1984

Jay A. Quealy, Jr., Virginia W. Quealy, His Wife, Peter P. K. Ng, And Wing Jun Ng, His Wife v. Bruce B. Anderson And Gary S. Anderson : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. QUEALY, JR., VIRGINIA W. QUEALY, his wife, PETER P. K. NG, and WING JUN NG, his wife,	:	
Plaintiffs and Appellants,	:	No. 19016
v.	:	District Court No. C80-9182
BRUCE B. ANDERSON AND GARY S. ANDERSON,	:	
Defendants, Respondents and Cross-Appellants.	:	

BRIEF OF APPELLANTS

Appeal from the Third Judicial District
in and for Salt Lake County,
Honorable Jay E. Banks, District Judge, Presiding

PRINCE, YEATES & GELDZAHLER
Gordon Strachan
Attorneys for Respondents
424 East Fifth South
Salt Lake City, Utah 84111
Telephone: (801) 521-3760

RAY, QUINNEY & NEBEKER
Don B. Allen and
Tara D. Anderson
Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. QUEALY, JR., VIRGINIA W. QUEALY, his wife, PETER P. K. NG, and WING JUN NG, his wife,	:	
Plaintiffs and Appellants,	:	No. 19016
v.	:	District Court No. C80-9182
BRUCE B. ANDERSON AND GARY S. ANDERSON,	:	
Defendants, Respondents and Cross-Appellants.	:	

BRIEF OF APPELLANTS

Appeal from the Third Judicial District
in and for Salt Lake County,
Honorable Jay E. Banks, District Judge, Presiding

PRINCE, YEATES & GELDZAHLER
Gordon Strachan
Attorneys for Respondents
424 East Fifth South
Salt Lake City, Utah 84111
Telephone: (801) 521-3760

RAY, QUINNEY & NEBEKER
Don B. Allen and
Tara D. Anderson
Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

NATURE OF THE CASE

This case involves a lawsuit instituted by plaintiffs-appellants ("Appellants") in November of 1980 to collect from defendants-respondents ("Respondents") certain damages incurred due to Respondents' alleged failure to perform the obligations of an Earnest Money Receipt and Offer to Purchase and related letter agreement between Appellants as the designated sellers and Respondents as the designated purchasers of certain real property situated in Wasatch County, Utah.

DISPOSITION IN LOWER COURT

The matter came on for trial before a jury and the Honorable Jay E. Banks, District Judge, on June 28, 1982. The jury entered a special verdict in the case and the trial court subsequently awarded a no cause of action judgment against Appellants and in favor of Respondents on July 15, 1982 (R. 622). The trial court took under advisement the issue of an award of attorneys fees to Respondents. Later, on January 17, 1983, the trial court entered a judgment providing that Respondents recover attorney's fees and costs from Appellants in the total amount of $24,877.00 (R. 714).

RELIEF SOUGHT ON APPEAL

In this appeal, Appellants seek reversal of the trial court's January 17, 1983 judgment which awarded attorneys fees to Respondents.

STATEMENT OF THE FACTS

A. BACKGROUND OF THE CASE.

The sole issue on appeal concerns attorneys fees and is a question of law to be determined by a review of the principal pleadings, certain trial proceedings, and the specific contractual language at issue. However, capsule summary of the facts of the principal lawsuit is helpful for proper understanding of the issue to be decided.

1. Appellants owned a ranch in Wasatch County, Utah, consisting of more than 900 acres (the "Property"). In July of 1977, Appellants entered into an Earnest Money Receipt and Offer to Purchase (the "Purchase Agreement") with Respondents, pursuant to which Appellants were to have sold the Property to Respondents. The Purchase Agreement was in the form of a standard, printed Earnest Money Receipt and Offer to Purchase subject to eleven additional typewritten clauses prepared by Respondents. Appellants subsequently clarified and amended some of the clauses in a typewritten document entitled "Proposed Amendments to the Offer on Quealy Property," which amendments were agreed to by the

parties and attached as pages 3-5 of the Purchase Agreement (Exhibit 2-P). The following conditions precedent to the Purchase Agreement became the focal issues of the subsequent lawsuit between the parties:

> 52.j. This offer is made subject to the following conditions being satisfied by purchaser within 60 days from date of acceptance of this offer:
>
> 1. Assurance of an adequate culinary and irrigation water system to meet the needs of residential development of the property.
>
> 2. Assurance of proper zoning to develop the property into residential lots.
>
> . . .
>
> 52.j.2. The "assurance" of proper zoning shall mean a preliminary indication by the Wasatch County officers regarding zoning. The offer will not be subject to the final determination of the county of a zoning change.

