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CASE NUMBER: 117103

No. 17-117103-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HM OF TOPEKA, LLC
Plaintiff/Appellee

vs.

INDIAN COUNTRY MINI MART AND CARLA D. NISSEN
Defendant/Appellant

BRIEF OF APPELLEE

Appealed from the District Court of Jackson County, Kansas
Honorable Gary Nafziger, District Judge
District Court Case No. 2006-CV-41

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I. Nature of the Case.

This is the second Appeal in the same case.

After several years of discussion and negotiations between Roger Aldis, a partner of the Defendants/Appellants and Terry Hummer, sole member of Plaintiff/Appellee, Mr. Aldis provided Mr. Hummer with a contract to purchase land and a mini-mart business which Aldis had used in regard to a previous attempt to purchase the same Mini-Mart.

The parties changed the names on the Defendant's former contract draft with the prior purchaser. The Defendants then refused to close and this action was filed for specific performance and damages. The District Court dismissed this case by ruling that the Plaintiff's name on the contract was incorrect. The Plaintiff appealed in the first appeal and this Court reversed the District Court in Appellate Case No. 100,055 HM of Topeka, LLC v. Indian Country Mini Mart, 44 Kan.App.2d 297, 236 P.3d 535 (2010) finding that the mistake in identifying the Plaintiff did not have any material effect on the enforceability of the purchase agreement. (44 Kan.App.2d at Syl. Par. 5 and 6).

The Defendants petitioned for Review and the Supreme Court denied Review on May 18, 2011. The case was remanded to the District Court to allow the Plaintiff to sue Defendants for specific performance of the underlying purchase agreement and damages for breach.

As the first appeal was pending, the Defendants were not paying taxes, resulting in tax liens being filed by the Kansas Department of Revenue (KDOR). After the remand, the District Court allowed discovery, set a pretrial, trial and trial briefing dates. After said Trial Briefs were filed and a separate hearing set, the District Court ruled on the equitable issue of specific performance after finding there was no ambiguity in the real estate contract and certifying that issue under K.S.A. 60-254(b). The Defendants appealed.

II. Statement of the Issues

Despite the numerous issues raised by the Defendants, which will be addressed herein, the one main underlying issue is whether the District Court erred in granting judgment for specific performance of the underlying contract. (Said Contract is attached as Appendix 1 hereto).

III. Statement of the Facts

1. The Plaintiff cites from the first Court of Appeals published decision which also states, at 44 Kan.App.2d 303, 304 and 305:

> We further note that, notwithstanding knowledge of this typographical mistake, both Hummer and Indian Country continued to actively work towards closing the deal in April, May, and June 2006...
>
> As the court concluded in Blades based on the facts presented there, we conclude based on the facts presented here that the mistake in identifying "HM of Topeka" as "HM of Kansas" in the purchase agreement is a misnomer that did not have any material effect on enforceability of the purchase agreement. Given this conclusion and the fact that HM of Topeka has alleged in this lawsuit that Indian Country's failure to close on the purchase agreement caused HM of Topeka to be unjustly deprived of its contractual right to purchase the convenience store, we find HM of Topeka is a legal entity with sufficient standing to sue Indian Country for specific performance of the underlying purchase agreement and damages for breach of the underlying contract.
>
> Reversed and remanded."

2. The subject contract is attached to the original Petition which was filed on June 15, 2006, (ROA, Vol. 1, P. 13-20) and is included in Appendix 1 hereto.

3. The Defendants cite to various allegations and oral statements but there exists a written executed contract (ROA Vol. 1, P. 16-20) which includes:

A. The opening paragraph lists the parties;

B. Par. 1 of the Contract sets out the street address and refers to the legal description on Exhibit A;

C. Contract Par. 1 also includes:

> And all personal property presently located thereon, including: All gasoline pumping equipment, convenience store shelving, fixtures and equipment, signs, telephone numbers, and any supplies or inventory presently located on the described premises along with all building currently located on the grounds. The Tex-Mex equipment and fixtures are not part of the contract and will not be included in the sale.

D. Contract Par. 2 states the price of 1.45 million dollars plus inventory payable in cash at closing; except for inventory. An inventory service is required to be used and the detailed method to inventory all items of the mini-mart are set forth. Said paragraph also grants Purchaser "full access and right to the lagoons located on the property for as long as Purchaser owns the property in question".

E. Contract Par. 3 requires Defendants to provide a General Warranty deed, Bill of Sale and title transfers at closing and lists exceptions with no leases assumed.

F. Contract Par. 4 requires Defendants to make available "prior to closing of this Contract" a title report; gives Plaintiff five days to examine the report and deliver objections and then gives Defendants 30 days to satisfy any objections to title.

G. Contract Par. 5 deals with proration of taxes.

H. Contract Par. 6 deals with maintaining insurance.

I. Contract Par. 7 deals with no assignments.

J. Contract Par. 8 states:

> "Unless additional time is required to provide marketable title this Contract shall be closed on or before forty-five (45) days from the date hereof, with possession to be delivered..."

K. Contract Par. 9 makes time of the essence.

L. Contract Par. 10 is the Defendant's warranty of the "property storage tanks, equipment and all fixtures" .... with leak detection equipment included.

M. Contract Par. 11 conditions the Contract upon suitable financing and binds successors of the parties.

N. The Contract is then signed by Carla Nissen as the owner, individual and representative of the Defendant, as well as Terry Hummer for the Plaintiff. (ROA Vol. 1, Page 16-20 and Vol. 2, Pages 270-275).

4. The Defendant then refused to close. Defendant's own Trial Brief admits (ROA Vol. 2, P. 131):

> 53. More than forty-five (45) days after the execution of the agreement, in or about May 30, 2006, Hummer states that Aldis called Hummer and told him that "they" decided not to close. Hummer dep., p. 78:4-10; Aldis dep., p. 83:1-7, attached hereto as Exhibit A.
>
> 54. Aldis states that during that same conversation, Hummer said "if you don't close tomorrow, I'll just have to sue you." Aldis dep., p. 83:1-7, attached hereto as Exhibit A.
>
> 55. Following defendants' revocation of the deal...

5. The Plaintiff then sued the Defendants within 15 days of being told by Mr. Aldis, on May 30, 2006, that the Defendants had decided not to close the next day. (Petition filed 6/15/06, ROA Vol. 1, P. 13, P. 125).

6. The District Court dismissed the case on the name issue. After the District Court dismissed the Petition on the Plaintiff's name issue and while the first appeal was pending, the Kansas Department of Revenue filed Tax Warrants, against the Defendant Carla Nissen and all of the Defendants properties and assets, totaling over 2.1 million dollars. (ROA Vol. 2, P. 64-67).

7. The Defendants then filed a "Motion to Stay" this case while the Defendants attempted to litigate the cloud on the title to this property caused by the Tax Warrants, (ROA Vol. 2, P. 17-19) and by the UCC filings of the KDOR which secure all of Defendant's property. (ROA Vol. 2, P. 311).

8. The Defendants and the KDOR came to a "Closing Agreement" in February 2014 as to payment of the tax warrants and dismissal of the tax challenge litigation. (Sealed records for courts use only - ROA Vol. 2, P. 312 and filed in this case at the appellate level by Defendants on January 24, 2017).

9. The Defendant Carla Nissen prepared an Affidavit for this case advising that Defendants had sold some of their property including Oklahoma real estate and a boat. KDOR had accepted those payments on the "Closing Agreement" as part of the payment requirements but Defendants have made no further payments. (ROA Vol. 2, P. 308).

10. Defendant's own Affidavit admits she has not made required tax settlement payments to KDOR since 2014. (ROA Vol. 2, P. 308).

11. The Defendant's own records (ROA Vol. 2, P. 310), show the tax lien is still at $2,084,176.34 and no payments have been made by the Defendants, since that printout.

12. The Defendant's own records show the Kansas Department of Revenue UCC Filing (ROA Vol. 2, P. 311), which secures everything Defendants own and the profits and proceeds from the store, which she has not been paying to the KDOR.

