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E. A. Russell, Martell E. Russell v. Park City Utah Corporation : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. A. RUSSELL and MARTELL E. RUSSELL,

Plaintiffs-Respondents,

vs.

PARK CITY UTAH CORPORATION, et. al.

Defendants-Appellant

Supreme Court
No. 14124

PETITION FOR REHEARING AND

BRIEF OF APPELLANT PARK CITY UTAH CORPORATION

Appeal From The Judgment Of The Fourth Judicial District Court For Summit County, The Honorable Allen B. Sorenson, Presiding.

* * * * * * * * * * * * *

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. A. RUSSELL and MARTELL E. RUSSELL, Plaintiffs - Respondents, vs. PARK CITY UTAH CORPORATION, et al., Defendants - Appellant.	APPELLANT'S PETITION FOR REHEARING No. 14124

In accordance with Rule 76 (e) (1) of the Utah Rules of Civil Procedure, the Appellant respectfully petitions this Honorable Court for a rehearing, on the ground that the Court has misquoted, misconstrued and omitted certain material facts in its written opinion filed in this proceeding on April 8, 1976, and has reached its decision by incorrectly applying the law, as relates to the severability of certain land purchase privileges contained in the March 31, 1967 Lease and Purchase Agreement (Exhibit 11) constituting the subject matter of the original appeal herein.

STATEMENT OF THE CASE

From the lower court's judgment against Appellant which determined that the subject Lease and Purchase Agreement (Exhibit 11) had been cancelled, the Appellant took the within appeal to reverse said court below. The issues were generally divided between the lease forfeiture question and severability of the land purchase privileges from the leasehold. This Court rendered its decision under date of April 8, 1976, affirming the lower court's judgment, with Justice Maughan's dissent holding that the remaining option was independent and severable from the leasehold interest.

STATEMENT OF FACTS

On March 31, 1967, Appellant's predecessor and the Respondents executed a "Lease and Purchase Agreement" (Exhibit 11).

On or about May 2, 1967, Appellant's said predecessor mailed the sum of $2,000.00 to Respondents (Exhibit 18) as required by the "Addendum" (Exhibit 11, last page) to paragraph VI, page 4, of said Lease and Purchase Agreement. Said $2,000.00 was the prior consideration for exercising all three land purchase privileges set forth in paragraphs IV and VII of said agreement.

Having mailed said $2,000.00 consideration for the three land purchase privileges (Exhibit 11: Page 3, Par. IV, 35 acre option .... Page 4, Par. VII, first refusal .... Page 5, Par. VII, March 31, 1977 option) to Respondents on May 2, 1967, five months later in October, 1967, the first option was "exercised" whereby "an escrow ... [was] opened by Lessee" as recited on Page 3, Par. IV, of the agreement.

Said first property purchase being thus initiated in October 1967, there was $1,600.00 cash and a mortgage note for $8,520.00 delivered into escrow for the 35 acres, at that time. The May, 1967, $2,000. consideration was not credited upon any land purchase until said escrow was opened 5 months later.

The initial rental check on the leasehold was not paid by Appellant's predecessor, but was remitted directly by said predecessor's sub-tenants after the aforementioned purchase escrow (Exhibits 13 and 14) closed in November, 1967. Said November, 1967, rental payment was the first cash consideration paid upon the leasehold.

During the first half of 1971, a controversy ensued between Appellant, successor to the lessee-land-purchaser interest under the agreement, and the Respondents, whereby the latter sought to terminate both the leasehold and the land purchase privileges resulting in the litigation encompassed by the within appeal.

Under date of July 1, 1971, Respondents entered into a Lease Agreement With Option To Purchase with Appellant's sub-tenants (Exhibit 26), purportedly excluding Appellant's interest under its agreement (Exhibit 11).

By its terms, said July 1, 1971, agreement granted to Appellant's said sub-tenants a right of first refusal together with a fixed option to purchase exactly the same land upon almost identical terms (Exhibit 26, Par. 8-10) as was granted Appellant under the latter's prior agreement herein (Exhibit 11). Whereas Appellant was to exercise its option on March 31, 1977, the sub-tenants were given until June 30, 1981, (Exhibit 26; Par. 1, 8 and 9). However, no separate consideration for the land purchase was provided for in said July 1, 1971, agreement as was the case in Appellant's agreement (Exhibit 11; Page 4, Par. VI).

ARGUMENT

POINT I: THIS COURT'S WRITTEN DECISION CONTAINS MATERIAL FACTUAL ERROR, THROUGH MISQUOTATION, MISCONSTRUING AND OMISSIONS OF SUBSTANCE.

[A] RE: FIRST REFUSAL RIGHT

This Court quotes a provision, presumably from Exhibit 11, which does not exist, to wit:

> "Lessee from and after the 1st day of November, 1968, has the irrevocable right to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors ... said right of purchase to remain in existence during the entire term of the lease [All emphasis herein added]".
>
> Utah Supreme Court decision, No. 14124, Page 3
>
> (See Appendix A to this brief)

Reference to said Exhibit 11, the Lease and Purchase Agreement of March 31, 1967, Page 5, near top of page, (See Appendix B to this brief) discloses that one-half of this Court's aforesaid quotation was crossed out, including most of the Court's emphasized portion, and words were added thereto by Respondents all of which embodied an entirely separate, distinct "option" having nothing whatever to do with the first refusal right set forth on the previous page of said Exhibit 11.

