

1996

Mark L. Rindlesbach v. Roger T. Russell, Drew William : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT

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

MARK L. RINDLESBACH,
Plaintiff and Appellee,
vs.

Priority 15

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

BRIEF OF APPELLEE - MARK L. RINDLESBACH

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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FILED

OCT - 8 1996

COURT OF APPEALS

MARK L. RINDLESBACH,
Plaintiff and Appellee,
vs.
ROGER T. RUSSELL, DREW WILLIAM
HANSEN, et al.,
Defendants and Appellant,

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370 East South Temple, Suite 400
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

* * * * *

MARK L. RINDLESBACH,

Plaintiff and Appellee,

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 and Appellant.

LIST OF ALL PARTIES

Court of Appeals
No. 960219-CA

Priority 15

* * * * *

MARK L. RINDLESBACH,

Plaintiff and Appellee,

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 and Appellant.

* * * * *

TABLE OF CONTENTS

	Page
JURISDICTION	1
STATEMENT OF ISSUES	1
A. ISSUES FOR REVIEW	1
B. STANDARD OF REVIEW	2
DETERMINATIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	4
STATEMENT OF MATERIAL FACTS	5
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. RUSSELL LACKS THE STATUTORY CAPACITY REQUIRED BY RULE 69 IN ORDER TO REDEEM PROPERTY FROM THE SHERIFF'S SALE	11
II. EVAN'S DEALINGS WITH RUSSELL WERE NOT BINDING UPON DREW AND DIANA IN ANY ATTEMPT TO SELL THE CONTRACT PROPERTY	15
III. THE STATUTE OF FRAUDS PREVENTS RUSSELL FROM ASSERTING ANY OWNERSHIP INTEREST IN THE CONTRACT PROPERTY.	19
CONCLUSION	24

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page

Cases:

<u>Bradshaw v. McBride</u> , 649 P.2d 74 (Utah 1982)	15, 16
<u>Clawson v. Moesser</u> , 535 P.2d 77, 78 (Utah 1975)	14
<u>Coombs v. Ouzounian</u> , 24 Utah 2d 29, 465 P.2d 356 (1970)	18
<u>Coombs v. Ouzounian</u> , 24 Utah 2d 39, 465 P.2d 356 (1970)	18
<u>Dohrmann Hotel Supply Co. v. Beau Brummel, Inc.</u> , 99 Utah 188, 103 P.2d 650 (1940)	17
<u>Forty-Four Hundred East Broadway Co. v. 4400 East Broadway</u> , 660 P.2d 866 (Ariz. Ct. App. 1982)	14, 15
<u>Higgins v. Salt Lake County</u> , 855 P.2d 231, 135 (Utah 1993)	2
<u>Kilner v. State Farm Mut. Auto. Ins. Co.</u> , 847 P.2d 1292, 1299 (Kan. 1993)	13
<u>Martin v. Scholl</u> , 678 P.2d 274 (Utah 1983)	20
<u>Mollerup v. Storage Systems International</u> , 569 P.2d 1122, 1124 (Utah 1977)	12
<u>Mountain States Telephone & Telegraph Co. v. Garfield County</u> , 811 P.2d 184, 192 (Utah 1991)	2
<u>Perry v. Safety Savings & Loan Association of Kansas City</u> , 544 P.2d 267 (Ariz. App. Ct. 1976)	15
<u>Plumb v. State</u> , 809 P2d 734, 740 (Utah 1990)	13
<u>Price v. Lloyd</u> , 86 P. 767 (Utah 1906)	21
<u>Randall v. Tracy Collins & Trust Co.</u> , 305 P.2d 480 (Utah 1956)	20
<u>Salt Lake City Corp. v. James Constructors</u> , 761 P2d 42, 45 (Utah App. 1988)	13
<u>State v. O'Neil</u> , 848 P2d 694, 697 (Utah App. 1993)	13
<u>The George Fisher, Jr. Family Inter Vivos Revocable Trust v. Fisher</u> , 277 Utah Adv. Rep. 44 (Ut. App. 1995)	23
<u>Williams v. