

1996

# Mark L. Rindlesbach v. Roger T. Russell, Drew William Hansen, et al : Reply Brief

Utah Court of Appeals

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William G. Marsden; John N. Brems; Jeffrey J. Devashrayee; Jardine, Linebaugh & Dunn; Attorneys for Russell.

T. Richard Davis; Callister, Nebeker & McCullough; Attorneys for Rindlesbach.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO. 960219-CA

MARK L. RINDLESBACH,  
Plaintiff and Appellee,

vs.

ROGER T. RUSSELL, DREW WILLIAM  
HANSEN, et al.,  
Defendants and Appellant.

MARK L. RINDLESBACH,  
Plaintiff and Appellee,

vs.

ROGER T. RUSSELL, aka ROGER T.  
RUSSELL, DDS, DREW WILLIAM  
HANSEN, et al.,  
Defendants and Appellant.

Court of Appeals No. 960219-CA

Priority 15

**REPLY BRIEF OF APPELLANT - ROGER T. RUSSELL**

On Appeal from the Order and Judgment  
of the Third Judicial District Court of Salt Lake County  
Judge Michael R. Murphy

William G. Marsden (#2087)  
John N. Brems (#3769)  
Jeffery J. Devashrayee (#6209)  
JARDINE LINEBAUGH & DUNN  
Attorneys for Roger T. Russell  
370 East South Temple, Suite 400  
Salt Lake City, UT 84111

T. Richard Davis  
CALLISTER, NEBEKER & McCULLOUGH  
Attorneys for Mark L. Rindlesbach  
10 East South Temple, Suite 800  
Salt Lake City, UT 84133

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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MARK L. RINDLESBACH,  
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JARDINE LINEBAUGH & DUNN  
Attorneys for Roger T. Russell  
370 East South Temple, Suite 400  
Salt Lake City, UT 84111

T. Richard Davis  
CALLISTER, NEBEKER & McCULLOUGH  
Attorneys for Mark L. Rindlesbach  
10 East South Temple, Suite 800  
Salt Lake City, UT 84133

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## ARGUMENT

### POINT I

#### **RUSSELL HAS THE STATUTORY CAPACITY NECESSARY TO REDEEM PROPERTY FROM THE SHERIFF'S SALE BECAUSE HE IS A SUCCESSOR IN INTEREST TO A JUDGMENT DEBTOR**

Utah's right of redemption statute provides that "[s]ales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under executions generally." Utah Code Ann. § 78-37-6 (1993 Supp). Those who may redeem property sold subject to redemption, or any part sold separately, include "the following persons or their successors in interest: (1) the judgment debtor; (2) a creditor having a lien by judgment or a mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold." Utah R. Civ. P. 69(j)(1) (emphasis added).

Plaintiff and Appellee Mark L. Rindlesbach ("**Rindlesbach**") relies on the Court's Order Granting Plaintiff's Motion for Summary Judgment entered on June 23, 1995 (the "**Order**") to argue that the "law of the case" doctrine bars Defendant and Appellant Roger T. Russell ("**Russell**") from redeeming two parcels of real property (the "**Subject Property**") purchased by Rindlesbach at a sheriff's sale. The Order states, in pertinent part, that "Russell is not a 'Judgment Debtor' as that term is used in Rule 69(e)(3) of the Utah Rules of Civil Procedure." However, the Order creates no "law of the case" implications because Russell does not seek to redeem the Subject Property as a judgment debtor, but as a successor in interest to Drew William Hansen ("**Drew**") and Diana M. Hansen ("**Diana**"), the judgment debtors. Nowhere in his appellate brief does Rindlesbach define "successor in interest to a

judgment debtor.” Russell submits that the best and most accurate definition of a successor in interest to a judgment debtor is “one who has acquired or succeeded to the interest of the judgment debtor in the property . . .” Forty-Four Hundred East Broadway Co. v. 4400 East Broadway, 135 Ariz. 265, 660 P.2d 866, 868 (Ct. App. 1982). Russell succeeded to the interest of Drew and Diana in the Subject Property when he purchased the Subject Property. Accordingly, the Order in no way affects Russell’s statutory capacity to redeem the Subject Property.

It is critical to note that Rule 69(e)(3) allows only the “judgment debtor” to designate the order of parcels at a sheriff’s sale, while Rule 69(j) allows the judgment debtor or his successor in interest to redeem. The difference in wording reflects the essential distinction between the purposes of the two subsections.” The “designation of parcels” subsection provides the judgment debtor an opportunity to maximize the bid, thus reducing or eliminating a deficiency. On the other hand, the redemption subsection allows the party having an interest in the property – be it the judgment debtor or a successor in interest – to recover the property within the redemptive period.

