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1464-EIGHT LTD V. JOPPICH

GILBREATH: It is our position that when an option contract contains a recital of nominal considerations, say $1 or $10, the nominal consideration need not actually be paid to make the option enforceable.

HECHT: Just an option contract or any contract?

GILBREATH: The restatement has a section called Contracts Without Consideration in which it addresses option contracts, guaranteed leases, and certain other situations. Of course our case, we would say that the court need only make the decision with respect to option contracts. But there certainly would be some merit according to many scholars of reconsidering the whole scheme of the bargain theory of consideration, which gives rise to these situations where you have these recitals of nominal consideration. But at this point for purposes of our case we would ask that the court adopt this approach simply for option agreements.

WAINWRIGHT: Define nominal?

GILBREATH: Under the bargain theory of consideration, nominal consideration would be - in most instances it's $1 or $10, but it really depends on whether the parties bargained for the amount of money that's recited. And in most instances it ends up being $1 or $10. But the real question is was there a bargain? were promises exchanged? was the promise exchanged in the transfer of this amount of money? If it wasn't, then it's nominal consideration. What the treatises say is nominal consideration is consideration - another term for it is sham consideration where it's not actually paid, that's just small in amount is somewhat distinguishable.

WAINWRIGHT: The restatement also talks about different amounts being nominal depending on the length of the option and the amount at stake. It talks about 120 day nominal consideration, recital requirement only. I think there's another example about a 10 year option period where it indicates that a certain so called nominal amount would not be sufficient. What guidance would you give us on what nominal should be, or is just up to us to pick a sliding scale?

GILBREATH: What we're going to advocate today is that you do away with the requirement of a recital of nominal consideration altogether, which is what the position as advocated in the ____ on Contracts by Prof. Gurillo, who says those types of charades should not be part of a material legal system. So that you wouldn't need this recital of nominal consideration. But your point goes to the fairness of the transaction. The restatement says Look. We're going to have to do away with the consideration of requirement but we are still going to require that the transaction be on fair terms. And so what Prof. Farnsworth says is that what we're looking to do here is to prevent excessive

speculation at the expense of a promisor, so that the promisee doesn't have this opportunity to take advantage of the promisor. Say if I have the right to repurchase this land for $50,000 and I can exercise that 10 years in the future when the land has increased, that would not be a fair transaction. The restatement says you can't have this rule apply unless it's a fair transaction.

WAINWRIGHT: Initially you said that as long as it's bargained for, that should be sufficient. Then you talked about a fairness element coming into play. If the contract recites X dollars, whatever that number might be, and the parties know it's there, there's no fraud, there's no other theory of defense established to invalidate the contract, is that sufficient to constitute ____ so long as it's bargained for it should be acknowledged by the court?

GILBREATH: Yes.

WAINWRIGHT: And then the fairness consideration you're talking about, should we wait on the parties or require that the parties have raised an unconscionability or a fraud, or a collusion defense before we delve into fairness? You're saying that should be one of the things we look at on the front-end?

GILBREATH: Yes. When the bargain theory of consideration came about, it evolved in late 19th century, one of the things that had to be done was to devise other ways of making sure that a transaction was fair. Because under the bargain theory, as the court well knows, a peppercorn would be sufficient as long as the parties bargained for it. But other doctrines had to be developed to make sure that the transaction was fair: Doctrines of Mistake, Capacity, Fraud, Duress. And so if a party brings those issues up and says Well I was tricked in to this then, yes, the court should...

WAINWRIGHT: So going back to your example, if there's an option contract and the contract says for $50,000, ____ paid, is acknowledged and confessed, the option period is 2 years. At the end of that there's an attempt to exercise it, but the $50,000 was never paid and no defensive theories are raised, then the option contract should be enforced?

GILBREATH: Yes. Because the option - the option is simply an irrevocable...

WAINWRIGHT: Let me clarify that. The only defense raised is the $50,000 wasn't paid. But no fraud, no collusion.

