

1995

Melvin Grossgold and Bruce Manka v. James C. Ziter : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

(Oral Argument Requested)

BRIEF OF APPELLANT

Plaintiffs' appeal from an Order of the Third District Court, Frank G. Noel presiding, granting defendant's Motion to Dismiss.

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FILE

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MELVIN GROSSGOLD and
BRUCE MANKA,

Plaintiff/Appellants,

vs.

JAMES C. ZITER,

Defendant/Respondent.

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Case No. 950086-CA

Priority No. 15

(Oral Argument Requested)

BRIEF OF APPELLANT

Plaintiffs' appeal from an Order of the Third District Court,
Frank G. Noel presiding, granting defendant's Motion to
Dismiss.

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STATEMENT OF JURISDICTION

Jurisdiction in this appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78-2a -3(k).

STATEMENT OF THE ISSUES

1. Did the trial court error in dismissing plaintiffs' Amended Complaint as a matter of law?

Standard of Review: The propriety of a Rule 12(b)(6) dismissal is a question of law, and the appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. St. Benedicts Development Co. v. St. Benedicts Hospital, 811 P.2d 194 (Utah 1991). When reviewing a judgment entered on a Motion to Dismiss under Rule 12(b)(6), the Court of Appeals is obliged to construe the Complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in plaintiffs' favor. Heiner v. S.J. Groves & Sons Co., 790 P.2d 107 (Utah App. 1990).

Issue Preserved: This issue is implicit in the Court's ruling. Plaintiff's trial memoranda on the subject are at R.57 and R.95.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES OR RULES

The appellant is aware of no constitutional provision, statute, ordinance or rule whose interpretation is determinative of any of the issues in this litigation.

STATEMENT OF THE CASE

Plaintiffs initiated this action seeking a determination that the defendant had breached express warranties contained in an Earnest Money Sales Agreement ("EMSA"). In the EMSA, the seller expressly warranted that "the plumbing, heating. . . system. . . shall be sound or in satisfactory working condition at closing." After acquiring the property, the plaintiffs discovered deficiencies in the plumbing and heating systems which were not discoverable prior to closing, and included leaking sewer, water and heat distribution lines within the walls and under the floors of the apartment building. Plaintiffs seek recovery of damages arising out of the defendant seller's breach of these express warranties.

The defendant brought a Motion to Dismiss the Complaint asserting that the express warranties in the earnest money had been disclaimed. The District Court dismissed the Complaint and awarded the defendant attorney's fees and costs.

STATEMENT OF FACTS

1. In June, 1992, the plaintiffs and the defendant James C. Ziter, entered into an Earnest Money Sales Agreement ("EMSA"). A copy of the EMSA is included in the Addendum.¹ (Para. 2, plaintiffs' proposed Amended Complaint and para. 2 of plaintiffs' Complaint; R.50, 3; the EMSA is at R.6).

¹ Since the time of the District Court's Order dismissing this action, plaintiffs have discovered that there were in fact two EMSA's, one signed by Bruce W. Manka on June 2, 1992 and one signed by Melvin Grossgold also dated June 2, 1992. The earnest monies are otherwise identical. Both of the earnest monies are attached in the Addendum.

2. The real property described in the EMSA is an apartment building located at 234 East 100 South, Salt Lake City, commonly known as the Hollywood Apartments. (Para. 3 of the Complaint and proposed Amended Complaint; R.3, 50).

3. As part of the EMSA (General Provision ¶C) Ziter, as the seller, expressly warranted that ". . . the plumbing, heating, air conditioning, and ventilating systems, electrical systems and appliances shall be sound or in satisfactory working condition at closing." (Para. 4 of the Complaint and proposed Amended Complaint; R.3, 8, 50).

4. Additional language in the EMSA provides as follows:

1. PROPERTY DESCRIPTION. . . .

(a) Included Items. . . .

(b) Excluded Items. . . .

(c) Connections, Utilities and Other Rights. . . .

(d) Survey. . . .

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in its present physical condition, except: None. Buyer accepts property "as-is".

6. SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: None.

Exceptions to the above and Section C shall be limited to the following:
None.

(R.6-9).

5. On or about June 30, 1992, the sale of the Hollywood Apartments was closed. (Para. 5 of the Complaint and para. 6 of the proposed Amended Complaint; R. 4,51).

6. At closing, the plumbing and heating systems were not in sound or in satisfactory working condition. The deficiencies in the plumbing and heating systems were of such a nature that they were not discoverable prior to closing, and included the following:

- a. Leaks existed in sewer lines within walls and under floors such that waste water and sewage ran directly into and leaked into the dirt under the lowest level of the structure, causing structural timbers to rot;
- b. Leaks existed in sewer and vent lines located in walls, some of which had been improperly patched, which allowed sewer gas into living spaces;
- c. Leaks existed in water lines and mains within walls and under the floors of the structure;
- d. Leaks existed under the lower floor of the structure in the steam heat distribution system, including the steam condensate return line, which were visible only after removal of walls and floors.

