IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA

JAMES E. LANG, TRUSTEE, Plaintiff, vs. **KENNETH W. BRION and LINDA B. BRION, husband and wife, and JAMES S. BRION and JANE M. BRION, husband and wife**, Defendants.	Case No. 4661 **DECREE OF SPECIFIC PERFORMANCE**

DATE OF TRIAL: November 29, 1999.

DATE OF DECISION: December 6, 1999.

APPEARANCES:

For plaintiff: Robert F. Peterson, of Laughlin, Peterson & Lang, without plaintiff, but with Frank R. Krejci, plaintiff's beneficiary.

For defendants: Jerold V. Fennell, of Domina Law pc, with defendants Kenneth W. Brion and James S. Brion only.

SUBJECT OF ORDER: Decision on the merits following trial to the court in equity.

FINDINGS: The court finds and concludes that:

1. The court has jurisdiction of the parties and the subject matter.

2. The plaintiff seeks specific performance of an agreement to purchase the following real estate:

> Lots 1 and 2 in Section 26; Lot 1, the Southwest Quarter of the Southeast Quarter (SW¼SE¼), and the South Half of the Southwest Quarter (S½SW¼) of Section 27; the Northeast Quarter (NE¼), the North Half of the Northwest Quarter (N½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), the East Half of the Southeast Quarter (E½SE¼), and the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34; and the North Half of the Northwest Quarter (N½NW¼) of Section 35, all in Township 34 North, Range 9, West of the 6th P.M. in Boyd County, Nebraska, EXCEPT that part of the Northwest Quarter of the Southeast Quarter of said Section 34 described as follows: Beginning at the Northwest corner of the Southeast Quarter (SE¼) of Section 34, thence East along the North boundary line of said SE¼ of Section 34 a distance of 330 feet, thence South to the South boundary of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34, thence West along the said South boundary to the Southwest corner of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34 a

distance of 330 feet, thence North along the West boundary of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34 to the point of beginning, said excepted tract containing 10 acres, more or less.

3. The first offer was prepared by Roger Waldo (Waldo) of Waldo Realty, who had a listing agreement on the property with one or more of the members of the Brion family. Waldo did not prepare the counter offer.

4. The documents were signed by the plaintiff as trustee for Frank R. Krejci (Krejci) as beneficiary. At all times, the trustee acted on behalf of Krejci. Krejci used his attorney as trustee because Krejci was not sure how title was to be taken or whether Krejci would be out-of-state at the time set for closing. However, Krejci personally negotiated all of the terms of the offers and all of the discussions that Waldo had with the proposed buyer were with Krejci.

5. In September of 1998, Waldo had shown Krejci various properties with scenic and recreation use potential in north central Nebraska, including the property which is the subject of this action.

6. Waldo originally had a listing from LaVerne Brion (LaVerne), the mother of defendant Kenneth Brion (Kenneth), for a 1,200 acre tract, including the subject property.

7. In June of 1998, Kenneth and his son James S. Brion (James) and their respective spouses purchased 693 acres of the 1,200 acre property. Waldo was not involved in that transaction and was not aware of the specific ownership of the 693 acre portion. Kenneth told Waldo that Kenneth and James owned the 693 acre portion. Waldo told Krejci that LaVerne owned 507 acres and that Kenneth and James owned the other 693 acres.

8. Waldo continued his efforts to sell the entire 1,200 acre property. He knew, however, that Kenneth desired to purchase the remaining 507 acre tract owned by LaVerne, and to end up retaining ownership of the entire 1,200 acre property. Indeed, the listing agreement provided for what the parties have characterized as a right of first refusal to allow Kenneth to meet the sales price on the 507 acre tract. Further, the sale to Krejci of the entire 1,200 acre property was divided into two purchase agreements, one for LaVerne's 507 acre portion and another for the balance of 693 acres. Each of the agreements provided that the agreement would be contingent on the buyer purchasing the other tract. Further discussion regarding this contingency follows.

9. On or about October 1, 1998, the plaintiff submitted a two written offers to purchase the respective tracts. These offers were not accepted. Instead, on October 5, 1998, LaVerne Brion submitted a counter offer on the 507 acre tract, and Kenneth, James, and Kenneth's wife, Linda K. Brion (Linda), submitted a counter offer on the 693 acre tract. Waldo did not prepare the latter counter offer and testified that he assumed Kenneth prepared the counter offer. The counter offers did not change the reciprocal contingency clauses regarding purchase of the other tract. However, James' wife, Jane S. Brion (Jane), did not sign the counter offer, which provides the real starting point of this litigation. The plaintiff timely accepted both of the counter offers.