Predicated on the foregoing erroneous quotation, the Court misconstrues the very nature of Appellant's position by this crucial observation:

> "The parties are in sharp disagreement as to the meaning of the just quoted language of the lease, particularly the emphasized portion. Defendants position is that the covenant that the right of purchase shall exist 'during the entire term of the lease' is a severable covenant .... Whereas, plaintiff contend to the contrary and that it was intended as an integral part of the total composite of the lease;" (Emphasis added)

Utah Supreme Court decision, No. 14124, Page 3
(See Appendix A hereto)

Appellant respectfully represents that the Court's conclusion just quoted is entirely in error, in that: 1) the parties are in no disagreement as to the meaning of the "emphasized portion", or that it was excised from the agreement, or that the handwritten words added at the instance of Respondents refer to an "option" not to the right of first refusal described on Page 4, Par. VII. of the subject agreement; 2) the Defendant-Appellant has not taken a position regarding any right based upon a covenant which states "during the entire term of the lease", since no such covenant remains in the agreement; 3) the Plaintiffs-Respondents have never contended "that it was intended as an integral part" of the agreement, in view of the foregoing.

Further to the above analysis, the Court mistakenly recited the time limits of the said first refusal right as:

> "....which granted to the defendant the first right of refusal to purchase any part of the land during the 'entire term' of the lease." (Emphasis added)
>
> Utah Supreme Court decision, No. 14124, Page 2, bottom.
> (See Appendix A hereto)

Reference to Exhibit 11, covering that part of the agreement dealing with the time limits of said first refusal right, reveals this provision:

> "From and after the 1st day of November, 1968, Lessors shall have the right to sell the entire leased premises, less any portion theretofore purchased by Lessee from Lessors, to any bona fide third party. However Lessors shall extend to Lessee the first and prior right of such land purchase at the same price and upon the same terms offered to Lessors by said bona fide third-party or at the land's appraised value ..." (Emphasis added)
>
> March 31, 1967, Lease and Purchase Agreement, Page 4, Par. VII
> (Exhibit 11)

Nowhere in the foregoing is the first refusal right restricted to: "during the entire term of the lease" (Utah Sup. Ct. Decision herein, Page 2, supra.).

On the contrary, said provision (Exhibit 11, Page 4, supra) gives an absolute right to purchase "from and after the 1st day of November, 1968" and ceases to be operative only when the Respondents obtain a "bona fide third-party" offer to buy, whereupon said provision will terminate either by Appellant's purchase on the terms specified or by declining such right.

[B] RE: THE MARCH 31, 1977 OPTION

It is apparent from the analysis hereinbefore set forth under the First Refusal Right portion hereof (POINT I - A, supra) that this Honorable Court overlooked the fact that the subject agreement contained a third purchase privilege in the form of an "option" (Appendix B, second paragraph) to be exercised on March 31, 1977, when the lease had ended. Thus, there were two options and a right of first refusal constituting a total of three purchase privileges paid for by Appellant when they remitted their $2,000.00 cash consideration on May 2, 1967 (Exhibit 18) in accordance with Page 4, Paragraph VI, and the "Addendum", in the agreement (Exhibit 11).

Said oversight by the Court no doubt explains why they keep referring to just one "option" instead of considering both options. Nowhere in this Court's opinion is the March 31, 1977, option referred to as such and the entire decision gives the impression that there were merely two purchase privileges, namely the 35 acre option and the first refusal right. In any case, Appellant is compelled to respectfully draw this Court's attention to certain erroneous implications and express recitals relating to this issue.

For the Court's opening statement on this subject, the decision contains references to "the option", involving only the 35 acres. Of particular significance in said opening there appears:

> "Paragraph VI of the lease provided that the lessees (defendants) would deposit $2,000.00 with plaintiffs as consideration for the option, in addition to all other covenants in the lease ... The defendant exercised the option as to part of the land in May, 1967." (Emphasis added)
>
> Utah Supreme Court Decision, No. 14124, Page 1, Fifth Paragraph (See Appendix A)

Notice that the underlined portions of the Courts' above quoted statement are inconsistent with what the agreement actually says here:

> "As a further consideration for the above option [referring to Paragraph IV and the 35 acres only], and other privileges to purchase hereinafter recited [referring to the first refusal right, and the March 31, 1977, option on Page 5 of the agreement], and in addition to the other covenants and conditions contained in this Agreement, Lessee agrees and herewith deposits with Lessors the sum of $1,000.00 cash ["Addendum" attached to agreement raised amount to $2,000.00, to be paid by May 5, 1967]." (Emphasis added)
>
> Lease and Purchase Agreement, Page 4, Par. VI (Exhibit 11)

Said provision just quoted does not state the cash deposit "exercised" any purchase privilege, 35 acre option or otherwise, but merely describes what the consideration shall be for all three land purchase privileges, not just the 35 acre option.