(Para. 8 of the proposed Amended Complaint and para. 7 of the Amended Complaint; R.51, 4).

7. The deficiencies were so severe that Salt Lake City has required that the entire plumbing (water and sewer) system be replaced. (Plaintiffs' proposed Amended Complaint (para. 9) and Complaint (para. 8); R.52, 5).

8. Bruce Manka understood that the language typed into Paragraph 1(e) of the EMSA meant that he would not make any further physical inspection of the property. He did not intend nor understand that the language could be construed to be a waiver of the express warranties set forth in Paragraph C of the General Provisions. It was his understanding, based upon his prior experience with the agreement, that the express warranties in Paragraph C remained a part of the EMSA unless specifically excluded in Paragraph 6 of the EMSA. Manka would not have entered into the EMSA or purchased the property had he understood that Ziter was attempting to exclude his express warranties. It was never discussed between Manka and Ziter that Ziter had any desire to exclude the express warranties contained in Paragraph C of the General Provisions. (Affidavit of Bruce Manka, para. 6; R.69).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a determination that:

- a) that as a matter of law, the express warranties at issue were not excluded;
- b) the trial court erred in dismissing the Complaint;
- c) the trial court's judgment should be set aside in its entirety.

SUMMARY OF ARGUMENT

The sellers expressly warranted that the plumbing and heating systems would be in satisfactory working condition at closing. It cannot be disputed that these systems were not in sound or satisfactory working condition at closing. The seller's argument that the "as is" reference in the visual inspection clause of the Earnest Money Agreement overrides all of the express warranties in the Earnest Money Agreement fails for a number of reasons. The EMSA consists of a series of representations and agreements. The "as-is" language appears only in the part of the agreement dealing with visual inspections. Even if the language were to apply beyond the paragraph dealing with visual inspections, it does not eliminate the separate, express warranties that existed for the heating and plumbing systems.

The "as is" language would apply, at most, to implied warranties and does not address or specify any express warranties as being excluded. The Earnest Money Sales Agreement contains specific language added by the parties to the agreement that none of the express warranties, including the warranties which are the subject of this action, were excluded.

The "as is" clause contained in the inspection provision is not inconsistent with the express warranties relating to the heat and plumbing systems. The "as is" clause cannot apply to those express warranties because the clause does not identify those warranties as being disclaimed.

It is also clear from the agreement itself, and the provisions added to the agreement by the parties, that none of the express warranties are excluded.

At a minimum, the language added to the agreement by the parties renders the agreement ambiguous on the issue of whether or not the express warranties survive the closing.

ARGUMENT

INTRODUCTION

In a Motion to Dismiss, all of the allegations in the Complaint are presumed to be true. More importantly, all reasonable inferences which can be drawn from those allegations are to be drawn in favor of the plaintiff. St. Benedicts Development Co. v. St. Benedicts Hospital, 811 P.2d 194 (Utah 1991).

A Motion to Dismiss should be affirmed only if it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claims. Heiner v. S.J. Groves & Sons Co., 790 P.2d 107 (Utah App. 1990).

The issues which are presented by this appeal and by Ziter's Motion to Dismiss are issues of law, and this court is free to substitute its own judgment for that of the trial court on the issues presented. St. Benedicts Development Co., *supra*.

The Complaint alleges, and it must be accepted as true for the purposes of this appeal, that after the purchase of the apartments was closed, that Manka and Grossgold discovered that the plumbing and heating systems contained substantial defects at the time of closing, defects which could not possibly have been discovered by a physical inspection of the property because they were buried under the floors and within the walls of the structure. The defects were so

significant that Salt Lake City required that the entire plumbing system be replaced before the property could be occupied. (R.4, 5).

POINT I.

THE EXPRESS WARRANTIES WERE NEVER EXCLUDED.

Section C of the General Provisions of the EMSA provides that:

SELLER WARRANTIES. Seller warrants that . . . (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

Section O of the General Provisions of the EMSA provides that:

ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement. (Emphasis added).

Paragraph 1.(e) of the EMSA provides as follows:

Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in its present physical condition, except: *None. Buyer accepts property "as-is"*.

(Italicized language is typed into the Agreement, emphasis added).

Paragraph 6 of the EMSA provides that:

SELLER'S WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: *None*.

Exceptions to the above and Section C shall be limited to the following: *None*.

(Emphasis added, italicized words are typed onto the form).

In the trial court, Ziter argued that the language in Paragraph 1(e) of the EMSA eliminated the express warranties in Paragraph C and, by implication, overrode the statement in Paragraph 6 of the EMSA (quoted above) including the typed in or added language that there were no exceptions to the express warranties contained in Paragraph C.