Pages 2 and 3 of Exhibit 2-P.

2. Respondents decided that a water well should be drilled in order to satisfy the first condition precedent: culinary water availability. Much time was consumed by Respondents in determining what to do about that matter. After negotiations and just prior to the scheduled closing date of the Purchase Agreement, the parties executed a letter agreement (the "Extension Agreement") which extended the closing date in consideration of the additional time needed by Respondents and a firm commitment to drill a test well on conditions stated therein

(Exhibit 3-P). Exhibits 2-P and 3-P operated together as the contract (the "Agreements") between the parties.

3. At this point the factual contentions of the parties diverge concerning what kind of well Respondents were obligated to drill and whether Respondents met their drilling obligations under the terms of the Agreements. For purposes of this appeal, however, it suffices to say that Respondents hired Gardner Drilling Company to drill the well, some drilling activity occurred, the well caved in, and it was abandoned without completion or test pumping.

4. Later, in May of 1978, Appellants' attorney received a letter from Respondents' attorney (Exhibit 27-P) which provided in relevant part as follows:

> 1. Equity [Respondents] has made a real effort to obtain a well on the Quealy property which has, as you might have heard, resulted in another cave-in and unusable well. The Andersons have expended substantially in excess of $50,000.00 on this effort but have not been able to bring in a producing water well.
>
> 2. Bruce Anderson has become ill and has had to be operated on and will have to spend some time recuperating. This, together with Gary's current condition, has now placed real strain on their abilities and efforts at development.
>
> For the foregoing reasons, the Andersons feel that they must abandon the Quealy project for purchase of the balance of the property and retain only the 29 acres previously purchased. . . .
>
> . . .

> In addition, there is a $5,000.00 Earnest Money Deposit with Mendenhall Brothers which should be refunded since the conditions of the earnest money agreement have not come to pass. A copy of this letter to Mendenhall Brothers will constitute our request that these funds be forthwith returned to Equity Homes.[1]

Appellants later instituted this lawsuit to recover damages, after selling the Property to other parties at a lower price than Respondents had offered. The $5,000.00 earnest money deposit was, in the meantime, returned to Respondents by the realtors without the express consent of Appellants.

B. OPERATIVE FACTS.

The operative facts for determination of the sole issue on this appeal consist of the contents of the documents already identified above and the following additional facts.

1. Respondents based their claim for attorneys fees in the trial court solely upon the following provision of the printed portion of the Purchase Agreement:

---

[1]The only exhibits relevant to this appeal concerning attorneys fees are Exhibits 2-P, 3-P and to a lesser extent, 27-P, all of which are quoted in this brief. Notwithstanding a rather limited designation of record on appeal, the clerk below included in the record all of the exhibits and all of the pleadings, most of which are not necessary for review for the limited issues to be determined on this appeal. The Court should not be burdened, therefore, by the non-relevant exhibits and/or pleadings not referred to in the briefs of the parties.

> We do hereby agree to carry out and fulfill the terms and conditions specified above [relating to sale of the Property], and the Seller agrees to furnish good and marketable title with a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed . . . . If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

Lines 45 - 48 of page 1, Exhibit 2-P.

2. Throughout the course of the case, beginning with Respondents' Answer and concluding with the proposed and actual jury instructions, argument, and proposed and actual special verdict, Respondents consistently sought to prove that the Purchase Agreement was (1) void from its inception; (2) vague, uncertain and unenforceable; (3) not signed by all of the needed parties; (4) later replaced by an accord and satisfaction between the parties; and/or (5) later rescinded or abandoned by mutual agreement of the parties, thereby relieving Respondents from any liability for damages to Appellants based upon the Purchase Agreement.

