

1995

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

NO. 950086

Case No. 950086-CA

Priority No. 15

Defendant/Seller.

FROM A JUDGMENT AND RULING OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH
HONORABLE FRANK G. NOEL, JUDGE

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APR 07 1995

**MELVIN GROSSGOLD and
BRUCE MANKA,**

v.

Defendant/Seller.

Priority No. 15

FROM A JUDGMENT AND RULING OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH
HONORABLE FRANK G. NOEL, JUDGE

Attorneys for Plaintiffs/Appellants

Attorneys for Defendant/Respondent

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Respondent James C. Ziter submits this *Brief of Respondent* in compliance with Rule 23(a)(3), of the *Utah Rules of Appellate Procedure*.

I. JURISDICTION

Respondent James C. Ziter (hereinafter "Seller") submits this brief in opposition to the appeal made to the Utah Supreme Court by the Appellants, Melvin Grossgold and Bruce Manka (hereinafter "Buyers"). The Utah Supreme Court assigned the appeal to the Utah Court of Appeals pursuant to Rule 4A of the *Rules of The Utah Supreme Court*. Jurisdiction is not disputed.

II. STATEMENT OF ISSUES PRESENTED FOR APPEAL AND APPROPRIATE STANDARD OF REVIEW

A. STATEMENT OF ISSUES

1. Do newly added terms to the pre-printed Earnest Money Agreement (hereinafter "*Agreement*"), control inconsistent boiler plate terms located in fine print on the backside of the *Agreement*?
2. Do the words "Buyer accepts property "as is" reasonable mean that the property was sold in its present condition?
3. Should the *Agreement* be interpreted to give meaning to the newly added words "Buyer accepts property "as is"?

4. Does the *Agreement* provide that the general terms on the backside of the *Agreement* are incorporated therein unless otherwise provided for in the main front section of the *Agreement*?

B. STANDARD OF REVIEW

Each of the foregoing issues concerns the interpretation of the unambiguous contract which is reviewed by the Utah Court of Appeals for a correction of error. *State v. Rio Vista Oil, Ltd.*, 786 P.2d 1343 (Utah 1990); *Brown v. Weis*, 871 P.2d 552, 559 (Utah App. 1994).

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Buyers appeal the order entered by the Trial Court which dismissed their *Amended Complaint* against the Seller. Buyers sued the Seller for an alleged breach of warranty arising under the standard terms of the *Agreement*. Before signing the *Agreement*, Buyer (Manka) and Seller expressly added terms to the *Agreement* which provided that "Buyer accepts the property 'as is'". The terms "Buyer accepts the property 'as is'" were used to disclaim any inconsistent terms made by the pre-printed *Agreement*. Because of the written disclaimer of warranties, the Seller did not make the standard warranties in finer print on the

backside of the *Agreement* as alleged by the Buyers. Based on the clear and unambiguous terms of the *Agreement*, Seller moved the Trial Court to dismiss the *Amended Complaint*. In opposition, Buyers argued that the typed in words "Buyer accepts property as is" do not control the inconsistent fine print on the backside of the *Agreement*. Upon reviewing the unambiguous language in the *Agreement*, the Trial Court granted Seller's Motion to Dismiss.

B. COURSE OF PROCEEDINGS

On December 30, 1993, Buyer (Grossgold) filed a complaint against the Seller. The complaint alleges that the Seller breached express warranties in the *Agreement* on the plumbing and heating. Seller moved to dismiss the original complaint on grounds that: (1) Buyer (Grossgold) was not a party to the *Agreement*, (2) the property was sold "as is" and without warranties, (3) the specific terms of the *Agreement* preempted the general terms on the backside of the *Agreement* and (4) the typed-in terms controlled the inconsistent printed terms on the backside of the *Agreement*. In response, Buyers filed an *Amended Complaint* joining Appellant Buyer (Manka) as a plaintiff. Thereafter, Seller renewed his motion to dismiss the *Amended Complaint*. A *Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss* was

filed by Seller. In opposition, Buyers filed a *Memorandum of Points and Authorities in Opposition to Seller's Motion to Dismiss*. A *Reply Memorandum in Support of Motion to Dismiss Amended Complaint* was filed by the Seller. Seller's *Motion to Dismiss* was argued before the Honorable Frank G. Noel on August 8, 1994.