A. The EMSA covers many topics, only one of which contains a statement of "as-is". The EMSA is a four page document which covers a wide range of topics. For example:

- a) it discusses personal property and fixtures that will be included in the sale (Paragraph A);
- b) it identifies additional information to be provided by the seller prior to closing (Paragraphs F, G, H, and 4);
- c) it discusses how defaults will be handled (Paragraph N);
- d) it provides how title will pass and who pays what closing costs (Paragraphs R, S, and 3);
- e) it allows for the buyer to make physical inspections (Paragraph 1.e.);
- f) it allows the parties to make special considerations on contingencies (Paragraph 7);
- g) it contains express warranties from the seller that survive closing that the plumbing and heating systems will be in sound or satisfactory working condition at closing (Paragraphs C and O); and
- h) it provides a special paragraph for the parties to exclude the seller's express warranties (Paragraph 6).

In this EMSA, the parties agreed in writing added by them to Paragraph 6 of the EMSA, the special paragraph included in the EMSA to exclude the express warranties, that no exceptions would be made to the seller's express warranties.

The parties also agreed, that so far as the buyer's visual inspection of the property was concerned, that the buyer accepted the property without additional visual inspections, but subject to the seller's express warranties of the heating and plumbing systems. (Paragraph 1.e.) of EMSA, R.6; Affidavit of Bruce Manka, para. 6, R.69).

The defendant argued, albeit successfully in the trial court, that the use of the words "as-is" in Paragraph 1.e., which deals only with visual inspection, cuts across the other paragraphs of the EMSA, including those paragraphs that set forth the express warranties that were unquestionably breached. Even more interestingly, the defendant also claims that the "as-is" in Paragraph 1.e. overrides the express agreement of the parties in Paragraph 6 of the EMSA that there were no exceptions to the seller's warranties.

The trial court's ruling ignored the plain language of the EMSA.

B. The "as is" language does not address the express warranties in the EMSA.

Contrary to the trial court's assertion in its Minute Entry (R.140), the plaintiffs are aware of no Utah case which has held that "as is" language as used in this EMSA excludes the seller's express warranties contained within the same agreement. In Tibbitts v. Openshaw, 425 P.2d 160 (Utah 1967), the Supreme Court considered only implied warranties. In Tibbitts, a buyer counterclaimed against a seller claiming that the seller had breached implied warranties that existed in a real estate contract (not the form EMSA used here). The Real Estate Contract provided that:

It is hereby expressly understood and agreed by the parties hereto that the buyer accepts the property in its present condition and that

there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto.

No contention was made in Tibbitts that any express warranties were at issue.

The warranties which are the subject of the plaintiffs' Complaint in this transaction are express warranties that the plumbing and heating systems would be "in sound or satisfactory working condition at closing." (EMSA, Paragraph C). For purposes of this appeal, it must be assumed the express warranty was breached.

In Olmsted v. Mulder, 863 P.2d 1355, rev. den. 875 P.2d 635 (Wash. App. 1993), a Washington court looked at the identical issues before this court and concluded that "as is" language in a real estate agreement does not override express warranties contained in the same agreement. In Olmsted, supra, an "as is" clause was set forth in a handwritten addendum and stated that: "Buyers to accept property as is." The addendum did not specifically disclaim any of the pre-printed warranties, and none of the express warranties contained within the agreement were stricken. In two pre-printed paragraphs of the agreement, the seller expressly warranted that the septic system was in good working order and needed no repairs and that the system met all governmental health and construction standards, and that the well had always provided an adequate supply of water. (These same warranties exist in Paragraphs D and E of the Utah EMSA). After closing, the buyers learned that neither of these warranties were true, i.e., that the septic system did not work, did not conform with governmental health standards, and that the well did not provide adequate water. The seller claimed that the "as is" language in the

agreement was bargained for, was not ambiguous, and prevailed over any boiler plate or other fine print warranties on the back of the form agreement. The Olmsted court stated as follows:

To the extent an "as is" clause negates express or implied warranties, it operates as a disclaimer and is not favored in the law. See Hartwig Farms, Inc. v. Pacific Gamble Robinson Co., 28 Wash. App. 539, 541-42, 625 P.2d 171 (1981). Therefore, the courts have added two conditions for effectiveness: "(1) a disclaimer must be explicitly negotiated or bargained for, and (2) it must set forth with particularity the qualities and characteristics being disclaimed. . . ." (863 P.2d at 1359).

In analyzing the second condition for the effectiveness of an "as is" clause, the Washington court looked to the Uniform Commercial Code and recognized that while the UCC Article 2 does not govern matters involving real estate, that:²

UCC Article 2 provides us with some guidance on disclaimers of warranties. (at 1359).

² In Tibbitts v. Openshaw, *supra*, the Utah Supreme Court made observations virtually identical to those in Olmsted regarding the application of the UCC in interpreting disclaimers in agreements involving real property. The Utah Supreme Court stated in a footnote in Tibbitts that:

[The Uniform Commercial Code] would not apply in the instant case, but by the process of reasoning by analogy are appropriate precedence to apply in an interpretation of the contract provision.