10. Although Linda's signature appears on Exhibit 1 as Linda B. Brion, the parties stipulated that her true and correct name is Linda K. Brion.

11. Kenneth had told Waldo to allocate the overall price in a higher proportion to LaVerne's tract than to his own. As the allocation did not affect the overall total price to Krejci, the buyer did not care. Kenneth did so to assure that his mother would have sufficient money to provide for her long-term needs, and to enable long-term capital gain income tax treatment on a greater portion of the overall purchase price.

12. Waldo obtained earnest money deposits from Krejci on both agreements, and still retains the earnest money deposit in his trust account on the 693 acre tract. Kenneth never told Waldo to tender the money back to Krejci. Krejci never requested the return of the money.

13. When Kenneth transmitted the counter offer to Waldo by fax on October 5, he stated on the fax cover sheet: "We are missing one signature. Will send it when Jane is off work this afternoon and back in Hamilton."

14. Waldo did not know, at that time, that Jane was one of the record owners. He assumed that her signature was necessary only because of any marital interest that she might have in James' interest in the property.

15. On October 6, Kenneth sent Waldo a fax stating: "Jane should be in very shortly to finish signing. What I need is a copy of the listing agreement (Mom signed many that I have copies of but [I am] not sure which is the valid one)."

16. Waldo testified that after October 5, Waldo had telephone conversations with Kenneth about the missing signature "nearly every day." Waldo testified that, at one point, Kenneth told Waldo that Kenneth had obtained Jane's signature. Kenneth did not deny telling Waldo that Kenneth had obtained Jane's signature, but testified that he did not recall whether he told Waldo. Kenneth admitted that he had obtained Jane's signature, but that Jane had signed the document with an express instruction not to deliver the signed document to Waldo or the buyer.

17. Although Kenneth submitted various offers to his mother to purchase the 507 acre tract, none of the offers met the price in the counter offer accepted by Krejci. In other words, Kenneth never met the terms of any right of first refusal. There is some question in the evidence regarding the actual length of the time for exercise of the right of first refusal between 15 days or 30 days. However, for purposes of this decision, such difference may be disregarded as it is undisputed that the first refusal was never validly exercised.

18. Waldo did not determine that actual state of the title to the property until February of 1999. When he received a communication that the buyer was ready to close, he ordered the title insurance. About a week before actually receiving the title commitment, Waldo looked up the deed (Exhibit 11) at the courthouse. He then discovered that Jane was one of four record owners (with Kenneth, Linda, and James). Waldo testified that Kenneth had never told Waldo that the title was held in any way other than by Kenneth and James. However, a fax sent by Kenneth to Waldo on October 15 stated, in part, as follows: "As you know we never did get to the point where all owners were in agreement to sell our parcel. The whole transaction assumes we can get to that point." Waldo never communicated this information to Krejci. Waldo never acted as Krejci's agent, and consequently, information communicated to Waldo but not communicated to Krejci (or the plaintiff) is not imputed to the plaintiff. Waldo first told Krejci that Jane had an ownership interest in February of 1999. Waldo had told Krejci of Kenneth's representations that he would obtain Jane's signature and that he had actually obtained Jane's signature.

19. At some point after October 15, because of the way that conservatorship proceedings involving LaVerne were resolved, Kenneth became dissatisfied with the sale to Krejci and desired to find a way to avoid the sale. Kenneth testified that he told Waldo that Kenneth was not going through with the

sale. Kenneth testified that this conversation was sometime in the "October or November time frame." Kenneth admitted that he had not ruled out the sale as of October 15. However, when the conservatorship proceeding was not resolved to his satisfaction, Kenneth told Waldo that the signature would not be forthcoming. There is some evidence that the conservatorship proceeding was scheduled for December 1, 1998, but the evidence does not clearly show when it actually occurred.