Also relating to this Court's aforementioned quoted recitation (supra) appearing on the first page of the decision, where it states: "The defendant exercised the option as to part of the land in May, 1967", it must be pointed out that said 35 acre option was "exercised" in October, 1967, (Exhibit 13) by opening an escrow and remitting $1,600.00 cash with the execution of a mortgage note for $8,520.00, in accordance with this requirement:

"This option to purchase shall be exercised by Lessee on or before the 15th day of November, whereupon an escrow shall be opened." (Emphasis added)

Lease and Purchase Agreement, Page 3, Par. IV (Exhibit 11)

In support of Appellant's said position, Words & Phrases, West Publishing Company, 1970 Edition, Volumes 15A and 45 respectively, define certain of the above key terms in this fashion:

"The 'exercise' of an option to purchase is merely the election of the optionee to purchase. (Emphasis added) Floyd v. Morgan, 4 S.E. 2d 91, 97"

"Whereupon is defined as immediately after. In re Premises 230 South, etc., 177 A. 700, 703, 117 Pa. Super. 132" (Emphasis added)

Thus, on May 2, 1967, (Exhibit 18) the consideration for all three purchase privileges (35 acre option on Page 3 .... First Refusal Right on Page 4 .... March 31, 1977, Option on Page 5) was sent to Respondents under the agreement (Exhibit 11, Page 4, Par. VI) and the first such privilege was not "exercised" by opening escrow until five months later in October of 1967 (Exhibit 13), with the said escrow closing just before the required November 15, 1967, deadline (Exhibit 14). Further, about the time said escrow closed, the very first rental payment on the leasehold was tendered in November, 1967, (Exhibit 1) being wholly separate and distinct from the said land purchase consideration of $2,000.00 paid six months earlier (Exhibit 18).

Had neither the 35 acre option been exercised by opening escrow or the first rental payment of $4,855.00 been paid by Ski Park West, there was no legal obligation for Respondents to return the $2,000.00 land consideration and Respondents could have re-leased to others for any rent they wished, still subject to the remaining two purchase

privileges for which the $2,000.00 was paid (first refusal and March 31, 1977 option).

In any case, Respondents clearly derived a separate and additional benefit from the $2,000.00 paid in May, 1967, over and beyond any and all other consideration involved in the agreement, by virtue of the interest bearing value such sum possessed for six months, and the advantage to Respondents who could enjoy the use of said sum six months before the 35 acre option - escrow and the first leasehold rental would benefit Respondents in November of 1967.

THEREFORE, our analysis of the subject March 31, 1977, option, found on Page 5, of the agreement (see Appendix B) has reached the point in this brief where Appellant must again review those matters previously encountered herein under POINT I-A, in order to fully evaluate this Honorable Court's decision as it specifically relates to said March 31, 1977, option.

The Court's reference, on Page 3 of the decision, to "Paragraph VI of the lease", is accurately quoted and clearly interpreted in that said $2,000.00 cash is "further consideration" for the 35 acre option, "and other privileges to purchase", thus implicitly including the first right of refusal (POINT I-A herein) and the subject March 31, 1977, option now under discussion.

However, where the Court continues its opinion in this regard in an effort to connect the aforesaid Paragraph VI with the purported Paragraph VII quotation on said page 3 of the decision (Appendix A) and accurately relate the latter to any existing purchase right, such effort of course fails entirely. Said latter material quoted by the

Court does not reflect what is written in the agreement (Appendix B). Here is what the agreement does say, resulting from Respondents' action in changing the subject agreement by striking out portions thereof and adding words:

> "Lessee has the option to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors at its appraised value and terms as immediately above set forth [referring to down payment, interest rate, installments, etc.] at the termination of the 10 year lease term, March 31, 1977. Lessees will notify Lessors in writing of their intention to exercise this option 30 days prior to termination of lease." (Emphasis added)
>
> March 31, 1967, Lease and Purchase Agreement, Page 5
> (See Appendix B)

The last and concluding paragraph on Page 3 of the Court's decision employs a rationale which does not apply to the above-mentioned option just stated.

On the contrary, the crucial phrase quoted by the Court and used as a basis for attributing uncertainty to the agreement, namely: "during the entire term of lease", does not remain anywhere in the parties' purchase provisions the same having been crossed out and other words added by Respondents.

Said option appearing on Page 5 of the agreement is full, complete and framed simply. There are two parts: 1) the first sentence creates an absolute right to purchase on an exact date, March 31, 1977; 2) the second sentence merely establishes that notice of the Lessee's intention to exercise be communicated in writing to Lessors 30 days prior to March 31, 1977.

The very fact that Respondents crossed out "said right of purchase to remain in existence during the entire term of this lease", and then established a fixed date of March 31, 1977, can leave no doubt as to when the parties contemplated a purchase of the remaining land would finally

Respondents cannot now plead that they expected Appellant to exercise this option while the leasehold was in effect since by its very terms the Appellant was forced to wait until the lease had "terminated" and exercise said option on a date certain, March 31, 1977. This is the right the $2,000.00 cash consideration paid for in May, 1967, pursuant to these clear, unequivocal words:

> "As a further consideration for the above option, and other privileges to purchase hereinafter recited, and in addition to the other covenants and conditions contained in this Agreement, Lessee agrees and herewith deposits ..." (Emphasis added).
>
> March 31, 1967, Lease and Purchase Agreement, Page 4, Par. VI (Exhibit 11)

Moreover, whatever other obligations were to be performed by Lessee in connection with the leasehold, such as paying rent, the clause underlined above: "and in addition to the other covenants and conditions contained in this Agreement" (Exhibit 11, Par. VI, supra) effectively, by itself, separated and severed the purchase privileges from the rest of the lease including said rent payments.