3. Respondents' intensive and persistent attempts to void the Purchase Agreement were rewarded. The Special Verdict that was finally submitted to the jury in this case concentrated upon three basic issues: whether or not the condition precedent to the Purchase Agreement of appropriate zoning was met, whether or not the condition precedent to the Purchase Agreement of

adequate culinary water supplies was met, and whether the claims asserted by Appellants were the subject of a settlement and accord (R. 556).

4. In rendering the Special Verdict (R. 556) the jury found for Appellants on the issue of Respondents' failure to fulfill the condition precedent on the water well (paragraph 3) and also found that Appellants would have been entitled to $250,000 damages (paragraph 5). However, the Respondents eventually prevailed and succeeded in avoiding the Purchase Agreement and any damages due to Appellants for failure to perform thereunder by establishing to the satisfaction of the jury in rendering the Special Verdict (and the trial court in reaching its legal conclusions therefrom) that: (1) a condition precedent to performance under the Purchase Agreement relating to County approval was never met, and therefore the Purchase Agreement was never an enforceable contract (paragraph 2); and (2) even if the Purchase Agreement were at one time an enforceable contract between the parties, it was later replaced by a settlement and accord between the parties (paragraph 4).

5. After successfully avoiding liability to Appellants in the manner just described, with typical incongruence Respondents abrogated their theories of nonliability and claimed that the Purchase Agreement was indeed in existence and enforceable for the limited purpose of collecting their attorneys

fees. (See Transcript re Attorney Fees, pg. 1-4, lines 9-13, R. 734). The trial judge, incorrectly, bought the ploy.

ARGUMENT

A. RESPONDENTS SHOULD BE DENIED RECOVERY OF ATTORNEYS FEES WHETHER OR NOT A BINDING CONTRACT EXISTED.

(1) Respondents Are Estopped from Recovering Attorneys Fees Based Upon Language In A Contract Which They Successfully Established Did Not Exist Between the Parties.

Throughout the case, Respondents based their theories of nonliability upon the position that the obligations of the parties pursuant to the terms of the Purchase and Extension Agreements never came into existence because (1) the Purchase Agreement was void at inception; (2) the Agreements were too vague and uncertain to constitute a final and enforceable contract between the parties; (3) the Agreements were never signed by Peter P. K Ng and Wing Jun Ng (the "Ngs") and were therefore void pursuant to Utah's Statute of Frauds; (4) the conditions precedent to any obligation to perform the Agreements were never met; and/or (5) if a binding purchase contract ever existed, it was later rescinded by mutual agreement or replaced with a new contract created by an accord and settlement between the parties.

The following list chronologically catalogues some of the defenses raised or interpretations asserted by Respondents dur-

the course of litigation, which bear on Respondents' claimed right to recover attorneys fees even when the contract did not exist. Emphasis has been added by Appellants:

a. "The terms of the documents . . . did not create or reflect a meeting of the minds sufficient to establish an enforceable contractual relationship between plaintiffs and defendants. . . ." (Sixth Defense of Respondents' Answer, R. 22).

b. "[T]he documents . . . are void because not subscribed by the plaintiffs NG . . . ." (Eighth Defense of Respondents' Answer, R. 23).

c. "Any contractual relationship created or reflected by the documents . . . was rescinded or abandoned by the mutual agreement of plaintiffs and defendants. . . ." (Tenth Defense of Respondents' Answer, R. 23).

d. "Plaintiffs and defendants have reached a settlement and accord, as evidenced by, among other things, plaintiffs' return to defendants of the $5,000 deposit. . . ." (Eleventh Defense of Respondents' Answer, R. 23).

e. "Any contractual obligation of defendants to purchase the subject property was excused by the inability of defendants to locate adequate supplies of . . . water . . . and by the inability to secure proper zoning. . . ." (Fourteenth Defense of Respondents' Answer, R. 24).

f. "Exhibits 'A' and 'B' to plaintiffs' Complaint are copies of the alleged written contracts of the parties." (Page 6 of Memorandum in Support of Defendants' Motion for Summary Judgment, R. 99).

