

IN THE UTAH COURT OF APPEALS

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Lloyd B. Gurney, Betty Gurney,)
Paul Gurney, Donna S. Gurney,)
Lee A. Jeppson, LaRae G.)
Jeppson, and LaRee Smith,)

Plaintiffs,)

v.)

Randy G. Young; Stone River)
Development, Inc.; RCP Land)
Investment, LLC; and R.G.)
Young, Inc.,)

Defendants.)

Randy G. Young; Stone River)
Development, Inc.; and R.G.)
Young, Inc.,)

Counterclaimants, Third-)
party Plaintiffs, and)
Appellants,)

v.)

Lloyd B. Gurney, Betty Gurney,)
Paul Gurney, Donna S. Gurney,)
Lee A. Jeppson, LaRae G.)
Jeppson, and LaRee Smith,)

Counterclaim Defendants,)
Third-party Defendants, and)
Appellees.)

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20070554-CA

F I L E D
(September 25, 2008)

2008 UT App 343

Fourth District, Provo Department, 060400548
The Honorable Steven L. Hansen

Attorneys: Mark A. Larsen and Matthew Muir, Salt Lake City, for
Appellants
Lincoln W. Hobbs and Lisa M. McGarry, Salt Lake City,
for Appellees

Before Judges Greenwood, Bench, and Billings.

BENCH, Judge:

Randy G. Young; Stone River Development, Inc.; and R.G. Young, Inc. (collectively, the Young Entities) appeal the trial court's grant of summary judgment in favor of Lloyd B. Gurney, Betty Gurney, Paul Gurney, Donna S. Gurney, Lee A. Jeppson, LaRae G. Jeppson, and LaRee Smith (collectively, the Gurneys). The Young Entities claim that the trial court erred in determining (1) that the Real Estate Purchase Contract (REPC) and the incorporated Addendum 1¹ lapsed when neither party signed the REPC by the date required therein and (2) that the REPC ceased to exist for failure of consideration due to the Young Entities' failure to pay a second \$10,000 in earnest money as required by Addendum 1. Finding the issue of failure of consideration dispositive, we need not reach other issues raised.

The Young Entities argue that there was no failure of consideration because the parties entered into a subsequent addendum--Addendum III--that superseded Addendum 1 and effectively eliminated the requirement to pay an additional \$10,000 to extend the closing date. "'[Q]uestions of contract interpretation not requiring resort to extrinsic evidence' are matters of law, which we review for correctness."² Fairbourn Commercial, Inc. v. American Hous. Partners, Inc., 2004 UT 54, ¶ 6, 94 P.3d 292 (quoting Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988)). An examination of the language in the REPC and addenda shows that Addendum III did not expressly modify or otherwise conflict with Addendum 1's requirement of an additional \$10,000 to extend the closing date. Addendum III was completely silent as to the matter of an additional payment. Thus, Addendum III did not expressly eliminate or modify Addendum 1's requirement of additional payment for the extension, nor did Addendum III's terms impliedly alter the requirement. It is undisputed that the Young Entities did not make the required \$10,000 payment before the June 30, 2004 deadline.

¹The parties began labeling the addenda by using Arabic numerals but subsequently switched to using Roman numerals. We use the labels given by the parties.

²This case does not require a resort to extrinsic evidence because the REPC contained a clear integration clause and both the REPC and addenda are facially unambiguous. See Daines v. Vincent, 2008 UT 51, ¶¶ 22-27, 609 Utah Adv. Rep. 37.

The trial court correctly determined that the Young Entities' failure to pay consideration relieved the Gurneys of their obligation to perform and renders the REPC void and unenforceable. The Utah Supreme Court has "unequivocally held . . . that 'evidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable.'" Aquagen Int'l, Inc. v. Calrae Trust, 972 P.2d 411, 414 (Utah 1998) (quoting Nielsen v. MFT Leasing, 656 P.2d 454, 456 (Utah 1982)). In particular, failure to make a contractually required payment constitutes "an uncured material failure sufficient to render the contract unenforceable for failure of consideration." Id. (internal quotation marks omitted). Thus, even if the REPC did not lapse due to the untimely signatures, it became unenforceable when the Young Entities failed to pay the second \$10,000 in earnest money by the specified date.

Because the Gurneys received attorney fees below and prevailed on appeal, they are "'entitled to fees reasonably incurred on appeal.'" Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) (quoting Utah Dep't of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991)). We affirm the summary judgment and remand for an award of the reasonable attorney fees the Gurneys have incurred on appeal.

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Judith M. Billings, Judge