POINT II: THE LEGAL PRINCIPLES STATED IN THE COURT'S DECISION HEREIN, TOGETHER WITH COLLATERAL LAW THERETO, SUPPORT APPELLANT'S PETITION.

[A] RE: FORFEITURE; PARTIES' INTENT; ENFORCING TERMS.

The within proceeding boils down to whether or not Appellant should be required to forfeit the remaining two land purchase privileges already paid for with the sum of $2,000.00 (POINT I, "A" and "B"). This Court proclaimed a basic guideline in its decision herein:

"It is true, as defendant argues, that forfeitures are not favored in the law, and that forfeiture provisions will be strictly construed against the one who seeks to enforce them. But it is also true that parties are free to contract according to their desires ... that the contract should be enforced according to its terms ..."
(Emphasis added)

Utah Supreme Court Decision, No. 14124, Page 2, Par. 4
(See Appendix A hereto)

Applying the three fundamentals, raised by the statement just quoted, to the land purchase privilege issue, it would be unconscionable to force forfeiture upon Appellant when the Respondents have clearly manifested their continuing desire to sell their land, as demonstrated by: Appellant's first refusal right which prevails "from and after the 1st day of November, 1968" (Exhibit 11, Page 4) unlimited as to duration; Appellant's option which can only be exercised on March 31, 1977, (Exhibit 11, Page 5), a date clearly in the future; and, the fact Respondents have reaffirmed their desire to sell even in the purported option given to Appellant's subtenants, on essentially the same basis as given to Appellant, which provision runs to June 30, 1981 (Exhibit 26, Pages 1, 3). Finally, since the expression "said right of purchase to remain in existence during the entire term of the lease" (Appendix A, Page 3 middle), is not part of the parties' agreement, thus removing the uncertainty mistakenly relied upon by the Court for its decision, now the terms of the remaining two purchase rights need nothing extraneous to make them operative and should be enforced. Further, by enforcing said remaining two purchase privileges in favor of Appellant no prejudice whatever

can result to Respondents as they will merely obtain the benefits of a land sale originally intended by them on March 31, 1967 (Exhibit 11), which intention has never ceased as indicated by the aforesaid purported agreement with Appellant's subtenants (Exhibit 26, Page 3, Paragraphs 8 to 10) that runs to June 30, 1981.

Thus, wholly apart from all the other legal elements supporting Appellant's position herein, the equities also favor Appellant as embraced by these rules:

> "The presence of independent equities or grounds for relief from forfeiture may constitute a basis for enforcement of or other appropriate relief respecting such an option, although the lease in which it was contained and upon which it was dependent [Note: Nevertheless, Appellant's purchase rights are independent of the terminated lease herein] has been terminated."
>
> 115 ALR 376, 384

> "A construction which is just and fair to both parties will be preferred to one which is unjust or unfair [citing many cases]" (Emphasis added)
>
> 17 Am. Jur 2d Contracts, P. 646

[B.] RE: CONSIDERATION; SEVERABILITY

This Court has clearly expressed the fundamental doctrine governing whether Appellant's remaining two purchase privileges survive:

> "In this instance, for the purpose of determining whether this right of refusal survived the termination of the lease, we think the same rule applies as that which governs options contained in leases: that is, if by the express terms of the option, it can be seen as independent of the other covenants of the lease, and is supported by a valid consideration, it can continue in existence notwithstanding the lease's termination."
>
> Utah Supreme Court decision, No. 14124, Page 3
> (Appendix A hereto)

In this connection it is implicit that the relevant provisions of the lease can be narrowed down to paragraphs VI and VII, concerning both of the remaining two purchase privileges due Appellant (i.e. first refusal, Page 4; March 31, 1977, option, Page 5).

This Court agrees with the foregoing and has identified the material part of said Paragraph VI that bears on the problem, as follows:

> "As a further consideration for the above option, and other privileges to purchase hereinafter recited, and in addition to the other covenants and conditions contained in this agreement, Lessee agrees and herewith deposits with Lessors the sum of $2,000.00 cash ..." (Emphasis added)
>
> Utah Supreme Court decision, No. 14124, Page 3 (Appendix A hereto)

The full significance of said unequivocal statement just quoted, in creating severability of Appellant's remaining two purchase privileges on the basis of consideration alone, is demonstrated in these terms:

> "That is, if the consideration is single, the contract is entire, but if the consideration is expressly or by necessary implication apportioned, the contract is severable. Thus, where several things are to be done under a Contract, and the money consideration to be paid is apportioned to each of the items [i.e. $2,000.00 on options .... rent on leasehold], the contract is ordinarily regarded as severable [citing many, many cases]." (Emphasis added)
>
> 17 Am Jur 2d Contracts, Sect. 326

Also supporting the view that the nature of the consideration alone is the primary test of severability, this Court in a Utah case (Thomas J. Peck & Sons, Inc. vs. Lee Rock Products, Inc., 515 P2d 448; Footnote 2), involving the severability of an option from a leasehold, refers

the reader to the following authority:

> "Another test that has been suggested is the possibility or impossibility of a certain apportionment of benefits, according to the compensation in the contract, in case of part performance only. The singleness or apportionability of the consideration appears, however, to be the principal test. If the consideration is single, the contract is entire; but if the consideration is expressly or by necessary implication apportioned, the contract is severable. The question is ordinarily determined by inquiring whether the contract embraces one or more subject-matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned." (Emphasis added)
>
> Knapp v. Strauss, 58 S.W. (2d) 808 (middle of second column); [Said case is quoting from 6 R.C.L. 858, Sect. 246]

It should be observed that, beyond the consideration question, Appellant's options meet the other severability criteria just quoted: apportionment of benefits in case of part performance, more than one subject matter and different time frames for performance.

