should still be awarded lost-rent damages in this matter. In awarding damages for breach of contract, courts attempt to place the nonbreaching party in as good a position as if the contract had been performed. Saunders v. Sharp, 840 P.2d 796, 809 (Utah Ct. App. 1992) (citations omitted).

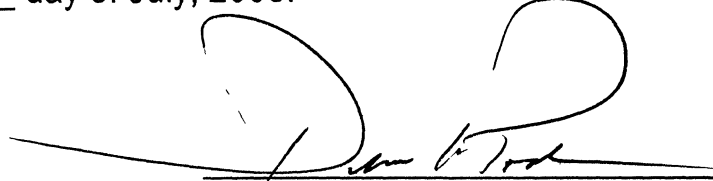
In the case at hand, Knighton testified that he had successfully leased the Property to a third party for \$200 per month. (T. 119-20.) He was thwarted in his efforts to complete the rental of the Property due to Bowers' breach of the Agreement when he had improved the Property sufficiently to install a mobile home in January 1997. (T. 178-79; Trial Ex. No. 36.) In addition, Bowers testified that she had been paying \$360 per month for lot rental elsewhere when she moved her mobile on to the Property. (T. 41.) Should this Court concur with the trial court that Knighton is entitled to damages rather than specific performance, he is entitled to damages that would put him in the same position had Bowers not breached the Agreement. Id. Knighton should therefore also be awarded lost-rent damages in the amount of \$200 per month from January 1997, when the Property was improved

sufficiently to allow a mobile home to be installed pursuant to the West Valley City inspection, to the date of trial. (R. 58; T. 41, 147; Trial Ex. No. 36.) Should this Court deny Knighton specific performance, this matter should be remanded to the trial court to augment the amount of judgment in the amount of lost rents accruing from January 1997, when the Property was improved sufficiently to allow a mobile home to be installed, until the date of trial in the amount of \$200 per month.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment of the trial court and remand this matter to the trial court for award of specific performance of the Agreement, transferring title of the Property to Knighton, award of lost rents accruing from January 1997 to the date of trial, and an award of Appellant's costs in successfully prevailing against Appellee, both at trial and on appeal. In the alternative, this Court should remand this matter to the trial court to augment the amount of judgment in the amount of lost rents caused Knighton accruing from January 1997 to the date of trial and an award of Appellant's costs in successfully prevailing against Appellee, both at trial and on appeal.

DATED this 18 day of July, 2003.

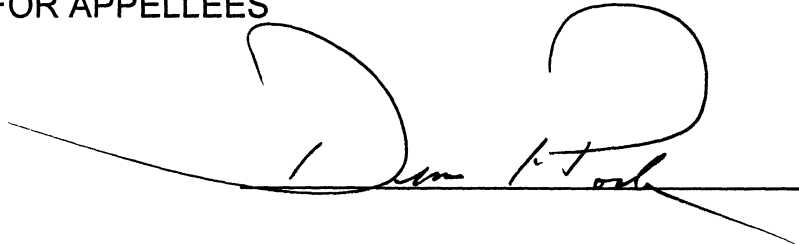


DENNIS K. POOLE  
JOHN L. ADAMS  
POOLE & ADAMS, L.C.  
Attorneys for Defendant and Appellant

### MAILING CERTIFICATE

I hereby certify that I caused to be mailed, U.S. Mail, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following this 18 day of July, 2003:

Stephen J. Buhler  
3540 South 4000 West, Suite 245  
West Valley City, Utah 84120  
Telephone (801) 964-6901  
ATTORNEYS FOR APPELLEES



## **ADDENDA**

Addendum "A"

Findings of Fact and Conclusions of Law

Addendum "B"

Dean v. Gregg, 34 Wash. App. 684, 663 P.2d 502 (1983)

Addendum "C"

Trial Exhibit No. 19, Letter Dated December 21, 1997



Tab A

JAN 07 2003

FILED DISTRICT COURT  
Third Judicial District

JAN 21 2003

By *Evelyn Thompson*  
SALT LAKE COUNTY  
Deputy Clerk

DENNIS K. POOLE (2625)  
POOLE & ADAMS, L.C.  
Attorneys for Plaintiff  
4543 South 700 East, Suite 200  
Salt Lake City, Utah 84107  
Telephone: (801) 263-3344  
Telecopier: (801) 263-1010

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

KERRY L. KNIGHTON,

Plaintiff,

vs.