13. The Defendants are required by the subject Contract, the District Court's Order and the KDOR tax liens, to sell the property and apply the proceeds to the KDOR lien. (Appendix 1 hereto, KDOR liens and Journal Entry herein).

14. After the KDOR Agreement was entered into with Defendants and the tax litigation was dismissed, the "stay" was lifted and further Discovery was updated by the parties in this case.

15. The District Court then conducted the final Pretrial conference pursuant to Supreme Court Rule 140. The Trial having been previously scheduled to begin November 15, 2016. (ROA Vol. 3, P. 2).

16. The Plaintiff pursued prosecution at the final pretrial of its said Specific Performance of the Contract attached to Plaintiff's Petition for the purchase and sale of the Indian Country Mini Mart located at 20330 US-75 Hwy, Holton, Kansas. (ROA Vol. 3, P. 3).

17. Pursuant to Sup.Ct.R. 140 the District Court then set this matter for an in-person hearing before the Court on October 31, 2016 at 1:00 p.m. and requested the parties brief the issue of parole evidence, sufficiency of material terms, specific performance and identify any language which any party asserts is ambiguous in the subject written contract. (ROA Vol. 3, P. 18, Lines 20-25, P. 19, Lines 1-12).

18. Each party filed a brief herein and appeared at the October 31, 2016 hearing before the court. (ROA Vol. 2, P. 120 and P. 251).

19. Referring to the four corners of the Contract, the Court specifically ruled on the legal issue, and found the Contract is unambiguous, ordering that Plaintiff is entitled to specific performance of the said Contract, specifically certifying under K.S.A. 60-254(b) the issue of damages or equities between the parties until after the closing of the contract and sale. (ROA Vol. 4, P. 18, Lines 6-25; ROA Vol. 2, P. 268-269).

20. The Defendant's Appellate Brief Statement of Fact paragraphs 4-17 are background as to the Defendant's "thoughts" before signing the subject contract.

21. The Defendant's Statement of Fact Paragraph 18 accurately cites portions of 3 paragraphs of the subject contract.

22. The Defendant's Statement of Fact Paragraphs 19-21 reflect comments about the thoughts of the parties as to closing.

23. The Defendant's Statement of Fact Paragraphs 22-24 reflect comments about the legal description. The actual legal description of the written contract was provided by

Defendants and is attached in Appendix 1. (See also, ROA Vol. 2, P. 209 and 210).

24. The Defendant's Statement of Fact Paragraphs 25-40 reflect comments and arguments about such things as water meters, lagoons, other property the Defendant may want to sell and additional easements the parties may want to agree upon in addition to the Contract already signed.

25. The Defendant's Statement of Fact Paragraphs 41 and 42 recognize that Defendants failed to close on or about May 30, 2016 and that Plaintiff would sue if Defendants continued to refuse to close on May 30, 2016.

26. The Defendant's Statement of Fact Paragraphs 43-56 reflect that after the May 31, 2016 closing date was rejected by the Defendants their attorney continued to make statements as to "...ICMM (Defendants) was still willing to close"... (Appellant's Brief at Par. 49, P. 11) but still wanted to discuss side issues of "the two issues we need to decide on Monday are insurance and the water meter," a possible lease back and clarifying the name. (Defendant's Brief Par. 50-54 on Page 12).

27. Defendant's Statement of Fact Paragraphs 57-59 reflect statements that the Defendants allege they never received confirmation of Plaintiff's financing which would have been required at the closing which they refused to allow.

28. Defendant's Statement of Fact Paragraphs 60-61 reflect Defendant's comments as to utilities and her own legal description as well as why she now asserts she did not allow the closing to occur, which ends with "how I was going to pack that up and move it if no one paid me for it. The issue of get your stuff out in two weeks because we are coming in and where was I going to go...It became an issue with my home life, and that's when it got to be too much and it escalated from all those points on." (Defendant's Brief at Par. 61).

29. Defendant's Statement of Fact Paragraphs 62-70 reflect Defendant's statements as to "procedure" in the case.

30. Defendant's Statement of Fact Paragraphs 71-93 reflect Defendant's counsels "arguments" at the Pretrial hearings.

31. The Journal Entry requiring Specific Performance and addressing Defendant's arguments was entered on December 5, 2016 (ROA Vol. 2, P. 261).

32. The Defendants then appealed but have not posted the bond set by the District Court at $160,000.00 to acquire a stay. (ROA Vol. 2, P. 299).

IV. Argument and Authority

There are two ways to look at the Defendant's arguments. Are they exercising the good faith required in every written contract? Or are they doing everything they can to stall and avoid their responsibilities in the contract they signed?

When you look at the Defendant's arguments through the light of those prisms it becomes clear that the Defendants are doing nothing more than trying to nullify the contract into which they entered.

Good Faith

Inherent in every Kansas contract, except an employment-at-will contract, is a duty of good faith and fair dealing. The duty of good faith and fair dealing is an implied undertaking in every contract on the part of each party that he or she will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily, if one exacts a promise from another to perform an act, the law implies a counter promise against arbitrary or unreasonable conduct on the part of the promisee. See, Waste Connections of Kansas,

Inc. v. Ritchie Corporation, 296 Kan. 943, 298 P.3d 250 (2013).

A. Background

The Indian Country Mini Mart is a convenience store located at 20330 US-75 Hwy, Holton, Kansas. After several years of discussion between Roger Aldis and Terry Hummer, Mr. Aldis provided Mr. Hummer with a contract which Aldis had used in regard to a previous attempt to purchase the Mini-Mart that had failed due to lack of financing. Hummer signed the document. Aldis took the agreement to his partner, Nissen, and on March 20, 2006, Carla Nissen signed off on the written contract for the sale of the real estate and personal property. The Agreement provides for the sale of the Mini Mart for One Million Four Hundred and Fifty Thousand Dollars and Zero Cents ($1,450,000.00), plus the inventory at the time of closing. (See Contract attached as Appendix 1).

The closing date for the transaction was 45 days from the date the Agreement was signed, "unless additional time is required to provide marketable title". (Paragraph 8). Hummer received a loan commitment for a loan to purchase the Mini Mart from Valley View Bank on April 7, 2006. Paragraph 4 requires the Defendants to "make available to Purchaser prior to the closing of this contract, as evidence of marketable title, a standard owner's preliminary title insurance report". The preliminary title report was not received until May 26, 2006.

As this Court of Appeals has already ruled in the first appeal 44 Kan.App.2d 303, 304, "both Hummer and Indian Country continued to actively work towards closing the deal in April, May and June 2016..." After the title report was received, a closing date was immediately agreed to by the parties.

Mr. Hummer and Mr. Aldis scheduled the closing for May 31, 2006. The

Defendants deny a closing was set but their own factual statements set out the undisputed fact that Mr. Aldis called Mr. Hummer the day before closing and told him the Defendants had decided to not close. (See Fact Statement No. 4 above quoted from Defendants own Brief). Closing was set within 5 business days of the date that the preliminary title insurance report (May 26, 2006) was provided.

On the night before closing, the Defendants admit Aldis called Terry Hummer and told him that they were not closing on the sale of the Mini Mart and that they did not want to go through with the deal. The Defendants point out in their Fact Statements 45 and 49, a letter from the Defendant's attorney dated the next day, on June 1, 2016, confirmed the Defendant's refusal to close, but then also requested more time for the Defendants to close. (Defendant's Fact Statement No. 49). The Petition herein was filed on June 15, 2006, within 15 days of that refusal to close.

B. Defendant's Issue No. 1 - The Trial Court's Legal Ruling and Procedure

The Defendants argue that the District Court ruled on a summary judgment motion without a motion being filed.

The Defendants raise every kind of argument they can to change the fact that a written contract was entered into, but the existence of that written contract is absolutely without question. (Appendix 1 hereto).

The Defendant's arguments are all based upon their position that the Court should not look at that existing written contract.

The fact is that the parties negotiated and entered into a written contract.

When a court is faced with a written contract, certain standards of review apply.

The case was already at the Pretrial stage and Supreme Court Rule 140 requires:

> "(c) Procedural Steps. A final pretrial conference must be conducted substantially in conformity with the following procedural steps: ...