C. DISPOSITION OF THE TRIAL COURT

After a thorough inspection of the *Agreement*, the Trial Court granted *Seller's Motion to Dismiss the Amended Complaint*. After reviewing controlling case law, the Trial Court held that the typed-in provisions on the *Agreement* superseded the other pre-printed terms on the *Agreement* particularly those general provisions which were in finer print on the backside of the *Agreement*. The Trial Court determined that the words "Buyer accepts property as is" were clear and unambiguous and precluded Buyers' alleged breach of warranty claims based on the standard pre-printed boiler plate language on the backside of the *Agreement*.

D. FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

1. On June 2, 1992, Buyer Bruce Manka, a licensed real estate agent acting on his own account, entered into the *Agreement* dated June 2, 1992 with the Seller, James C. Ziter. (See Exhibit A; Record at 006-009.)

2. The *Agreement* related to the sale of commercial property called the Hollywood apartments located at 234 East 100 South, Salt Lake City, Utah (hereinafter the "Property"). (See *Agreement*, Exhibit A, paragraph 1).

3. Paragraph 1(d) of the *Agreement* expressly provides that Buyer (Manka) made a visual inspection of the Property and agreed to the specific language stating that "Buyer accepts property as is". (*Agreement*, paragraph 1(d); Record at 006).

4. Buyers sued Seller claiming Seller breached express warranties that the plumbing and heating fixtures were in good working condition at closing. (*Amended Complaint*, paragraphs 8 and 9; Record at 050-053.)

5. The warranties, which Seller is alleged to have breached, are located in subparagraph C which is found in fine print on the backside of the *Agreement*. (See *Agreement*, Exhibit A; Record at 008.)

6. Paragraph 11 of the *Agreement* expressly provides that the general provisions on the backside of the *Agreement*, (including the boiler plate warranties relied upon by the Buyers), are only incorporated in the *Agreement* if the other preceding terms of the *Agreement* do not provide otherwise. (See *Agreement*, paragraph 11; Record at 007.)

7. The boiler plate warranty terms located on the backside of the *Agreement* are not incorporated into the *Agreement* because paragraph 6 of the *Agreement* provides otherwise by stating, in part, "Buyer accepts property "as is"". (*Agreement*, paragraph 11; Record at 007.)

8. The boiler plate warranties made in fine print on the backside of the *Agreement* are inconsistent with the typed-in terms on the front of the *Agreement* which provide in part, "Buyer accepts property "as is". (*Compare Agreement* paragraphs 1(d), 6 and 11 (Record at 006-07) with paragraph C (Record at 008.)

9. The Trial Court ruled that the *Agreement* was unambiguous in that the parties agreed that the Buyers purchased the property "as is", and that the added terms on the front side of the *Agreement* displace and control the

inconsistent warranties on the backside of the *Agreement*. A copy of the Trial Court's minute entry is attached as Exhibit B; *See* Record at 140-42.)

10. Based on the Trial Court's ruling, an *Order Dismissing Case and Awarding Fees* was signed and entered by the Court. A copy of the *Order Dismissing Case and Awarding Fees* is attached as Exhibit C; *See* Record at 169-172.)

IV. SUMMARY OF ARGUMENT

The parties agreed in the *Agreement* that the Property was to be sold without warranties as to the physical condition of the Property. This is evidenced by the newly added terms to the *Agreement* which provide that the "Buyer accepts property "as is" and the express terms of the *Agreement* which provide that the general warranties on the back of the *Agreement* are incorporated only unless they are not otherwise provided for in the *Agreement*. The law is settled that newly added words to a pre-printed boiler plate agreement, like the *Agreement* in this case, displace inconsistent boiler plate terms. This is especially true when the displaced terms are located on the backside of the *Agreement* in fine print, and when the *Agreement* expressly states that the warranties on the back of the *Agreement* are incorporated

