1995

# Dennis A. Lott and Francine G. Lott v. Kerry L. Knighton and Ralph J. Marsh : Reply Brief

Utah Court of Appeals


Mark A. Larsen; Kristine Edde; Campbell Maack & Sessions; Attorneys for Appellants.
Ralph J. Marsh; Backman, Clark & Marsh; Attorneys for Appellees.

**IN THE UTAH COURT OF APPEALS**

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| DENNIS A. LOTT and FRANCINE G. LOTT, | : | |
| Plaintiffs/Appellants, | : | **REPLY BRIEF OF APPELLANTS** |
| vs. | : | |
| KERRY L. KNIGHTON and RALPH J. MARSH, | : | Case No. 950760-CA |
| Defendants/Appellees. | : | Priority No. 15 |

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**APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, JUDGE HOMER F. WILKINSON**

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### I.

**THIS COURT MUST REVIEW THE DISTRICT COURT's INTERPRETATION OF THE TERMS OF THE EARNEST MONEY SALES AGREEMENT IN ORDER TO ADDRESS THE PROPRIETY OF THE DISTRICT COURT's AWARD OF ATTORNEY'S FEES TO KNIGHTON.**

One of the issues presented by this appeal is the propriety of the District Court's award of $8,845.50 in attorney's fees to defendant Knighton. Such award was premised upon and entered pursuant to the terms of the parties' Earnest Money Sales Agreement in accordance with the Court's finding that (1) time did not become of the essence until fifteen days after the scheduled date of closing; and (2) the delays in closing were due to the Lotts rather than Knighton and Marsh. In order to determine the propriety of the District Court's award of fees, this Court must address the provisions of the Earnest Money Sales Agreement under which such fees are claimed, and determine which party in fact breached the Agreement. Consequently, Knighton's attempt to argue that this Court should essentially ignore the provisions of the Earnest Money Sales Agreement is senseless.

Paragraph N of the parties' Earnest Money Sales Agreement provides for an award of attorney's fees:

> 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 . . . .

By the plain language of this Paragraph, a necessary prerequisite to any award of attorney's fees is a finding as to which party breached the terms of the Agreement. Here, the District Court found, in clear contravention of the substantial issues of disputed fact, that the Lotts breached the Agreement. To do so, the District Court was required both to interpret the time is of the essence provision of the Agreement and to address the factual issues presented by each party's performance. On appeal, then, this Court must consider the District Court's findings before it can determine whether or not the attorney's fee award was proper.

This Court's decision in *Cobabe v. Crawford*, 780 P.2d 834 (Utah Ct. App. 1989), cited by appellees at page 16 of their Reply Brief, is supportive of the Lotts' position. The *Cobabe* Court held that, where the sales contract in dispute awarded attorney's fees to the "successful party," the appellate court's role is to determine whether the trial court erred by finding that there was no prevailing party. *Id.* at 836. To review the trial court's decision, this Court necessarily had to consider the issue of which party prevailed under the contract.

Here, the Lotts merely ask this Court to follow the precedent of *Cobabe* and determine the propriety of the District Court's award of attorney's fees by the only means possible: determining entitlement to such fees under the Agreement by resolving the issue of which party in fact breached the terms of the Agreement. This does not amount to "rearguing the merits," as claimed by Knighton and Marsh; rather, it is the only possible means by which this Court may address the issues presented for appeal.

## II.

## KNIGHTON AND MARSH ARE RESPONSIBLE FOR THE BREACH OF THE EARNEST MONEY SALES AGREEMENT, REGARDLESS OF THE INTERPRETATION OF THE TIME IS OF THE ESSENCE CLAUSE.

The crucial fact presented by this appeal is that the subject sale was required to close on May 1, 1994, but the Lotts did not receive the Note and Trust Deed necessary to close such sale until June 9, 1994. Regardless of the interpretation of the time is of the essence clause, then, someone breached the Agreement. For the District Court to have held that the Lotts breached the Agreement, in light of the substantial issues of disputed fact which were presented, is perplexing at best.