. . .

Section 70A-2-316(3)(a), Utah Commercial Code, - not in effect at the time the instant contract was executed - provides: "Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty.

(425 P.2d at 162).

The Washington court then looked at its §2-316(3)(a) of the UCC (which is identical to U.C.A. §70A-2-316(3)(a)) and observed that the provision does not address the effect of an "as is" clause on express (as opposed to implied) warranties.

The Olmsted court concluded that the reasoning of the UCC limiting an "as is" disclaimer to the disclaiming of implied warranties was persuasive and should be applied, by analogy, to cases involving real estate:

We interpret the "as is" clause to be consistent with the express warranties relating to the sewer system and well. It makes no reference to these express warranties, and it therefore cannot be fairly read as disclaiming them. The clause fails because it does not state with particularity the items being disclaimed. (863 P.2d 1359-1360).

The Olmsted court also rejected the seller's argument that the "as is" clause prevails over any conflicting printed clauses. The Washington court stated:

. . . His argument misses the point. Because the clause is silent as to what is being disclaimed, it does not expressly conflict with any printed clause. (863 P.2d at 1359).

The Olmsted case is virtually identical to this case. It involves a form agreement with express warranties, and the use of "as-is" language added by the parties. If anything, the facts in the case at bar are even more compelling than Olmsted because in this case the parties also added language confirming that there were no exceptions to the express warranties. (Paragraph 6 of EMSA).

In addition to the reasoning in Olmsted, other courts have refused to apply "as is" clauses in Earnest Money Agreements to latent defects not discoverable by the buyer. Wagner v.

Cutler, 757 P.2d 779 (Mont. 1988). For purposes of this appeal, because of the allegations in the Complaint, it must be assumed that the defects were latent. This rationale is even more appropriate where the "as is" language appears in the inspection clause of the EMSA, as it does here. One obvious reason for the express warranties in the EMSA is to protect the buyer from latent defects, and to protect the seller from having his property torn open as part of the inspection process. These express warranties about the plumbing and heating are so crucial to the transaction that special language has been added to the EMSA to assure that they survive the closing. (Para. O., EMSA).

C. **The added "as is" clause does not preempt the express warranties.** Inherent in the seller's argument before the District Court is the proposition that, somehow, the "as is" clause, because it was added to the printed form, supersedes all of the express warranties contained in the agreement. This argument ignores two critical facts: 1) the language appears in the inspection clause, which has nothing to do with express warranties, and 2) language was added to other portions of the agreement confirming the express warranties.

The seller's argument that the "as is" language added to Paragraph 1.e. overrides the express warranties is undermined by the language in the very paragraph in which it appears.

The paragraph states:

(e) **Buyer Inspection.** Buyer has made a visual inspection of the property and subject to Section 1(c) and 6 below, accepts it, in its present physical condition, except: *None. Buyer accepts property "as-is".*

(Italicized language typed on the form, emphasis added).

The use of "as is" is made expressly subject to the language in Paragraph 6 which states that there are no exceptions to the express warranties.

The defendant's broad interpretation of the "as is" clause is also undermined by other language added to the EMSA which states that no express warranties are being excluded. Paragraph 6 of the EMSA states:

6. SELLERS WARRANTIES.

Exceptions to the above and Section C shall be limited to the following: *None*.

(Section C contains the express warranty regarding the plumbing and heating systems. Italicized language was typed onto the form, emphasis added).

With this added language, the buyer and seller expressly agreed that there would be no exceptions to the express warranties at issue. This added language is directly contrary to the interpretation the seller seeks to place on the "as is" language in Paragraph 1.e. of the EMSA.

Thus, not only does the "as is" language fail to address the express warranties, or to identify any warranty being excluded, but the seller's argument begs this Court to ignore other language added by the parties to Paragraph 6 of the EMSA.

Ziter argued before the trial court that because the "as is" language was added to the printed form, that it took precedence over all of the pre-printed language in the form. Implicit in this argument, however, is the requirement that the added language contradict the pre-printed language. Copper State Leasing Co. v. Blacker Appliance & Furniture, 770 P.2d 88 (Utah 1988) (where the added language was directly contrary to the printed language). In this case,

however, as discussed above, the added language does not contradict or even address the express warranties contained within the agreement. Olmsted, supra. There is no inconsistency between the pre-printed terms and the added terms. As discussed above, the terms added to Paragraph 6 of the EMSA confirmed the survival of the express warranties for the heating and plumbing systems.

Because there is no inconsistency between the pre-printed terms and the added language, the rule of construction advanced in Copper State Leasing, supra, does not apply. Olmsted, supra.