Recalling again that the subject $2,000.00 cash consideration for all three purchase privileges (Exhibit 11, Page 3; Page 4; Page 5, respectively), was paid on May 2, 1967, (Exhibit 18), and that the first purchase privilege was not "exercised" until October, 1967 (See analysis: POINT I-B herein), so that Respondents had the use of said money for six months, including its interest bearing value, before any further cash or other consideration was received by them, the following fundamental rule is relevant in ascertaining the sufficiency of said payment:

"It is fundamental that adult persons suffering from no disabilities have complete freedom of contract, and ordinarily the courts will not inquire into the adequacy of the consideration for their contracts .... The general rule is that consideration is not insufficient merely because it is inadequate [citing much authority, including: Williston, Contracts 3d ed. Sect. 115 and the Restatement, Contracts, Sect. 81] .... Even a nominal consideration, such as $1.00 will sustain a promise if it is the consideration in fact agreed upon. And while, to be sufficient, the consideration agreed upon must be a legal benefit or detriment, it need not be an actual pecuniary benefit or detriment."

17 Am. Jur 2d. Contracts Sect. 102

[C.] RE: CONSTRUCTION OF THE AGREEMENT

Continuing with this Honorable Court's evaluation whereby it has narrowed down the relevant provisions of the lease to Paragraph VI (See analysis: POINT II-B, herein) and Paragraph VII, concerning Appellant's remaining two purchase privileges (i.e. first refusal, Page 4; March 31, 1977, option, Page 5), the Court has, as heretofore shown (POINT I-A, herein), miquoted the second quotation appearing in its decision on Page 3 thereof relating to said Paragraph VII.

Consquently, the right of first refusal which is contained only on Page 4 (Exhibit 11) is entirely misconstrued, and the March 31, 1977, option that is included only on Page 5 (Exhibit 11) is entirely omitted from this Court's opinion.

As a result, the concluding paragraph found on Page 3 of the decision (Appendix A hereto) is inappropriate.

As previously indicated in this brief (POINT I, A and B) the language of the first refusal (Exhibit 11, Page 4 only) and the March 31, 1977, option (Exhibit 11, Page 5 only) is clear in both substance and detail. No further words are needed as to either

purchase privilege to make them fully functional, and they clearly are separate and distinct in subject matter, as well as time for performance, from the leasehold interest.

Nowhere in the subject agreement is there this phrase: "during the entire term of the lease" pertaining to any of the purchase privileges, which was erroneously relied upon for the Court's decision of April 8, 1976. On the contrary, that phrase was specifically rejected when Respondents changed the agreement by crossing-out the same !

The language that does remain, as it involves the first refusal and March 31, 1977, option, must be read in light of these governing principles of construction:

> "The determination that an agreement is sufficiently definite is favored [Citing many, many cases]"
>
> 17 Am. Jur 2d Contracts P. 414, Sect. 75
>
> "A construction which would render a contract provision of doubtful validity is to be avoided if another reasonable construction can be placed upon it."
>
> Newport News Shipbuilding etc. v. United States (CA 4) 226 F2d 137
>
> "The court should interpret an instrument in cases of doubtful construction, ut res magis valeat, [so that the provision becomes operative rather than terminated].
>
> Dundas v. Hitchcock, 12 How (U.S.) 256, 13 L.ed 978
> Supporting this principle:
> Schofield v. ZCMI, 85 Utah 281, 39 P2d 342
> Restatement, Contracts. Sect. 236
>
> "A contract, being construed, should be viewed prospectively as the parties viewed it at the time of its execution, and not from a retrospective point of view."
>
> 45 ALR 2d 984

"Generally, words in a contract are to be given their usual and primary meaning at the time of the execution of the contract. The mere fact that at the time of suit the parties do not agree upon the proper construction of their unambiguous language does not make it ambiguous."