Despite the plain language of paragraph Q of the Earnest Money Sales Agreement, which provides that extensions of the May 1, 1994, closing date are to be granted only upon certain types of extraordinary occurrences which are not at issue here, the District

Court found that time did not become of the essence until fifteen days after the designated closing date. As fully set forth in the Lotts' Opening Brief, the District Court's finding is in clear contravention of the express contractual language and prevailing principles of contractual interpretation.[1] Furthermore, the case relied upon by Knighton and Marsh in support of their interpretation, *Krantz v. Holt*, 819 P.2d 352 (Utah 1991), does not constitute binding authority because the issue of the enforceability of the time is of the essence clause was not even presented to the Supreme Court by the parties.

However, assuming arguendo, that the District Court's interpretation was in fact correct, and the time is of the essence clause did not take effect until May 16, 1994, fifteen days after the scheduled closing, Knighton was <u>still</u> was in default. Knighton and Marsh attempt to obfuscate their failure to perform by claiming that the Lotts were in breach because they did not designate the location of the closing or obtain a title report[2]. As the closing

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[1] Utah courts have held that time is of the essence clauses will be enforced where performance is untimely or nonexistent *Barber v. Francis*, 741 P.2d 548 (Utah Ct.App. 1987), and that ambiguities should be construed against the party responsible for drafting of the Agreement (here, Knighton and Marsh) *Matter of Orris' Estate*, 622 P.2d 337 (Utah 1980).

[2] Knighton also asserts that the Lotts were not in a position to convey title because the property was in fact titled in Zions First National Bank. However, as the closing agent, Marsh should have discovered the defect, as he was obligated to obtain title

agent, however, Marsh was responsible for both of these tasks.

What Knighton and Marsh fail to mention, and what makes the District Court's decision so puzzling, is the fact that, clearly, one party was in default as evidenced by the fact that closing was set to occur on May 1, 1994, or, even under the District Court's interpretation, by May 16. However, the Lotts did not receive the Trust Deed and Note necessary for closing until June 9, 1994. This delay was due solely to Knighton and Marsh. The Lotts requested minor changes in the Trust Deed on May 16. In light of his own delay, Knighton's assertion that he did "everything required of him to close the transaction by April 29, 1994" is flatly erroneous. (See Appellee's Brief, p. 28). Knighton failed to tender performance within either interpretation of the time is of the essence clause and was in clear breach of the Agreement. The District Court's grant of summary judgment upon these facts is clearly unsupported. Consequently, any award of attorney's fees to Knighton cannot be sustained.

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insurance, and did obtain a Deed to cure the defect in title shortly after the discovery of such defect. (See Exhibit H to the Lotts' opening brief).

## III.

**THE MERGER DOCTRINE EXPRESSLY PRECLUDES ANY AWARD OF FEES ON APPEAL TO KNIGHTON.**

There is no basis for an award of fees on appeal to Knighton; consequently, such an award must be denied. The only potential basis for such an award is the Earnest Money Sales Agreement, the terms of which were extinguished upon the Lotts' court-ordered delivery of the Warranty Deed to Knighton under the merger doctrine. This case does not present an exception to the merger doctrine, nor is there any other basis for such an award, as Knighton argues.

As fully set forth in the Lotts' opening Brief, the delivery and acceptance of a Warranty Deed extinguishes the terms of a previous contract for the sale of land. *Secor v. Knight*, 716 P.2d 790, 792 (Utah 1986). This principle, which was recently reiterated by this Court, *Maynard v. Wharton*, 912 P.2d 446 (Utah Ct.App. 1996), applies with equal force to an attorney's fees clause contained in an Earnest Money Sales Agreement. *Espinoza v. Safeco Title Ins. Co.*, 598 P.2d 346, 348 (Utah 1979). Here, Paragraph O of the parties' Earnest Money Sales Agreement contained an express abrogation clause. Consequently, the attorney's fee provision of the Agreement was extinguished by the Lotts' delivery of the Warranty Deed, and its provisions are no longer valid.