only if the *Agreement* does not provide otherwise. The *Agreement* does provide otherwise and the newly added terms to the *Agreement* supersede and control inconsistent boiler plate terms located in fine print on the backside of the *Agreement*. Buyers argue that because the newly added terms are inconsistent with the boiler plate warranties on the backside of the *Agreement*, the *Agreement* is ambiguous. However, the Utah Courts have rejected Buyers suggested construction, and held that if the contract is a pre-printed form agreement, the newly added terms displace and control inconsistent pre-printed terms. Buyers argue alternatively that the terms are not inconsistent and that the words "Buyers accepts property 'as is'" may be read in harmony with the express warranties in subsection C. However, Buyers' argument is unpersuasive based on the plain meaning of the newly added terms. In addition, the other added terms to the *Agreement*, which address the poor condition of the boiler, evidence that the heating system was not warranted to be in good condition. The Seller's *Motion to Dismiss* the Buyers' *Amended Complaint* was properly granted by the Trial Court.

IV. ARGUMENT

POINT I SELLER DID NOT WARRANT THE PLUMBING OR HEATING TO THE BUYERS

Sub-Point A TYPED-IN TERMS CONTROL INCONSISTENT PRE-PRINTED TERMS IN FINE PRINT LOCATED ON THE BACKSIDE OF THE AGREEMENT

The law is well settled that written or typed-in terms on a pre-printed form contract take precedence over and control inconsistent pre-printed terms. The Utah Supreme Court applied this well accepted canon of construction in *Bank of Ephraim v. Davis*, 559 P.2d 538 (Utah 1977), wherein the high Court explained:

One will not be permitted to so fashion a contract as to mislead another, by setting forth clearly an apparent representation, induce a contrary limitation or expansion elsewhere in the instrument. Furthermore, this court has held where there is a printed form of contract, and other words are inserted, in writing or otherwise, it is to be assumed the latter take precedence over the printed matter.

Bank of Ephraim, 559 P.2d at 540 (emphasis added). *Accord Holland v. Brown*, 394 P.2d 77 (Utah 1964). The doctrine applies whether the added terms are handwritten or typed. *See Copper State Leasing Company v. Blacker Appliance & Furniture Company*, 770 P.2d 88, 91 (Utah 1988). ("We,

therefore, hold as a matter of law that the typed-in provisions on the Acceptances take precedence over the printed words in the Acceptance.") *Holland v. Brown*, 394 P.2d 77 (Utah 1964). The doctrine is especially applicable in cases such as this where the inconsistent language is in fine print on the backside of the pre-printed *Agreement*.

Sub-Point B
THE AGREEMENT UNAMBIGUOUSLY PROVIDES
THAT THE PROPERTY WAS SOLD "AS IS"

In *Tibbitts v. Openshaw*, 425 P.2d 160 (Utah 1980), the Utah Supreme Court affirmed a decision by Judge Wahlquist that the sale of real property is subject to any contract language disclaiming warranties through an agreement that the property is sold "as is".¹

Similarly, the Utah Uniform Commercial Code also allows the use of the words "as is" to disclaim implied warranties arising through the sale of goods.

The Utah Uniform Commercial Code provides:

Notwithstanding Subsection (2) (a) unless the circumstances indicate otherwise, all implied warranties are excluded by

¹The interpretation of the unambiguous words of a contract is a question of law for the Court. See *Copper State Leasing Company v. Blacker Appliance & Furniture Company*, 770 P.2d 88, 90 (Utah 1988) citing *Kimball v. Campbell*, 699 P.2d 714 (Utah 1985).

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 plain that there is no implied warranty.

Utah Code Ann. § 70A-2-316(3)(a).

In the present case, the *Agreement* unambiguously and expressly provides that the Property was sold "as is". (See *Agreement*, paragraph 1(d)). The "as is" language was typed on the blank line following the paragraph on inspections. The added words "Buyer accepts Property 'as is'" disclaims the standard warranties provided for in fine print on the backside of the *Agreement* for several reasons. First, the added terms of the *Agreement* unambiguously disclose the intent of the parties that the Property was sold in its present condition without warranties. Paragraph 1(e) of the *Agreement* provides in relevant part:

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

Agreement, paragraph 1(e)(Record at 006).