g. "Presumably, at that point, the condition precedent not having been met, defendants have the right to be released from the Earnest Money Receipt and Offer to Purchase." (Page 9 of Memorandum in Support of Defendants' Motion for Summary Judgment, R. 102).

h. "In conclusion, defendants submit that, pursuant to the express language of the Utah Statute of Frauds, and to Utah Supreme Court decisions interpreting that language, the agreements of the parties are void and unenforceable." (Page 8 of Respondents' Memorandum in Support of Motion for Directed Verdict, R. 462).

i. "However, a preliminary indication on zoning approval was never obtained. Consequently defendants' obligation to perform the amended earnest money agreement never came into existence." (Page 9 of Respondents' Memorandum in Support of Motion for Directed Verdict, R. 463).

j. "'An accord and satisfaction is a method of discharging a contract, or settling a claim arising from a contract, by substituting for such contract or claim an agreement for the satisfaction thereof and the execution of the substituted agreement.'" (Page 10 of Respondents' Memorandum in Support of Motion for Directed Verdict, R. 464).

k. "[T]he parties and plaintiff QUEALY's counsel believed the agreements were merely preliminary to final agreement on all terms." (Respondents' Trial Brief at page 2, R. 661).

l. "The Earnest Money and the Proposed Amendments further conditioned the effectiveness of the agreements on assurance of proper zoning." (Defendants' Trial Brief at page 5, R. 664).

m. "Plaintiff at no time indicated an intention to enforce the Earnest Money absent occurrence of the condition precedents and never made any demand upon defendants for performance

of the parties' agreement. Accordingly, plaintiffs' agent returned to defendants their earnest money deposit." (Defendants' Trial Brief at page 6, R. 665).

n. "Almost two years after the transactions with defendants had terminated, plaintiffs filed the instant action." (Defendants' Trial Brief at page 7, R. 666).

o. "You are further instructed that the law of this state renders void any agreement for the sale of an interest in real property unless the sale is evidenced by a written document that is signed by all of the selling parties. . . ." (Defendants' Proposed Jury Instructions at page 19, R. 489, not given by the trial court).[2]

p. "If the condition precedent is not fulfilled, or the fact or event does not exist or occur, the right to enforce the contract does not arise." (Defendants' Proposed Jury Instructions at page 22, R. 492, given as Instruction No. 18, R. 540).

q. "A settlement and accord is a method of discharging a contract . . . by substituting another agreement. . . ." (Defendants' Proposed Jury Instructions at page 34, R. 504, given as Instruction No. 21, R. 543).

r. "The parties to a contract may agree to rescind, i.e., abandon the contract by relieving the contractual liability of either party." (Defendants' Proposed Jury Instructions at page 35, R. 505, not given).

---

[2]By making references to jury instructions, whether or not given, Appellants do not quarrel with the trial court's instructions to the jury on seeking any review thereof by this Court; rather, Appellants are demonstrating the inconsistent manner in which Respondents alternately claim relief for attorneys fees through avoiding and/or establishing a contract.

s. "Were the claims asserted by plaintiff Jay A. Quealy, Jr. in this lawsuit the subject of a settlement and accord with defendants?" (Special Verdict, as initiated by Respondents at paragraph 10, R. 467, and answered by the jury, paragraph 4 of Special Verdict, R. 556).

Two of the theories asserted by Respondents during the course of the trial--accord and satisfaction and failure of a condition precedent to the Agreements--ultimately prevailed when the jury returned the Special Verdict and the trial court entered judgment based thereon. Having successfully established that Respondents were released from all of the obligations of the Agreements, Respondents substantively reversed their position and asserted that the printed obligations in the Purchase Agreement were indeed applicable insofar as they would support an award of attorneys' fees to Respondents.

The clause that Respondents relied upon for attorneys' fees is contained in the basic printed terms of the Purchase Agreement, and reads as follows:

> We do hereby agree to carry out and fulfill the terms and conditions specified above [basic terms of sale and purchase], and the seller agrees to furnish good and marketable title with a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed. . . . If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

Lines 45-48 of the Purchase Agreement, Exhibit 2-P.

