

1996

# Mark L. Rindlesbach v. Roger T. Russell, Drew Wiliam Hansen : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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DOCKET NO. 960219-CA

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

ROGER T. RUSSELL, DREW WILLIAM  
HANSEN, et al.,

Defendants and Appellant.

Court of Appeals No. 960219-CA

Priority 15

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

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

Defendants and Appellant.

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

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AUG 12 1996

COURT OF APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

ROGER T. RUSSELL; DREW WILLIAM HANSEN and DIANA M. HANSEN; EVAN W. HANSEN, individually and as Personal Representative for the Estate of GENEVA B. HANSEN; and BANK ONE, N.A., fka VALLEY BANK & TRUST COMPANY, N.A.,

Defendants and Appellant.

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

ROGER T. RUSSELL, aka ROGER T. RUSSELL, DDS; DREW WILLIAM HANSEN, aka DREW W. HANSEN, and DIANA M. HANSEN; GUARDIAN STATE BANK; SMALL BUSINESS ADMINISTRATION OF THE UNITED STATES OF AMERICA; UTAH STATE DEPARTMENT OF FINANCIAL INSTITUTIONS, as Custodian of the Assets for TRACY-COLLINS BANK & TRUST COMPANY and TRACY MORTGAGE COMPANY; MERRILL G. HANSEN, aka MERRILL HANSEN; KATHLEEN HANSEN; DARRELL DALTON; UTAH STATE TAX COMMISSION; and EVAN W. HANSEN, individually and as Personal Representative for the Estate of GENEVA B. HANSEN,

Defendants and Appellant.

LIST OF ALL PARTIES

Court of Appeals No. 960219-CA

Priority 15

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## JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1995 Supp.). Following transfer from the Utah Supreme Court, the Utah Court of Appeals has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1995 Supp.).

## STATEMENT OF ISSUES

### A. ISSUES FOR REVIEW.

1. Did the District Court err in finding that Defendant and Appellant Roger T. Russell ("**Russell**") was not a "successor to the judgment debtor" within the meaning of Rule 69(j)(1), Utah Rules of Civil Procedure, and therefore lacked the capacity to redeem two parcels of real property (the "**Subject Property**") which Plaintiff and Appellee Mark L. Rindlesbach ("**Rindlesbach**") had purchased at a sheriff's sale? Russell raised this issue in the District Court in his memorandum in opposition to Rindlesbach's Motion for Summary Judgment ("**Opposition Memorandum**"). (Rec. pp. 517-521.)

2. Did Evan W. Hansen ("**Evan**") have apparent authority to act on behalf of Drew William Hansen ("**Drew**") and Diana M. Hansen ("**Diana**") when he entered into an oral agreement with Russell for the purchase of the Subject Property? Russell raised this issue in the District Court in his Opposition Memorandum. (Rec. pp. 521-523.)

3. Did Drew and Diana ratify Evan's act of selling the Subject Property? Russell raised this issue in the District Court in his Opposition Memorandum. (Rec. pp. 523-526.)

4. Is the oral agreement between Russell and Evan for the purchase of the Subject Property specifically enforceable? Russell raised this issue in the District Court in his Opposition Memorandum. (Rec. pp. 526-528.)



5. Did the District Court err in finding that Russell's acts performed in reliance on the oral purchase agreement failed to meet the test of exclusive reference, i.e., that they would not have been performed had the contract not existed? Russell raised this issue in the District Court in his Opposition Memorandum. (Rec. pp. 528-529.)

6. Did the District Court err in finding that Russell had no legitimate right or interest in the subject property? Russell raised this issue in the District Court in his Opposition Memorandum. (Rec. pp. 517-529).

B. STANDARD OF REVIEW.

This matter is on appeal from the District Court's grant of summary judgment in favor of Mark L. Rindlesbach ("**Rindlesbach**") and against Russell. The issues for review set forth above involve whether a material fact exists with respect to Russell's ownership of, and interest in, the Subject Property and, therefore, whether the District Court properly entered summary judgment in favor of Rindlesbach. In reviewing a grant of summary judgment, the appellate court views the facts in a light most favorable to the losing party. Mountain States Telephone & Telegraph Co. v. Garfield County, 811 P.2d 184, 192 (Utah 1991). In deciding whether a district court properly granted judgment as a matter of law to the prevailing party, the appellate court reviews the judgment for correctness. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). This standard is particularly appropriate to this action, in which the District Court ruled solely on the basis of affidavits filed in support of and in opposition to Rindlesbach's Motion for Summary Judgment and did not observe the demeanor, credibility or competency of witnesses. See Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah Ct. App. 1988).

## DETERMINATIVE STATUTES AND RULES

### UTAH CODE ANNOTATED

#### TITLE 25, CHAPTER 5, STATUTE OF FRAUDS

##### **25-5-1. Estate or interest in real property.**

No estate or interest in real property other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

##### **25-5-8. Right to specific performance not affected.**

Nothing 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.

#### TITLE 78, CHAPTER 37, MORTGAGE FORECLOSURE

##### **78-37-6. Right of redemption — Sales by parcels — Of land and water stock.**

Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under executions generally. In all cases where the judgment directs the sale of land, together with shares of corporate stock evidencing title to a water right used or intended to be used, or suitable for use, on the land, the court shall equitably apportion such water stock to the land, or some part thereof, in one or more parcels, as it may deem suitable for the sale thereof, and the land and water stock in each parcel shall be sold together, and for the purpose of such sale shall be regarded as real estate and subject to redemption as above specified. In all sales of real estate under foreclosure the court may determine the parcels and the order in which such parcels of property shall be sold.

## UTAH RULES OF CIVIL PROCEDURE

### **RULE 56(c). Summary Judgment.**

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

### **RULE 69(j)(1). Redemption of real property from sale.**

(1) **Who may redeem.** Real property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (A) the judgment debtor; (B) a creditor having a lien by judgment, mortgage, or other lien on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

### **STATEMENT OF THE CASE**

This case involves Russell's asserted right to redeem the Subject Property in his capacity as the successor in interest to Drew and Diana, who were the judgment debtors in this case and the former owners of the Subject Property. On November 18, 1993, Rindlesbach, who had acquired the beneficiary's interest in a trust deed encumbering the Subject Property and other property, filed a Complaint seeking judicial foreclosure of the trust deed. On January 6, 1994, Russell filed an Answer to Rindlesbach's Complaint, as well as a Counterclaim, Crossclaim and Third-Party Complaint, in an attempt to protect his

asserted interest in the Subject Property. On February 17, 1994, Rindlesbach filed a Motion for Summary Judgment seeking the relief sought in his complaint and dismissal of Russell's Counterclaim. On June 23, 1994, the District Court entered its Order Granting Plaintiff's Motion for Summary Judgment in favor of Rindlesbach and also entered a Decree of Foreclosure on all of the property subject to Rindlesbach's foreclosure action, including the Subject Property.

