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Lan C. England v. Eugene Horbach, an individual, Medicode, Incorporated, a Utah corporation and Does I through V : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LAN C. ENGLAND, Plaintiff-Appellant, vs. EUGENE HORBACH, an individual, MEDICODE, INCORPORATED, a Utah corporation and DOES I THROUGH V, Defendants-Respondents.	:	Case No. 940695-CA Priority No. 15

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE J. DENNIS FREDERICK

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TABLE OF CONTENTS

Page

RESPONSE TO STATEMENT OF RELEVANT FACTS 1

ARGUMENT 3

I. THE DOCTRINE OF MUTUAL MISTAKE DOES NOT PRECLUDE FINDING AN ACCORD AND SATISFACTION IN THIS CASE 4

A. The Doctrine of Mutual Mistake Does Not Apply to Void an Accord and Satisfaction When the Mistake Concerns the Obligations of the Parties on the Underlying Agreement and Not the Terms of the Accord and Satisfaction 4

B. Application of Any Mistake Doctrines to the Facts of this Case Ignores the Well-Established Rule that One's Position Need Not Be Well Founded in an Accord and Satisfaction 6

C. The Doctrine of Mutual Mistake Does Not Apply Because the "Mistake" Did Not Concern a Basic Assumption of the Contract and Defendant Bore the Risk of Any Mistake 8

1. The Mistake With Respect to Whether Money Was Due Did Not Have a Material Effect on the Bargain 8

2. Plaintiff Bore the Risk of a Mistake with Regard to How Much Money Was Due 9

II. DEFENDANT'S ARGUMENTS THAT NO CONSIDERATION SUPPORTED THE ACCORD AND SATISFACTION ARE CLEARLY WITHOUT MERIT 11

A. Plaintiff's Consideration Argument Is Not Raised for the First Time on Appeal 11

B. Although There is a Dispute, It Is Irrelevant to This Action That a Dispute Exists 12

C. Plaintiff's Position Was Not Wholly Baseless 13

III. THIS COURT CAN PROPERLY REVERSE ON THE BASIS OF PLAINTIFF'S PROMISSORY ESTOPPEL ARGUMENT 14

A. There Is Good Reason Why the Estoppel Defense Was Not Raised Before the Trial Court 14

B. This Is An Appropriate Case in Which to Consider an Item Raised for the First Time on Appeal 15

C. Contrary to Defendant's Assertion, Plaintiff Has Demonstrated Detrimental Reliance 17

D. Defendant Was Aware of the Material Facts 18

IV. THE TRIAL ERRED IN GRANTING DEFENDANT'S MOTION TO AMEND THE PLEADINGS TO INCLUDE A COUNTERCLAIM 18

A. Plaintiff Does Not Raise His Objection to the Inclusion of the Counterclaim for the First Time on Appeal as Defendant Contends 18

B. Plaintiff Did Not Consent to the Inclusion of a Counterclaim in This Matter and Any Failure to Object to the Introduction of the Evidence Does Not Operate as Consent, Express or Implied, on the Unusual Facts of This Case 19

C. An Additional Ground Exists For Reversing the Counterclaim 22

CONCLUSION 22

TABLE OF AUTHORITIES

Cases — Page

Ebbert v. Ebbert
744 P.2d 1019 (Utah 1987), *cert. denied*,
765 P.2d 1278 (Utah 1988) 21

Frink v. Prod
643 P.2d 476, 477 (Cal. 1982) 15

Gasser v. Horne
557 P.2d 154, 155 (Utah 1976) 11

General Ins. Co. v. Carnicero
545 P.2d 502 (Utah 1976) 19

In re Grimm
784 P.2d 1238, 1244 (Utah App. 1989);
cert. denied, 795 P.2d 1138 (Utah 1990) 6

Kennecott Corp. v. State Tax Comm'n
862 P.2d 1348, 1350 (Utah 1993) 3

Klas v. Van Wagoner
829 P.2d 135, 141 n.8 (Utah Ct. App.),
cert. denied, 843 P.2d 1042 (Utah 1992) 18

LaFleur v. C.C. Pierce Co. Inc.
496 N.E.2d 827, 830 (Mass. 1986) 5

Lloyd's Unlimited v. Nature's Way Mktg., Ltd
753 P.2d 507, (Utah App. 1988) 19

Loader v. Scott Constr. Corp.
681 P.2d 1227, (Utah 1984) 19

Ludwick v. Bryant
697 P.2d 858 (Kan. 1985) 11

Niederhauser Builders v. Campbell
824 P.2d 1193, 1197 (Utah Ct.App. 1992) 5, 6, 12

Pearce v. Shurtz
270 P.2d 442, 444-45 (Utah 1954) 13, 17

Public Util. Dist. v. Washington Public Power
705 P.2d 1195 (Wash. 1985), modified,
713 P.2d 1109 (Wash. 1986) 8

Romrell v. Zions First Nat'l Bank,
611 P.2d 392 (Utah 1980) 15

State v. Cook
881 P.2d 913, 914 (Utah Ct. App. 1994) 15

Sugarhouse Finance Co. v. Anderson
610 P.2d 1369, 1372 (Utah 1980) 5, 11, 12, 16, 17

Trafton v. Yongblood
442 P.2d 648 (Cal. 1968) 21, 22

Other Authorities

13 S. Williston, *Contracts* § 1535 (1970) 5

E. Allan Farnsworth, *Contracts* § 9.3 & nn. 19 (1982) 9

Restatement (Second) of Contracts, § 152 (1981) 8, 9

Restatement (Second) of Contracts, § 154 (1981) 10, 18

Appellant Lan England ("Plaintiff") respectuflly submits the following Reply Brief:

RESPONSE TO STATEMENT OF RELEVANT FACTS

Plaintiff has already set forth his statement of facts in this case and will not repeat that statement here. Plaintiff simply wishes to point out a few critical admissions and inaccuracies in the factual statement of Appellee Eugene Horbach ("Defendant").