Moreover, as Rindlesbach correctly notes, “the ‘law of the case’ doctrine is employed to avoid delay and prevent injustice.” Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah Ct. App. 1988). Employment of the “law of the case” doctrine to the procedural setting of this case will not avoid delay and, in fact, will promote injustice. The District Court’s finding that Russell is not a judgment debtor for purposes of Rule 69(e)(3) has no bearing on whether Russell is a judgment debtor for purposes of determining who may redeem under Rule 69(j). Indeed, such a finding was neither critical nor necessary to the entry of



summary judgment granting the relief sought in Rindlesbach's foreclosure complaint. Russell should not be denied the opportunity to prove at trial that he is entitled to redeem the Subject Property under Rule 69(j). See Evans v. Stamper, 835 P.2d 1145, 1148 (Wyo. 1992) (redemption statutes should be liberally construed in favor of right to redeem following foreclosure).

Rindlesbach argues in his appellate brief, in effect, that successive owners of real property do not qualify as successors in interest to a judgment debtor under Rule 69(j). That argument is devoid of legal support. Instead, Rindlesbach attempts to discredit Russell's reliance on the case of Forty-Four Hundred East Broadway Co. v. 4400 Broadway, 135 Ariz. 265, 660 P.2d 866 (Ct. App. 1982), by claiming that Arizona's right of redemption statute is broader than Rule 69(j)(1) because it states that property sold subject to redemption may be redeemed by the "judgment debtor or his successor in interest in the whole or any part of the property." Rindlesbach claims that Russell is precluded from redeeming the Subject Property as a successor in interest to a judgment debtor because unlike Arizona's right of redemption statute, Rule 69(j)(1) does not contain the express language that a judgment debtor or his successor in interest "in the whole or any part of the property" may redeem property sold subject to redemption.

Simply put, Russell is a successor in interest to a judgment debtor because he succeeded to the interest of Drew and Diana in the Subject Property when he purchased the

Subject Property on contract in April 1991.<sup>1</sup> Indeed, a strong argument can be made that Rule 69(j)(1) is broader than Arizona's right of redemption statute because persons entitled to redeem are not limited to successors in interest of a judgment debtor "in the whole or any part of the property." Russell is a successor in interest to a judgment debtor under Rule 69(j) and also would qualify under the more specific right of redemption statute in Arizona. Accordingly, Russell has the statutory capacity to redeem the Subject Property and should be allowed to do so.

## **POINT II**

### **THE STATUTE OF FRAUDS HAS NO EFFECT ON EVAN W. HANSEN'S DEALINGS WITH RUSSELL AS AN AGENT OF DREW AND DIANA NOR DOES IT PREVENT RUSSELL FROM ASSERTING AN INTEREST IN THE SUBJECT PROPERTY**

Rindlesbach claims in his appellate brief that Russell essentially asks this Court to repeal the statute of frauds in seeking specific performance of his contract with Evan W. Hansen ("Evan") as if the statute of frauds were a rule without exception no matter how completely lacking in fraud the transaction may be. Russell respectfully requests the Court to prevent Rindlesbach from turning the statute of frauds on its head and using it as a weapon to perpetrate a gross injustice against Russell. Indeed, the affidavits of Russell, Dale Hansen ("Dale"), and Brook Hansen ("Brook"), all show that Evan had sold the Subject Property to Russell for the benefit and with the approval of Drew and Diana. There is more than one

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<sup>1</sup>Russell's argument that Rule 69(j)(1) is broader in its application than Arizona's right of redemption statute also is supported by Perry v. Safety Federal Sav. & Loan Ass'n of Kansas City, 25 Ariz. App. 443, 544 P.2d 267 (1976), a case cited by Rindlesbach in his appellate brief in an attempt to minimize the effect of Forty-Four Hundred East Broadway. Perry indicates that a person does not become a successor in interest to a judgment debtor in Arizona unless he or she acquires a properly acknowledged deed in accordance with Arizona statute. See id. at 269. In contrast, Utah has no such provision limiting who can be a successor in interest.

genuine issue of material fact in this case with respect to Russell's dealings with Evan and his purchase of the Subject Property, thus dictating that Russell have his day in court.