VICKEY A. BOWERS,

Defendant.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

CIVIL NO. 000909408

JUDGE TIMOTHY R. HANSON

---

This matter came on regularly for trial on the 4<sup>th</sup> day of December, 2002. The Court, having received evidence and argument of the parties and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. The parties entered into an agreement on December 22, 1995, whereby the defendant agreed to sell and the Plaintiff agreed to purchase real property subject to certain conditions, including Plaintiff's due diligence (Exhibit 2).

2. The terms of the agreement included a price for the property of \$15,000, with a down payment and deferred payments payable to the Defendant Seller.

3. The parties agreed that the Plaintiff would pay the Defendant \$200.00 per month which would be applied to the price of the property and would be forfeited only if later the Plaintiff decided not to buy the property.

4. In signing the December 22, 1996 agreement, the Defendant represented that she had clear title to the property.

5. The Defendant did not, in fact, have clear title to the property but she should have known that she did not have clear title before entering in to the agreement with the Plaintiff, based upon the deed that she received on the property.

6. The parties entered into a subsequent agreement on April 19, 1996, which was entered into after the Plaintiff discovered problems with Defendant's title and after he informed Defendant of those problems, specifically the existence of two trust deeds (Exhibits 5 and 6) and one Certificate of Non-Compliance (Exhibit 7).

7. The April 19, 1996 agreement was executed as an extension of the December 22, 1995 agreement, adding that closing would be within thirty (30) days of Defendant clearing title, in anticipation that the liens would be removed within a short time. This agreement also permitted Plaintiff to move his mobile home to the property.

8. The liens were not timely removed by Defendant as anticipated in April 1996.

9. By December 1996, the Plaintiff was rightfully concerned about the money he had been paying to Defendant with the risk of never getting the property.

10. In December 1996, the Plaintiff stopped paying the Defendant directly and unilaterally started putting the \$200 monthly payment in escrow. The Defendant did not object to this procedure.

11. It was reasonable for Plaintiff to protect himself from Defendant's breach by placing the money in escrow until such time as clear title could be provided.

12. Following December 1996, the property was scheduled for a trustee's sale by the trust deed holder of the property. The Defendant paid \$4,899.50 on February 11, 1998, to save the property from the trustee's sale and to obtain a release of the two trust deeds.

13. After paying the money to obtain the release of the trust deeds, the Defendant decided she had too much time and money invested into the property to sell it to the Plaintiff for the agreed-to sales price of \$15,000.00.

14. The Defendant also paid off the lien in favor of Salt Lake County for the Certificate of Non-Compliance.

15. Defendant had her attorneys write letter to the Plaintiff stating that Plaintiff had not performed on the contract, which statements were not true.

16. Defendant did not advise Plaintiff of the release of the trust deeds or the payment of the liens in favor of Salt Lake County.

17. The Plaintiff never prepared closing papers or tendered the payments directly to Defendant because the Defendant was not prepared to close.

18. The Plaintiff recorded a Notice of Interest on the property on July 3, 1996.

19. There is no evidence that the Plaintiff could not perform under the contract if Defendant had performed by clearing the title.

20. It is a non-special mobile home lot that is currently the Defendant's residence.

21. Plaintiff knew in December 1996 that he could not likely get the property and could have then declared a breach and sued for return on his money.

22. Plaintiff paid the Defendant \$200.00 per month for a total of thirteen (13) months, which payments were to be applied against the purchase price.