(6) The court may rule on any motions, including motions in limine, for dismissal, judgment on the pleadings, or summary judgment...

(11) The court states and may rule on the legal issues...

(15) The court determines whether briefs may be filed and, if so, specifies the time for filing them.

(16) The court determines any procedures that may aid in disposition of the case, including:"

Here, the Court was faced with a Specific Performance of a contract case and required the parties to brief that issue.

1. Standard of Review - Contract Cases

After briefing by the parties, the District Court applied the standards of review for contract cases.

In an equitable proceeding for specific performance of a contract the court looks to the real intent of the parties and enforces the contract accordingly. Debauge Bros. V. Whitsitt, 512 P.2d 487, 212 Kan. 758 (1973). The interpretation and legal effect of written instruments are matters of law. McGinley v. Bank of America, N.A., 279 Kan. 426, 431, 109 P.3d 1146 (2005). The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the contract language **without applying rules of construction**. Anderson v. Dillard's, Inc., 283 Kan. 432, 436, 153 P.3d 550 (2007).

Any Court's analysis must begin with the four corners of the instrument itself. See Safelite Glass Corp. v. Fuller, 15 Kan.App.2d 351, 362, 807 P.2d 677, rev. denied 249 Kan. 776 (1991). In interpreting contracts, courts must determine the parties' intent from the four corners of the instrument by construing all provisions together and in harmony with each other rather than by critical analysis of a single or isolated provision. See Varney Business Services, Inc. v. Pottroff, 275 Kan. 20,42-43,59 P.3d 1003 (2002);

Hollenbeck v. Household Bank, 250 Kan. 747, 751,829 P.2d 903 (1992). Whether a written instrument is ambiguous is a matter of law subject to de novo review. Investcorp, L.P. v. Simpson Investment Co., L.C, 267 Kan. 840, 847, 983 P.2d 265 (1999).

Furthermore, if the meaning of a contract is ambiguous, the contract must be construed against the drafter. Uggatt v. Employers Mut. Casualty Co., 273 Kan. 915, 921, 46 P.3d 1120 (2002) states:

> "The primary rule in interpreting written contracts is to ascertain the intent of the parties. If the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself. [Citation omitted.] A party to a contract has a duty to read the contract before signing it, and the failure to read a contract does not make the contract less binding. [Citation omitted.] Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. [Citation omitted.] Put another way: 'Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.' [Citation omitted.] Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction. [Citation omitted.]" 273 Kan. at 921. (Emphasis added).

Hochard v. Deiter, 219 Kan. 738, 549 P.2d 970 (1976) states at syllabus Par. 2:

> "2. When the party seeking specific performance of a Contract establishes the existence of a valid binding contract, which is definite and certain in its terms and contains the requisite of mutuality of obligation, and is one which is free from unfairness, fraud, or overreaching, and enforceable without injustice upon the party against whom enforcement is sought, **the court will, when the remedy at law for the breach of such contract is inadequate** and the enforcement of specific performance will not be inequitable, oppressive, or unconscionable or result in undue hardship, **grant a decree of specific performance as a matter of course or right.**
>
> ...Where the trial court abuses its discretion and arbitrarily refuses to order specific performance of a contract in a proper case it is within the power of this court to reverse the judgment of the trial court and order that the contract be specifically enforced". (Emphasis added).

When specific performance is involved, the court is allowed considerable latitude in making orders to obtain equity between the parties. Schaefer & Associates v.

Schirmer, 3 Kan.App.2d 114, 590 P.2d 1087 (1979).

In an equitable proceeding for specific performance of a contract the court looks to the real intent of the parties and enforces the contract accordingly, as a matter of law. Debauge Bros. v. Whitsitt, 512 P.2d 487, 212 Kan. 758 (1973); McGinley v. Bank of America, N.A., 279 Kan. 426, 431, 109 P.3d 1146 (2005); City of Topeka v. Watertower Place Dev. Group, 265 Kan. 148, 1 52-53, 959 P.2d 894 (1998). Unrau v. Kidron Bethel Retirement Services, Inc., 271 Kan. 743, 763, 27 P.3d 1 (2001).

Interpreting a written contract that is free from ambiguity is a judicial function and does not require oral testimony to determine the contract's meaning. Ambiguity in a contract does not appear until two or more meanings can be construed from the contract provisions. Gore v. Beren, 254 Kan. 418, 426-27, 867 P.2d 330 (1994).

2. Application of Standards to our Facts - Procedure Used

Here, the District Court looked at these standards and determined that it must look at the four corners of the contract and decide whether the contract terms, used by the parties, have two or more meanings. The Defendants were given the opportunity to come forward with language from the contract that they claimed was ambiguous.

The District Court here stated at the Pretrial (ROA Vol. 3, Transcript P. 18 and 19):

> THE COURT: I'm just thinking here. Wouldn't it be logical, then, for you to brief the issue of ambiguity of the contract or nonambiguity, the contract speaks for itself and the Court can rule on that and then we'll know where we're going from there?
>
> ...
>
> THE COURT: I don't want to drag a jury in here and send them home. We have to decide this before the trial. I don't know how long you need. I don't need reams of paper. I just need the specific on-point authorities relied on and –

District Courts exercise considerable latitude in managing cases and dockets, so

this procedure to determine the legal issue of the contract interpretation and legal effect, which are matters of law, is a discretionary call that is reviewed for abuse of discretion. See Holt v. State, 290 Kan. 491, 497-98, 232 P.3d 848 (2010) (recognizing inherent authority to control docket); Harsch v. Miller, 288 Kan. 280, 288, 200 P.3d 467 (2009) (recognizing authority to manage case). A district court abuses its discretion by ruling in a way no reasonable judicial officer would under the circumstances. Here, the District Court utilized the most common sense and logical method to apply the Standards of Review to the contract before it.

The Defendants argue summary judgment cases which do not support their position; where discovery was not completed; where there was no written contract or where there were communications not resulting in a formal contract. See for example Page 27 of Defendant's Appellate Brief, citing Integrated Living Communities, Inc. v. Homestead Co., L.C., 106 F.Supp.2d 1141, 1143 (D.Kan. 2000) and Hoxeng v. Topeka Broadcomm, Inc., 911 F.Supp. 1323 (D.Kan. 1996) and Page 33 of Defendant's Brief cites Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000), where the "court specifically noted that agreements pertaining to an interest in land must be in writing..."

In Integrated Living, 106 F.Supp. At 1143, cited by the Defendants, the Court was faced with a written contract where the party was arguing that a provision in the contract should be "interpreted" to waive interest on past due amounts. The Court granted summary judgment enforcing the contract and stating at 106 F.Supp.2d at 1143:

> "Under Kansas law, the issue of whether a contract is ambiguous is a question of law to be determined by the court. Clark v. Prudential Ins. Co. Of America, 204 Kan. 487, 464 P.2d 253, 256 (1970). If the contract is not ambiguous, the contract must be enforced as written.
>
> ....
>
> Id. Courts should not attempt to create ambiguity in a contract where, in

> common sense, there is none. Pink Cadillac Bar and Grill, Inc. v. U.S. Fidelity and Guar. Co., 22 Kan.App.2d 944, 925 P.2d 452, 456 (1996).
> [4] The Court finds that the contract between the parties is not ambiguous.
> ....
> (1144) The court is unwilling to accept the defendant's position and read ambiguity into the contract where it is clear no genuine controversy exists. The statement that the payments were to be made without interest was clearly used solely to indicate that there was no interest to be charged on the loan itself. This is much different than stating that the plaintiff would not charge the defendant interest on the debts that accrued when installments went unpaid.

In the other case cited by the Defendants, Hoxeng v. Topeka Broadcomm, Inc., 911 F.Supp. 1323 (D. Kan. 1996), the Court was faced with a letter of intent, two other letters and an expressed intent to proceed "with the potential sale", prior to drafting and execution of a formal writing. The Court determined that under such circumstances the issue of whether the parties entered a contract was a fact issue. (911 F.Supp. At 1327).