As Appellants will later demonstrate, the clear contractual terms of the above clause did not entitle Respondents to an award of attorneys fees. More importantly, however, Respondents are estopped from relying upon the clause, regardless of its content, because the clause is part of a Purchase Agreement which Respondents successfully established was not in legal existence at the time of trial. Respondents cannot be allowed to capitalize on certain theories in order to prevail on the merits and then reverse those theories in order to recover attorneys' fees.

B. L. T. Investment Company v. Snow, 586 P.2d 456 (Utah 1978), is a controlling decision and represents the law of Utah applicable to this case. The defendant Snow, as seller of a ranch, and the plaintiffs, as buyers, executed a written contract in which specific provisions relating to the establishment of an escrow account which would protect Snow were largely absent. When a satisfactory escrow agreement which would protect Snow was not reached, he refused to execute and deliver deeds to the property, which precipitated the lawsuit. At trial, Snow sought rescission of the purchase agreement, and contended that a satisfactory escrow arrangement was a condition precedent to the purchase agreement. He claimed that since a satisfactory escrow arrangement had never been reached, the terms of the purchase contract were not binding. The trial court agreed with Snow,

granted rescission, and also granted Snow's request for attorneys' fees based upon a clause in the purchase agreement.

The Utah Supreme Court upheld the rescission of the purchase agreement but concluded that the trial court had committed reversible error in awarding attorneys' fees to Snow based upon the purchase contract. This Court supported its decision to deny attorneys' fees to Snow with a quote from Bodenhammer v. Patterson, 563 P.2d 1212 (Ore. 1977):

> Finally, Pattersons contend that the trial court erred in denying their request for attorneys' fees. This was not error. Their claim for attorneys' fees is based upon a provision in the contract of sale. By asking for rescission of the contract, they disaffirmed it in its entirety. They may not avoid the contract and, at the same time, claim the benefit of the provision for attorneys' fees. (Emphasis added).

586 P.2d at 458.

It is clear that Respondents are seeking the same benefits that the Utah Supreme Court disallowed in Snow. The Respondents attempted to avoid the contract at every turn in trial court, succeeded in doing so, and then claimed the benefits of a provision in the successfully avoided contract. This Court cannot countenance the attempts of Respondents to pick and choose arbitrarily and at will the benefits and/or disadvantages of the Purchase Agreement. In contrast to Respondents' tactics, Appellants tried to show that the conditions precedent were fulfilled and that the Agreements were enforceable, but lost on

the facts pursuant to the jury's decision on three of the five special verdict interrogatories. Appellants do not incongruently pick and choose their terms, but rely on the applicable contract terms as clearly written.

Respondents ultimately prevailed on the theories of (1) failure to satisfy a condition precedent and (2) accord and satisfaction. A condition precedent is something that must happen or be performed before the main contract is enforceable. Without the performance of the condition precedent, the main contract, although executed and delivered by the parties, cannot be enforced. Barbara Oil Company v. Patrick Petroleum Company, 566 P.2d 389, 392 (Kan. Ct. App. 1977); Sweet v. Stormont Vail Regional Medical Center, 647 P.2d 1274, 1280 (Kan. 1982). A condition precedent calls for the performance of some act or happening of some event after the contract is executed, without which the obligations of the contract in main do not exist. Meacham v. Oklahoma Bank and Trust Company, 600 P.2d 868, 870 (Okla. 1979).

In Haraka v. Datry, 252 S.E. 2d 71 (Ga. Ct. App. 1979), the court stated that evidence of a condition precedent "goes to the very existence of the contract and tends to show that no valid and effective contract ever existed, at least not until the fulfillment of the condition." Id. at 72. Similarly, in Hicks v. Bush, 180 N.E. 2d 425 (N.Y. Ct. App. 1962), the court stated that

"[a]s the courts below found, the parties did not contemplate performance of the written agreement until [certain] funds were first received. In other words . . . the writing was not to become operative as a contract . . . until [the money] was raised." Id. at 428.