GILBREATH: Yes. Because if we get to exercise the option, we will pay the promissory for the land. And so there will be an exchange in consideration at that time. And that's why the restatement says look, these option agreements are ancillary to bargain transactions.

O'NEILL: You would have to admit that there hasn't been necessarily a lot of jumping on to the restatement train. Why do you think that is?

GILBREATH: I think because the issue doesn't come up that often. I think this is such a

formality and a technicality that it's rarely raised. We've looked of course for cases and we found - I don't think we found any cases that said we reject the restatement position, other than the one Idaho case that we cite in our brief.

O'NEILL: But nor have you found any that have adopted it. Most have continued to follow the other approach.

GILBREATH: That's right. We have cited some federal cases where the courts have cited it and followed that approach, but they haven't really discussed it. So I think the reason is this issue just doesn't come up that often. And I think as Prof. Farnsworth says, there's a problem with - in the legal system we're very complacent about the Doctrine of Consideration, and we've grown accustomed to it. It's really difficult to come up with an alternative to the bargain theory of consideration. And so courts have remained wetted to some of these antiquated rules that frankly the business community - I mean every business person I've talked to about this case scoffs at the notion that this exchange of nominal consideration has anything with Lavargo(?), or what's going on in the transaction. And frankly, I think that it invites disrespect for the law for courts to enforce this requirement, because in the real world where these transactions are taking place, people are saying well we've got to have this recital in here because I guess the law requires it.

PHILLIPS: So you think if we adopt the position you want, we would - part and parcel of not honoring this is to say it's not necessary?

GILBREATH: That's right.

PHILLIPS: Or even stupider to say you have to put it in there but we're not going to enforce it unless there's some proof you really wanted that $10?

GILBREATH: That's right. I think the court should go farther than a restatement. Prof. Carillo(?) in _____ on Contracts says the restatement is great but they don't go far enough. Because of this recital requirement it's a charade and a mature legal system should not have that. What the restatement accomplishes without the recital is the formality that brings home to the parties what they are doing: they are agreeing to be bound by this transaction. Legal formalities perform two functions. First they perform an evidentiary function, the writing requirement. You can see that the contract exist, and you can see what the terms are. And they perform a cautionary function, which is they bring home to the parties the significance of what they are doing: I'm entering into a binding contract. In the past the seal served that purpose of the cautionary formality. But over time the formality of the seal eroded, so that you could just adopt a seal on a piece of paper, your signature could suffice as a seal. So basically we abolished this seal because it was no longer performing a cautionary formality. Consideration - many of the scholars say well we ought to do away with the Doctrine of Consideration for the same reasons.

Oliver Wendel Holmes, at the turn of the century said, look consideration is as much a forum as it is a seal. And Lord Mansfield said in 1765, he gave birth to the idea that the

formality of putting a promise in writing should operate as an alternative to consideration. And that's what the restatement requires, is put it in writing, you sign it. That should be sufficient to...

HECHT: Suppose there would be times though when you would want to be clear what the consideration was, so there wouldn't be an argument later on that something else was really the consideration, or in a failure situation you wouldn't know exactly what have failed. Is that true or what do you think?

GILBREATH: I think the restatement says, Let's do away with the consideration requirement altogether. It's in a section called Contracts Without Consideration. There is no consideration requirement for the option. The reason being is because it's just the first step in a transaction where you're going to have an exchange of consideration, a bargain transaction where for example in our case we exercised the option. We pay her 90% of the purchase price. That was a bargain that took place in the context of the sale of the land.

BRISTER: The option could have a significant value. There could be occasion where nominal consideration is not enough. The parties might negotiate - I mean it's just worth a lot to have that very option. And in that case you wouldn't do away with consideration. Is that right?

GILBREATH: You would have other doctrines to ensure the fairness of the transaction. The Doctrine of Consideration is primarily developed to protect promissors from their own donated promises. A bargain is an inevitable ingredient of a transaction that takes place in the marketplace. So you're not going to have a situation where the promisor is making a donated promise. And so under the bargain theory of consideration, we don't look at the sufficiency of the consideration. We don't look at market equivalence. So under those circumstances if it takes place in the marketplace, there's no other reason to believe the transaction was unfair, then let's enforce it.

OWEN: Except to our employment at will cases.

GILBREATH: I'm not sure how that would arise.

OWEN: Well you say that you want to do away with consideration entirely.

GILBREATH: In this situation with option agreements. Yes. There certainly is some merit and many scholars would advocate that the court look at the possibility of changing or at least restricting the doctrine of consideration in all contracts. And that's the theory Professors Matheson and Far____, I believe, had this theory...

BRISTER: How many states have done that?

GILBREATH: Probably none.

BRISTER: So we would be at the cutting edge?

GILBREATH: It certainly would be.

BRISTER: Was the purchase price $99,000 as stated in the written words, or $58,500 as stated in the parenthesis - in the option?

GILBREATH: In the option it would be 90% of the purchase price.

BRISTER: The option says two different prices in it. I was just wondering.

GILBREATH: I think that we would concede that it would be the higher of the two.

O'NEILL: Why doesn't estoppel work in this situation where it's recited in the option contract that it's hereby acknowledged to be sufficient and proceed as hereby acknowledged? Why doesn't estoppel take care of that?

GILBREATH: Courts have used that theory. I think as Prof. Carillo said that's sort of a legal slight of hand that courts have used, because they are scared to get away from the doctrine of consideration. The restatement says do away with the doctrine of consideration. But certainly that theory has been used and it would work in this case.

WAINWRIGHT: And it's been raised and argued in this case. Right?

GILBREATH: Yes. We certainly would take that position. We also take the position that if the court is unwilling to reach this issue of whether we should adopt the restatement, the court may reverse the CA's judgment on a simple motion that there was consideration for this transaction. It was the exchange of the land.

WAINWRIGHT: Isn't there a statute that requires that option contracts be in writing? It may be in the UCC. You may argue it only applies to goods. Does it apply generally though?

GILBREATH: No. It's in the UCC 2-205.

WAINWRIGHT: So it doesn't apply here?

GILBREATH: It does not apply here.

WAINWRIGHT: Does the statute in the UCC say anything about the consideration issue? I haven't looked at it in some time. Anything that might be analogous in our situation.

GILBREATH: The UCC just says if it's a merchant and it's in writing, it's a firm offer and it will be enforceable.

O'NEILL: What did the San Antonio CA says?

GILBREATH: That case supports our argument that the land itself, the exchange of the land was consideration for the option agreement. And that case was a very similar set of facts.

O'NEILL: Were they signed the same day in that case?

GILBREATH: They were signed the same day. One was signed in the bank, and then they went out in to the parking lot and signed a right of repurchase, the parties did.

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RESPONDENT

MATHERNE: J. Walker speaking for the court in 1959, in Miles v. Martin, acknowledges that separate instruments executed at the same time between the same parties and relating to the same subject matter may be considered together and construed as one contract.

He also acknowledges that a decision will be found where instruments have been construed together or treated as one instrument if they are not even between the same parties.

He also says it's a sound principle, but we have to look at the intention of the parties before we use it. What were the intentions of the parties here? Two separate contracts. A deed and an option. The option could have been retained, reserved in that deed just like you reserve minerals.

BRISTER: So when she signed it under oath she didn't mean it, because it was out in the parking lot? The option agreement is signed by your client under oath. Right?

MATHERNE: No it's not under oath.

BRISTER: So let's assume it's a separate contract. Why doesn't that make it invalid?

MATHERNE: I didn't say it was invalid. I said it should be construed together. It's two separate transactions: the deed transfers the property to the respondent; and then the other document gives the petitioner the right to repurchase the property for a lesser value than it was paid. I'm saying that in this case we have two separate instruments. They should not be construed together.

O'NEILL: What about the language in the option contract that says and other good and valuable consideration?

MATHERNE: It does not say that. It only says $10.00. And if you look at the deed it says the same exact language. Now if it had other good and valuable consideration, then we could have explained what it was. But there's no language in the deed or the option agreement that says other good and valuable consideration. It just says $10.00.

In Johns v. Kelly, a 1981 case, where two earnest money contracts were used and construed it together to satisfy the statute of frauds.

In Jim Walker Homes, 1984, was used to construe various documents together to get user's(?) interest.

O'NEILL: Was this concept of the ability to buy back absent development within a certain period of time, or building within a certain period of time, was that discussed in connection with the sale of the property?

MATHERNE: I cannot say yes or no.

HECHT: Well it was in the earnest money agreement.

MATHERNE: If you look at the earnest money agreement, there's one paragraph...

HECHT: Well it's in there.

MATHERNE: Right. It is. But it was merged into the deed...

HECHT: But how can the answer be it wasn't discussed in the negotiations when it was in the earnest money agreement?

MATHERNE: I thought you said in the closing.

HECHT: Well it was discussed at closing too because they cited it.

MATHERNE: It may have been. But that's not the key. The key is when the deed was written, all the negotiations were merged into that deed. Now let's assume if you will that option agreement is not there. And let's say we are trying to enforce an option agreement based on the earnest money contract and based upon the deed. The option agreement would not be enforceable. Why? Because it was an agreement to make a contract in the future. And the central terms were not there. If you look at the earnest money contract, the option is one paragraph. If you look at the true option agreement it's three pages.

WAINWRIGHT: Do you dispute that the parties understood that the developer 1464-Eight Ltd., wanted the land in this subdivision to be developed, not just to sit undeveloped?

MATHERNE: It's not in the record. But that's not the issue here. The issue is, did that $10 not paid offer a valid consideration? The first thing we do is say that the two instruments should be construed separately, and they should each be supported by a consideration.

WAINWRIGHT: Is there anything in the record where the developer ever intimated that it

wouldn't sell the land unless it was going to be developed?

MATHERNE: I don't believe so.

WAINWRIGHT: And you don't think the option to contract sends that message?

MATHERNE: It could have been. But all I'm saying is the option is not - I didn't say it was void. I said it's voidable. Because he didn't pay the consideration.

OWEN: There's a section paragraph D, in addendum 8, the earnest money contract specifically says that the option agreement shall be executed by the buyer and seller at closing. It specifies the 90%, the 18 months. Let's suppose that at closing the buyer comes in and has not executed that. Can the seller get specific performance of this provision?

MATHERNE: You need to understand that earnest money contract ____ merger doctrine was merged into the deed. So all prior negotiations and everything are merged into that deed.

OWEN: My question is at closing the seller and the buyer show up. Can the seller specifically enforce, get specific performance and require the buyer to exercise an option agreement at closing that says this?

MATHERNE: I would think so, but I don't know.

OWEN: And that's what they did didn't they?

MATHERNE: They could. But here again it's got to be consideration for the doctrine. I'm not saying it's void. I'm saying it's voidable.

OWEN: Wasn't the consideration the agreement to convey the property in the first place?

MATHERNE: No. Because it says $10. You cannot expand or alter a written instrument. Now if it had said other than the value of consideration, you could have brought in everything.

BRISTER: So we really are just talking about form then, and stamps, and wax and things like that. You're just asking us to maintain this allusion that this language makes a difference? makes sense?

MATHERNE: It does make a difference.

JEFFERSON: How? I mean how does it in the practical world, the $10 was not exchanged upon that date?

MATHERNE: It could have been voided two ways. Pay $10.

JEFFERSON: But why does $10 matter or $1?

MATHERNE: It matters because...

JEFFERSON: What does that add to the transaction?

MATHERNE: It performs an essential element to a contract - consideration.

BRISTER: So why didn't your client say Hey, where is my $10?

MATHERNE: I don't know.

BRISTER: How can your client sign something under oath saying the $10 was in hand, and say something different now. Is she lying now or then?

MATHERNE: No sir. It's nothing more than a receipt and you can prove...

BRISTER: In the broadest case this court said you can't sign a promissory note with a bank, and then come back later and say, actually they told me I didn't ever have to pay that. When you sign a note that says you will pay $50,000, you can't have a King's X, and try to prove that you didn't. Why is this any different? She said she got $10.

MATHERNE: Because the SC says you can dispute it. It's nothing more than a receipt, and it can be disputed. You're acknowledging receiving $10.

BRISTER: So why isn't my promise to pay $50,000 to the bank a receipt or a recital?

MATHERNE: You can come in and prove that you didn't get it.

BRISTER: That's what Broaddus says you can't do. Broaddus says if I promise to pay the bank $50,000 for the loan, I can't come back and say no I never promised that.

MATHERNE: This is not a loan. This is a payment. I'll pay you $10 for your car. I'm not promising to pay you $10 for your car. I'm saying I gave you $10 for your car. You can say I didn't get the $10.

BRISTER: So every contract can be avoided on that basis?

MATHERNE: Every contract that recites a receipt of consideration, the receipt can be disputed.

WAINWRIGHT: Would you acknowledge if - let's say the option was never exercised, and then there was a purchase of the land, and the purchase price for the land was never paid. That can be disputed?

MATHERNE: Yes.

WAINWRIGHT: Even if the deed says well it's going to be paid, it has been paid. That can be disputed because it's the consideration for the purchase of the property?

MATHERNE: The developer was saying I received X dollars. And then he could say I can prove that he didn't get it.

WAINWRIGHT: Lanier v. Faust, 1891 that you cite, in that case there may be two differences here. You cited for support of your position. Let me ask you about it. In that case the amount wasn't nominal. It was $100 in 1891. There is a quarter of the purchase price for 79 acres of land. $100 in 1891 was probably a pretty sizable sum. Right?

MATHERNE: Right.

WAINWRIGHT: So there's probably a difference here. Whether you think it makes a difference, at least according to petitioner's position, a big difference. The other one is it was the purchase price for the actual property, not an amount as consideration for an option. Those two differences you don't think are important?

MATHERNE: The difference being that acknowledging that you received X dollars is nothing more than a receipt and it can be disputed or explained by ____. And so that case I think is good law today.

WAINWRIGHT: So you think Lanier applies whether it's the purchase price for the property at issue, or whether it's a nominal amount for an option?

MATHERNE: No. It's being able to dispute whether or not you actually received the money. That's what that stands for. Now they've cited two cases for the nominal saying that the nominal consideration doesn't have to be paid. One is from Pennsylvania. Now the Pennsylvania case, the results have been the same here in Texas. Because they failed to plead the failure of consideration.

O'NEILL: Let's talk about a Texas case. Haven't the CA's held that if consideration is not actually paid, the option contract is revokable prior to acceptance?

MATHERNE: Yes.

O'NEILL: Why wasn't there acceptance here before it was revoked? My understanding

is the option was exercised.

MATHERNE: No. It was an intent. If you look at the option agreement, it says that he has to exercise the option. He did not exercise the option, and as I stand here today that option has not been exercised.

BRISTER: It says the option may be exercised upon written notice, delivered. And he did that.

MATHERNE: No. He said, I intend to exercise this option. If you look at his notice - in other words, the option agreement says I shall give you notice that I have exercised it. He said, I intend to exercise this option on a date in the future. 30 days, I think. And so the option was never exercised. If you look at the option agreement, he had to tender the money. That money was never tendered. So as we stand here today, that option has not been exercised.

O'NEILL: If we were to find it had been exercised, if we were to find that he had properly exercised the option...

MATHERNE: I would be out of here. Because a gratuitous option is enforceable if it's accepted prior to revocation. If I say I'll give you an option to buy my land for X dollars, and you exercise it before I revoke it, it's enforceable. Because I have the right to tell you - give ___ anything. So in this case here the option was not revoked. The option was not exercised, and if he had exercised it, we would not be here today.

What they are trying to say though in this nominal consideration issue is that the mere mention of nominal consideration is equivalent to a seal. We have a very old case where there was a contract for land under seal, but there was no consideration proved and it was not upheld.

It should also be noted that the Georgia case applies that rule to all real property cases, not just options. So if you have a nominal consideration to sell real property, you are dead in the water in Georgia. Whereas that's not true here.

There are several federal courts that have adopted this particular principle. Well as _____ RR v. Tompkins says, the federal court cannot decide what the common law of Texas is.

WAINWRIGHT: What do you make of the estoppel argument, the argument that your client signed the option agreement...

MATHERNE: There's no pleadings to that. That was not pled. In our pleadings, we pled all conditions precedent that had been performed. They filed a general denial. Even in their petition for specific performance they did not plead all conditions precedent. They did not prove anything.

There was no evidence that they presented in order _____ through summary judgment. No evidence that met the evidence rules.

If I pled all conditions present, that means that it hasn't been exercised. That's one of the things that they had to deny. They didn't deny it. I had to prove that the money wasn't tendered when I said all conditions present that had been performed. That took care of all of those arguments.

WAINWRIGHT: If it had been pled, would that be a problem for you?

MATHERNE: I didn't brief it, so I cannot discuss it. It's not an issue in this case.

BRISTER: Did they mention it in their motion for summary judgment?

MATHERNE: No. There was no evidence presented...

BRISTER: Obviously if they mentioned in their motion for summary judgment, it wouldn't matter whether they pled it or not unless you objected. Right?

MATHERNE: Right. And I don't think they did. But I cannot tell you they did or not. The peppercorn theory that they talk about saying that nominal consideration doesn't have to be paid, that could change Texas law. Because why shouldn't it be applied to all contracts?

Why can't we consider the option, the earnest money contract as part of the sale of the property, as part of the sale? Because of the merger doctrine that's been well briefed by this court.

WAINWRIGHT: You mention estoppel both in connection with Lanier v. Faust, the SC case you cite in 1891, and in another section. But your position is it's not properly before the court?

MATHERNE: No. It's not. A 1967 case, Mason v. Satterwhite, said in the absence of ____ state action in a fraud, all prior agreements are merged into one document. So all our prior agreements up until the time that deed was executed was merged into the agreement.

HECHT: Including the option?

MATHERNE: Including the option.

HECHT: So your position is, you can't have a separate option agreement?

MATHERNE: No. You can if it's supported by a consideration. For instance, if they had said...

HECHT: Why wouldn't it still be merged in the deed?

MATHERNE: Because it was in the earnest money contract. That's the way it came about. If you notice in their brief they said it should be considered because it was mentioned in the earnest money contract. Well it might be mentioned but it was merged into the deed. So that part you cannot use the property as consideration for a separately executed document when the consideration says $10. There could have been other considerations. But you cannot expand it because they failed to do one thing: they failed to put other good and valuable.

OWEN: We're at closing. The buyer and the seller are sitting across from one another and the deed is on the table and the options agreement is on the table. We sign them, but we sign the deed first. Thirty seconds later we sign the option. You say that option is invalid?

MATHERNE: Right. I say it's not enforceable unless...

OWEN: So if we had signed the option agreement thirty seconds before the deed, then it would be enforceable?

MATHERNE: It's got to be supported by consideration.