Nor has Knighton identified any other basis for an award of fees on appeal. Knighton attempts to argue that the "collateral" exception to the merger doctrine applies; specifically, that the Lotts have a "collateral" obligation to pay attorney's fees to Knighton in an action by Knighton to compel them to convey title, including fees incurred to defend a resulting judgment.

The collateral exception was set forth by the Utah Court of Appeals in *G.G.A., Inc. v. Leventis*, 773 P.2d 841 (Utah Ct. App. 1989). However, in *Leventis*, the court found that the collateral exception applied because the parties had clearly entered into an express agreement collateral to the conveyance of real property: specifically, the seller would remove certain equipment from the building. *Id.* at 844.

Here, there was no such express agreement. The Earnest Money Sales Agreement contained an standard attorney's fee provision with an abrogation clause. The Agreement presents a textbook case for application of the merger doctrine. Nor are the remaining cases cited by Knighton of any assistance. *Cabrera v. Cottrell*, 694 P.2d 622 (Utah 1985) and *Cobabe v. Crawford*, 780 P.2d 834 (Utah Ct. App. 1989). In neither case is the application of the merger doctrine at issue.

Furthermore, Knighton has provided absolutely no support for his attempt to rely upon Rule 33 of the Utah Rules of Appellate

Procedure as a basis for an award of fees on appeal. This Court has held that such sanctions are to be applied only in egregious cases, to avoid chilling the right to appeal. *Porco v. Porco*, 752 P.2d 356 (Utah Ct.App. 1988). "Frivolous" appeals have been defined as those lacking in any reasonable legal or factual basis, *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct.App. 1989), such as mischaracterization and misstatement of evidence and law. *Eames v. Eames*, 735 P.2d 395 (Utah 1987). Here, the Lotts have presented an extensive chronology of disputed facts, in light of which the District Court's decision compels review, as well as significant issues of law regarding the interpretation of the time is of the essence" clause. Consequently, there is no basis for an award of fees under Rule 33, nor has Knighton identified any specific justification in support of such award.

## CONCLUSION

Knighton and Marsh's argument fails to realize that, in order to consider the issues presented by this appeal, namely, the recoverability of attorney's fees, this Court must determine (1) the proper interpretation of the "time is of the essence" clause; and (2) which party breached the Earnest Money Sales Agreement by failing to tender performance. It is simply illogical to argue, as do Knighton and Marsh, that the propriety of the attorney's fee award can be considered absent such determination.

Furthermore, an analysis of the disputed facts demonstrates that the District Court erred by finding that the Lotts were the breaching party. Knighton failed to tender the Trust Deed and Note until well after the expiration of the time is of the essence clause, even under the District Court's interpretation. Knighton has advanced absolutely no justification for his failure to timely tender performance. Knighton attempts to shift the blame to the Lotts for failure to perform acts which in fact were Marsh's responsibility in order to obfuscate the fact of his non-performance.

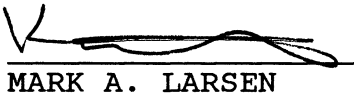
Finally, there is absolutely no basis for an award of attorney's fees on appeal. In fact, the merger doctrine expressly prohibits such award. Knighton has advanced no argument sufficient to overcome the application of the merger doctrine; the collateral exception does not apply, as the parties entered no collateral agreement. Nor has Knighton suggested any justification for an award of fees under U.R.A.P. 33.

Consequently, the Lotts request that: (1) should this Court find that the time is of the essence clause took effect on May 1, 1994, this case be remanded to determine the issue of attorney's fees to the Lotts; or, in the alternative, should this Court find that the clause took effect on May 16, 1994, then the fee award should be reversed and the case remanded to determine which party

breached; and (2) Knighton and Marsh's claim for fees on appeal should be denied.

DATED: January 13, 1997.

CAMPBELL MAACK & SESSIONS



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of January 1997, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed, postage prepaid, first-class, to:

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