Russell claims that the case of Bradshaw v. McBride, 649 P.2d 74 (Utah 1982), is factually similar to that before this Court and defeats Russell's ratification claim. In Bradshaw, the plaintiffs and one of eight sibling owners of certain property entered into an oral agreement to sell the plaintiffs the property. However, two of the siblings were not notified of the agreement at any relevant time and manifested by their actions their disapproval of the agreement. Indeed, one of the siblings continually stated his objection to the agreement. Drew and Diana in the instant case not only knew of Evan's agreement to sell the Subject Property to Russell but, in fact, approved of such sale and did nothing to disaffirm the agreement. Russell submits that if the facts of the instant case were before the Utah Supreme Court in Bradshaw, the Supreme Court would have found that Drew and Diana ratified Evan's actions:

“Ratification like original authority need not be express. Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification. The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty to undeceive him. . . .”

Id. at 78 (quoting Moses v. Archie McFarland & Son, 119 Utah 602, 630 P.2d 571, 572-74 (1951)).

Rindlesbach also claims that Russell's claim of ratification violates the statute of frauds because Evan was not authorized in writing by Drew and Diana to enter into the agreement. However, as Rindlesbach well knows, there is a statutory limitation on the harshness of the

statute of frauds. In particular, Utah Code Ann. § 25-5-8 (1995) expressly provides that “[n]othing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.” It is well settled that “[c]ourts of equity, in establishing the doctrine [of part performance], have not, by any means, intended to annul the statute of frauds, but only to prevent its being made the means of perpetrating a fraud.” Price v. Lloyd, 31 Utah 86, 86 P. 767, 772 (Utah 1906).<sup>2</sup>

Russell’s part performance, as presented to the District Court in his affidavit, meets each of the standards of sufficient performance necessary for part performance, which are as follows:

First, the oral contract in its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed, and (b) a failure to perform on the part of the promisor would result

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<sup>2</sup>Rindlesbach relies heavily on “general” rules taken from the Bradshaw case and improperly treats them as absolutes. For example, Rindlesbach argues that “[t]he general rule is that one who deals with an agent has the responsibility to ascertain the agent’s authority despite the agent’s representations.” Bradshaw, 649 P.2d at 78. This general rule, however, is severely tempered by a more recent case, Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992), in which the Utah Supreme Court recognized in no uncertain terms that “[i]t is well established in the law that a principal is liable for the acts of his agent within the scope of the agent’s authority, irrespective of whether the principal is disclosed or undisclosed.” Id. at 110 (emphasis added). The fact that Evan acted in his own name without disclosing the identities of Drew and Diana “does not preclude liability on the part of the principal when he is discovered to be such by a third party who has dealt with the agent.” Id. Significantly, “[t]his is true even though the third person dealing with the agent did not learn of the existence of the principal until after the bargain was completed.” Id. In short, the proposition of law espoused in Garland protects persons such as Russell who deal with agents such as Evan who create “such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first person.” Walker Bank & Trust Co. v. Jones, 672 P.2d 73, 75 (Utah 1983).

Rindlesbach also relies on the general rule that “[w]here the law requires the authority to be given in writing, ratification must also generally be in writing.” Id. at 79 (emphasis added). However, like other transactions which fall under the statute of frauds, the transaction also is subject to escape from the harshness of the statute of frauds in accordance with the doctrine of part performance. Part performance of the transaction satisfies the very reason for which the statute of frauds applies at all, which is to prevent a fraud from being perpetrated.

in fraud or on the performer who relied, since damages would be inadequate.

Martin v. Scholl, 678 P.2d 274, 275 (Utah 1983).

The terms of the agreement between Russell and Evan were definite and certain, and the proposed written document between the parties, although never signed, clearly evidenced the intent of the parties to consummate the transaction. Russell and Evan specifically described the real property which Russell agreed to purchase. Evan agreed to sell the Subject Property to Russell for \$115,000.00, and their agreement required Russell to make monthly payments of \$1,000.00 for application to the loan. Russell did in fact make over two years' worth of monthly payments under the agreement and also paid \$8,500.00 in cash and \$7,688.92 to bring property taxes current as required by the agreement. Although Russell has not paid the entire purchase price, Russell has paid the full redemption amount into court and has averred his ability, readiness and willingness to fulfill all of his agreed obligations. These facts alone show that the agreement is certain and definite enough to be specifically enforceable. "[T]he proper application of [the rule that the essential terms of the contract must be definite] is as a shield to protect from injustice, and not as a weapon with which to work an injustice." Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980). Even though the parties' agreement was never reduced to a signed document, its essential terms have never been disputed.

Further, Russell's acts – including payment of about \$40,000.00, possession of the Subject Property, maintenance and improvement of it, and even his rental of pasturage to others – were clear and definite. Moreover, Russell acted in reliance on the agreement and absolutely would not have performed as he did had the agreement not existed. Finally, Evan's

failure to perform the agreement would have resulted in fraud on Russell because (a) Russell relied to his detriment on Evan's promise to sell the Subject Property and (b) damages would not compensate Russell for loss of the Subject Property as a unique asset.