Defendant argues that Plaintiff "conceded at trial that as of May 23, 1991 Horbach had already overpaid the agreed stock purchase price." *See* Appellee's Brief, at p. 4. Defendant fails to acknowledge that any concession by Plaintiff was based on Plaintiff's assuming certain matters, which he disputed, for hypothetical purposes at Defendant's counsel's request. (R. 531-542). Though the lower court did not so find, Plaintiff maintains that he was not fully compensated for the stock when he met with the Defendant on May 23, 1991. Several of the payments which Defendant testified and the court apparently found were for this stock purchase, were in fact payments for services which the Plaintiff rendered to the Defendant, his company and Medicode--the company whose stock Defendant purchased--or were related to other stock purchases and deals between Plaintiff and the Defendant. (R. 485-87, 495-504).

The court concluded that the Plaintiff's testimony was incredible because no documentation supported his claims that the extra payments were for services and other deals. While Plaintiff does not formally challenge this finding on appeal, he disputes the court's conclusion. It seems incredible that the court would expect documentation in this case. After all, Plaintiff had sold over a million dollars worth of stock to the Defendant without any documentation whatsoever. (R. 582) Plaintiff had always relied on Defendant's goodwill in keeping his promises. Defendant's willingness to keep his word, however, evaporated when he finally got his hands on Plaintiff's stock. He had what he wanted and his word was no longer good.

The Defendant's story, by contrast, seems far more "incredible" than Plaintiff's. He asks the court to believe that by mere oversight he paid Plaintiff $170,000.00 more for the stock than agreed. His testimony that all the payments were for the stock and nothing else is contradicted by his own statements and conduct. In August of 1993, Defendant swore upon his oath in an affidavit, that he owed Plaintiff $25,000.00 on the stock purchase when they met in 1991. (R. 134-36). Later in his deposition in November, 1993, he also acknowledged that he owed Plaintiff money for the stock at the May meeting. (*Id.*)

Moreover, why would Defendant have agreed to give up 2% of the company's stock at the meeting unless he had breached the agreement by failing to make payments and still owed money. His own testimony indicates that he wanted the stock, and he signed the agreement and paid the money because he knew at the meeting he was not entitled to the stock. (R. 584-85). He had breached the agreement.

Finally, Defendant suggests, but the court did not find, that the 2% agreement was simply security for the final payment. (R. 577). He asks the Court to believe that, contrary to the express language of the agreement which he drafted, his promise to hold 2% of the stock forever meant that he would hold it until the $25,000.00 payment cleared. He asks the court to believe that he pledged $400,000.00 in stock to secure a $25,000.00 payment. In short, Defendant's testimony was anything but credible, but the trial court bought it.

Defendant concedes that Plaintiff believed that he was owed money at the May 23, 1991 meeting. *See* Appellee's Brief, at p. 4. He also concedes that he gave "England an interest in 2% of the Medicode stock." *Id.* In addition, Defendant admits that it was only on the basis of Defendant's promise to pay $25,000.00 and give Plaintiff 2% of the stock that Plaintiff agreed immediately to convey the stock to Defendant. *Id.* Thus, Defendant admits that he made promises to Plaintiff to secure delivery of the stock, which Plaintiff disputed he was entitled to

based on both the fact that Defendant had not paid for the stock in full and that the payments had been delayed, and that he later refused to honor those promises.

Defendant suggests that Plaintiff cannot claim any prejudice based on the court's amending the pleadings to include a counterclaim. *Id.* at 6. However, the items of prejudice have been clearly set forth in Appellant's brief. *See* Appellant's Brief at p. 19. Defendant also argues that comments by counsel for Plaintiff show that Plaintiff knew that he was facing a counterclaim. The cited comments, however, affirmatively establish that Plaintiff believed the evidence of overpayment was being introduced and could only be considered *in defense* of Plaintiff's claim. Counsel for Plaintiff stated in opening argument: "there's been a recent **defense** raised that Mr. England was way overpaid for the stock in the amount of about $200,000.00." *Id.* at 6 (R. 450). Clearly, this statement establishes that Plaintiff believed that the evidence of overpayment would be introduced only to establish a defense to Plaintiff's claim. Counsel makes absolutely no mention of a pending counterclaim.

Finally, Defendant suggests that by failing to object to the evidence of overpayment, Plaintiff consented to the amendment of the pleadings to include a counterclaim. That simply is not the case. Plaintiff was aware that the evidence would be introduced to establish a defense to his claim. He was wholly unaware that he faced the potential of a counterclaim.

ARGUMENT

Defendant argues that this court should "presume [the decision] of the lower court to be correct and search for grounds upon which [it] may be upheld." *See* Appellee's Brief at p. 10. However, case law clearly establishes that when a court reviews the application of the law to the facts, a lower court's decision is entitled to no presumption of correctness. *See Kennecott Corp. v. State Tax Comm'n*, 862 P.2d 1348, 1350 (Utah 1993). The Supreme Court has declared: "We accord a trial court's legal conclusions no deference but review them for correctness." *Id.*

(emphasis added). Here, Plaintiff's appeal challenges the lower court's application of the law to the facts. Accordingly, the lower court's legal conclusions are entitled to no deference.