The above theories of condition precedent were, in substance, put forward by Respondents during the course of the trial through arguments which include the following:

> "However, a preliminary indication of zoning approval was never obtained. Consequently, defendants' obligation to perform the amended earnest money agreement never came into existence." (Respondents' Memorandum in Support of Motion for Directed Verdict at page 9, R. 463).
>
> "If the condition precedent is not fulfilled, or the fact or event does not exist or occur, the right to enforce the contract does not arise." (Defendants' Proposed Jury Instructions at page 22, R. 492, given as Instruction No. 18, R. 540).
>
> "The Earnest Money and the Proposed Amendments further conditioned the effectiveness of the agreements on assurance of proper zoning." (Respondents' Trial Brief at page 5, R. 664).

In addition to successfully convincing the jury, with the consequent legal conclusions by the trial court, that the obligations of the Purchase Agreement never came into existence, Respondents also successfully asserted that if the Purchase Agreement ever existed, it was later replaced by an agreement between the parties known legally as an "accord and satisfaction".

The defense of accord and satisfaction is a substitution of a new contract for a previous contract. Fairchild v. Mathews, 415 P.2d 43, 46-47 (Idaho 1966). It is a method of discharging a previous contract in toto by substituting for such contract an agreement for the satisfaction thereof and the subsequent execution of such a substituted agreement. Smith Construction Company v. Knights of Columbus, 519 P.2d 286, 288 (N.M. 1974). The old agreement is substituted by a new agreement. The new contract is controlling and totally replaces the old one. Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1386 (Utah 1977), Plywood Marketing Associates v. Astoria Plywood Corporation, 558 P.2d 283, 289 (Wash. Ct. App. 1976), Clark Leasing Corporation v. White Sands Forest Products, Inc., 535 P.2d 1077, 1079 (N.M. 1975). See also Williams v. Leathem, 637 P.2d 1296, 1298 (Ore. Ct. App. 1981), and United American Life Insurance Company v. Zions First National Bank, 641 P.2d 158, 160 (Utah 1982).

Respondents also staunchly supported the substance of the discharge through accord theory of defense throughout the trial, as reflected by:

> You are instructed that the parties to a contract may mutually terminate their contractual obligations and resolve any claims resulting from those obligations by a settlement and accord. A settlement and accord is a method of discharging a contract or settling a claim arising from a contract by substituting another agreement that satisfies that contract or claim and by performing the substitute agreement.

(Respondents' Proposed Jury Instructions at page 34, R. 504, and as Instruction No. 21, R. 543).

In summary, Respondents prevailed on the merits in lower court with the theories (1) a condition precedent to the operation of the Purchase Agreement never came into existence and, in the alternative, (2) if the Purchase Agreement was ever operative, it was later replaced by another contract between the parties by the legal operation of an accord and satisfaction. Respondents chose the theories upon which they ultimately prevailed and are estopped from denying those theories for the purpose of recovering attorneys fees based on language of a nonexistent contract. The Utah case of BLT Investment Company v. Snow, supra, is controlling.

(2) If a Contract Had Existed Respondents Would be Bound to Their Detriment by the Contract Terms Which They Proposed.

The award of attorneys fees here at issue cannot be affirmed irrespective of which horn of Respondents' dilemma they may choose to sit on. If no effective contract existed then Respondents cannot rely on the contractual language for support, as argued under (1) above. If a contract existed they are bound by the very printed contractual language which they proposed to Appellants. As argued subsequently in Point B, the language does not support an award of attorneys fees to Respondents. Respondents simply cannot justify relief either way. This Court on appeal is not required to determine whether or not a binding

contract existed between the parties, but is called upon to reverse the attorneys fee judgment by concluding that Respondents should not have been permitted to recover such fees under any theory. Aside from the controlling and/or persuasive legal precedents cited herein, some rational approaches involving applicable philosophical concepts and fairness considerations are in order.

Respondents initiated the offer to Appellants on a printed form of Earnest Money Receipt which they selected (Exhibit 2-P). Many of the standard terms were amended by Respondents to suit their particular desires in the transaction, but lines 45-48 containing the disputed language were not amended.