Another rule of construction relied on by Ziter is that an agreement be harmonized to attempt to give meaning to all of its parts. Manka/Grossgold do not disagree with the rule, but submit that Ziter's attempt to apply the rule ignores the rule. Ziter argues that the rule should be applied to find that the "as is" language in the inspection clause (1.(e)) eliminates the express warranties. But this argument by the seller undermines the rule. Seller's argument begs this Court to ignore the following parts of this agreement:

1. Paragraph 6, which contains added language stating there are no exceptions to the express warranties.
2. Provision C, which contains the express warranties.
3. The language in Paragraph 1.e. which states that the language of that Paragraph is "subject to" Paragraph 6.
4. The language of Paragraph O which states that the express warranties survive closing.

The added language in Paragraph 1.e. is best harmonized by:

1. Limiting its application to implied warranties;
2. Limiting it to the buyer's physical inspection of the property, and those matters which are observable in such an inspection. Pipes in walls and under floors are not observable without tearing up the building, thus the need for the express warranties.

D. At a minimum, the agreement is ambiguous. It is the plaintiffs' position, first and foremost, that the "as is" clause does not exclude the express warranties for the reasons outlined and discussed above.

If, however, this court should determine that the "as is" language applies to the express warranties, then an ambiguity exists in the EMSA arising out of the language added to Paragraph 1.e. and Paragraph 6 of the EMSA. The ambiguity is this: (i) Paragraph 6 of the EMSA states that there are no exceptions to the express warranties; (ii) Paragraph 1.e. of the agreement states that the sale is "as is".

The ambiguity is created by language added to each paragraph of the form. Where a contract can have two possible meanings, it is ambiguous and extrinsic evidence of the parties' intent must be received and considered. C.J. Realty v. Willey, 758 P.2d 923 (Ut. App. 1988). In such a case where evidence must be received, the granting of a Motion to Dismiss would be inappropriate. In ruling on a Motion to Dismiss for failure to state a claim, which the trial court did in this case, the court must construe the Complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. Mountier v. Power & Light Co., 823 P.2d 1055 (Utah 1991). The Affidavit of Bruce Manka (R.76) sets forth Manka's understanding that the added language in the EMSA did not affect the express warranties. Manka's Affidavit also


reflects that Ziter never indicated to him that Ziter believed the added language eliminated the express warranties. If Ziter had some belief or expectation that he was eliminating the express warranties, he was obligated to make that desire known to Manka. Unexpressed intentions are not enforceable. Zions First Nat. v. B. Jensen Interiors, 787 P.2d 478, 480 (Utah A. 1989).

In the alternative, at a minimum, the agreement is ambiguous.

CONCLUSION

For the foregoing reasons, the Order of the District Court dismissing the Complaint should be set aside in its entirety, this Court should determine as a matter of law that the express warranties were not excluded, and the matter should be remanded to the District Court for trial on the issue of plaintiffs' damages.

DATED this 9 day of March, 1995.



Keith W. Meade
COHNE, RAPPAPORT & SEGAL
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage fully prepaid, on the 9 day of March, 1995, to the following:

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A handwritten signature in dark ink, appearing to read "S. W. Call", is written over a horizontal line.

(lj/manka.brf)

ADDENDUM

COURT'S MINUTE ENTRY
JUDGMENT
EARNEST MONEY SALES AGREEMENT ("EMSA")

COURT'S MINUTE ENTRY

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• • • • •

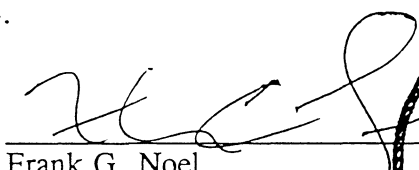
JUDGE FRANK G. NOEL

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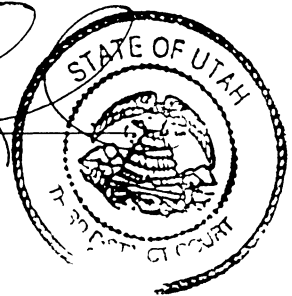
As to the second ground for defendant's motion the court is of the opinion that defendant Ziter does not have standing to assert the Statute of Frauds with regard to the oral assignment of the earnest money contract from Manka to Grossgold.

Counsel for defendant is to prepare an order consistent with this ruling.

Dated this 9th day of August, 1994.



Frank G. Noel
District Court Judge

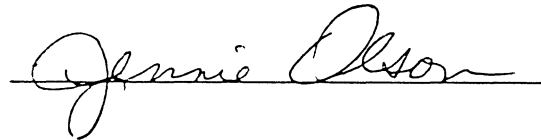


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,
postage prepaid, to the following on this 9 day of August, 1994.

Keith W. Meade
COHNE, RAPPAPORT & SEGAL
Attorney for Plaintiff
P. O. Box 11008
Salt Lake City, UT 84147-0008

Steven W. Call
RAY, QUINNEY & NEBEKER
Attorney for Defendant
79 South Main Street
Salt Lake City, UT 84145-0385

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

JUDGMENT

IRA B. RUBINFELD (A4244)
STEVEN W. CALL (A5260)
RAY, QUINNEY & NEBEKER
79 South Main Street
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

CCT 10 1994

Pat. Jones

Attorneys for Defendant
James C. Ziter

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

MELVIN GROSSGOLD and
BRUCE MANKA,

Plaintiffs,

v.