I. THE DOCTRINE OF MUTUAL MISTAKE DOES NOT PRECLUDE FINDING AN ACCORD AND SATISFACTION IN THIS CASE.

Defendant argues that the doctrine of accord and satisfaction cannot be applied to the facts of this case due to the parties "mutual mistake". *See* Appellee's Brief, p. 12. Defendant goes to some length to point out that Plaintiff makes no argument that the doctrine of mutual mistake should not apply. Accordingly, Plaintiff will show that the doctrine is wholly inapplicable in this case, and that its application constitutes legal error. Indeed, Plaintiff will show that acceptance of the lower court's ruling and Defendant's position on mutual mistake would virtually destroy the doctrine of accord and satisfaction, would go against clear precedent, and would encourage fraud.

A. The Doctrine of Mutual Mistake Does Not Apply to Void an Accord and Satisfaction When the Mistake Concerns the Obligations of the Parties on the Underlying Agreement and Not the Terms of the Accord and Satisfaction.

The trial court ruled that the May 23, 1991 agreement was unenforceable because it was executed under a mutual mistake of fact and was without consideration. (R. 441-42). Defendant contends that the doctrine of mutual mistake therefore precludes reversal of the trial court's ruling even if consideration supported the May 23, 1991 agreement. *See* Appellee's Brief at p. 12. Defendant argues essentially that a mutual mistake regarding the obligation owing on the underlying contract operates to void an accord and satisfaction reached in settlement of the agreement. Defendant's position is not supported by authority and would eviscerate the doctrine of accord and satisfaction.

"The legal principles underlying the doctrine of mutual mistake are well established. Where there has been a mistake between the parties as to the subject matter of a contract, there has been no *meeting of the minds*, and the contract is voidable at the election of the party

adversely affected." *See LaFleur v. C.C. Pierce Co. Inc.*, 496 N.E.2d 827, 830 (Mass. 1986) *citing* 13 S. Williston, *Contracts* § 1535 (1970) (emphasis added). The lower court's application of the doctrine in this case and Defendant's defense of that application defy logic and precedent. The lower court held in essence that because the parties were mutually mistaken with respect to the amount due and owing on the *underlying contract* there was no meeting of the minds and hence no accord and satisfaction.

The court's ruling ignores the reality that there is rarely, if ever, a meeting of the minds with respect to the party's obligations on the underlying contract when parties enter an accord and satisfaction. That is precisely the reason for an accord and satisfaction--parties cannot come to a meeting of the minds as to what the obligations are under the contract. If a "mistake" or failure to come to a meeting of the minds as to the obligation due on an underlying contract voids an accord and satisfaction, the doctrine of accord and satisfaction is a legal *nullity.*

The doctrine is designed to allow parties to a contract "to mutually agree that a performance *different than* that required by the original contract" and to substitute that performance for the performance originally agreed upon. *Niederhauser Builders v. Campbell*, 824 P.2d 1193, 1197 (Utah Ct. App. 1992) (emphasis added). The doctrine specifically contemplates that parties will not be able to come to a meeting of the minds as to the obligations on the underlying contract. Indeed, the Utah Supreme Court has indicated that "where the underlying claim is disputed or uncertain, the obligor's assent to the definite statement of performance in the accord amounts to sufficient consideration." *Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1369, 1372 (Utah 1980). To rule as the lower court did and as the Defendant asks this court to rule that a failure to come to a meeting of the minds as to the obligations due on the underlying contract because of a mutual mistake voids an accord and satisfaction, is to render the entire doctrine of accord and satisfaction null and void. After all, if parties can agree or come to a

meeting of the minds as to what is due under the underlying contract, there is no need to agree on a "substitute performance."

Defendant cites the *Niederhauser* case as support for the lower court's conclusion that there is no enforceable accord and satisfaction in this case on the basis of a mutual mistake. That case, however, is clearly distinguishable and does not support the lower court's conclusion and Defendant's position. The *Niederhauser* court did not void the accord and satisfaction because the parties were mutually mistaken regarding the obligations due on the underlying contract. Rather, the court ruled that mutual mistake voided the accord and satisfaction there because the parties were mutually mistaken as to the terms of the accord and satisfaction. 824 P.2d at 1198. Thus, mutual mistake voids an accord and satisfaction only if the parties to the accord and satisfaction are *mutually mistaken* as to *terms* of the accord and satisfaction, and not if they are mutually mistaken as to the *obligations on the underlying contract* as the lower court ruled and Defendant contends. Here, there was no mutual mistake regarding the terms of the accord and satisfaction. Plaintiff agreed immediately to deliver the stock certificates to Defendant, despite the Defendant's failure to make timely payments. The Defendant in turn agreed to pay $25,000.00 and hold 2% of the Medicode stock in trust for Plaintiff. There is no mutual mistake regarding the terms of the accord and satisfaction.

B. Application of Any Mistake Doctrines to the Facts of this Case Ignores the Well-Established Rule that One's Position Need Not Be Well Founded in an Accord and Satisfaction.

The Defendant's argument suggests that there can be no mistake, unilateral or mutual, with respect to the obligation on the underlying agreement or the accord and satisfaction is void. This position is clearly contrary to the well-recognized rule that consideration for an accord and satisfaction "may consist of a compromise of a bona fide dispute *which is not necessarily well-founded* but is in good faith." *In re Grimm*, 784 P.2d 1238, 1244 (Utah App. 1989), *cert. denied*,

795 P.2d 1138 (Utah 1990) (emphasis added). Simply stated, case law establishes that a party may be mistaken about his or her position and still enter a binding accord and satisfaction. Defendant's position runs counter to this well-recognized rule.

Moreover, adopting the lower court's conclusion as the law would establish a rule of law that encourages fraud. Defendant argues essentially that Plaintiff's position at the May 23, 1991 meeting, that he was still owed money, was mistaken and that because Defendant had agreed with Plaintiff that money was still owed a mutual mistake precludes this court from finding an accord and satisfaction. Consider for a moment the following hypothetical example which illustrates the danger in accepting Defendant's argument.