Following entry of the Decree of Foreclosure and an Order of Sale, Rindlesbach purchased the Subject Property at a sheriff's sale conducted on August 2, 1994, paying \$88,000.00 for the parcels comprising the Subject Property.

Six months later, on February 2, 1995, Russell filed his Petition for Determination of Entitlement to Redeem the Subject Property and, pursuant to a Stipulation and Joint Motion Respecting Redemption, Russell paid to the Court the redemption price for the Subject Property, \$93,280.00. Twenty days later, on February 22, 1995, Rindlesbach commenced a new action, this time seeking to quiet title to the foreclosed property. On March 21, 1995, the foreclosure action and the quiet title action were consolidated under the consolidated civil number 930906701. On May 9, 1995, Rindlesbach filed a Motion for Summary Judgment and Default Judgment against defendants other than Russell. On December 22, 1995, the District Court entered its Order on Plaintiff's Motion for Judgment Against Various Defendants, by which it granted Rindlesbach's Motion for Summary Judgment and Default Judgment. On August 11, 1995, Rindlesbach filed a Motion for Summary Judgment against Russell. On December 22, 1995, the District Court granted Plaintiff's Motion for Summary Judgment Against Defendant Russell. Also on December

22, 1995, the District Court entered its Judgment and Decree Quieting Title in the Subject Property. On January 18, 1996, Russell filed his Notice of Appeal.

### STATEMENT OF FACTS

1. Before December 1987, Evan and his spouse, Geneva, held fee title to certain real property located at approximately 1815 East Creek Road, Salt Lake City, Utah, consisting of approximately 3.53 acres designated in six separate parcels, which included the Subject Property. (Rec. pp. 414, 415, 487, 488.)

2. On November 30, 1987 and December 7, 1987, Evan and Geneva conveyed their Creek Road property to Drew and Diana by Quit Claim Deed. (Rec. pp. 415, 487, 488.)

3. Drew and Diana acquired their interest in the Creek Road property in order to enable Drew to collateralize a loan (the "**Loan**") from Capital City Bank (the "**Bank**") for a business venture which later failed. The loan was evidenced by a Trust Deed Note (the "**Note**") secured by Trust Deed (the "**Trust Deed**") which, at commencement of this action, encumbered property which included the Subject Property. (Rec. pp. 418, 512, 533, 546, 547, 553.)

4. When Drew became unable to repay the Loan, Dale Hansen ("**Dale**") (Drew's brother), David Hansen (another brother), and Brook Hansen ("**Brook**") (Dale's son) all made payments in Drew's behalf in an effort to save the property which their parents had conveyed to Drew and Diana. (Rec. pp. 512, 547, 553.)

5. Russell, who for many years had been a friend of Evan, also made several payments on the Loan to assist Evan. (Rec. pp. 512, 534.)

6. In the spring of 1991, Evan, who had negotiated with at least two other potential buyers, asked Russell to buy the Subject Property. While Russell was not initially interested because he was experiencing financial difficulties following his wife's liver transplant, he finally reached an agreement with Evan in 1991 to purchase the Subject Property. The total purchase price was to be \$115,000.00 and consisted of the following components: \$10,000.00 down; \$15,000.00 to be paid by January 1, 1992; delinquent property taxes of approximately \$6,000.00 to be paid by Russell; and the Loan balance of approximately \$84,000.00 to be paid in monthly installments by Russell. In addition, Russell agreed to grant Evan and Geneva a life estate in a portion of the Subject Property which included their home. (Rec. pp. 513, 534.)

7. Evan had his nephew, defendant Merrill G. Hansen ("**Merrill**"), prepare a written contract to memorialize their agreement. The contract generally reflected the parties' oral agreement. Russell did not sign it because he was experiencing creditor difficulties at the time and did not want to jeopardize the Subject Property. (Rec. pp. 513, 534, 535.)

8. Evan told both Brook and Dale that he had sold the Subject Property to Russell. During the year or so beginning in August 1992, talk of the Subject Property and of Russell's purchase dominated virtually every one of the many conversations among Brook, Drew, Evan and Merrill. (Rec. pp. 513, 547, 553.)

9. After Russell and Evan reached their agreement, Russell paid every monthly installment of the Loan from April 1991 through June 1993, generally making the payments to Evan. The total Russell paid to the Bank (or to Evan for payment of the

Loan) was approximately \$26,000.00. Russell also paid \$8,000.00 as a part of the down payment and brought property taxes current by paying \$7,688.92. Russell did not pay the full cash payments within the time required by the oral agreement, but Evan allowed Russell to make those payments late in light of Russell's financial circumstances. (Rec. pp. 513, 514, 535.)

10. Russell took possession of the Subject Property in May 1991, and immediately moved his own horses on to the Subject Property and exercised total control of the barn and pastures. He paid water fees on the Subject Property, stored vehicles on it, mended fences, cleaned up and maintained the Subject Property, hired help to clean the stalls, and rented the Subject Property to others for horse pasturage. He would not have rented the Subject Property from Evan to pasture his horses, since he had other property for that purpose. Consistent with the life estate which Russell had granted to Evan and Geneva, they continued to live in their home on a portion of the Subject Property, and Evan volunteered to care for the horses. Except for storing an old car on a portion of the Subject Property which Evan occupied, Drew and his family have not occupied the Subject Property since Russell took possession. (Rec. pp. 514, 536.)