JAMES C. ZITER,

Defendant.

:
:
:
:
:
:
:
:
:
:
:

ORDER DISMISSING
CASE AND AWARDED
REASONABLE ATTORNEYS'
FEES AND COSTS

Civil No. 930907514CN

Judge Frank G. Noel

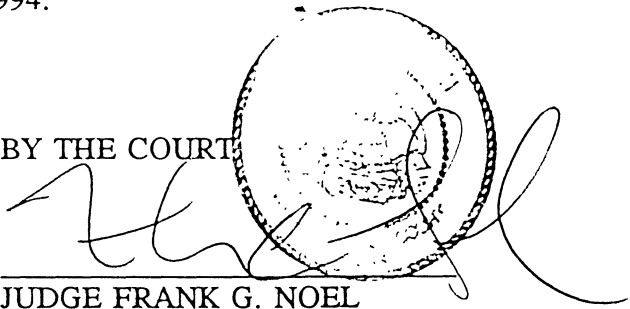
On August 8, 1994, a hearing was held before the above Court on the motion of defendant James C. Ziter to dismiss the *Amended Complaint* filed by plaintiffs Melvin Grossgold and Bruce Manka. Steven W. Call and Ira Rubinfeld of Ray, Quinney & Nebeker appeared on behalf of defendant James C. Ziter and Jeffrey L. Silvestrini of Cohne, Rappaport & Segal appeared on behalf of plaintiffs Melvin Grossgold and Bruce Manka.

*Order Dismissing Case
and Awarding Reasonable
Attorneys Fees and Costs*

5. This Order is final as to the matters ruled upon and shall be entered by the Clerk of the Court without delay pursuant to Rule 54(b) of the *Utah Rules of Civil Procedure*.

DATED this 8 day of October, 1994.

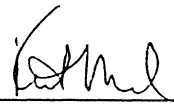
BY THE COURT



JUDGE FRANK G. NOEL
District Court Judge

Approved as to form:

COHNE, RAPPAPORT & SEGAL



Jeffrey L. Silvestrini
Keith W. Meade

Attorneys for plaintiffs

89076/swc

**EARNEST MONEY SALES
AGREEMENT ("EMSA")**

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



GENERAL PROVISIONS (Sections)

A INCLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, air conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s) fencing, trees and shrubs

B INSPECTION Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

C SELLER WARRANTIES. Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not been remedied prior to closing, (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing, and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound and in satisfactory working condition at closing.

D CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

E CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

F ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally prove the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

G TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

H TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and shall not include encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any acceleration charge.

I EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

J CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

DATE: June 2, 1992

The undersigned Buyer BRUCE MANKA a licensed agent acting on own account hereby deposits with Broker as EARNEST MONEY, the amount of SIX THOUSAND AND NO/100 * * * * * Dollars (\$ 6,000.00) in the form of a check, to be deposited upon mutual agreement, which shall be deposited in accordance with applicable State Law.

COMMERCE PROPERTIES

355-5100

Received by

Kip Paul

Brokerage

Phone Number

OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 234 East 100 South in the City of Salt Lake County of Salt Lake, Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer accordance with Section G. Said property is owned by Zeitter, a licensed agent as sellers, and is more particularly described as: legal to follow.

CHECK APPLICABLE BOXES:

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____

☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included Items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property.

The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title.

All personal property owned by Seller currently on premises.

(b) Excluded Items. The following items are specifically excluded from this sale: None.

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:

| | | |
|--|--|--|
| <input checked="" type="checkbox"/> public sewer <input checked="" type="checkbox"/> connected | <input checked="" type="checkbox"/> well <input type="checkbox"/> connected <input type="checkbox"/> other _____ | <input checked="" type="checkbox"/> electricity <input type="checkbox"/> connected |
| <input type="checkbox"/> septic tank <input type="checkbox"/> connected | <input checked="" type="checkbox"/> irrigation water / secondary system | <input type="checkbox"/> ingress & egress by private easement |
| <input type="checkbox"/> other sanitary system _____ | <input type="checkbox"/> # of shares _____ Company _____ | <input checked="" type="checkbox"/> dedicated road <input type="checkbox"/> paved |
| <input checked="" type="checkbox"/> public water <input checked="" type="checkbox"/> connected | <input checked="" type="checkbox"/> TV antenna <input type="checkbox"/> master antenna <input type="checkbox"/> prewired | <input checked="" type="checkbox"/> curbs and gutter |
| <input type="checkbox"/> private water <input type="checkbox"/> connected | <input checked="" type="checkbox"/> natural gas <input type="checkbox"/> connected | <input type="checkbox"/> other rights _____ |

(d) Survey. A certified survey ☐ shall be furnished at the expense of _____ prior to closing, ☒ shall not be furnished.

