

ATC 01036045

## IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR KLAMATH COUNTY

BRUCE M. STRAMPE and SUSAN R. STRAMPE,

Case No. 9101646 CV

Plaintiffs,

FINAL DECREE OF SPECIFIC  
PERFORMANCE AND JUDGMENT

vs.

EDNA GAYLE MCINTOSH, aka EDNA  
GAYLE HENDERSON,

Defendant.

This matter came before the Court for Trial on January 2, 1992. The Plaintiffs appeared personally and were represented by attorney William M. Ganong. The Defendant appeared personally and was represented by attorney Scott MacArthur. On February 18, 1992, the Court made and entered Findings of Fact and Conclusions of Law. On February 24, 1992, the Court made and entered its Interlocutory Decree of Specific Performance, and on April 16, 1992, the Court made and entered its Supplemental Decree of Specific Performance.

This Final Decree of Specific Performance and Judgment supersedes said Findings of Fact and Conclusions of Law, Interlocutory Decree of Specific Performance and Supplemental Decree.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

FINDINGS OF FACT

## 1.

On or about January 9, 1991, by written contract, Plaintiffs' Exhibit 7 in evidence, Defendant Edna McIntosh, then the owner, (herein referred to as "Defendant") agreed to sell and Plaintiffs

1 agreed to purchase the real property described therein for the  
2 terms contained in said agreement. Defendant was a reluctant  
3 seller (Plaintiff's Exhibit 4) under economic pressure from  
4 absentee ownership of a mortgaged residence which had been vacant  
5 for two years (Plaintiff's Exhibit 3), had been declared  
6 unrentable because of neglected repairs (Plaintiff's Exhibit 37)  
7 and had to be offered for sale "as is." Said contract is fair and  
8 equitable and is supported by adequate consideration. None of the  
9 economic pressures on Defendant to offer to sell were caused or  
10 contributed to by Plaintiffs.

## 2.

12 Plaintiffs have performed all conditions precedent on their  
13 part to be performed pursuant to their agreement with Defendant  
14 except Plaintiffs have not tendered the purchase price because  
15 Defendant informed Plaintiffs and the closing escrow agent in  
16 writing by letter dated April 18, 1991, Plaintiff's Exhibit 19,  
17 that she would not complete the subject transaction. Defendant  
18 failed and refused and still fails and refuses to perform her  
19 obligations under said contract by refusing to cooperate or sign  
20 any documents to facilitate the subject sale.

## 3.

22 The Defendant's refusal to proceed with consummation of the  
23 sale to Plaintiffs was a result of her change of mind, not breach  
24 by Plaintiffs of their obligations under the contract, Exhibit 7.

## 4.

26 Plaintiffs performed in a timely fashion, all of their  
27 obligations under said contract except they have not paid the  
28

1 purchase price to the closing escrow agent because Defendant  
2 repudiated the contract. Plaintiffs obtained a loan commitment  
3 for the funds necessary to close the transaction and offered and  
4 tendered full performance thereof, but Defendant wrongfully  
5 refused and still refuses to accept the same. Plaintiffs were at  
6 all material times ready, willing and able to complete said  
7 contract. Defendant waived the time of the essence provision of  
8 Exhibit 7 by delaying the return of her acceptance, by not  
9 complying with well test requirement and by failing to sign and  
10 return the required FHA documents.

## 11 5.

12 As a result of Defendant's failure to consummate said  
13 transaction in a timely manner, Plaintiffs' loan commitment  
14 expired and Plaintiffs were required to apply for a new loan and  
15 incur the expenses of a current appraisal, credit report, pest and  
16 dry rot inspection, roof inspection and other expenses, the total  
17 cost of which is \$1,200.00.

## 18 6.

19 As a result of Defendant's failure and refusal to consummate  
20 said transaction and deliver possession of the subject premises to  
21 Plaintiffs, Plaintiffs have had to rent a residence at the rate of  
22 \$500.00 per month commencing on July 1, 1991. In addition,  
23 Plaintiffs have had to rent a storage unit at the rate of \$47.00  
24 per month and obtain renters insurance at the rate of \$46.50 per  
25 quarter.  
26  
27  
28

7.

Defendant or her agents intentionally took and installed on the subject property a wood stove insert owned by Plaintiffs. In the event the stove insert remains installed on Defendant's specific performance of Exhibit 7, Plaintiffs will be undamaged by reason thereof. In default of that, said wood stove insert has been converted by Defendant to Plaintiffs' loss in the sum of \$1,200.00.