That case is clearly distinguishable from this case where there was the "drafting and execution of a formal writing". In Hoxeng the court stated at Syl. Par. 5 and at 1331:

> But where the intent of the parties is clear that they are negotiating with an understanding that the terms of the contract are not fully agreed upon and a written formal agreement is contemplated a binding contract does not come into existence in the absence of execution of the formal document. (Weil & Associates v. Urban Renewal Agency, 206 Kan. 405, 479 P.2d 875). King v. Wenger, 219 Kan. 668, 671-72, 549 P.2d 986 (1976).

The District Court here clearly followed the standards of review requiring that it determine whether the "executed formal document" was ambiguous as a matter of law.

The Defendants try to get around these standards by arguing that a contract was not "formed".

C. Defendant's Issues II, III and IV - Contract Formation and Alleged Ambiguities.

Completely ignoring the written formal contract, the Defendants argue that there were ambiguities which caused questions of fact as to whether the parties "formed a

contract".

The "existence and terms" of the contract signed by these parties are undisputed. The signed contract exists and one must again question whether the Defendants are acting in good faith to "not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement". (See Appendix 1 hereto).

1. Standards of Review - Contract Formation

Once the "existence and terms" of a contract are established, their interpretation raises a question for the court's determination. M. West Inc. v. Oak Park Mall, LLC, 44 Kan.App. 2d 35, 46, 234 P.3d 833 (2010).

The Defendants also cite the M. West case but then ignore the existence of the contract.

The Defendant's "arguments" that the court should have looked at negotiations and parol statements are the very reason for the establishment of our precedent and the statute of frauds, which prohibit the use of such incompetent evidence and arguments. Our contract law is based upon the standards of review above and not the Defendant's arguments.

As long ago as 1922, in Price v. Shay, 110 Kan. 351, 203 P. 1105 (1922), the Supreme Court ordered judgment for the Plaintiffs on a written contract when the Defendant argued "the instrument differed from his understanding of what the agreement was". (110 Kan. At 355).

The Price court cited our general rules and refused to allow Defendant to escape from his written contract stating at 110 Kan. 353, 354:

> "To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made, or to allow him to admit that he signed it but did not read it or know its stipulations, would absolutely destroy the value of all contracts. The purpose of the rule is to

> give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible...If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." (6 R.C.L. 624, 625; followed and approved in Burns v. Spiker, 109 Kan. 22, 202 P. 370).
>
> While, as we have seen, one of the purposes of the rule making incompetent parol evidence to contradict a written instrument is to remove the temptation and possibility of perjury which would be afforded if parol evidence was admissible...
>
> In Deming v. Wallace, 73 Kan. 291, 85 P. 139, it was held that the rule that oral representations or inducements preceding or contemporaneous with the agreement are merged in the writing, is subject to the exception that if the representations amount to fraud which avoids the written contract they are not merged therein, and parol evidence is admissible to show the fraud.

In Kansas, we adhere to the general principle that competent parties may make contracts on their own terms, provided they are neither illegal nor contrary to public policy, and that in the absence of fraud, mistake, or duress a party who has fairly and voluntarily entered into such a contract is bound. This rule applies regardless of a failure to read the contract or inclusion of terms disadvantageous to one party. Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 757, 549 P.2d 903 (1976); Washington v. Claassen, 218 Kan. 577, 580, 545 P.2d 387 (1976).

As the cases above instruct, when a contract is reduced to writing, it constitutes the agreement of the parties as to its subject matter and prior or contemporaneous oral agreements or statements varying or nullifying its terms are not admissible.

The Defendants try to get around the fact that they entered into a formal written agreement by arguing that they can come up with other terms that could be added to the contract, so they want the Contract nullified.

Such an argument would destroy the enforceability of every written contract, since

there are always more terms that could be added to every contract.

The question is not whether more terms "could" be added. The cases above clearly state that the question is whether the terms actually used are sufficient to form a binding contract on the subject therein.

The Defendants even cite to this authority at their Brief Page 31:

> It is generally recognized in Kansas "for an agreement to be binding it must be sufficiently definite as to its terms and requirements as to enable the court to determine what acts are to be performed and when performance is complete". Adams Parker Furniture, Inc. v. Ethan Allen, Inc., 1988 WL 235667, (D.Kan. Aug., 16, 1988)(quoting Hayes v. Underwood, 196 Kan. 265, 267-68, 411 P.2d 717, 721 (1966))...
>
> The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

Here, the Contract Par. 1 includes not only the land (with the survey attached) but also:

> And all personal property presently located thereon, including: All gasoline pumping equipment, convenience store shelving, fixtures and equipment, signs, telephone numbers, and any supplies or inventory presently located on the described premises along with all building currently located on the grounds. The Tex-Mex equipment and fixtures are not part of the contract and will not be included in the sale.

The Contract then provides for an inventory of the contents.

Further, Contract Par. 10 is the Defendant's warranty of the "property storage tanks, equipment and all fixtures" .... with leak detection equipment included.

These terms are more than sufficient to enable the District Court to determine if the land and personal property was to be sold.

In Brown v. Oliver, 123 Kan. 711, 256 P. 1008 (1927), the court allowed parole evidence to prove that a contract of sale for a hotel building included the furniture in the building, even though the furniture was not specified in the written contract. The court

found that the written instrument was not intended to constitute exclusive evidence of an entire transaction of sale, but was intended to relate to the real estate only, 123 Kan. at 713 stating:

> "The writing was appropriate to evidence a sale of real estate to be consummated in the future, and was devoted to that subject. **It was unambiguous**, made no reference to any item of personal property, and contained **nothing to indicate the parties were dealing with respect to any subject except land and matters incidental to the land described. The parties were not obliged to extend the writing beyond the single subject of land.** They could leave personal property included in the transaction of sale to be transferred by bill of sale or by delivery on payment of price. (St. L.L.&W. Rly. Co. v. Maddox, 18 Kan. 546). Such an arrangement would not contradict any provision of the land contract because it purported to relate to land only...**When the court, not the jury, had determined in this manner the preliminary questions of what the writing covered** the court was in a position to rule on whether parol evidence of **sale of the furniture should be received and go to the jury.**

Thus the Supreme Court clearly approved of the District Court enforcing the real estate contract and then any peripheral issues, if any remain and were still undecided, would go to a jury.

It should be noted here that the Defendants have not asserted that any of the discussions on their incidental issues (such as utilities and easements) should be determined to be an oral contract or supplements to the contract. Instead, they are using those later conversations as a sword to nullify the written contract and do not request enforcement of any of their incidental later conversations.

The Brown Court recognized the doctrine of "partial integration" permits parole evidence to prove the terms of the "entire" contract. However, the doctrine applies only when a portion of a transaction has been embodied in a single writing and the remainder has been left in some other form. Brown, 123 Kan. at 713. If a term or subject was not covered in the written document, then parole evidence may be offered **on the omitted term so long as the evidence does not contradict the express terms of the writing and**

merely supplements its contents. 123 Kan. At 713-14. See also, Robertson v. McCune, 205 Kan. 696, 699, 472 P.2d 215 (1970) (parole evidence **may not be used to nullify a clear and positive provision of the writing**). (Emphasis added).

Parole evidence which tends to vary or contradict the terms of a written contract must be stricken and such evidence should not be considered by a court in reaching its decision. Such evidence is considered to be incompetent and its admission is in violation of the parole evidence rule. Gibbs v. Erbert, 198 Kan. 403, 412, 424 P.2d 276 (1967).

2. Application of Standards to each of Defendant's Issues

The Defendants make general statements and jump back and forth from one argument to another and back again, but their arguments can be boiled down to the following:

a. The General Sales Language. The subject Contract contains, within its four corners, all of the necessary elements of a real estate sales contract (price, property, closing terms and signatures). The outward expression of assent in the written contract is sufficient to form an enforceable contract. (See Fact Statements above 3(A) through (N) for more details).

The written contract provides for the sale of the Mini Mart for One Million Four Hundred and Fifty Thousand Dollars and Zero Cents ($1,450,000.00), plus a procedure to determine the price of the inventory at the time of closing. [Paragraph 2(a),(b),(c) and (d)].