11. On numerous occasions, Drew acknowledged his understanding and acceptance of Russell's oral purchase agreement. For example: (a) Drew often became visibly upset about Russell's delinquencies in payment of Loan payments and property taxes; (b) on several occasions, he said that he could sell the Subject Property to Rindlesbach, his boss, since Russell had no written contract; (c) when confronted by Dale in July 1992, Drew stated in essence: "When Roger gets delinquent and Capital City is

ready to foreclose, Rindlesbach can come in"; (d) he made no effort to deter Russell from making Loan payments in Drew's behalf; (e) on one occasion when Russell made a delinquent payment, Drew informed him that he would continue to honor Russell's purchase agreement; (f) on another occasion, Drew threatened Russell that if Russell did not bring the delinquent taxes current, Drew would sell the Subject Property to Rindlesbach (Russell brought the taxes current); and (g) in the late spring or early summer of 1993, Evan told Brook that Merrill and Drew had come up with an idea to categorize Russell's payments as "rent" and to disavow Russell's entitlement to the Subject Property. Evan said that he would not stand for what they were doing because it would be ridiculous to pay rent of \$1,000.00 per month for the Subject Property as horse pasture; however, he later acknowledged that the plan to squeeze Russell out was a "done deal," but that out of the proceeds from Rindlesbach, Evan would pay Russell back for what Russell had paid under the purchase agreement. (Rec. pp. 514, 515, 536, 537, 547, 548, 554.)

12. But for the existence of the purchase agreement, Russell would not have made any of the payments, nor would he have conducted any maintenance of the Subject Property. He never intended that any payment be construed as a loan, as a rental payment, or as anything other than partial performance of his purchase obligation. He has been ready, willing and able to fulfill all of his obligations under the purchase agreement. (Rec. pp. 515, 537.)

13. On or about August 10, 1993, Rindlesbach, as buyer, and Drew, Diana and Evan, collectively as sellers, entered into an earnest money sales agreement by which Drew,



Diana and Evan agreed to sell to Rindlesbach five parcels, including the Subject Property. (Rec. pp. 415, 417.)

14. Closing of the sale under the earnest money agreement was conditioned upon Rindlesbach's clearance of title to the property, including the Subject Property. (Rec. pp. 418.)

15. On August 16, 1993, Russell recorded his Notice of Interest in the Subject Property in the official records of Salt Lake County, Utah, as Entry No. 5579822, in Book 6731, at Page 2762. He supplemented the notice with a Correction Notice of Interest recorded on August 17, 1993, as Entry No. 5581629, in Book 6733, at Page 1352. (Rec. pp. 420.)

16. On or about October 26, 1993, Rindlesbach purchased the Note and the beneficiary's interest in the Trust Deed from the Bank. (Rec. pp. 418.)

17. On November 18, 1993, Rindlesbach initiated a judicial foreclosure action on the Trust Deed Property by filing a Complaint in the Third Judicial District Court, styled Mark L. Rindlesbach v. Drew William Hansen, et al., Civil No. 930906701 (the "**Foreclosure Action**"). (Rec. pp. 418, 419.)

18. On June 23, 1994, the District Court entered an order granting Rindlesbach's Motion for Summary Judgment and entered a Decree of Foreclosure in the Foreclosure Action. (Rec. pp. 419.)

19. On August 2, 1994, pursuant to an Order of Sale, Rindlesbach purchased the property encumbered by the Trust Deed at a sheriff's sale for \$98,036.11, of which \$88,000.00 was allocated to the Subject Property. (Rec. pp. 419.)

20. On or about November 17, 1994, Drew and Diana executed Quit Claim Deeds by which they quit claimed the Subject Property and other property to Rindlesbach. (Rec. pp. 419, 496.)

21. On or about December 2, 1994, Drew and Diana executed an Assignment of Redemption Rights, assigning to Rindlesbach all of their rights to redeem the Subject Property and other property from the August 2, 1994 sheriff's sale. (Rec. pp. 419.)

22. On February 2, 1995, Russell filed his Petition for Determination of Entitlement to Redeem the Subject Property. (Rec. pp. 319-327, 421.)

23. Within the redemption period, Russell paid into the Third Judicial District Court the full amount of the \$93,280.00 redemption price for the Subject Property (subject to stipulated augmentation for 1994 property taxes if Rindlesbach provided evidence of payment). (Rec. pp. 516.)

24. Rindlesbach's claims against each of the defendants in this case other than Russell have been resolved. (Rec. pp. 421.)

#### **SUMMARY OF ARGUMENT**

As a successor in interest to Drew and Diana, the judgment debtors in this case, Russell has the right to redeem the Subject Property under Utah Code Ann. § 78-37-6 (1992) and Rule 69(j)(1), Utah Rules of Civil Procedure. Russell succeeded to the interest of Drew and Diana in the Subject Property when he purchased the Subject Property from Evan. Russell became the owner of the Subject Property under the doctrine of equitable conversion because as the purchaser of the Subject Property, Russell acquired the equitable interest in the Subject Property at the moment his purchase agreement with Evan became

fully enforceable. The doctrine of equitable conversion applies to Russell's purchase of the Subject Property even though Russell dealt with Evan and not Drew and Diana, and even though Russell and Evan did not reduce the agreement to writing, because (1) Evan consummated the agreement with Russell as the agent for Drew and Diana, (2) Russell could bring an action for specific performance, and (3) Russell satisfied the statute of frauds by partly performing under the oral agreement.

Evan had apparent authority to act for Drew and Diana when he entered into the agreement with Russell because Drew and Diana knowingly permitted Evan to act for them and manifested their consent to his exercise of that authority. Acting in good faith, Russell reasonably believed that Evan possessed such authority, and Russell changed his position in detrimental reliance upon Evan's apparent authority. Further, even if Evan did not have apparent authority to act for Drew and Diana, Drew and Diana ratified Evan's act of selling the Subject Property to Russell by accepting the benefits of Russell's act and failing to disaffirm the agreement between Evan and Russell.

The agreement between Evan and Russell is specifically enforceable because its terms were both sufficiently certain that Evan and Russell knew what was required of them and definite enough that the courts could delineate their intent. Further, Russell has tendered the purchase price for the Subject Property to Rindlesbach and has averred his ability, readiness and willingness to fulfill all of his agreed obligations pursuant to the purchase agreement.

Russell partly performed the purchase agreement to satisfy the statute of frauds by making payments under the purchase agreement, possessing the Subject Property,

maintaining and improving the Subject Property, and even renting pasturage to others, all in accordance with the clear and definite terms of the purchase agreement. Russell also acted in reliance on the agreement and would not have performed as he did had the agreement not existed. The failure of Evan, Drew and Diana to perform under the agreement would have resulted in fraud on Russell because Russell relied to his detriment on Evan's promise to sell the Subject Property, and damages would not compensate Russell for loss of the Subject Property.

Each of the legal arguments stated above finds ample factual support in the affidavits which Russell filed in opposition to Rindlesbach's summary judgment motion. The trial court committed reversible error by failing to find that those affidavits created material issues of fact which precluded summary judgment.