8.

Plaintiffs have no plain, speedy or adequate legal remedy at law because the real property is unique and cannot be duplicated on the open market.

9.

Defendant failed to prove her first affirmative defense.

10.

Defendant failed to prove her second affirmative defense.

11.

Defendant failed to prove her third affirmative defense.

12.

Defendant, although she had wrongfully repudiated the contract and without request by Plaintiffs, express or implied, through error in judgment and mistake of law, made improvements to the residence and property. Those improvements conferred benefit on Plaintiffs in the sum of \$7,552.86 and Defendant is entitled to set off the reasonable value of said benefit against Plaintiffs' special damages.

## 13.

The agreement between the parties provides in part:

"... seller shall pay the cost of ... legal fees if seller accepts buyer's offer ... and:

"(a) ...

"(b) seller fails to consummate the sale."

## 14.

Plaintiffs are unable to complete the purchase of the subject property because Defendant's intention to appeal this Final Decree prevents the title insurance company from issuing the necessary mortgage title insurance until the statutory time for filing an appeal has expired, or if an appeal is filed, until the appeal is complete.

## 15.

The Defendant failed to comply with the requirements of the Interlocutory Decree of Specific Performance by failing to execute and return the documents necessary to close the transaction.

## 16.

As a result of Defendant's failure to comply with the requirements of the Interlocutory Decree of Foreclosure and to close the transaction in a timely manner, Plaintiffs' second loan commitment expired and Plaintiffs will incur additional costs and damages in obtaining a new loan commitment.

CONCLUSIONS OF LAW

## 17.

Plaintiffs are entitled to a Decree of this Court requiring that the Defendant specifically perform the terms of the said

1 written earnest money agreement. Due to Defendant's failure to  
2 comply with the requirements of the Interlocutory Decree of  
3 Foreclosure:

4 A. This Decree shall be deemed to be equivalent to the  
5 execution, signature and delivery of the Defendant Edna Gayle  
6 McIntosh, who is also known as Edna Gayle Henderson, of all  
7 documents reasonably required by the title company to close this  
8 transaction including, without limiting the generality of the  
9 foregoing, the following documents:

- 10 1. Aspen Title & Escrow, Inc. Escrow Instructions;
- 11 2. Sellers' Estimated Closing Statement;
- 12 3. Aspen Title & Escrow, Inc. Preliminary Title Report,  
13 which is hereby deemed read, accepted and approved, and a copy  
14 thereof acknowledged by said Defendant;
- 15 4. Warranty Deed;
- 16 5. Aspen 01036045 Affidavit entitled Statement Under Oath  
17 Regarding Possession, Repairs, Alterations and New Construction;
- 18 6. U.S. Department of Housing and Urban Development Form No.  
19 OMB 2502-0265;
- 20 7. Addendum to HUD-1 Settlement Statement;
- 21 8. Amendment to Sales Contract and Mortgagor's Certificate;
- 22 9. The Mortgage Company's Sweat Labor Form;
- 23 10. Information for Real Estate 1099-B Report Filing;
- 24 11. Interest Bearing Account Letter; and
- 25 12. Payer's Request for Taxpayer Identification Number.

26 B. Upon the closing of the transaction, this Decree shall be  
27 effective to convey to the Plaintiffs Bruce M. Strampe and Susan  
28

1 R. Strampe, husband and wife, Grantees, the Estate in fee simple  
 2 of Edna Gayle McIntosh, who is also known as Edna Gayle Henderson  
 3 in the following described property to-wit:

4 The N1/2 NW1/4 NW1/4 of Section 16, Township 39S., Range  
 5 8 E.W.M., and the N1/2 NE1/4 NE1/4 of Section 17,  
 6 Township 39S., Range 8 E.W.M. in the County of Klamath,  
 7 State of Oregon.

## 18.

8 Plaintiffs are entitled to a Judgment against Defendant for  
 9 Plaintiff's special damages described in paragraphs 5 and 6,  
 10 above. As of June 1, 1992, said damages total:

11 a. Rent: \$500/month x 12 months =	\$ 6,000
12 b. Storage: \$47/month x 12 months =	564
13 c. Renter's Insurance: \$46.50/quarter x 4 quarters =	186
14 d. Expenses of Second Loan Commitment	1,200
15 Total to June 1, 1992	<u>\$ 7,950</u>

16 Plaintiffs are further entitled to a Judgment against  
 17 Defendant for their continuing damages for rent, storage, renter's  
 18 insurance, ~~renter's insurance~~ and loan costs from May 31, 1992, until  
 19 Defendant delivers possession of the subject premises to  
 20 Plaintiffs.

## 19.

21 Plaintiffs are entitled to a Judgment against Defendant for  
 22 Plaintiffs' costs of suit and attorney's fees incurred in  
 23 enforcing the terms of the Agreement between the parties.

## 20.

24 The Defendant is entitled to an offset, in the sum of  
 25 \$7,552.86, against the Judgment in favor of Plaintiff.



1  
2 PRETRIAL MOTIONS

3 21.

4 Plaintiffs filed a Motion, prior to trial, to dismiss the  
5 Defendant's counterclaim and, in the alternative, to strike the  
6 allegations of the counterclaim. Plaintiffs' said Motions are  
7 denied. (Appalachian Regional Hospital, Inc. v. Henry, 287 Or 151  
8 (1979); Welch v. Webb, 47 Or App 771 (1980); Brown v. D25, 61 Or  
9 App 8, rev. denied 294 Or 682 Restatement of Contracts, § 357(1)e.

10 22.

11 Prior to trial, Plaintiffs filed their Notice of Dismissal of  
12 Defendant Dryden F. McIntosh. Defendant then moved to dismiss the  
13 Complaint, or in the alternative, to strike the Complaint for the  
14 reason that Dryden F. McIntosh is a party in interest necessary to  
15 a full adjudication of Plaintiffs' claim. The Court finds that  
16 Dryden F. McIntosh's interest in the subject property was awarded  
17 to Edna Gayle McIntosh by the Supreme Court of Alaska.  
18 (Plaintiffs' Exhibit 5) Defendant's said Motions are denied.

19 23.

20 Prior to trial, Defendant moved to dismiss or strike  
21 Plaintiffs' Reply to Defendant's Counterclaim as untimely.  
22 Defendant's said Motion is denied.

23 POST TRIAL MOTIONS

24 MOTION TO AMEND INTERLOCUTORY DECREE

25 24.

26 Defendant filed a Motion to Amend the Interlocutory Decree of  
27 Specific Performance to add the language necessary to make it  
28



1 appealable under ORCP 67B. Defendant's Motion was denied by the  
2 Court's letter ruling dated April 15, 1992.

3 MOTION TO STAY PROCEEDINGS

4 25.

5 Defendant filed a Motion pursuant to ORCP 72 to stay  
6 proceedings. Defendant's Motion was premature and is denied.

7 MOTION TO DISMISS COUNTERCLAIM

8 26.

9 Plaintiffs filed a Second Motion to Dismiss Defendant's  
10 Counterclaim for Quantum Meruit (unjust enrichment). Plaintiffs'  
11 said Motion was denied by the Court's letter ruling dated May 7,  
12 1992.

13 MOTION FOR SUPPLEMENTAL RELIEF

14 27.

15 Plaintiffs filed a Motion for Supplemental Relief requesting  
16 that the Court place Plaintiffs in possession of the subject  
17 premises pending the completion of Defendant's Appeal of this  
18 Final Decree.

19 28.

20 Plaintiffs attended the hearing on this Motion held on May  
21 19, 1992. The Plaintiffs sought possession because their current  
22 rental arrangement was expiring on May 31, 1992. The Court has  
23 found that the Plaintiffs are entitled to a continuing judgment  
24 against the Defendant for their rental expenses. Plaintiffs are  
25 further entitled to a Supplemental Judgment for damages caused by  
26 Defendant's Breach of the Sales Agreement, ~~including expenses of~~ *including expenses of*  
27 ~~attorney's fees.~~ *attorney's fees.*

29.

Plaintiffs' Motion for Supplemental Relief is denied. However, if Defendant fails to post an undertaking pursuant to ORS 19.040(1)(b), pending an appeal of this Decree, the Court, on Motion by Plaintiffs, will reconsider this Order.