It is the Defendant's duty to come forward with alleged contract terms that have two or more meanings. The Defendants have not done so. The Contract has no material ambiguity in its terms. All essential terms and conditions were agreed upon.

> "In determining intent to form a contract, the test is objective, rather than subjective, meaning that the relevant inquiry is the 'manifestation of a

> party's intention, rather than the actual or real intention.' [Citation omitted.] Put another way, the **'inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.'** [Citation omitted.]" (Emphasis added) Southwest & Assocs., Inc. v. Steven Enterprises, 32 Kan.App.2d 778, 781,88 P.3d 1246.

The subject Contract contains all of the necessary elements (price, property, closing terms and signatures).

The Defendants have asserted that the contract was not really a contract but rather something like a starting point for negotiations. Such a position makes no sense given the plain language of the Defendant's own written agreement.

b. The Plaintiff's Name Issue. The Defendant argues that the Plaintiff's name is different than on the Contract face, but the issue of Plaintiff's name as used on the Contract has already been decided by the Court of Appeals.

This Court of Appeals has already established the "law of the case" as to the contract interpretation being a question of law and non-material issues can not defeat the intent of the parties, stating at syllabus paragraphs 5 and 6:

> "5. Under the facts of this case, the mistake in identifying "HM of Topeka" as "HM of Kansas" in the purchase agreement is a misnomer that did not have any material effect on enforceability of the purchase agreement.
> 6. Under the facts of this case, Plaintiff is a legal entity with sufficient standing to sue Defendants for specific performance of the underlying purchase agreement and damages for breach of the underlying contract. (Emphasis added).

Essentially, the doctrine of the "law of the case" prevents parties from reopening issues in a case that have already been addressed and decided on appeal in that case. Thoroughbred Assocs. v. Kansas City Royalty Co., 297 Kan. 1193, 1212, 308 P.3d 1238 (2013) ("The law of the case prevents re-litigation of the same issues within successive stages of the same suit."); State v. Collier, 263 Kan. 629, Syl. , 3, 952 P.2d 1326 (1998):

> ("[O]nce an issue is decided by the [appellate] court, it should not be re-

litigated or reconsidered unless it is clearly erroneous...to assure the obedience of lower courts to the decisions of appellate courts." 263 Kan. 629, 952 P.2d 1326, Syl. , 2.

c. The Marketable Title Issue. The Defendants then assert that the Contract is ambiguous because there is "no time frame to deliver marketable title".

Paragraph 4 of the Contract requires the Defendants to "make available to Purchaser prior to the closing of this contract, as evidence of marketable title, a standard owner's preliminary title insurance report". Paragraph 4 states that "**upon delivery** of said preliminary owner's title insurance report, **Purchaser shall** have a reasonable time not to exceed five days to examine..." and allows the purchaser to object to any title issues but that time does not begin until "upon delivery of said preliminary owner's title insurance report..."

The Defendants admitted at the Pretrial they did not provide the preliminary title report which is required in said Paragraph 4. The Defendants argue in their Issue No. IV that the Court considered the Defendant's own admissions, which they claim to be extrinsic evidence. Our Pretrial rule requires the Court to determine undisputed facts.

Later in the Contract, Paragraph 8 then states: "Unless additional time is required to provide marketable title, this Contract shall be closed on or before forty-five days from the date hereof". These are all "standard" title due diligence paragraphs found in nearly every real estate contract.

As the cases cited above require, all of these paragraphs must be construed together and in harmony with each other rather than by critical analysis of the one isolated phrase argued by Defendants. Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction. Where there is no definite time set for a closing, the law and a fair, reasonable and practical construction,

both infer a reasonable time is intended.

In Hochard v. Deiter, 219 Kan. 738, 549 P.2d 970 (1976) the Supreme Court ruled:

> "The trial court erred in refusing to order specific performance of the contract"... (219 Kan. At 738).
>
> **The sale was not consummated because the Deiters failed to provide the Hochards with merchantable title... (219 Kan. At 741).**
>
> **Inasmuch as the instant contract did not specify a time limit within which the Deiters were to furnish merchantable title, it must be assumed that a reasonable time was intended... (219 Kan. At 742).**
>
> Where the parties have freely entered into a fair and reasonable contract and enforcement of its terms would not work a hardship or otherwise be inequitable, the parties are entitled to a decree of specific enforcement. We conclude the trial court erroneously refused to specifically enforce the contract (Emphasis added)(219 Kan. At 743).

Even though the Defendants failed to provide evidence of marketable title as clearly required in the Contract, the Plaintiff ordered a report and attempted to close within a reasonable time, i.e. 5 days after the title commitment was received. The Defendants admit, as quoted above in Fact Statement 4, that on May 30, 2016, the night before closing, Mr. Aldis, the Defendant's partner, called Terry Hummer and told him that Defendants were not closing on the sale of the Mini Mart. Why would Mr. Aldis call and refuse to close "tomorrow" unless a closing was scheduled for "tomorrow"? The Defendant's arguments do not follow logically when they use these very facts in their Brief to claim that no closing was set. The Defendants admit they refused to close and then state, "Following **Defendant's revocation** of the deal". (See Fact Statement No. 4 above). The Petition for Specific Performance of the said contract herein was filed herein on June 15, 2006.

The Defendants admit that they did not provide the preliminary title report, which would start the review period and objection period, but then Defendants complain that the

Plaintiff did not close within 45 days of signing the Contract. The Defendant's real argument is that they wanted the District Court to re-write the Contract to state this Contract "must be closed before May 4" and to delete all the specific due diligence title proof.

The Defendant's argument is that since they failed to provide the title report, which they agreed in writing to provide, that they should be allowed to "nullify" the Contract.

A party to a contract cannot prevent performance by another and derive any benefit, or escape any liability, from his own failure to perform a necessary promissory condition that prevents the completion of the transaction. Wallerius v. Hare, 194 Kan. 408, 399 P.2d 543 (1965); Talbott v. Nibert, 167 Kan. 138, 206 P.2d 131 (1949); and Sharman v. Webber Supply Co., 201 Kan. 507, 515, 441 P.2d 867 (1968).

A party to a contract will not be permitted, in the absence of justifiable cause, to interfere, hinder, or prevent performance by an adverse party and claim benefits or escape liability on the ground of nonperformance. Briney v. Toews, 150 Kan. 489, 95 P.2d 355 (1939).

The prevention doctrine is substantially related to the implied covenant of good faith and fair dealing that is implicit in every contract. See Cauff, Lippman & Co. v. Apogee Finance Group, Inc., 807 F.Supp. 1007, 1022 (S.D.N.Y. 1992). 13 Williston on Contracts §39:6, pp. 530-31, explains that the prevention doctrine is based on the duty of good faith as follows:

> "[T]he principle of prevention is based on the implied agreement of the parties to a contract to proceed in good faith and cooperate in performing the contract in accordance with its expressed intent and, therefore, to refrain from committing any willful act or omission that would interfere with the other party or prevent or make it impossible for the other party to perform."

Courts in other jurisdictions have held that when a contract contains a condition precedent to a party's performance obligation and the occurrence of the condition is within the control of that party, the party must make a good-faith effort to bring about the condition. Johnson v. Lambros, 143 Idaho 468, 474, 147 P.3d 100 (2006); see AquaSource v. Wind Dance Farm, Inc., 833 NE2d 535, 539 (Ind.App.2005)("[A] party may not rely on the failure of a condition precedent to excuse performance where that party's own action or inaction caused the failure. When a party retains control over when the condition will be fulfilled, it has an implied obligation to make a reasonable and good faith effort to satisfy the condition."); Brown v. Alron, Inc., 223 Neb. 1, 4, 388 NW2d 67 (1986); Tacoma Northpark, LLC v. NW, LLC, 123 Wash.App. 73, 82, 96 P.3d 454 (2004).