#### **ARGUMENT**

#### **RUSSELL, THE SUCCESSOR IN INTEREST TO THE JUDGMENT DEBTORS, MAY REDEEM THE SUBJECT PROPERTY AS ITS OWNER UNDER THE DOCTRINE OF EQUITABLE CONVERSION**

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 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). Russell redeemed the Subject Property as a successor in interest to

Drew and Diana, the judgment debtors. A successor in interest to a judgment debtor is defined as "the 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 on contract in April 1991 and became its owner pursuant to the doctrine of equitable conversion.

"The doctrine of equitable conversion provides that 'an enforceable executory contract of sale [upon which an action for specific performance could be brought] has the effect of converting the interest of the vendor of real property to personalty.'" Lach v. Deseret Bank, 746 P.2d 802, 805 (Utah Ct. App. 1987) (quoting Willson v. State Tax Comm'n, 28 Utah 2d 197, 499 P.2d 1298, 1300 (1972)). The purchaser of real property under the doctrine of equitable conversion "acquires the equitable interest in the property at the moment the contract is created and is therefore treated as the owner of the land." Lach, 746 P.2d at 805. In short, the purchaser of real property "has an equitable interest in the property while the seller's interest is 'converted to the right to receive the proceeds under the contract of sale.'" Lach, 746 P.2d at 805 (quoting Allred v. Allred, 15 Utah 2d 396, 393 P.2d 791, 792 (1964)) (emphasis in original).

An Arizona case with facts strikingly similar to those of this case shows that Russell, as the successor in interest to Drew and Diana, was entitled to redeem the Subject Property under the doctrine of equitable conversion. See Forty-Four Hundred East Broadway Co. v. 4400 East Broadway, 135 Ariz. App. 265, 666 P.2d 866 (1982). In Forty-Four Hundred, the trial court had held that a contract buyer of real estate was the successor in interest

to the judgment debtor/mortgagor in a foreclosure action brought by the holder of the underlying mortgage. The court had ruled that the buyer's assignee was entitled to redeem at any time within six months of the date of the foreclosure sale. Id. at 868. The appellate court affirmed, explaining that "the vendee under a binding contract for sale of realty is the owner and the vendor merely holds the legal title as personalty in trust for the vendee until the latter completes his performance." Id. Significantly, the court then explained that the "purpose of the statutory right of redemption for a successor in interest is to protect his interest as owner of the property in question." Id. The court confirmed this right even though the contract buyer was in default at the time of foreclosure.

Likewise in this case, Russell was entitled to redeem the Subject Property under the doctrine of equitable conversion as successor in interest to Drew and Diana, even if Russell was in default under his purchase agreement at the time of foreclosure (which he denies). Russell became the owner of the Subject Property at the moment the agreement became fully enforceable. The doctrine of equitable conversion applies to Russell's purchase of the Subject Property even though Russell dealt with Evan and not Drew and Diana when he entered into the agreement, and even though Russell and Evan did not reduce the agreement to writing, because (1) Evan consummated the agreement as the agent for Drew and Diana, (2) Russell could bring an action for specific performance, and (3) Russell satisfied the statute of frauds by partly performing under the agreement.

**A. Evan Acted As The Agent For Drew And Diana When He Entered Into The Agreement With Russell.**

**1. Evan had apparent authority to act for Drew and Diana.**

Implicit in the District Court's ruling that Russell was not the successor to Drew and Diana is the District Court's reliance on Drew's affidavit, which flatly stated that he never authorized Evan to act as his agent to sell the Subject Property. Standing alone, that affidavit would undoubtedly have sustained a finding that Evan lacked actual authority. But Russell's summary judgment defense did not rely on actual authority. Instead, the affidavits of Russell, Brook and Dale which Russell filed with the District Court showed that regardless of the extent of his actual authority, Evan had apparent authority to sell to Russell. At the least, those affidavits created an issue of fact which precluded summary judgment, because "even though an agent is not actually authorized by the principal, the principal may nevertheless be liable to a third party based on the doctrine of apparent authority." Luddington v. Bodenvest Ltd., 855 P.2d 204, 208-09 (Utah 1993). Apparent authority has been defined as "conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Luddington, 855 P.2d at 209. See also Walker Bank & Trust Co. v. Jones, 672 P.2d 73, 75 (Utah 1983) ("Apparent authority exists . . . where a person has created 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 . . ."). The following elements must be established to show apparent authority:

(1) that the principal has manifested his [or her] consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Luddington, 855 P.2d at 209.

The Russell, Dale and Brook affidavits abundantly established each of these elements. The facts drawn from those affidavits are that during the time that Drew and Diana were absolutely unable to make payments on the Loan, and thus would have faced foreclosure without assistance, (1) Evan continued to live on the Subject Property, (2) Evan and other family members made payments on the Loan, (3) Evan negotiated with at least two potential buyers other than Russell, (4) Evan negotiated with Russell to sell the Subject Property, and (5) Evan had Merrill prepare a written contract with Russell which named Evan and Geneva as sellers. There is no evidence that Drew and Diana objected to any of Evan's activities and transactions. It is reasonable to infer that Drew and Diana consented to the exercise of Evan's authority in selling the Subject Property and knowingly permitted Evan to assume the exercise of that authority.

Moreover, there is no evidence to contradict the proposition that Russell acted in good faith and had reason to believe, and did actually believe, that Evan had the authority to sell the Subject Property. Russell accepted this appearance of authority and changed his position in reliance on it by actually possessing the Subject Property, making payments on the Loan as required under the agreement, making improvements to the Subject Property,



and even paying taxes on the Subject Property. See, e.g., McFadden v. Wilder, 6 Ariz. App. 60, 429 P.2d 694, 698 (1967) ("Equitable conversion could be found to have taken place when the parties made their agreement. Plaintiff, who had been tenant on the property to that point, made improvements, paid taxes, and no longer paid rent."). Indeed, Russell stands to lose roughly \$40,000.00 in out-of-pocket expenditures alone — every penny of which benefitted Drew and Diana and no one else — if Evan's sale of the Subject Property does not bind Drew and Diana. The District Court's failure to recognize Evan's apparent authority was reversible error.

**2. Drew and Diana ratified Evan's act of selling the Subject Property.**

"A principal may impliedly or expressly ratify an agreement made by an unauthorized agent. Ratification of an agent's acts relates back to the time the unauthorized act occurred and is sufficient to create the relationship of principal and agent." Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982). Ratification requires that the principal "have knowledge of all material facts and an intent to ratify." Id. However, "a purported principal may not be wilfully ignorant, nor may he purposely shut his eyes to means of information within his possession and control and thereby escape ratification 'if the circumstances are such that he could reasonably have been expected to dissent unless he were willing to be a party to the transaction.'" Id. (quoting Moses v. Archie McFarland & Son, 119 Utah 602, 230 P.2d 571, 573-74 [1951]).

Ratification is particularly evident when a principal accepts the benefits of a previously unauthorized act. See, e.g., Corral v. Fidelity Bankers Life Ins. Co., 129 Ariz. 333, 630 P.2d 1055, 1058 (1981) ("Acceptance of the benefit of an unauthorized act of

one purporting to act as an agent amounts to ratification."); First Nat'l Bank in Miles City v. Nunn, 628 P.2d 1110, 1116 (Mont. 1981) ("It is well-settled that a principal who accepts the benefits of an agency transaction cannot later deny there was an agency. [Citation omitted.] Even if the agent's actions were unauthorized, the principal ratifies them by receiving the benefits and is estopped to deny the agency."); C.H. Stuart, Inc. v. Bennett, 617 P.2d 879, 885 (Okla. 1980) ("One who accepts the benefits of the unauthorized acts of his agent ratifies the acts and accepts all the burdens and benefits of the acts. It is not essential to ratification that the principal have knowledge of the acts of the agent if the benefits from the acts are retained after the happening of such events as would place a reasonably prudent person on inquiry.").

Even if Evan acted without the authorization of Drew and Diana under a theory of apparent agency, Drew and Diana<sup>1</sup> ratified the agreement between Evan and Russell. As reflected by the affidavits of Russell, Dale and Brook, Drew and Diana knew that Evan had sold the Subject Property to Russell. As the owners of the Subject Property, Drew and Diana benefitted from Evan's sale of the Subject Property to Russell because Russell's payments reduced the Loan balance and brought taxes current. Not surprisingly, Drew and Diana expressed their willingness to be part of the transaction by failing to disaffirm the agreement. See Bradshaw, 649 P.2d at 78. See also Ulibarri Landscaping Materials, Inc. v. Colony Materials, Inc., 97 N.M. 266, 639 P.2d 75, 79 (Ct. App. 1981) ("One may infer affirmance by a principal of an unauthorized transaction of its agent from the principal's

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<sup>1</sup> The parties' affidavits were silent about Diana's role, but since the benefits of Russell's agreement with Evan flowed to her just as they did to Drew, it is reasonable to infer that Drew's acts of ratification were intended to bind both marriage partners and had her consent or acquiescence.

failure to repudiate it."); Paragano v. Gray, 126 Or. App. 670, 870 P.2d 837, 842 (1994) ("Intent to ratify may be implied from the principal's neglecting promptly to disavow the agent's act."). Finally, and perhaps most important, Drew spoke often of Russell's agreement and sought ways to get out of it, not to repudiate it. The compelling conclusion from the affidavits is that Drew and Diana intended to ratify Evan's acts and are estopped, under all of the circumstances, from denying their agency relationship with Evan after benefitting from Evan's acts and failing to repudiate the agreement.

Because Evan acted as the agent of Drew and Diana, Drew and Diana were bound by Evan's sale of the Subject Property to Russell. "It 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." Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992) (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.

**B. The Oral Agreement Between Russell And Evan Is Specifically Enforceable.**

Russell contends that the parties entered into an oral contract to convey an interest in the Property. It is well settled that "[w]here the existence of an oral contract and the terms thereof are contested and the evidence is conflicting, it is for the trier of fact to determine whether the contract did in fact exist and, if so, the terms of such contract."

Curran v. Hastreiter, 579 P.2d 524, 526 (Alaska 1978). Because Russell intends to introduce evidence at trial showing that the agreement is specifically enforceable and satisfies the statute of frauds, the District Court's order and judgment should be reversed and the case remanded to allow the trier of fact to determine whether the parties did in fact enter into the agreement and, if so, the terms of that agreement.

"Before specific performance will be employed by the courts to enforce a contract the terms of the agreement must be reasonably certain so the parties know what is required of them, and definite enough that the courts can delineate the intent of the contracting parties." Reed v. Alvey, 610 P.2d 1374, 1377 (Utah 1980). See also Eliason v. Watts, 615 P.2d 427, 429 (Ut. 1980) ("Specific performance of contract depends on whether the obligations of the parties are set forth with sufficient clarity and definiteness that the contract can be performed according to its terms."). Further, "in a suit for specific performance of a contract for the sale of realty, the purchaser must show that he paid the purchase price, or tendered it, to the defendant prior to commencement of the suit. However, an action for specific performance may also be maintained if the plaintiff presents an excuse for his failure to make such payment or tender and avers his ability, readiness and willingness to pay the contract amount." Reed, 610 P.2d at 1379.

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 realty 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.

The Supreme Court of Utah has made clear that "the 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. To avoid injustice to Russell, the agreement should be upheld.

**C. Russell's Part Performance Of The Oral Agreement Satisfies The Statute Of Frauds.**

Utah's statute of frauds provides, in pertinent part, as follows:

No estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same . . . .

Utah Code Ann. § 25-5-1 (1995). A statutory limitation on the harshness of this rule is the doctrine of part performance:

Nothing 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.

Utah Code Ann. § 25-5-8 (1995).

The standards of sufficient performance are as follows:

First, the oral contract and 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) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate.

Martin v. Scholl, 678 P.2d 274, 275 (Utah 1983). Russell's performance, as presented to the District Court in his affidavit, met each of these standards. First, as shown above, the agreement between Russell and Evan and its terms were clear and definite enough to be specifically enforceable. Second, Russell's acts — including payment of about \$40,000.00, possession of the Property, maintenance and improvement of it, and even his rental of pasturage to others — were clear and definite. Third, 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 under the agreement would have resulted in fraud on Russell because (a) Russell relied to his detriment on Evan's promise to sell the 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. All of these acts exclusively refer to the purchase agreement. Russell was the owner of the Subject Property and not merely Evan's tenant.