It is understood that "[r]eliance may be made in innumerable ways all of which could refer exclusively to the contract." Id. In this case, Russell had the option to keep his horses elsewhere, but chose to keep his horses on the Subject Property because he owned it. Moreover, Russell had no reason to improve the Subject Property except that he owned the Subject Property and wanted to improve its utility and appearance. Further, both Russell and Evan acknowledged that payment of \$1,000.00 per month for rent would be absurd. Finally, Russell allowed Evan and his wife to stay on the Subject Property by conveying a life estate interest to Evan, with Russell retaining the fee simple interest in the Subject Property. Because all of these acts exclusively refer to the purchase agreement, Russell was the owner of the Subject Property and not merely Evan's tenant.

Like Rindlesbach's reliance on Bradshaw, Rindlesbach's reliance on the cases of Williams v. Singleton, 723 P.2d 421 (Utah 1986), and Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (Utah 1970), is equally misplaced because any violation of the statute of frauds is satisfied by the doctrine of part performance. In Williams and Coombs, the court recognized that there is no husband-wife exception to the statute of frauds. If any such violation existed in the case at bar, then the violation was cured by Russell's part performance of his agreement with Evan. In short, there are numerous "equities taking the case under consideration out of the statute of frauds." Lee v. Polyhrones, 195 P. 201, 202 (Utah 1921). Russell's agreement with Evan should be enforced exactly the way Drew and Diana intended.

Rindlesbach argues that the case of George Fisher, Jr. Family Inter Vivos Revocable Trust v. Fisher, 907 P.2d 1172 (Utah Ct. App. 1995), relied on by Russell in his appellate brief, is far different from the instant case. Russell disagrees. Fisher specifically involved a statute of frauds issue resolved in favor of part performance of an oral modification to a written escrow agreement. The part performance of the parties performing under the oral modification in Fisher is strikingly similar to that of Russell's part performance in the instant case. In particular, the parties in Fisher installed sprinkling systems, cleaned and graded the land, and installed ponds. Similarly, Russell took possession of the Subject Property and improved it by doing such things as mending fences and cleaning up and maintaining the Subject Property. Further, the terms of the agreement between Russell and Evan are much more clear and definite than the oral term modifying the underlying written agreement in Fisher. In Fisher, the payment term was modified simply to require payment under the agreement "until requested." In contrast, as shown above, the terms of the agreement between Russell and Evan are abundantly clear and definite and warrant specific enforcement.

It is also extremely important to note that the oral modification of the underlying written agreement in Fisher was binding on both the husband and the wife, the original sellers of the property in Fisher, even though there is no indication in Fisher that the wife gave written authorization to her husband as her agent to modify orally the written agreement. Indeed, this Court expressly affirmed the trial court's finding that the wife "knew of the modification and acquiesced in the agreement to postpone payments." Id. In short, the doctrine of part performance saved the oral understanding between the parties from violating the statute of frauds either directly or indirectly. The same is true in the instant case.

Russell's affidavit opposing summary judgment described his part performance in detail. At the very least, his affidavit created a material issue of fact which should have been reserved for trial.

### **CONCLUSION**

Based on the foregoing, Russell requests the following relief:

1. That the District Court's Order on Plaintiff's Motion for Summary Judgment against Defendant Russell be reversed;
2. That the District Court's Judgment and Decree quieting title in the Subject Property in favor of Rindlesbach and against Russell be reversed; and
3. That the action be remanded to the District Court, where Russell may be accorded a trial on the merits.

DATED this 23<sup>rd</sup> day of December 1996.

**JARDINE LINEBAUGH & DUNN**  
A Professional Corporation

By: Jeffery J. Devashrayee  
William G. Marsden  
John N. Brems  
Jeffery J. Devashrayee



**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of December 1996, I served the foregoing **REPLY BRIEF OF APPELLANT - ROGER T. RUSSELL** by causing true and correct copies thereof to be mailed, via United States Mail, postage prepaid, addressed to the following (2 copies to each addressee):

T. Richard Davis  
Callister, Nebeker & McCullough  
10 East South Temple, Suite 900  
Salt Lake City, UT 84133  
Attorneys for Mark L. Rindlesbach

David Black  
Black, Stith & Argyle  
1245 Brickyard Road, Suite 650  
Salt Lake City, UT 84106  
Attorneys for Defendants Hansen



JJD\P\1713  
File No 12780