In Johnson Tire Service, Inc. v. Thorn, Inc., 613 P.2d 521 (Utah 1980), this Court affirmed a judgment which had denied an award of attorneys fees as part of a judgment for the sale of goods. The prevailing plaintiff thus received contractual damages, but not attorneys fees. The "contract" for attorneys fees was claimed to exist through certain invoices sent by the seller but in the fine print added during the course of dealing. Although the buyer did not expressly object to the fine print during the course of dealing, this Court held that the contract terms were not set according to the seller's view of the import of the fine print:

> The addition of a provision for attorneys' fees alters the offer materially and thus does not fall within the "additional or different terms" which the statute renders acceptable by mere silence on the part of the offeror. We therefore hold that the contract in the instant case was formed on the defendant's (offeror's) terms and not plaintiff's (seller's) insofar as the attorneys' fees issue is concerned.
>
> * * *
>
> In the absence of a valid contractual or statutory provision therefor, the trial court did not err in refusing to make an award of attorneys' fees.

613 P.2d at 523.

In like manner, Respondents here (offeror) formed the contract on their terms, which terms do not permit attorneys fees unless enforcement is sought against the defaulting seller, which is not the case in the absence of a counterclaim or other affirmative pleading.

It is the very nature of an earnest money receipt and offer to purchase that the buyer-offeror states the terms initially. If Respondents had wished to assure themselves of recovery of attorneys fees in the event they refused to perform for whatever reason, were sued and then prevailed, they would have made the language clear in the manner they amended other language to their intended benefit. But no, it was to their interest to leave the language as it was, assuming that if Appellants as sellers failed to perform, then Respondents could sue and enforce the agreement against Appellants.

Moreover, Respondents had the burden of fulfilling the conditions precedent to their purchase obligations. They knowingly assumed the risk of their own performance and possible litigation relating to enforcement if they chose not to perform. Had Respondents wanted assurance of recovering attorneys fees in the event of a dispute they would have initiated contractual language to cover their position of risk. Appellants, as sellers, required some amendments to the Earnest Money Receipt before executing it as a contract (pages 3-5 of Exhibit 2-P), but had no need to change the language on attorneys fees because they knew such fees could be recovered if they chose to enforce the buyer's obligations and were to recover. Furthermore, Appellants were ready to fulfill their obligations upon buyers' performance and did not have to assume any burdens of fulfillment of conditions precedent or risk of their own performance. This differential in the respective positions of the parties is important in considering the basic philosophical and ethical reasons why it is fair to deny Respondents their attorneys fees even though they were involuntarily made defendants in the lawsuit. The buyer who proposes the deal, initiates the contract and assumes the risk of fulfilling the conditions precedent, is more in control of the transaction from inception to the time for performance (or the choice of nonperformance). In the event of voluntary non-performance of buyer, there would be no need from the buyer's

own perspective to have the protection sought in the contract of the non-defaulting seller. Moreover, it is a well accepted risk of business and of living generally that attorneys fees may have to be incurred, and the courts of this State and this nation have never sustained a broad right of prevailing defendants to recover attorneys fees. Accordingly, it is a just and proper judicial policy that would deny attorneys fees to such parties (Respondents here) in the absence of a clear statutory or contractual mandate. See Johnson Tire Service, Inc., supra, 613 P.2d at 523.

B. THE TERMS OF THE OPERATIVE CLAUSE DO NOT ALLOW RESPONDENTS TO RECOVER ATTORNEYS FEES IN THIS CASE.

Again, for the Court's convenience the relevant clause of the Purchase Agreement is reproduced:

> We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed . . . if either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorneys fee. (Emphasis added).

Lines 45-48 of page 1, Exhibit 2-P.

It is clear from the pleadings and trial proceedings that Respondents never incurred any expenses in an attempt to enforce the Agreements. The very prayer of the Answer seeks attorneys

fees only for "defending" the action (R. 25). There is no legal justification for such relief. No allegation was made that Appellants breached the Agreements. No affirmative relief was sought against Appellants. Instead of trying to enforce any part of the Agreements, all of Respondents' efforts were directed toward establishing that the Agreements had either never come into existence or had been replaced by another agreement.

Respondents succeeded in influencing the trial court to ignore the specific terms of the attorneys fee clause and award attorneys fees to Respondents based upon a misguided theory of "reciprocity." (See Transcript re Attorney Fees at pages 3-4, R. 737-738). All of the cases argued by Respondents and apparently relied upon by the court below in support of the "reciprocity" theory involved attorneys fees language different from the clause at issue in this case and were based upon considerations that are totally inapplicable to the case at bar.