Second, in correlation to the foregoing disclaimer, paragraph 6 of the *Agreement* also provides as follows:

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

Earnest Money Agreement, paragraph 6 (Record at 007).

Notwithstanding the foregoing, Buyers argue that the "as is" language was ineffective because it was added to the *Agreement* under paragraph 1(e). Buyers' argument is unpersuasive. The *Agreement* clearly shows that paragraph 1(e) expressly deals with the inspection and physical condition of the Property, and that it is the first and most logical place on the *Agreement* where the disclaimer terms should have been added.

Buyers also cite part of paragraph 6 and argue that by placing the word, "None." next to the line entitled "Seller Warranties" that the Seller intended to warrant the heating and plumbing. However, a review of the entire paragraph, evidences the contrary. Paragraph 6 provides as follows:

**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.
Agreement, paragraph 6 (Record at 007).

Buyers argue that the Supreme Court's decision in *Tibbitts* applies only to implied warranties and that express warranties can never be disclaimed. However, Buyers ignore the fact that the *Agreement* was a pre-printed form and that newly added terms displace inconsistent terms thereon. *Bank of Ephraim v. Davis*, 559 P.2d 538 (Utah 1977)("this court has held where there is a printed form of contract, and other words are inserted, in writing or otherwise, it is to be assumed the latter take precedence over the printed matter."); *Copper State Leasing Company v. Blacker Appliance & Furniture Company*, 770 P.2d 88, 91 (Utah 1988). ("We, therefore, hold as a matter of law that the typed-in provisions on the Acceptances take precedence over the printed words in the Acceptance."). In addition, the boiler plate warranty terms located on the backside of the *Agreement* are not incorporated into the *Agreement* because they are otherwise provided for in paragraph 6 which provides in part, "Buyer accepts property "as is". (*Agreement*, paragraph 11; Record at 007.) Moreover, this case involves a pre-printed form agreement with boiler plate language.²

²If Buyers' argument that express warranties can never be disclaimed were correct, parties to a pre-printed form agreement could never disclaim the boiler plate terms in the agreement.

Third, in addition to the foregoing disclaimers, the parties added the following terms below paragraph 12: "In consideration of the reduced down payment, Buyer agrees to install new boiler by 9/15/92." (Record at 007). Surely, no such term would have been added to the *Agreement* if the Seller had warranted the heating system was in good condition as suggested by the Buyers.

Sub-Point C
BUYERS' CASE AUTHORITY DOES
NOT SUPPORT REVERSAL OF THE TRIAL COURT

Buyers cite to *Olmsted v. Mulder*, 72 Wash.App. 169, 863 P.2d 1355 (1993), which is a decision by a Washington State appellate court. The decision was not cited or argued before the Trial Court. (See Record 095-105). More importantly, *Olmsted* is not controlling authority in Utah and is inconsistent with the decisions written by the Utah Courts which hold that warranties may be disclaimed by the use of the words "as is" without delineating the warranties disclaimed, See *Tibbitts v. Openshaw*, 425 P.2d 160 (Utah 1980), and that newly added terms to a pre-printed form agreement displace inconsistent pre-printed terms thereon. See *Bank of Ephraim v. Davis*, 559 P.2d 538 (Utah 1977); *Holland v. Brown*, 394 P.2d 77 (Utah 1964).

In *Olmsted*, the seller sold his residential property knowing that the well water was contaminated and dangerous to life. After having been informed that the well was contaminated, the seller signed a "Single Family Residence Property Information Form" wherein he warranted that the well provided an adequate supply of water to the property.³ The buyer relied on the "Single Family Residence Property Information Form" in purchasing the property. In addition, the "as is" terms were added to the addendum of the agreement by a real estate agent other than the agent representing the seller.

The facts in the present case are clearly and completely distinguishable from those in *Olmsted* for several reasons: First, the Property sold in this case is commercial not residential. As such, the duty to investigate the condition of the Property fell on the Buyers under the doctrine of *caveat emptor*. (See *Utah State Association v. Utah State Employees Credit Union*, 655 P.2d 643, 645-46 (Utah 1982); See also Seller's legal argument on *caveat emptor* in the Record at

³"Alvin Mulder admitted that Tarquinio told him that he suspected the water was contaminated. However, Mulder took no steps to investigate whether the water was contaminated prior to selling the property to the Olmsteds. Before closing the sale, Mulder filled out a Form 17 "Single Family Residence Property Information From", where he indicated that to the best of his knowledge the well provided an adequate year round supply of water." *Olmsted*, 863 P.2d at 1355.