17 Am. Jur 2d Contracts 639

Holding that generally a contract or lease is ordinarily to be construed more strongly against the promisor or lessor (Respondents) in case of ambiguity, are these volumes containing appropriate references:

51 ALR 628

61 ALR 706

148 ALR 580

2 ALR 2d 1143

20 ALR 2d 1320

46 ALR 2d 832

A provision in a lease giving the lessee an option to purchase after "expiration of the lease" was found not too indefinite, even though the price and terms were left to disinterested third parties, in circumstances less clear than Appellant's March 31, 1977, option herein, as indicated by this case:

Bewick v. Mecham, 26 Cal. 2d 92, 156 P2d 757

This Court has imparted considerable "certainty" to language in a lease giving an option to the lessee to purchase that requires said option to be performed "on a specified day", which is the situation with Appellant's March 31, 1977 option, as shown by:

Tilton v. Sterling Coal & Coke Co. 28 Utah 173,77 P. 758

Many authorities consider it fundamental construction that leases with options therein are independent of each other and of a "dual nature", so that a breach of the lease has no effect on the option. Here are just a few of the cases with this view:

Mathews Slate Co. v. New Empire Slate Co. (CC NY) 122 F 927

Larry v. Brown, 153 Ala, 452, 44 So. 841

Larstan Industries, Inc. v. Res-Alia Holding Co., 96 N.J. Super. 37, 232 A2d 440

Where by practical construction the option provisions and the leasehold provisions "are not interdependent", and the consideration therefore is separate, (Appellant's situation) this case cited by the Court in its decision herein (Appendix A, Page 3) holds the right to enforce the option is not dependent upon the subsistence of the lease:

Prout v. Roby, 82 U.S. (15 Wall) 471

Further to the case just cited, which this Court relies upon in its decision herein (Appendix A, Page 3), it is likewise pointed out that where the lessors' covenant to convey under the option is not limited to "the life of the lease", then such conveyance under the option may be demanded at the time for exercising said option and "the existence or nonexistence of the lease at the time the demand for a conveyance is made is immaterial to the rights of the parties.":

Prout v. Roby (supra.)

[D.] RE: PAROL EVIDENCE RULE

This Honorable Court has carefully consolidated its decision concerning the purchase privileges, into this final holding:

> "The parties are in sharp disagreement as to the meaning of the just quoted language of the lease, particularly the emphasized portion [i.e. 'said right of purchase to remain in existence during the entire term of the lease'] ... In view of the lack of certainty in the language of the lease, the trial court was justified in admitting extraneous evidence as to what was intended ..."
>
> Utah Supreme Court decision, No. 14124, Page 3, last Paragraph (Appendix A hereto)

Thus, the "lack of certainty in the language of the lease" comes down to the "emphasized portion", and on this basis "extraneous evidence" was justified in allowing the trial court to nullify Appellant's remaining purchase privileges.

By this same reasoning the Appellant urges this Court to properly employ the converse approach and hold that since the "emphasized portion" is nowhere part of the parties' agreement and since it is not true that the parties are in "sharp disagreement as to the meaning" thereof in view of the said expression having been deleted from the agreement (Appendix B hereto), there is no justification for allowing the lower court to let in "extraneous evidence as to what was intended" contrary to the Parol Evidence Rule.

All the necessary words and phrases are in writing and present in the provisions which embrace Appellant's remaining two purchase privileges (Exhibit 11, Par. VI; Par. VII), sufficient to operate without any "extraneous evidence", (POINT I, A and B. herein).

These fundamental legal concepts serve to bar the introduction of said extraneous evidence, under the present circumstances, as follows:

> "The general rule is that parol evidence is not admissible to vary or contradict the terms of a written lease ... When a lease is reduced to writing, the law presumes that the writing contains the whole agreement ... under ordinary circumstances, extrinsic facts are not considered in the construction and interpretation of a written lease, which is complete in itself ..." (Emphasis added)

49 Am.Jur 2d Landlord and Tenant, Section 145

> "The instrument itself is regarded as the best evidence of what the parties intended, and the writing still remains the best evidence of the understanding of the parties, even though, through a defect of form or by reason of some positive provision of law, it cannot have the effect intended for it ...[the rule] is designed to permit a party to a written contract to protect himself against perjury, infirmity of memory, or death ..." (Emphasis added).

30 Am.Jur 2d Evidence 152

> "Whatever the law implies from a contract in writing [i.e. separate consideration equals severable option, etc.] is as much a part of the contract as that which is therein expressed; and if the contract, with what the law implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence."

30 Am. Jur 2d Evidence Sect. 1018

> "It has been held that since the parol evidence rule is one of substantive law, the admission, without objection, of such testimony does not preclude the trial court from disregarding it ... and that an appellate court cannot consider such evidence or give it any weight." (Emphasis added)

30 Am. Jur 2d. Evidence. Sect. 1022

"The mere fact that there is a dispute between the parties as to the interpretation of a document does not mean that there is an ambiguity justifying the admission of parol evidence for explanatory purposes."

Midkiff v. Castle & Cooke, Inc., 45 Hawaii 409, 368 P. 2d 887

"Resort to extraneous facts is justified only if the contract itself creates a patent ambiguity."

Greer v. Stanolind Oil & Gas Co. (CA10) 200 F. 2d 920

CONCLUSION

WHEREFORE, Appellant requests this Honorable Court to grant a rehearing as hereinbefore set forth and determine that Appellant's two remaining purchase privileges in the form of a right to first refusal (Exhibit 11, Page 4 only) and a March 31, 1977, option (Exhibit 11, Page 5 only), be held as independent, severable rights in favor of Appellant which survive the leasehold interest.

To hold otherwise would be contrary not only to law but would fail to render substantial justice in this proceeding since Appellant has already suffered loss of the lease, the Respondents have intended at all times through to 1981 (Exhibit 26) to sell their land on substantially the same basis as embraced by Appellant's purchase privileges, and the subtenants will still have a lease on these same premises for 99 years, under Appellant (Exhibit 20), even after Appellant owns said land notwithstanding Appellant's termination of their lease with Respondents.