23. The Plaintiff continued to make deposits into escrow, such payments totaling \$12,400.00.

24. The Plaintiff made improvements to the property when he moved his trailer upon the property, which generally benefit the property as outlined in Exhibit 12, with the exception of the \$683.00 fence and the \$500.00 deduction that the Plaintiff made on that Exhibit, resulting in improvements to the property valued at \$3,691.60.

25. Plaintiff's last improvements were made on April 3, 1997.

26. Plaintiff presented no evidence regarding loss of the benefit of his bargain.

27. No other evidence was presented regarding the status of title to the property, although Plaintiff indicated he would take the property in its current status

Based upon; the foregoing Findings of Fact, the Court enters the following:

#### **CONCLUSIONS OF LAW**

1. The December 22, 1995 agreement, as extended by the April 19, 1996 agreement, is legally binding between the parties.

2. Prior to trial, Defendant resolved the title issues objected to by Plaintiff, but the Defendant still may not have clear title to the property.

3. The Plaintiff is entitled to recover for the Defendant's failure to obtain clear title.

4. The Plaintiff, in his pleadings, has asked for alternative remedies: (a) damages; and (b) specific performance.

5. Where there is an adequate remedy at law, the Court should not resort to equity.

6. Specific performance is not required or preferred over monetary damages if monetary damages are sufficient.

7. There is nothing unique to the Plaintiff about the property at issue.

8. Through monetary damages, there is an adequate remedy at law and specific performance is not an appropriate remedy and should not be granted.

9. The Court finds that the Plaintiff is entitled to judgment of \$200.00 per month for the thirteen (13) months of payments that he paid to the Defendant, even though the first four (4) months, or \$800.00, were to hold the property, that they were still part of the purchase price.

10. The Plaintiff is entitled to pre-judgment interest at the statutory rate on each of these \$200.00 payments until the judgment is entered, then post-judgment statutory interest should accrue thereon.

11. The Plaintiff is entitled to judgment of \$3,691.60 for the value of the improvements made by the Plaintiff to the property, with prejudgment interest to accrue thereon at the statutory rate from April 3, 1997, until the judgment is entered, then post-judgment statutory interest should accrue thereon.

12. The Plaintiff is entitled to the return of monies deposited into escrow.

13. The Plaintiff is entitled to Rule 54(d) costs of the filing fee and service of the Complaint, which shall be added to the judgment.

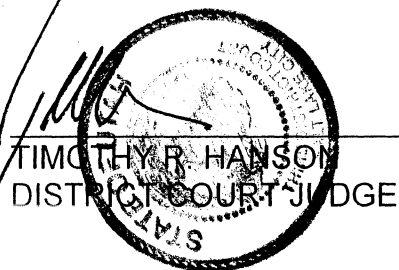
14. Upon the judgment being paid by the Defendant, the Defendant is entitled to the removal of Plaintiff's Notice of Interest which he has recorded against the property.

15. Neither party is entitled to an award of lost rents or damages which occurred after the breach was declared in December 1996, except as specifically set forth above.

16. Plaintiff is entitled to judgment in the amounts set forth in Schedule "A" attached hereto.

DATED this 21 day of January, 2003.

BY THE COURT:



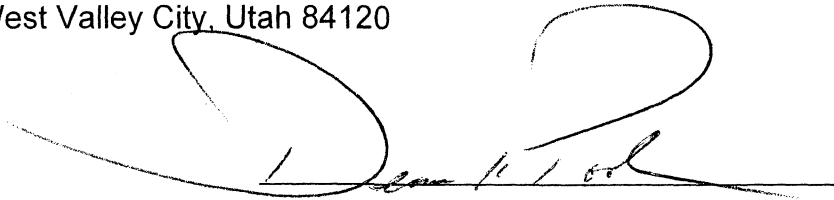
*Approved as to form*  
  
STEPHEN S. BUHLER  
Attorney for Defendant  
E:\EKH\FOFK\Knighton.wpd

January 7, 2003

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW in Case No. 000909408 was mailed, postage prepaid, United States Mail, the 6 day of January, 2003, to the following:

Stephen J. Buhler, Esq.  
3540 South 400 West, Suite 245  
West Valley City, Utah 84120

A large, stylized handwritten signature in black ink, appearing to read "Stephen J. Buhler", is written over a horizontal line.