037-38.) Second, the parties to the *Agreement* were real estate agents who were fully aware of the use of the terms "Buyer accepts property 'as is'" to disclaim warranties. Third, the "as is" terms were on the main page of the *Agreement* under the section dealing with the condition of the Property, rather than a subsequent addendum to the *Agreement*. Fourth, there was no "Single Family Residence Property Information Form" or other collateral document signed by Seller which expressly represented that the heating and plumbing systems were in good condition. In sum, the facts in *Olmsted* are quite different than those in this case, and the Buyer's reliance on *Olmsted* is misplaced.

Buyers' reliance on *Wagner v. Cutler*, 757 P.2d 779 (Mont. 1988) is also misplaced. In *Wagner*, the buyer recovered on grounds of misrepresentation not breach of contract. In fact, the court dismissed the alleged breach of habitability claim made by the plaintiff. In addition, the case involved the sale of residential property where express representations were made by the seller's agent to the buyer as to the condition of the subject property. In the present case, there are no claims that misrepresentations were made by Seller. *Wagner* is simply not on point.

Sub-Point D
THE EARNEST MONEY AGREEMENT SHOULD BE
INTERPRETED TO GIVE MEANING TO THE ADDED
WORDS THAT "BUYER ACCEPTS PROPERTY "AS IS"

The *Agreement* should be interpreted to give meaning to the words added on the face of the *Agreement*. The Utah Supreme Court has stated that courts are to interpret a contract so as to harmonize all of its terms and provisions, and all of its terms should be given effect if possible. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 110 (Utah 1990)(quoting *G.G.A., Inc. v. Leventis*, 773 P.2d 841, 845 (Utah App. 1989).

Notwithstanding the foregoing law, Buyers argue that the words "Buyer accepts property 'as is'" are consistent with the alleged express warranties. This is simply inaccurate. The words "Buyer accepts property 'as is'" are inconsistent with the boiler plate warranties asserted by Buyers in subsection C. If the Court accepts Buyers' strained interpretation of the *Agreement* that the words "Buyer accepts property 'as is'" do not exclude the inconsistent fine print warranties on the back of the *Agreement*, the new terms added by the parties become meaningless and redundant of subsection B which provides as follows:

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 Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6.

Agreement, General Provisions, paragraph B.

Conversely however, if the words, "Buyer accepts property 'as is'" are given their plain and ordinary interpretation, the words become effective in disclaiming the fine pre-printed warranties in subsection C thereby harmonizing with the other added terms to the *Agreement*.⁴

Sub-Point E
THE SPECIFIC TERMS OF THE AGREEMENT
EXPRESSLY PREEMPT THE GENERAL TERMS OF
THE AGREEMENT RELIED ON BY BUYERS

Section 11 of the *Agreement* expressly indicates that the general provisions set forth in the printed pages to the *Agreement* apply if the sections filled in by the parties do not provide otherwise. The section provides as follows:

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.

⁴The *Agreement* should be construed as a whole, the words should be considered in construing its meaning and all of the clauses harmonize with each other, and not subvert, the general intention of the parties. 17A Am.Jur.2d *Contracts* §385.

Agreement, paragraph 11 (capitalization not added) (emphasis added)(Record at 007). As stated above, the *Agreement* expressly indicates in Section 1(d) that the Property was sold "as is". Because the words "Buyer accepts property 'as is'" are contrary to subsection C of the General Provisions, the subsection C warranties were not incorporated into the *Agreement* and do not apply.