That is, no party suffers a detriment where Appellant prevails herein, but the Appellant will alone suffer should this Court refuse

the relief requested in this petition and brief.

DATED this 24th day of April, 1976.

Respectfully submitted,

Don R Strong

DON R. STRONG
Appellant's Attorney

CERTIFICATE OF SERVICE

Served two copies of the foregoing Petition For Rehearing and brief, upon counsel for Respondents, by mailing the same to them at their address set forth on the cover hereof, postage prepaid, this 24th day of April 1976.

Don R Strong

IN THE SUPREME COURT OF THE STATE OF UTAH

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E. A. Russell and
Martell E. Russell,
Plaintiffs and Respondents,

v.

Park City Utah Corporation, et al.,
Defendants and Appellant.

No. 14124
FILED
April 8, 1976

Allan E. Mecham, Clerk

CROCKETT, Justice:

Plaintiffs Russell sued to terminate all rights of defendant Park City Utah Corporation in a lease for nonpayment of rent. Plaintiffs' motion for summary judgment was granted, and defendant appealed. We remanded for trial.[1] From a judgment terminating both the lease and an option to purchase contained therein, defendant appeals, contending that there was no termination of the lease, and that even if there was, the option to purchase did not fall with it.

Defendant's predecessor obtained a ten-year lease with an option to purchase on March 31, 1967. On July 31, 1967, defendant's predecessor subleased the land, located in Summit and Salt Lake Counties, to Robert W. Ensign, who, within the next two or three months, assigned the lease to Ski Park City West, Inc., herein called Park West, which has since been in possession.

The lease covered some 1,987 acres, and called for rental payments of $2.50 per acre per year. Defendant was to develop the land as a ski resort by clearing runs, installing lifts and other facilities. (Plaintiffs reserved the right to graze their sheep on the land every year between May 15 and November 1.) The lease contained this provision, in Paragraph VIII, as to forfeiture:

> No default of Lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to Lessee specifying of what the default consists, and in the event Lessee fails to correct said default within such further time as is reasonably necessary to cure same, Lessee shall quit and surrender the premises to Lessor. . . .

The option to buy provided that the lessee (defendant) had the exclusive option to buy 35 acres of property at $300 per acre, exercisable before November 15, 1967. After that date, the lessor had the right to sell any part of the land, subject to the lessee's right of first refusal at the same price any third party should offer. Paragraph VI of the lease provided that the lessees (defendants) would deposit $2,000 with plaintiffs as consideration for the option, in addition to all other covenants in the lease, and that, if the option was not exercised before November 15, 1967, the deposit would be applied to the rental payments for 1967. The defendant exercised the option as to part of the land in May, 1967.

The annual rental payments were made for 1967, 1968 and 1969. Late in 1970 a dispute arose between defendant and its sublessee, Park West, as to money owed by the latter to defendant. The defendant instructed Park West to make payments directly to plaintiffs, but Park West refused. The defendant failed to make the rental payment on November 1, 1970, as required.

1. Russell v. Park City Utah Corporation, 29 Utah 2d 184, 506 P.2d 1274(1973).

In February, 1971, the defendant again instructed Park West to make its payments to plaintiffs, and again Park West refused. On March 11, 1971, plaintiffs sent a letter to defendant stating that if the rent was not paid within 45 days, they would declare the lease terminated. In a letter dated March 29, 1971, plaintiffs' attorney reaffirmed the letter of March 11, and set April 26, 1971, (45 days from March 12) as the deadline for payment. The defendant did not meet that demand, but on June 7, 1971, tendered payment which the plaintiffs refused.

It was on those facts that the trial court granted the plaintiffs' motion for summary judgment. We reversed because there were disputes concerning the defendant's receipt of the letter and other circumstances pertaining to the forfeiture. After remand and upon the trial, the court found the disputed issues in favor of the plaintiffsand that the lease had been terminated in accordance with its terms.

Defendant now argues that the procedure followed by the plaintiffs, giving it only 45 days to remedy its default, was not in conformity with Paragraph VIII of the lease quoted above, which gives it the 45 days after written notice, plus "such further time as is reasonably necessary to cure" the default. Under the findings and determination made by the trial court we do not confront the question as posed by the defendant. The notice was received on March 12, 1971, and the trial court found that the defendant made no attempt to pay the rent during the 45-day grace period, or during the following six weeks until the tender of June 7, 1971. The problem here is not what plaintiffs would or should have done if the defendant had made the tender at some earlier time. We are of the opinion that there is a reasonable basis in the evidence for the trial court's finding that the tender was not made within a reasonable time and that the plaintiffs were justified in refusing the tender and terminating the lease.

It is true, as defendant argues, that forfeitures are not favored in the law, and that forfeiture provisions will be strictly construed against the one who seeks to enforce them.[2] But it is also true that parties are free to contract according to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it.[3] No such circumstances appears to exist here.

The foregoing affirmance of the termination of the lease cuts the foundation out from under the defendant's argument that the plaintiffs had waived their right of forfeiture of the lease by accepting rent from defendant's sublessee, Park West. It is true that the latter had been the sublessee of the defendant and had been in possession of the property practically from the beginning of the lease term. Nevertheless, after the lease was terminated as delineated above, the plaintiffs were free to rent the property to Park West or anyone else, as the trial court correctly ruled.