In a remarkably similar case, the Utah Court of Appeals has recently held that a party's part performance of an oral modification to a written escrow agreement saved the oral modification from violating the statute of frauds. See George Fisher, Jr. Family Inter Vivos Revocable Trust v. Fisher, 227 Utah Adv. Rep. 44 (Utah Ct. App. 1995). In Fisher, the appellees purchased real property pursuant to a written escrow agreement. The parties later orally modified the agreement's payment terms to allow the appellees to invest the money in the property rather than make the required payments. During this time the appellees had taken possession of the property and had improved it by installing sprinkling systems, cleaning and grading the land, and installing ponds. When the oral modification to the written escrow agreement was challenged in court as violating the statute of frauds, the trial court found that the appellees' partial performance upheld the modification:

The contract was partially performed and [appellees] relied upon the oral representations. The improvements were substantial and valuable. The decision to invest in the property rather than make payments was exclusively referable to the oral modification. The Court believes that [appellees]

changed positions by performing on the oral modification so that it would now be inequitable to permit [appellants] to found their claim for breach on the original agreement as unmodified.

Id. at 46. The Court of Appeals affirmed the trial court, recognizing that "in reliance on the oral modification, appellees changed their position and partially performed the contract," and that "it would be inequitable to permit [appellants] to enforce the unmodified agreement." Id.

Like the appellees in Fisher, Russell changed his position in reliance on his oral agreement with Evan and partially performed the agreement by taking possession of the Subject Property and making improvements to the Subject Property. Indeed, Russell's actions in taking possession of the Subject Property and improving it, including mending fences and cleaning up and maintaining the Subject Property, are essentially the same as the appellees' actions in Fisher. Accordingly, Russell's substantial past performance of the agreement satisfies the statute of frauds and compels enforcement of the agreement.

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

### **CONCLUSION**

In granting Rindlesbach's motion for summary judgment, the District Court ruled that Russell was not a "successor to the judgment debtor" and therefore lacked the statutory capacity to redeem the Subject Property from the sheriff's sale. The District Court also ruled that Russell's acts in reliance on the oral purchase contract failed to meet the



test of exclusive reference. The District Court simply could not have made those legal determinations without ignoring the opposing affidavits of Russell, Dale and Brook, since those affidavits contained facts which, if true, would compel precisely the converse result. The District Court's failure to consider the opposing affidavits in a light most favorable to Russell constituted reversible error. Accordingly, 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 17 day of August, 1996.

**JARDINE, LINEBAUGH & DUNN**  
A Professional Corporation

By: 

William G. Marsden  
John N. Brems  
Jeffery J. Devashrayee  
Attorneys for Defendant and Appellant  
Roger T. Russell

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of August, 1996, I served the foregoing **BRIEF OF APPELLANT — ROGER T. RUSSELL** by mailing copies thereof, by first-class United States mail, postage prepaid and addressed as follows (two copies to each addressee):

T. Richard Davis  
Callister, Nebeker & McCullough  
10 East South Temple, #800  
Salt Lake City, UT 84133

David O. Black  
Black, Stith & Argyle  
1245 Brickyard Road, #650  
Salt Lake City, UT 84106

*Jeffrey S. Duvall*  
*Carolyn C. C. C.*

---

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

ROGER T. RUSSELL; DREW WILLIAM  
HANSEN and DIANA M. HANSEN; EVAN  
W. HANSEN, individually and as Personal  
Representative for the Estate of GENEVA  
B. HANSEN; and BANK ONE, N.A., fka  
VALLEY BANK & TRUST COMPANY,  
N.A.,

Defendants and Appellant.

MARK L. RINDLESBACH,

Plaintiff and Appellee,

vs.

ROGER T. RUSSELL, aka ROGER T.  
RUSSELL, DDS; DREW WILLIAM  
HANSEN, aka DREW W. HANSEN, and  
DIANA M. HANSEN; GUARDIAN STATE  
BANK; SMALL BUSINESS ADMINIS-  
TRATION OF THE UNITED STATES OF  
AMERICA; UTAH STATE DEPARTMENT  
OF FINANCIAL INSTITUTIONS, as Custo-  
dian of the Assets for TRACY-COLLINS  
BANK & TRUST COMPANY and TRACY  
MORTGAGE COMPANY; MERRILL G.  
HANSEN, aka MERRILL HANSEN;  
KATHLEEN HANSEN; DARRELL  
DALTON; UTAH STATE TAX COM-  
MISSION; and EVAN W. HANSEN, indi-  
vidually and as Personal Representative  
for the Estate of GENEVA B. HANSEN,

Defendants and Appellant.

ADDENDUM

Court of Appeals No. 960219-CA

Priority 15

Tab A

FILED DISTRICT COURT  
Third Judicial District

OCT 4 1995

SALT LAKE COUNTY

By                      Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

MARK L. RINDLESBACH,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 930906701
vs.	:	
DREW WILLIAM HANSEN and	:	
DIANA M. HANSEN, et al.,	:	
Defendants.	:	
-----	:	
MARK L. RINDLESBACH,	:	
Plaintiff,	:	
vs.	:	
ROGER T. RUSSELL, also known	:	
as ROGER T. RUSSELL, DDS,	:	
et al.,	:	
Defendants.	:	

-----

The court previously granted in part plaintiff's motion for summary judgment. The court, however, reserved ruling as to parcel No. 4. The court now rules that plaintiff is entitled to summary judgment as to parcel No. 4 for the reasons set forth in plaintiff's memorandum and as expressed at the hearing.

RINDLESBACH V. HANSEN

PAGE TWO

MINUTE ENTRY

Plaintiff's counsel is to submit a proposed judgment pursuant to Rule 4-504, Code of Judicial Administration.

Dated this 4 day of October, 1995.

  
\_\_\_\_\_  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 5 day of October, 1995:

T. Richard Davis  
Attorney for Plaintiff  
900 Kennecott Bldg.  
Salt Lake City, Utah 84133

William G. Marsden  
John N. Brems  
Attorneys for Roger T. Russell  
370 E. South Temple, Suite 400  
Salt Lake City, Utah 84111

David O. Black  
Attorney for Defendants Hansen  
1245 Brickyard Road, Suite 650  
Salt Lake City, Utah 84106

M. Small

Tab B



CALLISTER NEBEKER & McCULLOUGH  
T. RICHARD DAVIS (A0836)  
900 Kennecott Building  
Salt Lake City, Utah 84133  
Telephone: (801) 530-7300  
Attorneys for Plaintiff

FILED DISTRICT COURT  
Third Judicial District

DEC 22 1995

SALT LAKE COUNTY  
By M. Mitchell Sorensen  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