**DECREE OF SPECIFIC PERFORMANCE**

A. Defendant Edna Gayle McIntosh, who is also known as Edna Gayle Henderson, shall specifically perform the obligations of the "seller" set forth in Plaintiffs' Exhibit No. 7 entitled Oregon Association of Realtors Sale Agreement and Earnest Money Receipt, by signing all documents which are reasonably necessary to consummate the sale of the subject real property to the Plaintiffs, by delivering fee simple title to the Plaintiffs free and clear of all liens and encumbrances except zoning ordinances, covenants, conditions and restrictions, building and use restrictions, utility easements of record, and common to real estate in the area and apparent upon the land, and by delivering possession of the subject property to the Plaintiffs on or before the closing of the transaction.

B. This Decree shall be deemed to be equivalent to the execution, signature and delivery by Edna Gayle McIntosh, who is also known as Edna Gayle Henderson, of all documents reasonably necessary to consummate the subject transaction, some of which documents are more particularly described in paragraph 17, above;

C. Upon the closing of the subject transaction, this Decree shall be effective to convey to the Plaintiffs, Bruce M. Strampe and Susan R. Strampe, husband and wife, Grantees, the estate of

1 Edna Gayle McIntosh, who is also known as Edna Gayle Henderson, in  
2 the following described real property, to-wit:

3 The N1/2 NW1/4 NW1/4 of Section 16, Township 39 S.,  
4 Range 8 E.W.M., and the N1/2 NE1/4 NE1/4 of Section 17,  
5 Township 39 S., Range 8 E.W.M. in the County of Klamath,  
6 State of Oregon.

7 Klamath County Tax Lots: Code 52 & 21 Map 3908-1700 TL100  
8 Code 52 & 21 Map 3908-000-3000

9 D. Plaintiffs are entitled to a Judgment against Edna Gayle  
10 McIntosh, who is also known as Edna Gayle Henderson for Plaintiffs  
11 special damages described in paragraph 20, reduced by the offset  
12 described in paragraph 20, in the net amount of \$397.14, plus  
13 Plaintiffs' accruing damages, costs of suit and attorney's fees,  
14 as provided in paragraphs 18 and 19, above, as follows:

MONEY JUDGMENT

15 A. Name of Creditors: Bruce M. Strampe and Susan R.  
16 Strampe;

17 B. Creditors' Attorney: William M. Ganong, Attorney at Law,  
18 635 Main Street, Klamath Falls, Oregon 97601;

19 C. Judgment Debtor: Edna Gayle McIntosh, aka Edna Gayle  
20 Henderson.

21 D. Amount of Judgment:

22 (1) Initial Amount: \$397.14

23 (2) Accruing Amount: 562.50 per month on the

24 1st day of each month commencing on July 1, 1992, and continuing  
25 until possession of the above described real property is delivered  
26 to Plaintiffs.

27 (3) Costs, disbursements and attorney's fees: To be  
28 determined pursuant to ORCP 68C.

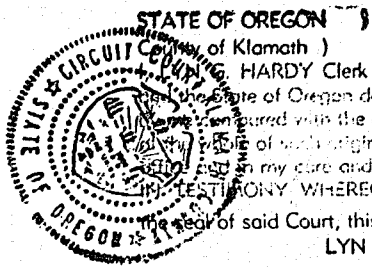
## 1 E. Interest:

2 (1) Prejudgment: None

3 (2) Post Judgment: Simple interest at the rate of 9%  
4 per annum accrued on the Judgment amounts listed in subsections D  
5 (1) - (3), above, from the entry of this Decree until paid.6 DATED this 20<sup>th</sup> day of July, 1992.7  
8 Donald A. W. Piper  
9 Donald A. W. Piper  
10 Circuit Court Judge11  
12 This form submitted by:  
13 William M. Ganong  
14 OSB No. 78213  
15 635 Main Street  
16 Klamath Falls, OR 97601  
17 Telephone: (503) 884-1721  
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STATE OF OREGON )  
 County of Klamath )  
 I, LYN G. HARDY Clerk of the Circuit Court of the County of Klamath  
 do hereby certify that the foregoing copy has been  
 compared with the original, and that it is a transcript therefrom, and  
 is a true and correct copy of such original as the same appears on file or of record in my  
 office and in my care and custody.  
 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed  
 the seal of said Court, this 23 day of July A.D. 1993  
 LYN G. HARDY, Clerk of Court  
 By Cathy Schreyer

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Aspen Title & Escrow the 26th day  
 of July A.D., 19 93 at 10:53 o'clock A M., and duly recorded in Vol. M93  
 of Deeds on Page 18116.  
 Evelyn Biehn, County Clerk  
 By Douglas Mulendare

FEE \$90.00