The other aspect of this case relates to the options to purchase given to the lessee (defendant). Paragraph VI of the lease provided:

> Lessors give and grant to Lessee the exclusive option to purchase thirty-five (35) acres of property. . . .
> This option to purchase shall be exercised by Lessee on or before the 15th Day of November, 1967. . . .

The defendant did exercise this option as to part of the thirty-five acres before November 15, 1967. The problem of more critical concern here involved the provision, referred to above, which granted to the defendant the "first right of refusal" to purchase any part of the land during the "entire term" of the lease. We note awareness that what is often called "the right of refusal" is not the

2. Green v. Palfryman, 109 Utah 291, 166 P.2d 215 (1946).
3. Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294 (1954); Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952) and cases cited therein.

same as an option, wherein the optionee has a definite right to purchase, whereas, the right of refusal has no effect until and unless the party granting it (plaintiffs here) decides to sell. If he does so decide, then the right of refusal does become an option in that its possessor has the first opportunity to purchase the property at the price at which the owner will sell to anyone.[4] In this instance, for the purpose of determining whether this right of refusal survived the termination of the lease, we think the same rule applies as that which governs options contained in leases: that is, if by the express terms of the option, it can be seen as independent of the other covenants of the lease, and is supported by a valid consideration, it can continue in existence notwithstanding the lease's termination.[5]

There are two provisions of the lease which have a bearing on the problem. Paragraph VI of the lease reads:

> As a further consideration for the above option, and other privileges to purchase hereinafter recited, and in addition to the other covenants and conditions contained in this agreement, Lessee agrees and herewith deposits with Lessors the sum of $2,000.00 cash. . . .

To be considered in connection with the foregoing is the provision of the next paragraph, No. VII, which states:

> Lessee from and after the 1st day of November, 1968, has the irrevocable right to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors . . . said right of purchase to remain in existence during the entire term of the lease. [All emphasis herein added.]

The parties are in sharp disagreement as to the meaning of the just quoted language of the lease, particularly the emphasized portion. Defendant's position is that the covenant that the right of purchase shall exist "during the entire term of the lease" is a severable covenant, supported by separate consideration, and exists independently of the other provisions of the lease for the entire ten-year term thereof. Whereas, plaintiff contends to the contrary and that it was intended as an integral part of the total composite of the lease; and when the lease was forfeited and terminated, this covenant fell with it. In view of the lack of certainty in the language of the lease, the trial court was justified in admitting extraneous evidence as to what was intended.[6] This was done and on disputed evidence, the court found in accordance with the plaintiffs' position as just stated.

Affirmed. Costs to plaintiffs (respondents).

WE CONCUR:

F. Henri Henriod, Chief Justice

A. H. Ellett, Justice

R. L. Tuckett, Justice

4. Chournos v. Evona Investment Co., 97 Utah 335, 93 P.2d 450 (1939).
5. Prout v. Roby, 82 U.S. (15 Wall) 471 (1872); and see, generally, 10 A.L.R. 2d 884, Annot. -- Tenant's Option to Purchase.
6. Penn Star Mining Co. v. Lyman, 64 Utah 343, 231 P.107 (1924); Ewell & Son Inc. v. Salt Lake City Corp., 27 Utah 2d 198, 493 P.2d 1283.

MAUGHAN, Justice: (Dissenting)

Dissent.

Given the language of Paragraph VI of the lease, that the $2,000 cash was a further consideration for the option, and in addition to the other covenants, I am of the opinion that the covenant controlling the option was independent; and thus not dependent upon the subsistence of the lease.

APPENDIX B

NOTE: THIS IS PAGE 5, OF THE LEASE AND PURCHASE AGREEMENT DATED MARCH 31, 1967, [EXHIBIT 11].

include the value of any improvements placed on or within said property by Lessee. The expense of said appraisal to be paid by the party employing the appraiser.

Lessee ~~from and after the 1st day of November, 1968~~ has the ~~irrevocable right~~ OPTION to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors at its appraised value and terms as immediately above set forth, ~~said right of purchase to remain in existence during the entire term of this lease.~~ AT THE TERMINATION OF THE 10 YEAR LEASE TERM, MARCH 31, 1977, LESSEES WILL NOTIFY LESSORS IN WRITING OF THEIR INTENTION TO EXERCISE THIS VIII ORTION 30 DAYS PRIOR TO TERMINATION OF LEASE.

No default of Lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to Lessee specifying of what the default consists, and in the event Lessee fails to correct said default within such further time as is reasonably necessary to cure the same, Lessee shall quit and surrender the premises to Lessors subject to the reservation contained in paragraph II above. Because of the difficulties in ascertaining the damages that would thus be sustained, if any, by Lessors, it is agreed that Lessee shall pay to Lessors the sum of $2,500 as exclusive, fixed and liquidated damages.

Any and all agreements, covenants and conditions hereinbefore stipulated shall apply to, benefit and bind the heirs, successors, executors, administrators and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties to this Agreement have hereunto signed their names and affixed their seals the day and year first above written.

LESSORS

E. A. Russell

Martelle Russell

Robert W. Major, President of THE MAJOR-BLAKENEY CORPORATION the Lessee herein

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