# KNIGHTON INTEREST CALCULATION

Payment	Amount	Int. Rate	Days Elapsed to January10,2003	Interest Amt.
<u>22-Dec-95</u>	\$200.00	10.00%	2586.00	\$141.70
20-Jan-96	\$200.00	10.00%	2547.00	\$139.56
19-Feb-96	\$200.00	10.00%	2517.00	\$137.92
19-Mar-96	\$200.00	10.00%	2488.00	\$136.33
19-Apr-96	\$200.00	10.00%	2457.00	\$134.63
20-May-96	\$200.00	10.00%	2426.00	\$132.93
21-Jun-96	\$200.00	10.00%	2395.00	\$131.23
10-Jul-96	\$200.00	10.00%	2375.00	\$130.14
06-Aug-96	\$200.00	10.00%	2348.00	\$128.66
06-Sep-96	\$200.00	10.00%	2317.00	\$126.96
20-Oct-96	\$200.00	10.00%	2273.00	\$124.55
20-Nov-96	\$200.00	10.00%	2242.00	\$122.85
21-Dec-96	\$200.00	10.00%	2211.00	\$121.15
03-Apr-97	\$3,691.60	10.00%	2108.00	\$2,132.03
Column Totals	\$6,291.60			\$3,840.63
Total Amount Due				\$10,132.23

Tab B

**C**

Court of Appeals of Washington,  
Division 2.

Leslie D. DEAN and Jose M. Dean, husband and  
wife, Appellants,

v.

Burton M. GREGG, Respondent.

**No. 5273-3-II.**

May 18, 1983.

Purchasers of realty under a real estate purchase and sale agreement appealed judgment entered by the Superior Court, Clark County, John Skimas, J., awarding the monetary damages for seller's breach of contract but denying them specific performance of that contract. The Court of Appeals, Petrie, J., held that purchasers of realty were entitled to specific performance.

Reversed.

West Headnotes

**[1] Specific Performance** ¶65  
358k65 Most Cited Cases

Purchasers of realty were entitled to specific performance of real estate purchase and sale agreement, in that seller's failure to complete sale was a most flagrant breach of contract, with his excuse for nonperformance being simply that he entered into a bad bargain.

**[2] Specific Performance** ¶16  
358k16 Most Cited Cases

In absence of fraud, entering into a bad bargain is not a sufficient reason to deny specific performance.

**\*685 \*\*502** Hugh Knapp, Camas, for the Deans.

**\*\*503** Hugh Potter, Vancouver, for Gregg.

PETRIE, Judge.

Plaintiffs, Leslie D. Dean and Jose M. Dean, purchasers of realty under a real estate purchase and sale agreement with defendant, Burton M. Gregg, seller, appeal a judgment awarding them monetary damages for seller's breach of the contract but denying them specific performance of that contract. We reverse and direct specific performance in the manner set forth herein.

The trial court's unchallenged findings of fact adequately describe the nature of the controversy. In June 1979 the parties executed a contract for the purchase and sale of a portion of Lot 64 of a previously recorded plat. The land in question, identified by courses and distances from a fixed point, was designated as Lot 4 of a proposed short plat of said Lot 64 which Dr. Gregg had presented to appropriate county officials and for which he had received conditional, preliminary approval. The contract provided, "This sale subject to property being short platted into 4 parcels," and also provided, "If either party defaults (that is, fails to perform the acts required of him) in his contractual performance herein, the non-defaulting party may seek specific performance pursuant to the terms of this agreement, damages, or rescission."