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical condition, except: None. Buyer accepts property "as-is".

2. PURCHASE PRICE AND FINANCING. The total purchase price for the property is FIVE HUNDRED FIVE THOUSAND AND NO/100 * * * * * Dollars (\$ 505,000.00) which shall be paid as follows:

| | |
|----------------------|---|
| \$ <u>6,000.00</u> | which represents the aforescribed EARNEST MONEY DEPOSIT: |
| \$ <u>39,000.00</u> | representing the approximate balance of CASH DOWN PAYMENT at closing. |
| \$ <u>-0-</u> | representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer which obligation bears interest at _____ % per annum with monthly payments of \$ _____ which include: <input type="checkbox"/> principal; <input type="checkbox"/> interest; <input type="checkbox"/> taxes; <input type="checkbox"/> insurance; <input type="checkbox"/> condo fees; <input type="checkbox"/> other _____ |
| \$ <u>-0-</u> | representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____ which include: <input type="checkbox"/> principal; <input type="checkbox"/> interest; <input type="checkbox"/> taxes; <input type="checkbox"/> insurance; <input type="checkbox"/> condo fees; <input type="checkbox"/> other _____ |
| \$ <u>460,000.00</u> | representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: <u>Seller to carry All Inclusive Trust Deed and Note at 10 1/2%, 25 year amortization, monthly P \$4343.24. Buyer agrees to accept payments of \$3500.00 for the first 24 months.</u> |
| \$ <u>-0-</u> | Other <u>Any negative accrual shall increase principal balance.</u> |
| \$ 505,000.00 | TOTAL PURCHASE PRICE |

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best effort to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer shall make application within n/a days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed n/a %. If Buyer does not qualify for the assumption and/or financing within n/a days after Seller's acceptance of this Agreement, this Agreement shall be voidable at the option of the Seller upon written notice. Seller agrees to pay up to n/a mortgage loan discount points, not to exceed \$ n/a. In addition, seller agrees to pay \$ n/a to be used for Buyer's other loan costs.

to encumbrances and exceptions noted herewith, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current with an attorney's opinion (See Section H).

4. **INSPECTION OF TITLE.** In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: to be directed by Buyer.

6. **SELLER'S WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: None.

Exceptions to the above and Section C shall be limited to the following: None.

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: Upon depositing an additional \$3000.00 non-refundable earnest money, Buyer shall be able to extend closing an additional 30 days. Buyer to take over responsibility for back tax in an amount not to exceed \$6,000.00. Seller agrees to pay a 3% sales commission to Commerce Properties at time of closing. If closing takes place any time after 6/30/92, purchase price

8. **CLOSING OF SALE.** This Agreement shall be closed on or before 6/30, 19 92, at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement. Provisions set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other _____.

9. **POSSESSION.** Seller shall deliver possession to Buyer on closing unless extended by written agreement of parties.

10. **AGENCY DISCLOSURE.** At the signing of this Agreement the listing agent Kip Paul represents (☒) Seller (☐) Buyer and the selling agent Kip Paul represents (☐) Seller (☐) Buyer. Buyer and Seller confirm that prior to signing this Agreement written disclosure of the agency relationship(s) was provided to him/her. (☒) Buyer's initials (☒) Seller's initials.

11. **GENERAL PROVISIONS.** UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

12. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 5:00 (AM/PM) 6/3, 19 92, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNES MONEY to the Buyer.

| | | | | |
|--|--------|-----------|---------|--------------|
| (Buyer's Signature) <u>[Signature]</u> | (Date) | (Address) | (Phone) | (SSN/TAX ID) |
| (Buyer's Signature) | (Date) | (Address) | (Phone) | (SSN/TAX ID) |

CHECK ONE

☒ **ACCEPTANCE OF OFFER TO PURCHASE:** Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

☐ **REJECTION.** Seller hereby REJECTS the foregoing offer. _____ (Seller's Initials)

☐ **COUNTER OFFER.** Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until _____ (AM/PM), 19 _____, to accept the terms specified below.

***and down payment to be increased \$5,000.00. In consideration of the reduced down payment, Buyer agrees to install new boiler by 9/15/92.

| | | | | | |
|---|----------------------|--------|-----------|---------|--------------|
| (Seller's Signature) <u>[Signature]</u> | (Date) <u>6-2-92</u> | (Time) | (Address) | (Phone) | (SSN/TAX ID) |
| (Seller's Signature) | (Date) | (Time) | (Address) | (Phone) | (SSN/TAX ID) |

CHECK ONE:

☐ **ACCEPTANCE OF COUNTER OFFER.** Buyer hereby ACCEPTS the COUNTER OFFER.