20. On or about January 23, 1999, LaVerne's property was transferred to the Elkhorn Valley Bank as trustee under an irrevocable trust agreement. Daniel B. Flood (Flood), the trust officer administering the trust for the bank, testified under subpoena.

a. Flood became aware of the purchase agreement for the sale of LaVerne's 507 acre tract to Krejci shortly after taking title.

b. The agreement was not closed as scheduled on March 1, 1999.

c. Although the plaintiff pressed Flood to admit that Kenneth was the cause of the delay, Flood did not so testify directly. However, Flood admitted that Flood's hesitation to close on the sale to Krejci arose, at least in part, from Kenneth. Flood stated that he was concerned over the issues involved, including the matter of the clause concerning sale to Kenneth. Flood considered that matter of Kenneth's right of first refusal to be confusing. Flood found the paper trail regarding Kenneth's right confusing. Flood admitted that he had communications from Kenneth. Kenneth told Flood that Kenneth had an option to purchase LaVerne's tract and that Kenneth felt he had properly exercised the option. However, Flood also testified that Kenneth never threatened Flood or the bank with litigation.

d. Flood admitted that he knew that Krejci was ready, willing, and able to close on the purchase from LaVerne prior to the March 1 closing date. He also admitted that none of the delay in closing was caused by Krejci (or Krejci's trustee).

e. The sale of LaVerne's 507 acre tract to Krejci closed on or about August 27, 1999.

21. At all relevant times, Krejci has been ready, willing, and able to close on the purchase of the 693 acre tract. In February of 1999, Kenneth received the plaintiff's demand to close, and admitted that he knew the purchaser wanted to close on the purchase of the 693 acre tract.

22. The defendants argued at trial that the plaintiff did not allege fraud on Kenneth's part and that reformation would not be proper because no mutual mistake occurred.

a. The pretrial order provided: "The issues to be tried shall include only those issues specified in the 'Issues' section of this pretrial order, which may be more or fewer than those raised by the pleadings."

b. The issues section incorporated by reference an attachment submitted by the parties stating the issues as:

(1) "Whether the plaintiff tendered performance pursuant to the October 1, 1998[,] [p]urchase [a]greement."

(2) "Whether the conditions precedent to the performance of the contract by the parties have been satisfied."

(3) "Whether the plaintiff is entitled to reformation of the [p]urchase [a]greement to reflect the sale of only the interest of Kenneth W. Brion and Linda B. (sic) Brion with a corresponding adjustment of the purchase price."

(4) "Whether the plaintiff is entitled to specific performance of the interest of Kenneth W. Brion and Linda B. (sic) Brion in the subject real estate."

c. The third issue broadly states the reformation question, which is sufficient to include the matter of fraud or misrepresentation. The issues set out in a pretrial order supplant those raised in the pleadings. *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995); *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

23. The plaintiff urges the court to apply the principles stated in *Egle v. Kitt*, 202 Neb. 735, 277 N.W.2d 87 (1979). The court has carefully considered the trial briefs of both parties. After consideration of the legal authorities, the court concludes that the plaintiff seeks specific performance of the contract as against the interests of Kenneth and Linda in the real estate. The court also concludes that reformation of the contract is unnecessary and inappropriate. The court's further discussion is limited to the applicable principles of specific performance.

24. The *Egle* opinion cites the decision in *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947). The *O'Brien* opinion sets forth several principles applicable to the case at bar.

a. An action for specific performance is equitable in character. *Id*.

b. Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. *Id*.

c. In a suit for specific performance, the court will not attempt to make a new contract for the parties litigant which they did not make themselves, or enforce new conditions which could not have been within the minds of the contracting parties, or enforce a contract which does not contain the substance of the agreement made by the parties. *Id*.

d. A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant or that he is ready, willing, and able to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him. *Id*.

25. The plaintiff and defendants Kenneth and Linda entered into a valid, legally binding contract. The plaintiff demanded performance, but Kenneth and Linda refused to perform. The plaintiff at all times performed, or stood ready, willing, and able to perform, the plaintiff's obligations under the contract. While the agreement is not enforceable against the party (Jane) who did not sign the agreement, it is valid and enforceable against Kenneth and Linda.

26. In *Egle*, the court considered the matter of abatement of a purchase price for a defect in title. The court considered the rule announced in *Moore v. Lutjeharms*, 91 Neb. 548, 136 N.W. 343 (1912), that if a purchaser, at the time of entering into a contract for the purchase of real estate, is aware of a defect in the vendor's interest or title, or deficiency in the subject matter, he will not, in a suit for specific performance, be entitled to any compensation or abatement of price, unless equity and good

conscience clearly require it. In *Egle*, the Supreme Court observed that the last clause shows that the rule is not absolute.

27. In this case, the evidence persuades the court that neither the plaintiff nor the plaintiff's beneficiary was aware of the title defect at the time of entering into the contract. Moreover, the rule adopted in *Egle* renders that consideration superfluous. Even if the knowledge that Jane's signature was missing constituted knowledge of the defect at the time of acceptance of the counter offer, *Egle* teaches that, in an action for partial specific performance, abatement of the purchase price should be granted even though at the time of contracting the purchaser had knowledge of the seller's title deficiency, when (1) the seller contracted to sell the entire interest in the land, and (2) the purchaser had reasonable grounds to believe the seller could fulfill the contract. *Egle v. Kitt*, *supra*, at 740, 277 N.W.2d at ___.

a. The evidence shows without dispute that the seller contracted to sell the entire interest.

b. Kenneth's representations that Jane's signature would be forthcoming establishes that the plaintiff and Krejci had reasonable grounds to believe the seller could fulfill the contract.

28. The defendants also urge the court to find that the plaintiff did not fulfill the condition precedent to purchase LaVerne's property in a timely manner.

a. The evidence shows that the plaintiff did everything within the plaintiff's power to perform that condition as soon as possible. The plaintiff demanded to close before the closing date. Flood admitted that the plaintiff was ready, willing, and able to timely close, i.e., to timely perform. The plaintiff ultimately did perform the condition in August at the earliest date that performance could be obtained. The plaintiff even pursued litigation to accomplish that performance.

b. Kenneth's assertion that the performance was untimely strikes this court as rather disingenuous. At least part, if not a major part, of the delay occurred when Kenneth was asserting to Flood that Kenneth had fulfilled the requirements of his right of first refusal, even though the evidence shows without dispute that Kenneth never met the plaintiff's offering price for LaVerne's tract. While Kenneth may not have solely caused the delay, his actions contributed to the delay. None of the plaintiff's or Krejci's actions caused or contributed to any delay in the performance of the condition.

c. Moreover, the contract does not itself specify a particular time for performance of the condition.

(1) "In the ordinary contract for the sale of real estate, time is not of the essence unless provided in the agreement itself or clearly manifested by the agreement construed in the light of surrounding circumstances." *Frenzen v. Taylor*, 232 Neb. 41, 46, 439 N.W.2d 473, ___ (1989); *Dowd Grain Co., Inc. v. Pflug*, 193 Neb. 483, 486, 227 N.W.2d 610, ___ (1975). The agreement does not provide that time is of the essence. In the light of all of the surrounding circumstances, the agreement cannot be construed as implicitly providing that time was of the essence. See, also, A. Corbin, CORBIN ON CONTRACTS § 716 at 677 (one vol. ed. 1952) ("[T]he fact that a specific time is fixed for payment or for conveyance does not make 'time of the essence' . . . .").

(2) Where time is not of the essence, performance must be within a reasonable time. *Frenzen v. Taylor*, *supra*, at 46-47, 439 N.W.2d at ___; *Dowd Grain Co., Inc. v. Pflug*, *supra*, at 486, 227 N.W.2d at ___. Where a contract expressly provides for a specific closing date, performance is normally due within a reasonable time after the date mentioned. *Frenzen v. Taylor*, *supra*, at 47, 439 N.W.2d at ___. Under the present circumstances, the court concludes that the accomplishment of the closing in August was reasonable, given that litigation was required to effectively compel the closing to occur.

29. The defendants stipulated at trial that nonperformance of the condition regarding an easement was not being asserted. Consequently, the court considers such condition to have been performed.

30. The plaintiff is entitled to partial specific performance against Kenneth and Linda, and to an abatement of the purchase price accordingly.

DECREE: IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Partial specific performance of the contract as requested by the plaintiff concerning the interest of the defendants, Kenneth W. Brion and Linda K. Brion, in the subject real estate, with appropriate abatement of the purchase price relating thereto, is hereby granted.

2. Within 20 days from the date of entry of this decree, the defendants Kenneth W. Brion and Linda K. Brion, husband and wife, shall direct their agent, Roger Waldo, in writing, to:

a. Deposit the sum of $6,000.00, representing one-half (½) of the earnest money deposit held by Roger Waldo with regard to this matter, with the Clerk of the District Court of Boyd County, Nebraska;

b. Return the sum of $6,000.00, representing the other one-half (½) of the earnest money deposit to the plaintiff, James E. Lang, Trustee; and,

c. To certify in writing to the Clerk of the District Court of Boyd County, Nebraska, the amounts, and the names and addresses of the persons or entities entitled to receive such amounts, of:

(1) The sellers' one-half (½) share of the cost of title insurance attributable only to the undivided one-half (½) interest of the defendants, Kenneth W. Brion and Linda K. Brion, in the real estate;

(2) One-half (½) of the amount of any 1998 or prior real estate taxes remaining unpaid upon the 693 acre tract; and,

(3) The amount, if any, of commission due and payable to Roger Waldo, attributable to the sale of the undivided one-half (½) interest of the defendants Kenneth W. Brion and Linda K. Brion.