On the date set for closing, plaintiffs were ready, willing and able to pay the purchase price in cash, and they signed all documents requiring their signatures. Defendant performed most of the acts required of him preparatory to performing his obligations under the contract. However, his costs to complete the platting procedure increased beyond his expectations. In anticipation of those costs exceeding the amount to be realized on the sale of Lot 4 of the plat, he arranged for a line of credit of \$25,000. [FN1] Nevertheless, those costs exceeded the net sale expectation by \$33,175.86.

FN1. He also testified that he had \$4,000 available to assist financing the short plat.

**\*686** In his words, when "costs started mounting up, I was becoming more and more concerned about the advisability of cutting this property up for what seemed to be a minimal economic return."

As a result, he asked his broker to contact the Deans to see if they would purchase Lot 3 of the same proposed short plat with a down payment of

(Cite as: 34 Wash.App. 684, 663 P.2d 502)

\$15,000. They refused, and Dr. Gregg testified, "I elected not to proceed."

The trial court expressly found that "The short plat probably could have been completed in December 1979," had Dr. Gregg acquired legal title from his vendors and release of a bank lien. Indeed, the record indicates that he had substantially complied with the conditions imposed by the preliminary approval so that, upon presentation of the appropriate documents signed by him as owner, final approval would have been a ministerial act.

By the time trial was held, however, the preliminary approval had lapsed. The trial court, though finding the breach, nevertheless denied specific performance because of (1) Dr. Gregg's financial inability to complete the transaction (despite the finding that the fair market value of the remainder of the proposed plat was in excess of \$135,000), and (2) the court's lack of authority to order final approval of the short plat.

[1][2] This court finds Dr. Gregg's failure to complete this sale a most flagrant breach of contract. Indeed, we find defendant's excuse for nonperformance so woefully deficient that justice demands reversal in this case. By his own testimony Dr. Gregg simply concluded that he had entered into a bad bargain. In the absence of fraud (and none is charged in this case), that is not a sufficient reason to deny specific performance. The facts in the case at bench are sufficiently similar to those in *Egbert v. Way*, 15 Wash.App. 76, 546 P.2d 1246 (1976), and *Hudesman v. Foley*, 4 Wash.App. 230, 480 P.2d 534 (1971), to warrant reversal.

**\*\*504** The only complication is the fact that at this late date Dr. Gregg will be required to refile his application for approval of the short plat. We direct that he do so, and **\*687** that he pursue it in good faith under the supervision of the Superior Court of Clark County. In the event the county, despite Dr. Gregg's good faith efforts, should for any reason fail to grant final approval of the short plat after a reasonable time, the court is directed to require Dr. Gregg to convey the property, together with the easement specified in the contract, by courses and distances set forth in the contract.  
[FN2]

FN2. A short subdivision is not subject to the restraints imposed by RCW 58.17.200 and .320. A short subdivision "shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060." RCW 58.17.030. We note that Section 17.03.020(H) of Clark County Land Division Ordinance presently in effect, which will govern Dr. Gregg's renewed effort to obtain short plat approval, specifically exempts "Divisions of land made by Court Order" provided that the division complies "with all the provisions of Title 18, Clark County Code."

It is so ordered.

WORSWICK, Acting C.J., and REED, J., concur.

663 P.2d 502, 34 Wash.App. 684

END OF DOCUMENT

Tab C



# MOAK LEGAL SERVICES



Post Office Box 1044  
Pleasant Grove, Utah 84062

N. Alan Moak, Attorney

1-801-221-9004

December 21, 1997

Kerry L. Knighton  
5890 South Kingston Way  
Murray, Utah 84107

Re: Sale Lot 9 Kopperview

Dear Mr. Knighton:

My client is prepared to pay for having the water placed on lot 10 so that Paul Frampton will release lot 9, and the sale to you can be concluded.

Please have your attorney contact me immediately relative to concluding this matter. As you know, Metro title has scheduled a trustee sale for 12 February 1998.

Sincerely yours,

N. Alan Moak