MARK L. RINDLESBACH, )  
 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DREW WILLIAM HANSEN and )  
DIANA M. HANSEN; EVAN W. )  
HANSEN, individually and as )  
Personal Representative for )  
the Estate of GENEVA B. )  
HANSEN; ROGER T. RUSSELL; )  
and BANK ONE, N.A., formerly )  
known as VALLEY BANK & TRUST )  
COMPANY, N.A., )  
 )  
Defendants. )

ORDER ON PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AGAINST  
DEFENDANT RUSSELL

Consolidated  
Civil No. 930906701

Judge Michael Murphy

\* \* \* \* \*

MARK L. RINDLESBACH, )  
 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ROGER T. RUSSELL, also known )  
as ROGER T. RUSSELL, DDS; )  
DREW WILLIAM HANSEN, also )  
known as DREW W. HANSEN, and )  
DIANA M. HANSEN; GUARDIAN )  
STATE BANK; SMALL BUSINESS )  
ADMINISTRATION OF THE UNITED )

STATES OF AMERICA; UTAH )  
 STATE DEPARTMENT OF )  
 FINANCIAL INSTITUTIONS, as )  
 Custodian of the Assets for )  
 TRACY-COLLINS BANK & TRUST )  
 COMPANY and TRACY MORTGAGE )  
 COMPANY; MERRILL G. HANSEN, )  
 also known as MERRILL )  
 HANSEN; KATHLEEN HANSEN; )  
 DARRELL DALTON; UTAH STATE )  
 TAX COMMISSION; and EVAN W. )  
 HANSEN, individually and as )  
 Personal Representative for )  
 the Estate of GENEVA B. )  
 HANSEN, )  
 )

Defendants.

\* \* \* \* \*

The above-entitled matter came on regularly for hearing before the Honorable Michael R. Murphy on September 11, 1995 at the hour of 9:00 a.m. Plaintiff being represented by his attorney of record, T. Richard Davis of the firm Callister Nebeker & McCullough; Defendant Roger T. Russell being represented by his attorneys of record, William G. Marsden, and John N. Brems of the firm Jardine, Linebaugh, Brown & Dunn; and Defendants Drew W. Hansen, Diana M. Hansen, Merrill G. Hansen, and Evan W. Hansen were represented by their attorney of record, David O. Black of the firm Black, Stith & Argyle; the Court having reviewed Plaintiff's Motion for Summary Judgment, the Memoranda and Affidavits filed in support and in opposition of said Motion, and having heard

argument of counsel and being fully advised in the premises and good cause appearing therefore,

THE COURT HEREBY finds as follows:

1. There are no bona fide issues of material fact precluding the entry of Summary Judgment granting the relief sought in Plaintiff's Motion for Summary Judgment: (1) denying Russell's Petition for Determination of Entitlement to Redeem; and (2) quieting title to all of the subject property against defendant Roger T. Russell and in favor of Plaintiff Mark L. Rindlesbach.

2. Defendant Russell was not and is not either a "judgment debtor" or a "successor to the judgment debtor" and therefore lacked the statutory capacity required by Rule 69 in order to redeem the subject property from the Sheriff's Sale.

3. Defendant Russell was not a creditor holding any valid lien on the subject property and therefore lacked the statutory capacity required by Rule 69 in order to redeem property from the Sheriff's Sale.

4. The acts allegedly performed by Defendant Russell in reliance on his asserted oral contract of purchase of subject property failed to meet the test of exclusive reference, i.e., that they would not have been performed had the asserted contract not existed.

5. Having acquired all of the subject property for good and valuable consideration, Plaintiff Rindlesbach is entitled to an Order Quieting Title to the property in his name.

6. Defendant Russell has no legitimate claim to any right or interest in the property.

PURSUANT TO SAID FINDINGS, IT IS HEREBY ORDERED:

1. That Plaintiff's Motion for Summary Judgment be and is hereby granted; and

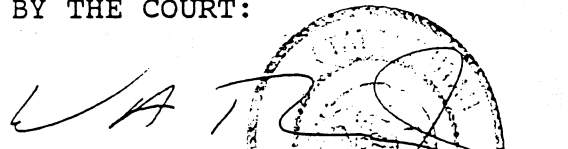
2. That Defendant Russell's Petition for Determination of Entitlement to Redeem be and is hereby denied; and

3. That the Clerk of this Court is hereby directed to deliver to Defendant Russell all sums paid into Court on or about February 1, 1995, as a tender of Redemption Payment; and


4. That a JUDGMENT AND DECREE QUIETING TITLE consistent with the Findings be entered.

DATED this 22 day of Dec, 1995.

BY THE COURT:

  
District Court Judge

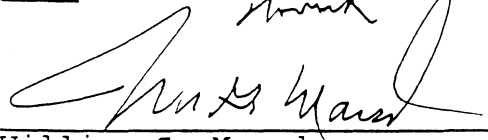
APPROVED as to form this  
22 day of ~~October~~<sup>100</sup>, 1995:



---

David O. Black  
Attorneys for Defendants Hansen

APPROVED as to form this  
1st day of ~~October~~<sup>month</sup>, 1995:



---

William G. Marsden  
John N. Brems  
Attorneys for Roger T. Russell

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT RUSSELL was mailed, postage prepaid, on this 20<sup>th</sup> day of October, 1995 to the following:

William G. Marsden  
John N. Brems  
Attorneys for Roger T. Russell  
JARDINE, LINEBAUGH, BROWN & DUNN  
370 East South Temple, #400  
Salt Lake City, Utah 84111

David Black  
Attorneys for Defendants Hansen  
BLACK, STITH & ARGYLE  
1245 Brickyard Road, #650  
Salt Lake City, Utah 84106

A handwritten signature in cursive script, appearing to read "Julie A. Baugh", is written over a horizontal line.