Assume for the sake of argument, that Plaintiff's belief at the May 23, 1991 meeting that he was owed money was mistaken.[1] Assume further that Defendant had disagreed with Plaintiff and taken the position that he had paid the full purchase price and demanded delivery, the position he later took at trial. It is undisputed that Plaintiff would not have delivered the stock to Defendant on that date under those circumstances. (R. 590). Plaintiff believed in good faith both that Defendant still owed him money and that Defendant had failed to pay within the agreed time period. (R. 491-94, 504-07, 517-18) Certainly in these circumstances the parties could have reach an accord and satisfaction, substituting the May 23, 1991 agreement as performance, in settlement of this dispute.

Defendant argues, however, that because Defendant *agreed* with Plaintiff that money was owed, the agreement cannot be enforced. This makes no sense and would encourage fraud. A party in Defendant's position may, in actuality, disagree with the other party. However, rather

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[1] England acknowledges that this was the finding of the lower court, and England does not challenge this finding on appeal, not because England agrees with the finding but because there is not a sufficient basis to challenge the factual finding based on the record. England does, however, vehemently dispute that no money was owed him on this date.

than acknowledge the disagreement and settle with an accord and satisfaction, a party could agree with the other side, come to a mutually agreed resolution, obtain what was desired, and refuse to honor the promise because both parties were "mutually mistaken," and keep the fruits of his fraudulent promise. That is precisely what Defendant has done in this case, and the Court should correct this injustice.

C. The Doctrine of Mutual Mistake Does Not Apply Because the "Mistake" Did Not Concern a Basic Assumption of the Contract and Defendant Bore the Risk of Any Mistake.

Courts and commentators have clearly held that a mutual mistake will not make a contract voidable unless the mistake concerns a basic assumption of the contract that has a material effect on the agreed exchange, and the party seeking avoidance must not have borne the risk of the mistake. *See Public Util. Dist. v. Washington Public Power*, 705 P.2d 1195 (Wash. 1985), *modified*, 713 P.2d 1109 (Wash. 1986); Restatement (Second) of Contracts, § 152 (1981). Here, the mistake, if any, did not have a material effect on the agreed exchange, and Defendant bore the risk of any mistake.

1. The Mistake With Respect to Whether Money Was Due Did Not Have a Material Effect on the Bargain.

The Restatement (Second) of Contracts clearly provides that a mutual mistake must have a "material effect" on the agreed exchange or performances to void a contract. Restatement (Second) of Contracts, § 152, (1981). Here the mistake with respect to whether purchase money was due did not have a "material effect" on the agreed exchange. Commentators have indicated that to show a

> material effect on the agreed exchange of performances a party must 'show more than a mere loss of advantage from the contract or that he would not have entered into it had there been no mistake.' He must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out.

E. Allan Farnsworth, *Contracts* § 9.3 & nn. 19 (1982). Here there is no evidence that the agreed exchange was materially affected by the parties' belief that $25,000.00 was still owing on the underlying contract.

Defendant testified that his real objective in entering the accord and satisfaction was to secure immediate delivery of the stock. (R. 138-39). According to his own testimony, he simply agreed to pay the $25,000.00 to expedite the transaction. (*Id*). The testimony suggests that if Defendant had known that the $25,000.00 was not owing, he still would have agreed to the terms of the accord and satisfaction. (*Id.*) He wanted the stock and was not entitled to it because of his failure to pay within the agreed time frame. The payment of the additional $25,000.00 did not materially affect the agreed upon exchange. Plaintiff gave up stock constituting 18.6% of the company, and Defendant agreed to hold 2% of the stock for Plaintiff. Given the value of the stock interest at stake on both sides of the accord and satisfaction, it is apparent that the $25,000.00 which was the subject of the mistake did not have a material effect on the agreed exchange. The $25,000.00 was of little or no consequence in this deal. This conclusion is borne out by the fact that the Plaintiff made no effort to undo the deal when the $25,000.00 check bounced. (R. 65-66). Moreover, because Defendant would have paid the $25,000.00 even if he had known or believed that he was not due to get the stock on that day, the alleged mutual mistake did not materially affect the parties agreed exchange.

2. Plaintiff Bore the Risk of a Mistake with Regard to How Much Money Was Due.

Section 152 of the Restatement (Second) of Contracts also states that a mutual mistake will not void a contract if the party seeking to avoid the contract bears the risk of mistake. Here, the record reveals that Defendant bore the risk of mistake in this case. Section 154 of the Restatement provides for the allocation of the risk between parties and states in relevant part

that "[a] party bears the risk of a mistake when ... (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts, § 154 (1981). Here, the provisions of both paragraphs (b) and (c) indicate that Defendant bore the risk of a mistake in this case.

Defendant was clearly aware at the time of contracting that he had limited knowledge with respect to whether the purchase price of the stock had been paid in full. At trial, Defendant testified that when Plaintiff claimed that Defendant owed $25,000.00, he agreed. (R. 584-85). He did not call his accounting staff. (R. 585). In fact, he did nothing to verify whether any money was still owed. Thus, Defendant knew that he had limited knowledge with respect to the matter to which the mistake relates, and chose to proceed. He treated his limited knowledge as sufficient because he wanted the stock. He was free so to act. However, he cannot now avoid the parties' accord and satisfaction based on any mistake.

In addition, it is reasonable in the circumstances of this case to assign the risk of mistake to Defendant. It was Defendant who wanted to secure the immediate delivery of the stock. (R. 256, ¶10, 502-07, 584-85). It was Defendant who arranged the meeting with Plaintiff to conclude the stock sale. Moreover, it was Defendant who had paid the money and in whose possession the evidence establishing the alleged overpayment always rested. Finally, it was Defendant who had failed to pay for the stock within the agreed time frame. Thus, it is reasonable to assign the risk of a mistake with regard to the amount owing under the contract to Defendant. Accordingly, the lower court erred in ruling that the agreement was void under the doctrine of mutual mistake.