OWEN: The unstated consideration. If we sign the option agreement first would be I'm not going to sign that deed until I see you sign the option agreement. Under my hypothetical if they are both signed at closing, does it make any difference whether one is signed ahead of the other or not?

MATHERNE: No. If you notice, the option is dated different than the deed. That's why they wanted them to do separate documents. Stated differently.

OWEN: Under my hypothetical. You're at closing. Does it matter which one is signed first?

MATHERNE: No.

OWEN: It's unenforceable. Period.

MATHERNE: I'm saying it's unenforceable because it has to be supported by consideration. I'm saying all prior agreements are merged into that deed.

OWEN: But we're executing them within 30 seconds of each other.

MATHERNE: It doesn't matter. It has to be supported by a consideration. Because all prior agreements, all negotiations...

OWEN: What if we sign the option before the deed?

MATHERNE: It doesn't matter. The negotiations for it was in the earnest money contract, and all those negotiations are merged into the deed.

WAINWRIGHT: What if the earnest money contract said I'm not going to sell the land unless you execute the option?

MATHERNE: It wouldn't matter, because it is merged into the deed. It doesn't matter what you say.

WAINWRIGHT: So what if the deed recites, I wouldn't have made that sale unless the option had been executed?

MATHERNE: That would present a different question. But you may not be able to,,,

WAINWRIGHT: It is probative of whether or not these documents were executed as part of the same transaction with the same general purpose.

MATHERNE: Intention of the parties. They intended them to be separate. Because there would have been no reason that they could not have put the option in the deed to reserve it. Just like minerals. Just like an easement. No difference. And so in this case they wanted them to be separate and distinct. And because they had to be separate and distinct, each had to be supported by a consideration. And you cannot go outside the four corners of the instrument the way the consideration clause is written. The consideration clause says $10. If it had said other good and valuable ___. It could have been a promise for me to wash his car. The four corners says $10. And that's why we are here.

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REBUTTAL

BRISTER: Did y'all put it in the summary judgment?

BROWN: It was in the summary judgment. We cited McKay v. Talley out of the Amarillo court in 1920, no writ. Estoppel was brought up. I will begin with the merger doctrine. The earnest money contract was not merged into the deed for the purposes of the option agreement. I cite the court to a case that is not mentioned in our brief, but which has been provided to opposing counsel. Harris v. Row, TX SC 1979, where this court said a deed that constitutes partial performance of the proceeding contract does not merge other distinct and unperformed provisions of the contract. A contract which provides for the performance of acts other than conveyance remains in full force and effect as to other such acts.

That is exactly that we have in this case. Addendum A to the earnest money

contract specifically provided that there would be an option that survived closing, that would allow the buy back of the property. And it is that mention in the earnest money contract that allows for this court to consider the purchase price of the property or the earnest money placed on the earnest money contract as additional consideration for the option agreement.

So if this court decides not to follow the restatement or even take it a step further...

O'NEILL: The court wouldn't even have to get into it would it? I mean the court could just say however we leave that question for another day. Everyone seems to agree that even a gratuitous option if you exercise it before revocation is okay. I think opposing counsel just conceded that. So if the option was properly exercised in this case that answers the question even by your opposing counsel's admission.

BROWN: It does. And to expand on a misstatement made. A closing did take place. Mr. Millis did go to the title company on the date mentioned in the letter and tendered the money to the title company. No one showed on the other side from Ms. Joppich's camp. And therefore no closing took place. So even if this court does not hold that the notice itself was sufficient to exercise the option, which we believe it was, certainly the act of going to the title company and depositing the monies does get us there. So yes there are several levels here.

Another issue is something that the CA relied upon. And that is the decision of Echols v. Bloom. And they relied on that case for the proposition that consideration must pass in order for a contract to be valid. In that case, we were looking at an earnest money contract situation where there was an option for I believe 13 or 14 days in which the offer for purchase would remain open. Although the earnest money contract stated that the $500 earnest money had passed and was deposited with the title company, it in fact was not paid until the last day of the option - the 13th day. And the court in Echols v. Bloom held that that money under the earnest money contract could not stand as consideration because it was not paid.