Tab C

16

CALLISTER NEBEKER & McCULLOUGH  
T. RICHARD DAVIS (A0836)  
900 Kennecott Building  
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Telephone: (801) 530-7300  
Attorneys for Plaintiff

FILED DISTRICT COURT  
Third Judicial District

DEC 22 1995

SALT LAKE COUNTY

By                      Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

MARK L. RINDLESBACH,	)	
	)	
Plaintiff,	)	JUDGMENT AND DECREE
	)	QUIETING TITLE
vs.	)	
	)	
DREW WILLIAM HANSEN and	)	Consolidated
DIANA M. HANSEN; EVAN W.	)	Civil No. 930906701
HANSEN, individually and as	)	
Personal Representative for	)	
the Estate of GENEVA B.	)	Judge Michael Murphy
HANSEN; ROGER T. RUSSELL;	)	
and BANK ONE, N.A., formerly	)	
known as VALLEY BANK & TRUST	)	
COMPANY, N.A.,	)	
	)	
Defendants.	)	

\* \* \* \* \*

MARK L. RINDLESBACH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ROGER T. RUSSELL, also known	)
as ROGER T. RUSSELL, DDS;	)
DREW WILLIAM HANSEN, also	)
known as DREW W. HANSEN, and	)
DIANA M. HANSEN; GUARDIAN	)
STATE BANK; SMALL BUSINESS	)
ADMINISTRATION OF THE UNITED	)



STATES OF AMERICA; UTAH )  
STATE DEPARTMENT OF )  
FINANCIAL INSTITUTIONS, as )  
Custodian of the Assets for )  
TRACY-COLLINS BANK & TRUST )  
COMPANY and TRACY MORTGAGE )  
COMPANY; MERRILL G. HANSEN, )  
also known as MERRILL )  
HANSEN; KATHLEEN HANSEN; )  
DARRELL DALTON; UTAH STATE )  
TAX COMMISSION; and EVAN W. )  
HANSEN, individually and as )  
Personal Representative for )  
the Estate of GENEVA B. )  
HANSEN, )  
)

Defendants.

\* \* \* \* \*

Based on the Order on Plaintiff's Motion for Judgment Against Various Defendants and the Order on Plaintiff's Motion for Summary Judgment Against Defendant Russell, the Court hereby enters Judgment in favor of Plaintiff, Mark L. Rindlesbach, and against all Defendants set forth herein as follows:

1. Title to the real property located at approximately 1815 East Creek Road South, Salt Lake City, Utah particularly described as Exhibit "A" attached hereto, is hereby quieted in the name of Mark L. Rindlesbach.

2. It is hereby declared that Plaintiff's ownership and possession of said property is free and clear of all claim of Defendants.


3. That Defendants and all persons claiming by, through or under them or any of them are hereby and forever barred and foreclosed of all right, title, claim, interest in and to the property and each and every part thereof.

DATED this \_\_\_\_ day of ~~October~~, 1995.

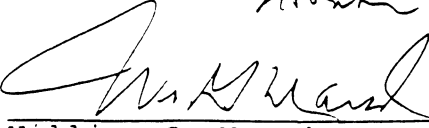
BY THE COURT:

12-22/95  
15  
\_\_\_\_\_  
Michael R. Murphy  
District Court Judge Thorne

APPROVED as to form this  
32 day of ~~October~~, 1995:

  
\_\_\_\_\_  
David O. Black  
Attorneys for Defendants Hansen

APPROVED as to form this  
1st day of ~~October~~, 1995:

  
\_\_\_\_\_  
William G. Marsden  
John N. Brems  
Attorneys for Roger T. Russell

## EXHIBIT "A"

That certain real property situated in Salt Lake County, State of Utah more particularly described as follows:

### PARCEL 2:

Beginning South 1193.95 feet, more or less, and West 1809.25 feet, more or less, and South 75°48'20" East 100 feet and North 9°16' East 151.84 feet form the Northeast corner of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian; thence North 0°16' East 50 feet; thence North 81°44' West 55.97 feet; thence South 8°16' West 50 feet; thence South 81°44' East 55.97 feet to the point of beginning.

### PARCEL 3:

Beginning 13 rods West and 61.12 feet North and North 75°45' West 40 feet and North 8°16' East 100 feet from center of the Northeast quarter of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence North 75°45' West 135 feet; thence North 8°16' East 101.84 feet; thence North 81°44' East 41 feet; thence South 8°16' West 72 feet; thence Easterly 69 feet, more or less, to the point of BEGINNING.

### PARCEL 4:

Beginning 214.5 feet West and 61.12 feet North from the center of the Northeast quarter of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 75°45' West 40.00 feet; thence North 8°16' East 100.00 feet; thence North 51°23'35" West 110.03 feet; thence North 8°16' East 72.00 feet; thence North 27°44'30" East 249.55 feet; thence South 75°08'28" East 62.24 feet; thence South 7°30' West 272.00 feet; thence South 66°00'

West 26.4 feet; thence South 5°30' West 174.01 feet to the point of beginning.

PARCEL 5:

BEGINNING at a point in the center of a county road, said point being West 13 rods and North 5°30' East 27.08 feet from the center of the Northeast quarter of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence North 5°30' East 207.44 feet; thence North 65° East 26.40 feet; thence North 7°30' East 308.55 feet; thence West 295.18 feet to the West line of the property described in that certain Quit-Claim Deed dated February 24, 1956, and recorded as Entry No. 1472471 of the records of Salt Lake County Recorder; thence South 8°16' West 231.78 feet; thence South 81°44' East 119.97 feet; thence South 8°16' West 201.84 feet to the center of a county road; thence South 75°48'20" East 169.12 feet to the point of BEGINNING.

LESS AND EXCEPTING therefrom the following:

BEGINNING at a point South 75°45'20" East 100 feet from the Southeast corner of the Salt Lake County Water Conservancy District property, which is South 1193.95 feet and West 1809.25 feet from the Northeast corner of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian, said point is also North 75°48'20" West 101.50 feet and north 8°16' East 33.18 feet from a County Street Monument at the intersection of Little Cottonwood Creek Road and Telford way, said street monument being 294.8 feet West and 51.64 feet North from the center of the Northeast quarter of said Section 33, and running thence North 8°16' East 100 feet; thence South 75°45' east 135 feet; thence South 8°16' West 100 feet; thence North 75°48'20" West 135 feet to the point of BEGINNING.

ALSO, LESS AND EXCEPTING therefrom Parcels 3 and 4 herein.

PARCEL 6:

BEGINNING at a point which is 253.80 feet East of the Northeast corner of Lot 26, CABALLERO RANCHES, a subdivision recorded in the office of the Salt Lake County Recorder and which is a part of Section 33, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South  $08^{\circ}16'$  West 188.84 feet; thence West 253.80 feet to the East line of Lot 26, CABALLERO RANCHES SUBDIVISION; thence South  $08^{\circ}16'$  West 95 feet; thence East 303.80 feet; thence North  $08^{\circ}16'$  East 283.84 feet; thence West 50 feet to the point of BEGINNING.

LESS AND EXCEPTING from all of the above any portions lying within the bounds of Little Cottoncreek Road.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing JUDGMENT AND DECREE QUIETING TITLE was mailed, postage prepaid, on this 20<sup>th</sup> day of October, 1995 to the following:

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