It is a principle in the law of contracts that a bilateral contract contains an implied condition on both parties to cooperate with each other in obtaining the goals of the contract. See Vanadium Corporation v. Fidelity & Deposit Co., 159 F.2d 105, 108 (2d Cir. 1947)("'[W]herever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied in fact that the cooperation will be given.'"). Moreover, not only is there an implied condition for the parties to cooperate in such performance if cooperation is necessary in achieving the goals of the bilateral contract, but there is also an implied condition to not prevent performance or make it impossible for the other party to perform. M. West, Inc. v. Oak Park Mall, LLC, 44 Kan.App.2d 35, at 53-54, 234 P.3d 833 (2010).

d. Utilities. The Defendant argues that the contract did not contain terms dealing with the utilities such as water service, propane service, telephone service, and lagoon service. Utilities are changed and transferred in every sale and this is an issue with the

utility providers, after closing. This is akin to the very "side issue" argument rejected in Brown v. Oliver, cited above, where the Court refused to allow incidental side issues to bar specific performance of the written contract. Further, these are Defendant's pre-existing issues and issues the Defendants could have dealt with when they entered the contract.

Hardship, fairly and voluntarily assumed as a part of the contract sought to be enforced, cannot prevail to stay a specific performance thereof, and a bad bargain, in the absence of fraud, will not relieve a party from specific performance. 81 C.J.S. Specific Performance §20 pp. 737-740.

In each case, these were not hidden issues but ones the defendants specifically created when they built the property and used the same services for the residence and Mini Mart. Defendants knew that the utilities were used for both the business and the residence and would need to be separated. Moreover, in each case, Mr. Hummer had, and still has, made arrangements to either repair or divide the utilities from the residence. Thus, not only were the issues, with regards to the utilities, omitted and nonessential terms, but items easily remedied and still ready to be dealt with by Mr. Hummer. They are not issues "which go to the very heart of the transaction".

e. Legal Description. The next of Defendant's arguments is that the property description provided by the Defendants for the contract was incorrect, at first. The Defendants do not explain that they then provided a second legal description to attach to the Contract which included the diesel and storage tanks.

It should be noted, again, that the Contract is clear that it covered all the property "tanks, equipment, and all fixtures" which go along with the store plus all "leak detection equipment". (See Fact Statement No. 3C and L above). Defendants cannot escape the

terms of the contract on the basis of them creating an issue.

The Contract clearly provides the street address of the Mini Mart and requires the Defendants to attach the legal description. The Defendants, at first submitted one survey and then provided the final survey. (ROA Vol. 2, P. 209). At one time the Defendants were claiming that they forgot to reserve an easement to Defendant's residence (although the Defendants own the surrounding property) and at another time the Defendants were claiming there is no entrance to either property (although the survey clearly shows the public road and U.S. Highway). These are also problems specifically created by the Defendants. Mr. Hummer did not provide any of the "attached" property descriptions, the Defendants Aldis and Nissen did. If the property description the Defendants provided and then corrected is incorrect or deficient as to storage tanks, it is a result of Defendants Aldis and Nissen moving the property lines around and providing two very similar but different surveys, which are almost identical. Moreover, Nissen owns all of the property at issue and all of the surrounding property except for the State Highway. Access to both properties is clearly available from the public road off the U.S. Highway.

With regard to the Defendant's desire to reserve a proposed easement across part of the property sold, the parties started discussions after the Defendants refused to close, but even with such a supplemental easement, the Defendants still refuse to close. They have never requested any relief such as "enforcing" the proposed easement that the Plaintiffs drafted, as a supplement after the contract was entered, for the benefit of the Defendants. If the Defendants really wanted an easement across the subject property wouldn't they be requesting it herein as alternative relief (or are they just using this as an excuse to nullify the Contract). Further, the Defendant has every ability to access her property from her other surrounding land. That access is 100% within her own hands.

The Defendants then argue in their Issue No. 5 that their failure to reserve an easement in the Contract violates the statute of frauds? The Defendants appear to be arguing that, after the Contract was entered into, they decided they wanted an access easement across the subject property, rather than using their surrounding property for access, and that since they refused to agree to a supplemental written easement, which would be solely for their own benefit, the previously executed written Contract, already entered into, should be nullified.

Again, the Defendants do not request that an easement be found to supplement the Contract. They argue that since they missed this clearly available issue in the original Contract and since they now want to get out of the subject Sales Contract, they should be able to do so by claiming they didn't sign a supplemental written easement agreement that they could have put in the executed Contract. Everything about the Defendant's argument shows they are not acting in good faith to work towards completing the Contract. They are doing everything they can to avoid the written Contract.

As is stated above, our Courts are clear that if a term or subject was not covered in the written document, then parole evidence may be offered on the omitted term so long as the evidence does not contradict the express terms of the writing and merely supplements its contents. Parole evidence may not be used to nullify a clear and positive provision of the writing. (Brown, supra, 123 Kan. At 713-714; Gibbs, supra, 198 Kan. At 412).

Parole evidence which tends to vary or contradict the terms of a written contract must be stricken and such evidence should not be considered by a court in reaching its decision. Such evidence is considered to be incompetent and its admission is in violation of the parole evidence rule. Id.

Further, if the Defendants are claiming they created a mutual mistake of fact,

similar to specific performance, reformation is an equitable remedy available to correct mutual mistakes of fact. See Schlatter v. Ibarra, 218 Kan. 67, Syl. P. 2, 542 P.2d 710 (1975). Reformation has been held to be available in cases of mutual mistake to correct transfers of real estate. See Harper v. Continental Oil Co., Inc., 805 F.2d 929.

Finally, even if the Defendants were completely cut off, which they are not, Kansas law implies easements for ingress and egress when someone sells a piece of their land. See Horner v. Heersche, 202 Kan. 250, 254, 447 P.2d 811 (1968) (implied easement by necessity is created whenever property is completely surrounded by adjoining lands).

f. The Defendant's Lagoon Issue

The Defendants next argue that the other ambiguous term, is that the Contract refers to the lagoon "on the property". First, the use of the Defendant's lagoon is not material at all to the Plaintiff as commercial disposal equipment is available for all such locations. Second, whether the Plaintiff can temporarily use the Defendant's lagoon is clearly addressed in the Contract. The Defendants argue the lagoon was on the Defendant's property when it was all one piece of ground, but after sculpting out the area for the mini-mart, the lagoon is on the remaining property owned by the Defendant Nissen and not on the parcel being separated from her property and sold to the Plaintiff. The Contract paragraph 2(e) refers to the lagoon used by the mini-mart and the Defendants have not provided any evidence of two different meanings as to that lagoon or that the parties "intent" was to include any other lagoons than the one that actually exists and is being used by the mini mart being sold. There are not two "understandings" as to any lagoon. There is one understanding as to the only lagoon. The Contract here clearly grants to Plaintiff "full access and right to the lagoons located on the property for as long

as purchaser owns the property in question". (Contract Par. 2). This contract creates a written agreement between the parties to use the lagoon, i.e. a "license", and nothing further is required for that license to be enforceable between the parties.

In The Stroup Lumber Company v. Larmor et al., 110 Kan. 670, 672, 205 P. 621 (1922); our Supreme Court stated:

> Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further...Agreements have been held to be licenses by which the owner of realty has given to another permission to maintain thereon horse sheds...a logging road, a bathhouse, a sheet-music business in space in a department store for which "rental" was to be paid, and billboards...and to flow the land with water...A permit to graze sheep although called a lease has been held to be but a license...The occupancy by a licensee may and often is of a very temporary character, but it also may be in some cases for rather notorious and continuous purposes, such as maintaining a building or other residence thereon." (Citations omitted).

The terms of the license are set out in this Contract.

g. The Defendant's Other Side Issues

The Defendant's final arguments all deal with what they assert are negotiations that were never agreed upon. The Contract is sufficient to evidence a sale of real estate to be consummated and was devoted to that subject. It is unambiguous, and contains nothing to indicate the parties were dealing with other issues. The parties were not obliged to extend the writing further.

Two persons may fully agree upon the terms of a contract knowing that there are other matters on which they have not agreed and on which they may expect further negotiations. Such an expectation does not prevent the agreement already made from being an enforceable contract. See, Storts v. Eby Construction Co., 217 Kan. 34, 535 P.2d 908 (1975).