☐ **REJECTION.** Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's Initials)

☐ **COUNTER OFFER.** Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

| | | | | | |
|---------------------|--------|--------|---------------------|--------|--------|
| (Buyer's Signature) | (Date) | (Time) | (Buyer's Signature) | (Date) | (Time) |
|---------------------|--------|--------|---------------------|--------|--------|

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed)

A. ☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

| | | |
|--|---------------|---------------------------------------|
| SIGNATURE OF SELLER <u>[Signature]</u> | <u>6-2-92</u> | SIGNATURE OF BUYER <u>[Signature]</u> |
| Date | Date | Date |
| Date | Date | Date |

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19 _____ by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by _____

K AUTHORITY OF SIGNATORS. If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

L COMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

M COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein.

N DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the non-satisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

O ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

P RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair, replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

Q TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, time is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

R CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

S REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those expected herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, retaining Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

T NOTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

U BROKERAGE. For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

V DAYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

PAGE FOUR OF A FOUR PAGE FORM.

EARNST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing



GENERAL PROVISIONS (Sections)

A INCLUDED ITEMS Unless excluded herein, this sale shall include all fixtures and any of the following items if presently attached to the property, plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s) fencing, trees and shrubs

B INSPECTION Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

C SELLER WARRANTIES Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

D CONDITION OF WELL Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

E CONDITION OF SEPTIC TANK Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

F ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

G TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

H TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and all encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

I EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

J CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

Legend Yes(X) No(O)

EARNEST MONEY RECEIPT

DATE June 2, 1992

The undersigned Buyer HEI GROSSGOLD hereby deposits with Brokerage as EARNEST MONEY the amount of SIX THOUSAND AND NO/100 * * * * * Dollars (\$ 6,000.00) in the form of a check, to be deposited upon mutual agreement, which shall be deposited in accordance with applicable State Law

COMMERCE PROPERTIES

355-5100

Received by

Kip Paul

OFFER TO PURCHASE

1 PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 234 East 100 South in the City of Salt Lake County of Salt Lake Utah, subject to any restrictive covenants zoning regulations utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section G Said property is owned by Zeitter, a licensed agent as sellers and is more particularly described as legal to follow.

CHECK APPLICABLE BOXES

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other ☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other

(a) Included items Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title

All personal property owned by Seller currently on premises.

(b) Excluded items The following items are specifically excluded from this sale None.

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase price

☒ public sewer ☒ connected ☐ well ☐ connected ☐ other ☒ electricity ☒ connected
☐ septic tank ☐ connected ☐ irrigation water / secondary system ☐ ingress & egress by private easement
☐ other sanitary system ☐ # of shares ☐ Company ☒ dedicated road ☒ paved
☒ public water ☒ connected ☐ TV antenna ☐ master antenna ☐ prewired ☒ curb and gutter
☐ private water ☐ connected ☒ natural gas ☒ connected ☐ other rights

(d) Survey A certified survey ☐ shall be furnished at the expense of ☒ shall not be furnished

(e) Buyer Inspection Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below accepts it in its present physical condition except None. Buyer accepts property "as is".

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is FIVE HUNDRED THOUSAND AND NO/100 * * * * *

* * * * * Dollars (\$ 500,000.00) which shall be paid as follows

\$ 6,000.00 which represents the aforementioned EARNEST MONEY DEPOSIT
\$ 39,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing
\$ -0- representing the approximate balance of an existing mortgage trust deed note, real estate contract or other encumbrance to be assumed by buyer which obligation bears interest at % per annum with monthly payments of \$ which include ☐ principal, ☐ interest ☐ taxes ☐ insurance, ☐ condo fees, ☐ other
\$ -0- representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at % per annum with monthly payments of \$ which include ☐ principal, ☐ interest, ☐ taxes ☐ insurance, ☐ condo fees, ☐ other
\$ 460,000.00 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows Seller to carry All Inclusive Trust Deed and Note at 10 1/2%, 25 year amortization, monthly P/I \$4343.24. Buyer agrees to accept payments of \$3500.00 for the first 24 months.
\$ -0- Other Any negative accrual shall increase principal balance.
\$ 505,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within n/a days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing a an interest rate not to exceed n/a % If Buyer does not qualify for the assumption and/or financing within n/a days after Seller's acceptance of this Agreement this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to n/a mortgage loan discount points, not to exceed \$ n/a In addition, seller agrees to pay \$ n/a to be used for Buyer's other loan costs

☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on 11/16/72, 1972 by
First Class Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by First Class
 - three of a four page form

K. AUTHORITY OF SIGNATORS. If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

L. COMPLETE AGREEMENT — NO ORAL AGREEMENTS. This instrument constitutes the entire agreement between the parties and supersedes and cancels all and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

M. COUNTER OFFERS. Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein.

N. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damage or to institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

O. ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

P. RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed.

Q. TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter time is of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

R. CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

S. REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

T. NOTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

U. BROKERAGE. For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

V. DAYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

PAGE FOUR OF A FOUR PAGE FORM.