II. DEFENDANT'S ARGUMENTS THAT NO CONSIDERATION SUPPORTED THE ACCORD AND SATISFACTION ARE CLEARLY WITHOUT MERIT.

Defendant suggests that because the lower court found that the purchase price had been paid in full he had no "legitimate basis to refuse to deliver the stock." Defendant ignores two critical points. First, Plaintiff testified, and Defendant did not dispute, that Defendant had failed to pay for the stock within the agreed time period. (R. 490-91, 494, 506-07). Courts have held that an extension of time in which to make payments constitutes consideration. See *Ludwick v. Bryant*, 697 P.2d 858 (Kan. 1985). Because Plaintiff granted Defendant additional time to make the payments, there was clearly consideration.

Second, Defendant ignores the fact that Defendant's failure to pay as agreed constituted a breach of the parties' agreement. Notwithstanding the breach, Plaintiff agreed to go forward with the transaction based on the accord and satisfaction. Plaintiff's surrender of his rights to sue for breach and his continuing with the deal in the face of Defendant's delay and breach clearly constituted consideration. Plaintiff suffered detriment and Defendant was benefitted. See *Gasser v. Horne*, 557 P.2d 154, 155 (Utah 1976) (Any benefit to promisor and detriment to promisee is consideration). In addition, the Utah Supreme Court has declared that courts should uphold an accord and satisfaction "wherever possible." *Sugarhouse Finance*, 610 P.2d at 1372. "Consideration is often found in the obligor's agreement to alter the means or method of payment...." *Id.* Here, Plaintiff altered the payment schedule or the method of payment. Consideration was given.

A. Plaintiff's Consideration Argument Is Not Raised for the First Time on Appeal.

Defendant's argument that Plaintiff's consideration argument must fail are specious. First, Plaintiff clearly raised the argument in the lower court that there was consideration in this case based on the settlement of a dispute. *See* Plaintiff's Trial Brief (R. 233-34). Defendant's

argument that the consideration argument is raised for the first time is simply without merit. Indeed, Plaintiff specifically ask the court to find an accord and satisfaction in this case. (R. 234).

B. Although There is a Dispute, It Is Irrelevant to This Action That a Dispute Exists

Defendant argues that there was no dispute and therefore that there can be no accord and satisfaction. That is simply not the case for two reasons. First there was a dispute. Defendant wanted immediate possession of the stock, and Plaintiff maintained that he was not entitled to it. That is a dispute. Neither party knew what exactly was due under the original contract. Plaintiff believed that $25,000.00 was due, and Defendant agreed to pay that amount and give Plaintiff 2% of the company's stock. (R. 584-85). Thus, the parties settled a dispute with respect to the immediate right to possession by entering an accord and satisfaction.

More importantly, Plaintiff ignores the fact there does not have to be a "dispute" to find an accord and satisfaction. Certainly, settlement of a "dispute" is one example of a situation in which the doctrine of accord and satisfaction commonly arises and is applied. Utah courts have clearly indicated that when an underlying claim is "disputed" or uncertain, ... a definite statement of performance in the accord amounts to sufficient consideration." *Sugarhouse Finance*, 610 P.2d at 1372. Here the underlying claim was clearly "uncertain." Defendant wanted the stock but believed he still owed money and had failed to pay for the stock within the agreed time frame. (R. 577, 504).

Moreover, as the *Niederhauser* court clearly held: "Accord and satisfaction arises when the parties to a contract mutually agree that a performance different than that required by the original contract will be made in substitution of the performance originally agreed upon and the substituted agreement calling for a different performance will discharge the obligation created under the original agreement." 824 P.2d at 1197. That is exactly what happened here. Under

the original agreement, Defendant was to pay Plaintiff the full purchase price in the first few months of 1990. (R. 490-91, 494). Defendant failed to perform. Nonetheless, he desired the stock certificates. Thus, at the May 23, 1991 meeting the parties agreed to a "substitute performance."

C. Plaintiff's Position Was Not Wholly Baseless.

Third, the parties' May 23, 1991 agreement did not constitute the compromise of a wholly baseless position. Even assuming that the purchase price had been paid in full by the May 23 1991 meeting, the fact remained that Defendant had not paid within the time frame agreed. The uncontroverted evidence at trial showed that the consideration was to be paid within the first few months of 1990. (R. 490-91, 494, 506-07). Moreover, the evidence also showed that payments for the stock, even under Defendant's version of the facts, was not received until at least September, 1990. (R. 257, ¶ 4). Defendant's argument that Plaintiff's position is baseless is belied by his own conduct in this matter and clear legal authority.

Case law clearly establishes that late payments under a contract constitute a breach of the contract. *See Pearce v. Shurtz*, 270 P.2d 442, 444-45 (Utah 1954). Because Defendant had failed to pay as agreed, Plaintiff's position that he did not need to deliver the stock was not only in good faith, it was well-founded. Accordingly, there was consideration.

For all intents and purposes, Defendant acknowledged the validity of Plaintiff's position that Plaintiff had no obligation to deliver the stock at the parties May 23, 1991 meeting. (R. 590) Thus, there was a legitimate controversy as to whether Defendant had a right to immediate delivery of the stock. Defendant himself acknowledged that Plaintiff's position was not baseless--he was of the same opinion.