Further, these are Defendants' pre-existing issues and issues the Defendants should

have realized when they entered the contract.

The rule against specific performance has been said to **apply only** where the consequences of enforcement **cannot be deemed to have been contemplated by the parties when the contract was made**. Hence, hardship, fairly and voluntarily assumed as a part of the contract sought to be enforced, cannot prevail to stay a specific performance thereof, and a bad bargain, in the absence of fraud, will not relieve a party from specific performance. 81 C.J.S., Specific Performance §20, pp. 737-740. 7 Kan.App.2d at 189-90, 638 P.2d 985. Kansas Baptist Convention v. Mesa Operating Ltd. Partnership, 253 Kan. 717, 785, 864 P.2d 204 (1993) (emphasis added). See also, Link's Estate v. Wirtz, 7 Kan.App.2d 186, 638 P.2d 985 (1982).

In each case, these were not hidden issues but ones the Defendants specifically created when they built the property and used the same services for the residence and Mini Mart.

Not only were the additional issues, omitted and nonessential terms, but items easily remedied. They are not issues "which go to the very heart of the transaction".

h. Defendant's Last Issues

The Defendant's arguments are a clear showing that they did not take good faith actions and that they set up road blocks to closing. Now they are using those road blocks to avoid their duty to sell the property.

The Defendants then claim that since they refused to close the day before the closing and revoked "the deal," (Fact Statement 4 above), the Plaintiff did not prove to them they could have financed the property. This too was 100% in the hands of the Defendant to show up at the closing the next day and the Plaintiff would have proved financing, by closing the sale. The Defendants prevented that action, not the Plaintiff.

Finally, the Defendants argue the sale can not be closed at all until the 2 million dollar unpaid Kansas Department of Revenue tax lien is resolved and that they have been negotiating with KDOR for several years. First, lien releases are provided every single day in real estate closings and in almost all cases the creditor (KDOR) is glad to finally get some actual payment from an arms-length buyer for part of the secured assets. Here, the Defendant's own Affidavit shows that she sold other real estate and personal property and applied the proceeds to the amount the Defendants owe to the State of Kansas for their unpaid taxes. Such action could not have occurred unless KDOR released its liens on all of that secured property to allow the sales to go through. Most creditors that have already been given "several years" of broken promises with no payments (as is occurring already in this case) are extremely happy to release liens so that an arms length sale can be closed and so that the creditor (KDOR) can finally get a payment.

The alternative for the creditor (KDOR), is for the creditor to file an action to seize the mini-mart and all the secured assets and sell the assets at auction or at a "fire" sale, which usually results in a greater loss than compared with allowing this arms-length transaction to close and releasing their lien on that property.

The Sales Contract here requires good faith cooperation to provide Plaintiff with clear title and part of that process, in every sale, is allowing the buyer to contact creditors of the seller to obtain lien releases. The Defendants are absolutely refusing any contact here because they are obviously not negotiating for the Plaintiff/Buyer for a lien release. They appear to just be continuing their "years" of negotiating with KDOR for some larger settlement of all amounts due, including their own personal liability.

The Defendants are using the "KDOR" lien to stall this sale, at the same time they are using this sale to try to make a personal deal with KDOR. In the intervening years,

between the sales contract and now, the Defendants have taken hundreds of thousands of dollars out of the mini-mart, each year, in salaries and distributions. The Defendants have no incentive at all to complete the contract. If they closed this sale, they would lose the cash cow they have kept for years. Plus, the proceeds from this sale would go to KDOR to pay toward the 2 million dollars in taxes owed. **This has been going on for years and needs to stop.**

In Summary

The District Court is not "forcing" a sale, it is holding the Defendants to their written agreement to sell real estate. The work to be done in closing the sale was clearly anticipated in this and every contract for the sale of real property. Doing work to close a sale is no reason to defeat the contract.

The Defendants have successfully stalled the closing of their own Contract for years and in that time have taken all the profits from the property and have caused sales to decrease every year while taxes, and a huge tax lien, have gone unpaid.

There is a great difference between alleging there are parol statements that should be considered to determine if the parties agreed on other incidental side issues that could be enforced as part of a supplement to a contract and using those same parol statements to nullify and escape from an already agreed upon written contract.

The Defendants are not pushing or requesting that any of their incidental side issues be enforced. They are using them to destroy their written contract and escape from their obligations.

The Defendants stated that they were not going through with the closing scheduled for the next day and then started asking the Plaintiff to agree to revoke the contract. The Defendants couldn't get the Plaintiff to agree to terminate the existing contract so they

came up with everything plus the kitchen sink to get out of the contract.

If one looks at all these issues of Defendants as a way to supplement or complete the contract, that is one thing as these issues would not have stopped a closing. But it is quite clear that their goal is to nullify the contract.

WHEREFORE the Plaintiff respectfully submits that the District Court did not err in granting specific performance of the Contract.

RESPECTFULLY SUBMITTED BY:

/s/ Stephen P. Weir
Stephen P. Weir #11624
STEPHEN P. WEIR, P.A.
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Attorney for Appellee, HM of Topeka, LLC

CERTIFICATE OF SERVICE

I, Stephen P. Weir, attorney for the Appellee, certify that on the 15th day of June, 2017, a true and correct copy of the above and foregoing Brief of Appellee, was e-filed with the Court and a copy to counsel either e-mailed or placed in the United States mail, postage prepaid, addressed as follows:

Original: Clerk of the Court of Appeals
Kansas Judicial Center
301 W. 10th Street
Topeka, KS 66612

Copy: J. Phillip Gragson
Henson, Hutton, Mudrick & Gragson, LLP
100 SE 9th Street, 2nd Floor
Topeka, KS 66612

/s/ Stephen P. Weir
Stephen P. Weir, #11624

APPENDIX 1

AGREEMENT FOR PURCHASE OF REAL ESTATE AND PERSONAL PROPERTY

THIS CONTRACT made this 20 day of MARCH 2006, by and between Indian Country Mini Mart, a Kansas General Partnership, and Carla D. Nissen (collectively referred to as "Seller"), and HM of KANSAS LLC (referred to herein as "Purchaser").

FOR GOOD AND VALUABLE CONSIDERATION, Seller and Purchaser agree as follows:

1. Seller agrees to sell and **Purchaser** agrees to buy the following real estate located in Jackson County, Kansas, commonly known as 20330 US-75 Hwy. Holton, Kansas with a Legal Description as follows:

See Attachment "A"

And all personal property presently located thereon, including:

All gasoline pumping equipment, convenience store shelving, fixtures and equipment, Signs, telephone numbers, and any supplies or inventory presently located on the described premises along with all buildings currently located on the grounds. The Tex-Mex equipment and fixtures are not part of the contract and will not be included in the Sale.

2. The total purchase price is one million four hundred fifty thousand dollars ($1,450,000), plus the value of inventory and supplies determined as herein provided, payable as follows:

(a) Payment in cash by the **Purchaser** at the time of closing of all amounts except for inventory and supplies which shall be paid as set forth below:

(b) An inventory reconciliation shall occur the day of closing of this transaction. An inventory service to be agreed upon by the parties, shall be employed to take the inventory, which shall be done in the presence of representatives from both **Purchaser** and **Seller**, and the expense of the inventory service shall be split equally between **Purchaser** and **Seller**.

(c) The purchase price for the inventory shall be the invoice cost for gasoline, cigarettes and beer, with all remaining inventory, including soda and deli items, being purchased at retail price less thirty percent (30%) and will be paid to **Seller** by Hummer Markets, LLC.

(d) The decision of the inventory service shall be binding on both parties and upon approval by the parties or their representatives and upon the determination of the inventory value, Hummer Markets, LLC shall pay to **Seller** the inventory value within twenty-four (24) hours after the value of the inventory is so determined.

(e) The **Purchaser** shall have full access and right to the lagoons located on the property for as long as **Purchaser** owns the property in question.