When you couple that with the Harris v. Row decision from this court in 1979, it says the option does not _____. What you now have, there's no dispute that the earnest money was paid. The earnest money was paid well before the option period even began. And so even Echols v. Bloom is distinguishable on the facts because the reason the option was nullified in Echols is because the earnest money was never paid.

So again if this court does not feel comfortable adopting the restatement and going to that level, even the decisions of the law as it stands now support the fact that the earnest money contract first of all does not merge into the deed as far as the option is concerned. And the court has recognized in Echols v. Bloom that that underlying earnest money that is paid certainly serves as additional consideration for the options.

HECHT: Do you know whether it's a common place to put option agreements like this

in deeds?

BROWN: I'm not familiar of them being placed in deeds themselves. But it is clear that, and I believe it's US Life Title Co. of Dallas v. _____, that again stated that when these contracts are executed together, even though they are not on the same day, they are construed as a single document. And therefore, the option agreement in this case can be considered a part of the deed. They are considered together to explain and to show the full breath of the transaction between the parties.

PHILLIPS: Your argument was premised on the $1 or $10 being nominal consideration. But what if it was $1000?

BROWN: My position before this court today is the amount of the consideration is irrelevant.

PHILLIPS: Okay. The briefs seem to me to talk a whole lot about nominal peppercorn and I was trying to get an idea of where you would draw the line. But if there's no line to be drawn...

BROWN: For an option agreement, I would submit there is no line.

WAINWRIGHT: Does the restatement support that position?

BROWN: Yes. It does support that position.

WAINWRIGHT: But there are examples that talk about a sliding scale for the amounts.

BROWN: My understanding, the amounts go to the underlying fairness of the transaction, which is going to remain a consideration regardless of what we do with consideration. We're not asking this court to say now all contracts are fair. One of the requirements for it to be an option agreement that can exist without consideration is that it is a fair transaction that is not _____ by fraud.

WAINWRIGHT: You mean the underlying transaction needs to be fair not the option transaction itself?

BROWN: That's my position. I believe we should go further into the restatement and say that option agreements require not even a recital of consideration, which would take that issue basically out of the equation.

O'NEILL: Or just that the recital creates an unenforceable obligation. The same thing.

BROWN: That was the argument at the TC level and at the CA level because of course we were dealing within the confines of the current state of Texas law. And although the CA chose

to distinguish McKay v. Tally and Heard v. Pratt, I don't necessarily agree that the court got it right on the distinction. Both of those cases hold that the recital of consideration creates an obligation to pay. The CA found additional consideration in both of those cases and relied upon that additional consideration for saying only when additional consideration is found is it not necessary to pay. And they cited the Echols v. Bloom case for that proposition.

I would submit that a closer reading of McKay v. Tally and Heard v. Pratt.

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...but that the court made a very clear decision that the estoppel argument is valid.

BRISTER: Let's just say we wipe out this whole recital business and we don't require consideration. Just assume for me that there are people out there that believe that the law required consideration and that it be paid. And the option contract is in front of them, they sign it knowing that there is no money exchanging hands that they can walk away from that anytime they want. Wouldn't a holding like the one that you're proposing potentially prejudice those people's reliance on the prior law?

BROWN: I would submit that it would not, because as Mr. Gilbreath indicated, discussions with every businessman that we have come into contact with has stated that they don't take the money that is recited, and they do not believe that the failure to accept the money is going to invalidate the option. It's basically just a reverse of the current situation. And I think that adopting the restatement position will make Texas law much clearer, much fairer and much more in line with the modern view, that in an option agreement, which is a part of another commercially relevant transaction, the issue of consideration is simply not an issue.

WAINWRIGHT: Does your description of what happened at the proposed closing in the record?

BROWN: It is.