3. Upon the failure of said defendants to comply with paragraph 2 above, this decree shall operate as such acquittance and direction to Roger Waldo as provided by NEB. REV. STAT. § 25-1304 (Reissue 1995).

4. Within 20 days from the date of entry of this decree, the plaintiff shall give his consent in writing to Roger Waldo for such remittances and certifications required by paragraph 2 above. Upon the failure of the plaintiff to do so, this decree shall operate as such acquittance and consent to Roger Waldo as provided by NEB. REV. STAT. § 25-1304 (Reissue 1995).

5. Within 20 days from the date of entry of this decree, the plaintiff shall deposit with the Clerk of the District Court of Boyd County, Nebraska, the sum of $130,250.00, in cash or certified funds

approved by the court clerk, representing one-half (½) of the contract price of $272,500.00, less the $6,000.00 earnest money deposit to be remitted by Roger Waldo to the court clerk.

6. Within 20 days from the date of deposit of such funds by the plaintiff as required by paragraph 5 above, the defendants, Kenneth W. Brion and Linda K. Brion, husband and wife, shall execute, acknowledge, and deliver to the Clerk of the District Court of Boyd County, Nebraska, a good and sufficient deed of conveyance in fee simple, with the usual covenants of warranty, free and clear of all liens, encumbrances, and special assessments levied or assessed, and subject to all easements and restrictions or covenants of record as of October 5, 1998, of the following described property, to-wit:

> The undivided one-half interest of the said defendants, Kenneth W. Brion and Linda K. Brion, in and to:
>
> Lots 1 and 2 in Section 26; Lot 1, the Southwest Quarter of the Southeast Quarter (SW¼SE¼), and the South Half of the Southwest Quarter (S½SW¼) of Section 27; the Northeast Quarter (NE¼), the North Half of the Northwest Quarter (N½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), the East Half of the Southeast Quarter (E½SE¼), and the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34; and the North Half of the Northwest Quarter (N½NW¼) of Section 35, all in Township 34 North, Range 9, West of the 6th P.M. in Boyd County, Nebraska, EXCEPT that part of the Northwest Quarter of the Southeast Quarter of said Section 34 described as follows: Beginning at the Northwest corner of the Southeast Quarter (SE¼) of Section 34, thence East along the North boundary line of said SE¼ of Section 34 a distance of 330 feet, thence South to the South boundary of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34, thence West along the said South boundary to the Southwest corner of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34 a distance of 330 feet, thence North along the West boundary of the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 34 to the point of beginning, said excepted tract containing 10 acres, more or less.

7. If the defendants fail to deliver said deed within 20 days after the date of such deposit, this decree shall operate as the deed of conveyance of the undivided one-half (½) interest of the defendants, Kenneth W. Brion and Linda K. Brion, as provided by NEB. REV. STAT. § 25-1304 (Reissue 1995).

8. Upon such actual delivery of such conveyance as required by paragraph 6 above, the court clerk shall remit the deposited funds, less the certified amounts of the sellers' share of cost of title insurance, unpaid real estate taxes, and unpaid commission, to the defendants, Kenneth W. Brion and Linda K. Brion, in care of their attorney of record, and shall deliver the deed of conveyance to the plaintiff, in care of his attorney of record.

9. If the said defendants refuse to receive said remitted funds, the court clerk shall hold the same as unclaimed property for disposition in the manner provided by law.

10. After the deposit of funds by the plaintiff and by Roger Waldo as required above, and upon the delivery of the deed of conveyance required above or expiration of the time for delivery thereof, the court clerk shall remit the certified amounts of the sellers' share of cost of title insurance, unpaid real estate taxes, and unpaid commission to the person or entity entitled thereto pursuant to the certification.

11. The plaintiff shall have and recover of the defendants, Kenneth W. Brion and Linda K. Brion, the taxable costs of this action taxed in the amount of $70.80.

12. Judgment is hereby entered in favor of the plaintiff and against the said defendants, Kenneth W. Brion and Linda K. Brion, accordingly.

Entered: December 6, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.

: Enter judgment on the judgment record.
Done on _____, 19____ by _____.

: Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19____ by _____.

: Note the decision on the trial docket as: 12/6/99 Signed "Decree of Specific Performance" entered; judgment entered accordingly.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

_____

William B. Cassel, District Judge