Moreover, Defendant's argument that Plaintiff's position is baseless assumes that Plaintiff's position was based solely on his belief that he was owed additional money. This

assumption ignores one critical fact. In addition to the fact that he believed he was owed money, Plaintiff believed that Defendant had breached the original agreement by failing to make the payments within the agreed time frame. (R. 490-91, 494, 506-07). Indeed, one year prior to the May, 1991 meeting, Plaintiff testified that Defendant acknowledged that the payments had been slow and first mentioned giving Plaintiff 2-3% of the company as compensation. (R. 494) This testimony was wholly uncontroverted. Certainly, Plaintiff had a good faith basis for believing that Defendant had breached the original purchase agreement. Even assuming that he was owed nothing, the fact remained that the agreement had been breached by Defendant's failure to pay as agreed. This basis provides a solid foundation for Plaintiff's position that Defendant was not entitled to delivery of the stock.

III. THIS COURT CAN PROPERLY REVERSE ON THE BASIS OF PLAINTIFF'S PROMISSORY ESTOPPEL ARGUMENT.

Plaintiff concedes that the estoppel argument was not raised before the trial court. However, that should not prevent its consideration and application in this case for three reasons.

A. There Is Good Reason Why the Estoppel Defense Was Not Raised Before the Trial Court.

First, it is ironic that the Defendant admonishes this court not to consider or rely on the legal theory of estoppel raised for the first time on appeal when one considers that the basis the trial court relied on for refusing to enforce the May 23, 1991 agreement--mutual mistake--was never raised by the Defendant in any pleading, his trial brief, or in opening or closing arguments. The lower court applied the doctrine of mutual mistake *sua sponte* to void the accord and satisfaction entered on May 23, 1991. Perhaps if Plaintiff could have anticipated that the court would use the doctrine of mutual mistake to find that no consideration supported the accord and satisfaction, Plaintiff may have considered raising the theory of estoppel to respond to the court's finding of no consideration on the grounds of mutual mistake. However, because the argument

had not been raised by Defendant and because, as discussed above, it has no application in this case, Plaintiff did not anticipate the necessity for making such an argument. Indeed, that Defendant did not believe the doctrine was relevant in this case is evidenced by his failure to raise it.

B. This Is An Appropriate Case in Which to Consider an Item Raised for the First Time on Appeal.

Failure to raise an issue in the trial court does not preclude its consideration on appeal. Utah courts have clearly held that matters raised for the first time on appeal can and should be considered in some circumstances. In *State v. Cook*, 881 P.2d 913, 914 (Utah Ct. App. 1994) *cert. denied*, ___ P.2d ___ (Utah 1995), this Court declared that "Utah's appellate courts have evidenced a willingness to hear and rule on issues 'raised for the first time on appeal [if] the trial court committed plain error or the case involves exceptional circumstances.'" *Id.* at 914. Moreover, the Supreme Court has indicated that appellate courts have some discretion to consider a matter raised for the first time on appeal. In *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980), the appellant not only failed to raise the issue below but failed to raise it on appeal until filing a reply brief. Nonetheless, the court held that it had discretion to "decide the case upon any points that its proper disposition may require, even if first raised in a reply brief." *Id.* at 395.

This is an appropriate case in which to consider this issue raised for the first time on appeal. One of the most widely recognized exceptions to the rule precluding the raising of an issue for the first time on appeal is if the issue presents a question of law. *See, e.g. Frink v. Prod*, 643 P.2d 476, 477 (Cal. 1982). Here, the estoppel argument presents a legal question. The facts of the case are in evidence. The court must only determine whether, as a matter of law, the theory applies in this case.

In addition, this case involves plain error. It was plain error for the court to hold that the parties did not enter an accord and satisfaction on the grounds of mutual mistake. *See* Section I, *infra*. As discussed above, to so rule is completely to ignore the well-settled rule that a dispute need not be well-founded to be the subject of an accord and satisfaction. The court plainly failed to apply this principle.

Furthermore, this case involves exceptional circumstances. This is not a case in which the complaining party simply failed to raise a legal theory to support its claim before the trial court. The estoppel theory, which Defendant contends Plaintiff should not be able to raise on appeal, is relevant and necessary only in response to the court's ruling that the doctrine of mutual mistake voids the accord and satisfaction. The doctrine of mutual mistake, however, had never been raised by Defendant or anticipated by Plaintiff.[2] To require a party to anticipate that a court will raise a legal theory not presented by the other side to decide a case, and require a response to that legal theory, is inequitable. Because the court raised the doctrine of mutual mistake *sua sponte*[3], Plaintiff should be afforded an opportunity to raise the estoppel theory. This is precisely the kind of case in which it makes sense to reach an issue raised for the first time on appeal.

Finally, and most importantly, the Utah Supreme Court appears to have considered an estoppel argument in response to a failure of consideration argument in an accord and satisfaction when raised for the first time on appeal. In *Sugarhouse Finance*, the Supreme Court

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[2] Plaintiff has argued previously that to hold that the doctrine of mutual mistake voids the accord and satisfaction on these facts completely ignores the fact that an accord and satisfaction arises when the parties agree to settle a dispute in good faith. If a mutual mistake regarding the nature of the dispute voids an accord and satisfaction, the parties cannot in reality settle such disputes. They are bound by the terms of the original agreement and must ask a court to determine what the rights of each party are.

[3] The first mention of the doctrine of mutual mistake in this case is in the court's decision. Horbach did raise the doctrine of unilateral mistake in his trial brief, but had not raised it previously. Because the trial brief was presented the day of trial, England had no way of raising the estoppel argument in response to the brief.

held that the doctrine of estoppel could be applied to sustain an accord and satisfaction challenged on the ground that no consideration supported the agreement. 610 P.2d at 1372. The trial court had ruled that there was consideration to support the accord and satisfaction. Absolutely no indication is given that an estoppel argument was raised below. Notwithstanding, it appears from the case that the argument was raised for the first time by the court on appeal. *See id.* at 1373. Accordingly, the court here should not refuse to consider Plaintiff's estoppel argument.