Justice Stewart's dissent in Devore v. Bostrom, 632 P.2d 832, 837 (Utah 1981), was grounded in a consumer/dealer context and relied on a section of the Utah Consumer Credit Code as a basis for attorneys' fees, not "reciprocity." Similarly, in United States v. Peter Kiewit & Sons Co., 235 F. Supp. 500 (D. Alaska 1964), the attorneys' fees issue was actually determined by an interpretation of the Miller Act and an Alaskan statute that had nothing to do with "reciprocity" or the Purchase Agreement

clause at issue in this case. In Morrison v. Frederico, 120 Ut 75, 232 P.2d 374 (1951), attorneys fees were rewarded pursuant to a specific Utah statute which provided that an award of attorneys fees to be given in a divorce action was discretionary with the judge. In Hackford v. Snow, 657 P.2d 1271 (Utah 1982), the parties who were awarded attorneys fees pursuant to the Earnest Money Agreement were the same parties who had sought and had been awarded specific performance under the Agreement, unlike the position of Respondents here. Indeed, none of the above cases can be held to support the proposition that a party may rely upon the terms of a contract which the party has successfully avoided in order to collect attorneys fees. In fact, none of the above cases can be used to support the concept of "reciprocity" which Respondents urged to the trial court. All of the cases were decided pursuant to specific statutory or contract language which was carefully interpreted and followed by the awarding court, and distinguishable from any of the operative facts and law in the case at bar. If no contract existed here, no enforceable rights existed, and hence no reciprocal rights could possibly exist.

Moreover, any reliance by the lower court on Respondents' attempt to establish reciprocity in the award of attorneys fees as a requirement of "due process" is also totally unfounded. The cases cited by Respondents on which the trial court may have

relied in support of the theory of "reciprocity/due process" involved discussions of "fundamental interests," or discrimination against a "suspect classification," and no assertion of reciprocity as a general theory. See Barrows v. Jackson, 346 U.S. 249 (1953); Postow v. Oriental Building Assoc., 455 F. Supp. 781 (D.C. Cir. 1978). No fundamental interests or suspect classifications are involved in the case at bar. Any purported reliance on civil rights cases in support of the lower court's view that Respondents should receive attorneys fees does not justify further comment.

CONCLUSION

The judgment of January 17, 1983 awarding attorneys fees against Appellants must be reversed. Respondents cannot be allowed alternately to uphold and/or discard their prior theories to their best advantage. Respondents are estopped to raise in support of attorneys fees the contents of the Agreements which they proved in the trial court did not legally exist. Moreover, the terms of the clause relied on, even if effectively binding, do not entitle them to attorneys fees in this case because Respondents did not incur any expenses in enforcing the Purchase Agreement or seeking affirmative relief against Appellants, or otherwise sustain any defenses grounded in the terms of the Purchase Agreement. All Respondents' efforts were successfully expended in

avoiding the Purchase Agreement. Whether the Purchase Agreement existed or whether it did not, a point which this Court does not have to decide, Respondents are not entitled to recover attorney fees.

Respectfully submitted this 12th day of May, 1983.[3]

RAY, QUINNEY & NEBEKER

Don B. Allen

Tara D. Anderson

Attorneys for Appellants
400 Deseret Building
Salt Lake City, Utah 84111

[3]In order not to delay the appeal process this brief is timely filed. However, the transcript of the proceedings of January 5, 1983 has not yet been prepared by the Court Reporter and will subsequently be filed as a supplement to the record. Appellants reserve the right to make appropriate reference to that transcript covering issues on this appeal in their reply brief, if any. However, no additional points of argument on Appellants' case will be asserted.

MAILING CERTIFICATE

On this 12th day of May, 1983, I hereby certify that I caused to be mailed, postage prepaid, two (2) true and correct copies of the foregoing Brief of Appellants to the following parties of record:

PRINCE, YEATES & GELDZAHLER
Gordon Strachan
Attorneys for Respondents and
Cross-Appellants
Third Floor MONY Plaza
424 East Fifth South
Salt Lake City, Utah 84111