Sub-Point F
**OTHER TERMS OF THE EARNEST MONEY AGREEMENT
MANIFEST THAT THE HEATING SYSTEM WAS IN NEED OF REPAIR**

The terms added by the parties to the *Agreement* under paragraph 12 provide that Seller would give Buyer (Manka) a \$5,000.00 discount if a new boiler was installed by 9/15/92. Surely, had the parties intended the express warranties under subsection C to apply, Seller would not have agreed to reduce the down payment by \$5,000 on the condition Manka replace the boiler. The added terms manifest that the parties considered the poor condition of the heating system before entering into the *Agreement*, which is in harmony with Seller's disclaimer of warranties.

V. CONCLUSION

The law is well settled that added terms to a pre-printed agreement control the inconsistent boiler plate terms thereon. This is especially true when

the inconsistent pre-printed terms are in fine print on the backside of the agreement. In this case, the unambiguous words added to the *Agreement* which expressly provided that the property was sold "as is" control and displace the inconsistent fine print warranties in subsection C on the backside of the *Agreement* as a matter of law.

WHEREFORE, the Order of the Trial Court dismissing Buyers' *Amended Complaint* should be affirmed as a matter of law.

DATED this 7th day of April, 1995.

RAY, QUINNEY & NEBEKER

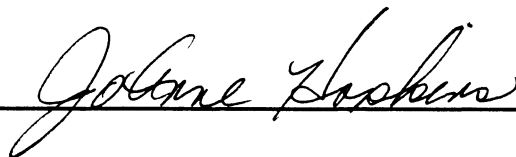
By Steven W. Call
Ira B. Rubinfeld
Steven W. Call

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Ray, Quinney & Nebeker, 79 South Main, Suite 500, Salt Lake City, Utah, and that in said capacity, true and correct copies of the foregoing *Brief of Respondent* was mailed, postage prepaid, this 7th day of April, 1995, to:

Keith W. Meade, Esq.
COHNE, RAPPAPORT & SEGAL
525 East 100 South, 5th Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008



DATE: JUNE 6, 1992

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

<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 checked="" type="checkbox"/> connected
<input type="checkbox"/> septic tank <input type="checkbox"/> connected	<input checked="" type="checkbox"/> irrigation water / secondary system	<input checked="" type="checkbox"/> ingress & egress by private easement
<input type="checkbox"/> other sanitary system _____	# of shares _____ Company _____	<input checked="" type="checkbox"/> dedicated road <input checked="" 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"/> curb and gutter
<input type="checkbox"/> private water <input type="checkbox"/> connected	<input checked="" type="checkbox"/> natural gas <input checked="" 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 aforesaid 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 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>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 1/4%, 25 year amortization, monthly \$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>
\$ <u>505,000.00</u>	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 agrees to make application within 15 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 10 1/4 %. If Buyer does not qualify for the assumption and/or financing within 15 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 15 % mortgage loan discount points, not to exceed \$ 1500.00. In addition, seller agrees to pay \$ 1500.00 to be used for Buyer's other loan costs.

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, 1992 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, 1992 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

(Buyer's Signature) _____ (Date) _____ (Address) _____ (Phone) _____ (SSN/TAX) _____

(Buyer's Signature) _____ (Date) _____ (Address) _____ (Phone) _____ (SSN/TAX) _____

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) James St (Date) 6-2-92 (Time) _____ (Address) _____ (Phone) _____ (SSN/TAX) _____

(Seller's Signature) _____ (Date) _____ (Time) _____ (Address) _____ (Phone) _____ (SSN/TAX) _____

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 BUYER _____ SIGNATURE OF SELLER _____

_____ Date 6-2-92 _____ Date _____

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19____.

Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by _____.

Legend Yes (X) No (O)

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



GENERAL PROVISIONS (Sections)

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, 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.

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 a 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, such inspection shall be allowed by Seller but arranged for and paid by Buyer.

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.

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.

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.

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 or other debt instruments 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 agree to 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, the 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.

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. After closing, 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.

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 be free of 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 received, 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 title insurance charge.

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.

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

s 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, it 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 or 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, 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 existing 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.

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.

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

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

GE FOUR OF A FOUR PAGE FORM.