C. Contrary to Defendant's Assertion, Plaintiff Has Demonstrated Detrimental Reliance.

Defendant argues that Plaintiff did not rely on Defendant's promise to his detriment. Again, Defendant ignores the fact that Plaintiff's legal obligation to deliver the stock was "questionable." Even assuming that the full purchase price had been paid, the uncontradicted evidence showed that Defendant did not pay in the agreed time frame. Plaintiff testified, and Defendant did not dispute in any way, that the full purchase price was due in the first quarter of 1990. (R. 490-91, 494, 500-09) The evidence showed that Defendant failed to so perform. It is axiomatic that failure to pay a contractual obligation in the time frame agreed constitutes breach of a contract. *See, e.g., Pearce*, 270 P.2d 442, 444-45. Thus, Plaintiff's legal obligation to deliver the stock was questionable at best.

Plaintiff suffered significant detriment due to Defendant's promise. He delivered the stock when he believed he had no obligation to do so. He gave up his right to rescind the agreement and sue for breach based on Defendant's late payments and rights to sue for damages as a result of Defendant's delay in making payments. Defendant promised to give Plaintiff 2% of the company's stock so that he could acquire the stock on May 23, 1991. He should not be able to keep the stock and refuse to honor his promise.

D. Defendant Was Aware of the Material Facts.

Finally, the court must reject Defendant's specious argument that he cannot be estopped because he was not aware of all the material facts. Defendant was aware of all the material facts. He knew that he had made several payments to Plaintiff for the stock. He knew what he had agreed to pay for the stock.

Moreover, at the very least, he was aware that he did not know for sure whether he still owed Plaintiff money. Nonetheless, because he wanted the stock immediately, he determined to proceed. Thus, Defendant proceeded at the very least with "conscious disregard" of his lack of knowledge. He cannot therefore be heard to complain that he was unaware of the material facts. He treated his lack of knowledge as sufficient and thus assumed the risk of any lack of knowledge of a material fact. *See Klas v. Van Wagoner*, 829 P.2d 135, 141 n.8 (Utah Ct. App.), *cert. denied*, 843 P.2d 1042 (Utah 1992); Restatement (Second) of Contracts, § 154 (1981).

IV. THE TRIAL ERRED IN GRANTING DEFENDANT'S MOTION TO AMEND THE PLEADINGS TO INCLUDE A COUNTERCLAIM.

Defendant concedes that the first mention of his intention to pursue a counterclaim at trial was in his trial brief delivered to Plaintiff on the day of trial. *See* Appellee's Brief, at p. 6. Defendant also concedes that he had asked the court for leave to file a counterclaim days before the first trial date and that his request was denied. *See* Appellee's Brief, at p. 5. However, Defendant argues that Plaintiff consented to the inclusion of a counterclaim in this matter by failing to object at trial to the introduction of the evidence of overpayment. Defendant's position is mistaken.

A. Plaintiff Does Not Raise His Objection to the Inclusion of the Counterclaim for the First Time on Appeal as Defendant Contends.

Plaintiff acknowledges that no objection was raised to the introduction of the evidence of overpayment during trial. However, the objection was raised before the trial court. (R. 247, ¶

7). Plaintiff clearly pointed out to the trial court that no consent, express or implied, was given to try the issue of overpayment in his objection to the Findings of Fact and Conclusions of Law. Thus, Plaintiff raised this issue before the trial court, and the Defendant's argument that the issue is presented for the first time on appeal is without merit.

B. Plaintiff Did Not Consent to the Inclusion of a Counterclaim in This Matter and Any Failure to Object to the Introduction of the Evidence Does Not Operate as Consent, Express or Implied, on the Unusual Facts of This Case.

Defendant suggests that Plaintiff consented to the amendment of the pleadings to include a counterclaim by failing to object to the introduction of the evidence of overpayment. As support for the proposition, Defendant cites several cases in which courts have followed the well-established rule that a party consents to the trial of an issue if the party permits the issue to be tried without objection despite the fact that the issue is not in the pleadings. However, this case presents a factual situation much different than those presented by the cases Defendant cites.[4]

Generally, the failure to object to evidence that goes to an issue not in the pleadings operates as consent because the evidence clearly relates only to that issue and failure to object is

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[4] Defendant cites three cases, all of which are clearly distinguishable. In *General Ins. Co v. Carnicero*, 545 P.2d 502 (Utah 1976), the court amended the pleadings to conform to the evidence when the defendant raised an affirmative defense, not a counterclaim, to the Plaintiff's complaint. The evidence which was not objected to established only the affirmative defense and related to no other issue at trial. Thus, failure to object clearly constituted implied consent to the trial of the issue.

Defendant also cites *Loader v. Scott Constr. Corp.*, 681 P.2d 1227 (Utah 1984). Again, this case involves an affirmative defense, not a counterclaim, and the evidence related only to the affirmative defense and no other issue at trial. Because *Loader* and *Carnicero* involve situations far different from the case at bar, they provide little, if any, guidance as to how the court should deal with this case.