3. **Seller** shall convey marketable title by General Warranty Deed to be delivered to **Purchaser** at the closing of this Contract, upon receipt of the total purchase price, free of all Liens and encumbrances except

(a) Zoning, conditions restrictions, deed restrictions, reservations, right of way and easements of record, if any, which do not materially affect the

value or prohibit the use of the property for its intended use;

(b) Encumbrances created by **Purchaser**, if any;

(c) Installments, if any, of special assessments not yet due;

Seller shall convey ownership of the personal property by appropriate bill of sale, title transfer or other document evidencing free and clear title to purchaser at the closing of this contract. **Purchaser** does not purchase nor assume any lease or rental agreement presently in effect for equipment located on the premises. Likewise, **Purchaser**, does not assume or purchase any service or supply agreements the **Seller** may have made during the course of its operation of the convenience store located on the premises. Seller must arrange for the removal of any leased equipment and termination of any service contracts, providing **Purchaser**. A complete list of all equipment will be furnished to the **Purchaser** prior to closing.

4. **Seller** shall make available to **Purchaser** prior to closing of this Contract, as evidence of marketable title, a standard owner's preliminary title insurance report, and, after closing of this Contract, a standard owner's title insurance policy which will insure **Purchaser** against loss or damage to the extent of the total purchase price by reason of defects in title of **Seller** to said real estate, subject to the above exceptions. Upon delivery of said preliminary owner's title insurance report, **Purchaser** shall have a reasonable time not to exceed five (5) days to examine the same and return the same to **Seller** with any written objections concerning the marketability of the title or the same shall be deemed waived. If the **Seller** shall be unable to deliver marketable title as herein provided, this Contract shall be of no further force or effect; provided, however, **Seller** shall have a reasonable time not to exceed thirty (30) days to satisfy any valid objections to title. If the **Seller** does not correct valid objections to title within thirty

(30) days. Purchaser shall have the right to waive such objections and to close this Contract even though objections have not been corrected by the Seller. The cost of the title insurance and all closing costs of the title company shall be split equally between Seller and Purchaser.

5. Taxes and Assessments due and payable for the calendar year 2005 and all prior years, shall be paid by Seller. Taxes and Assessments for 2006 shall be prorated to the date of closing, and all taxes and assessments that may be levied, imposed or become payable after said time shall be assumed and paid by the Purchaser. The personal property taxes for 2006 shall be pro-rated to the date of closing, and shall be payable by Seller and Purchaser respectively.

6. Seller agrees to maintain in force, until the closing of this Contract, all liability and casualty insurance now in effect on the premises and improvements, if any, at which time said insurance shall be canceled. In the event of loss or damage to the improvements prior to the closing of this Contract, the proceeds of such insurance, plus any deductible to be paid by the Seller, shall, at the option of the Purchaser, be used to repair such damage or applied to reduce the purchase price. If such proceeds are inadequate to restore the improvements to substantially their same condition as before such loss or damage or in the event of an uninsured loss or filing of a condemnation petition to acquire all or any part of said real estate before the closing of this Contract, it may be canceled at the option of either Seller or Purchaser.

7. Prior to the closing of this Contract, Purchaser shall not sell, assign or transfer this contract or any interest in said property, without first obtaining the written consent of Seller.

8. Unless additional time is required to provide marketable title, this Contract shall be closed on or before forty-five (45) days from the date hereof, with possession to be delivered

to Purchaser upon closing.

9. Time is of the essence in this Contract.

10. Seller warrants that the property, storage tanks, equipment and all fixtures are in proper working order and they have no material defects. Leak detection equipment is included in the purchase price.

11. This Contract is expressly conditioned upon the **Purchaser** being able to secure suitable financing for the purchase price as set forth above, and if such financing cannot be suitably arranged by **Purchaser**, this Contract shall be null and void, and **Seller** and Purchaser shall be released from all liability hereunder, and any monies paid hereunder shall be returned to the **Purchaser**.

This Contract shall extend to and become binding upon the heirs, executors, administrators, successors and assigns of the respective parties.

IN WITNESS WHEREOF, the parties have signed their names as of the day and year first above written.

SELLER

Carla D Nissen
Indian Country Mini Mart
By: Carla D. Nissen

Carla D Nissen
Carla D. Nissen

PURCHASER

HM OF KANSAS, LLC

ATTACHMENT A

No. 1380

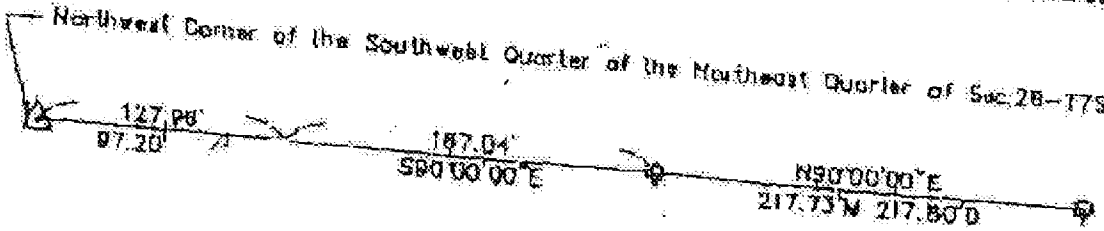
ORDERED BY DENISON STATE BANK

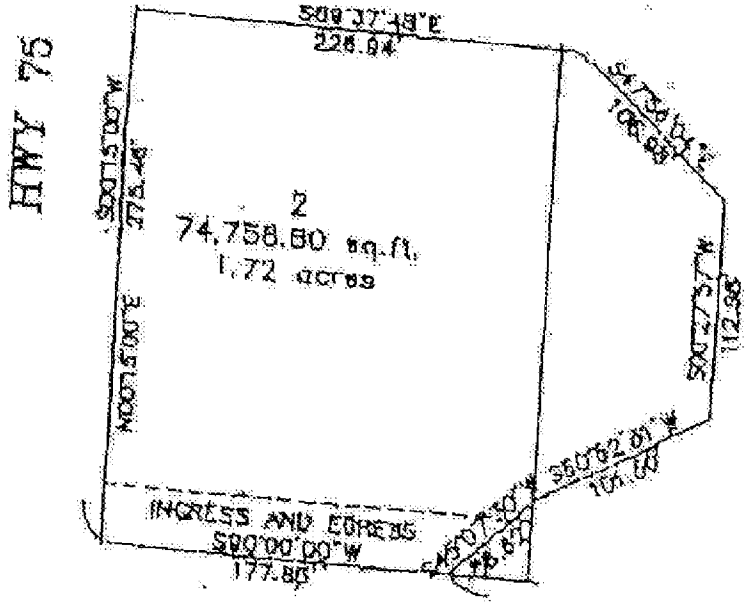
SURVEY MADE April 30th 19 98 PARTY ML/DC/EH FIELD NOTES 1380

DESCRIPTION:

A tract of land in the Southwest Quarter of the Northeast Quarter of Section 28, Township 7 South, Range 15 East of the 6th PM, Jackson County, Kansas, More particularly described as follows:

Commencing at the Northwest corner of the Southwest Quarter of the Northeast Quarter of said Section 28; Thence South 90 degrees 00 minutes 00 seconds East a distance of 97.20 feet; Thence South 00 degrees 15 minutes 00 seconds East a distance of 275.48 feet to the Point of Beginning; Thence North 90 degrees 15 minutes 00 seconds East a distance of 275.48 feet; Thence South 89 degrees 37 minutes 48 seconds East a distance of 226.04 feet; Thence South 47 degrees 55 minutes 04 seconds East a distance of 108.80 feet; Thence South 00 degrees 27 minutes 57 seconds West a distance of 112.98 feet; Thence South 60 degrees 52 minutes 31 seconds West a distance of 101.80 feet; Thence South 49 degrees 07 minutes 30 seconds West a distance of 55.62 feet; Thence South 90 degrees 00 minutes 00 seconds West a distance of 177.85 feet to the Point Of Beginning. Said tract contains 1.72 acres.





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NO PINS WERE SET ON THIS SURVEY AT OUR REQUEST OR [illegible]

MARTIN E. LOWE
LICENSED
1081
4-30-98