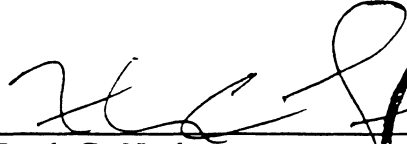
	:	
Melvin Grossgold,	:	MINUTE ENTRY
Plaintiff,	:	
	:	Civil No. 930907514 CN
vs.	:	
	:	JUDGE FRANK G. NOEL
James C. Ziter,	:	
Defendant.	:	

The court grants defendant's motion for the reason that the language contained in the contract, "Buyer accepts property "as-is"", is clear and unambiguous. This provision is typed into the contract and supersedes the other printed provisions of this pre-printed form, particularly those general provisions which are pre-printed in fine print on the reverse side of one of the pages of the contract. The language the parties used "buyer accepts property as is" has been given legal significance by the courts of Utah and in the opinion of the court is clear and unambiguous and accordingly grants defendant's motion.

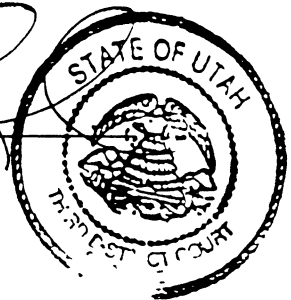
As to the second ground for defendant's motion the court is of the opinion that defendant Ziter does not have standing to assert the Statute of Frauds with regard to the oral assignment of the earnest money contract from Manka to Grossgold.

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

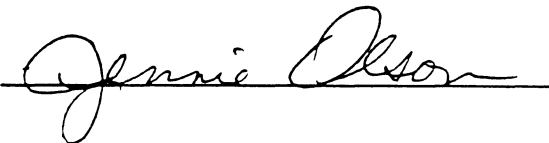


MAILING CERTIFICATE

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.

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

GOV 13 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 Cohn, Rappaport & Segal appeared on behalf of plaintiffs Melvin Grossgold and Bruce Manka.

The Court having considered the defendant's *Motion to Dismiss*, the memoranda and affidavits filed in support and opposition thereto and having considered defendant's subsequent *Motion for Additur of Reasonable Attorneys' Fees and Costs* and for other cause appearing,

HEREBY ORDERS THAT:

1. Defendant's *Motion to Dismiss* is hereby granted on the basis that the language contained in the *Earnest Money Sales Agreement* providing that "Buyer accepts property as-is" is clear and unambiguous, that the provision was typed into the *Agreement* and supersedes the other printed provisions on the pre-printed *Agreement*, particularly those general provision that are pre-printed in fine print on the reverse side of one of the pages to the *Agreement*.

2. Defendant's *Motion for Additur of Reasonable Attorneys Fees and Costs* is granted on the grounds that the *Agreement* between the parties provided for the award of attorneys fees.

3. Plaintiffs shall pay to defendant \$ 8,703.50 in attorneys' fees which have determined to be reasonable pursuant to Rule 4-501 of the *Utah Code of Judicial Administration*.

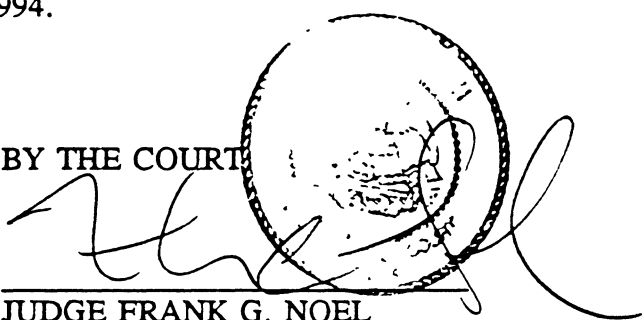
4. Plaintiffs shall pay to defendant the costs of the action in the amount of \$647.25 in compliance with Rule 54(d) of the *Utah Rules of Civil Procedure*.

*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 18 day of October, 1994.

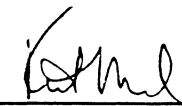
BY THE COURT



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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Order Dismissing Case and
Awarding Reasonable Attorneys' Fees and Costs was mailed this ____ day of October, 1994,
to:

Keith W. Meade, Esq.
COHNE, RAPPAPORT & SEGAL
525 East 100 South, 5th Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008

Steven W. Call
RAY, QUINNEY & NEBEKER
79 South Main
P. O. Box 45385
Salt Lake City, Utah 84145

Clerk of the Court