The final case cited by Defendant, *Lloyd's Unlimited v. Nature's Way Mktg., Ltd*, 753 P.2d 507, (Utah App. 1988), actually supports Plaintiff's position. In *Lloyd's*, the plaintiff sued to recover commissions. On the second day of trial, evidence was introduced without objection to support a defense that had not been raised before trial. *Id.* at 508-09. Following the conclusion of the trial, the Plaintiff asked the court to permit amendment of its complaint to address the defense raised at trial. *Id.* at 509. The lower court denied the post-trial motion, and the Plaintiff appealed. *Id.* This court held that the Plaintiff had not been given an adequate opportunity to respond to the newly raised defense, despite its failure to object to the evidence. *Id.* at 511. The court remanded for further proceedings. *Id.*

clear evidence of consent. Here, however, there was no consent to the inclusion of a counterclaim. Plaintiff was aware that evidence of overpayment was to be introduced as a defense. *See* (R. 354). However, he did not believe that the evidence was being introduced to pursue a counterclaim, as evidenced by counsel's statement in opening argument: "Now, unfortunately, there's been a recent defense raised that Mr. England was way overpaid for the stock in the amount of about $200,000.00 ...." *Id.* Clearly, counsel did not believe that a counterclaim was before the court. This belief was reasonable in light of the fact that the court had expressly ruled three months previous that no counterclaim could be pursued. *See* (R. 199).

The court should note that the overpayment issue had not been raised even as a defense in the pleadings. However, Plaintiff learned just before trial that the evidence of overpayment would be introduced to establish Defendant's defense of lack of consideration. Plaintiff did not, therefore, object to the introduction of the evidence because Plaintiff knew that the evidence would be introduced to establish Defendant's defense.

Significantly, Defendant fails to identify a single case in which a court *has permitted* the amendment of the pleadings to include a counterclaim at trial. While courts have permitted amendments to previously pled counterclaims, careful research reveals no precedent for permitting a party to amend the pleadings to include a counterclaim that is raised at trial. Defendant suggests that Plaintiff's citation of several cases in which appellate courts have upheld a lower court's refusal to allow a counterclaim to be interposed on the eve of trial is unpersuasive because those cases "merely upheld the trial courts' exercise of discretion in denying motions to amend." *See* Appellee's Brief, at p. 21, n.18. These cases, however, clearly establish that counterclaims cannot generally be interposed in a proceeding on the eve of trial. If they cannot be raised on the *eve of trial*, certainly they should not be raised *during* trial. Moreover, the

appellate court's upholding the actions of the lower courts' in the cited cases establishes that those courts ruled correctly and that the lower court here erred.

Defendant attempts to trivialize the importance of *Trafton v. Yongblood*, 442 P.2d 648 (Cal. 1968), but the fact remains that it is the closest case to the case at bar identified by either party and clearly supports the conclusion that the lower court erred in permitting the Defendant to amend the pleadings to include a counterclaim. It is beyond dispute that the factual situation presented here is unique. Seldom if ever will the evidence necessary to establish a counterclaim be identical to the evidence necessary to establish an affirmative defense. In those rare cases, a party will not generally raise the affirmative defense but fail to raise the counterclaim and thus squarely present the issue. In *Trafton*, however, and this case, that is exactly what happened. The defendant in *Trafton* had pled an affirmative defense and the evidence of this defense also established a counterclaim against the Plaintiff. The Defendant, however, did not plead the counterclaim. *Id.* at 652-53. The evidence establishing both the defense and the counterclaim was received *without objection*. After the trial, the Defendant moved to amend the pleadings to conform to the evidence to include the counterclaim. The court denied the motion, and the Supreme Court of California affirmed. *See id.* at 653, 658.

Defendant attempts to distinguish the *Trafton* case by pointing to two differences between that case and the case at bar. The distinctions, however, are of no legal consequence. First, Defendant observes that the motion to amend the pleadings to include a counterclaim in *Trafton* was not made until after trial. Utah courts have clearly indicated that motions to amend the pleadings to conform to the evidence brought during trial will be treated the same as such motions brought after trial. *See Ebbert v. Ebbert*, 744 P.2d 1019 (Utah 1987), *cert. denied*, 765 P.2d 1278 (Utah 1988). Thus, the *Trafton* case is as applicable to a motion brought at the end of trial as it is to a motion brought after trial.

Next, the Plaintiff suggests that the case is inapposite because it merely affirmed the trial court's denial of the motion to amend. *See* Appellee's Brief, at p. 22. Defendant focuses on this distinction is perplexing. Defendant suggest that because the trial court affirmed a denial of a motion virtually identical to the motion that the lower court granted in this case, the case is distinguishable. To the contrary, the only distinction between the *Trafton* case and this case is the decision of the lower court. In *Trafton*, the lower court properly denied the motion to amend to include a counterclaim. Here, by contrast, the lower court granted the motion. Thus, the decision of the California Supreme Court on appeal firmly establishes that the lower court in *Trafton* decided this issue correctly while the lower court here did not. Thus, Defendant's distinction related to the lower court's action only serves to emphasize the fact that the lower court here erred.

C. An Additional Ground Exists For Reversing the Counterclaim.

An additional ground exists for reversing the counterclaim. Defendant recovered nearly $170,000.00 because his payments for the stock allegedly exceeded the amount due under the contract. Plaintiff has argued, however, that an accord and satisfaction was entered by the parties on May 23, 1991. If the court rules that in fact the parties entered an accord and satisfaction, the Defendant cannot recover any overpayment on the underlying contract. To permit such enforcement of the underlying contract is contrary to clear authority regarding the legal effect of an accord and satisfaction.

CONCLUSION

Based on the foregoing and the Appellant's Opening Brief, the Plaintiff respectfully requests that the court reverse the judgment of the lower court and rule that the parties entered an accord and satisfaction or that Defendant is estopped from denying his promise to deliver 2% of the stock of the company. The defendant also requests that the court reverse the court's

ruling permitting the presentation of a counterclaim below and vacate the judgment based thereon.

RESPECTFULLY SUBMITTED this 23rd day of March, 1995.

KIRTON & McCONKIE

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MAILING CERTIFICATE

I hereby certify that on the 23rd day of March, 1995, I caused to be delivered by the method indicated below a true and correct copy of the foregoing to the following:

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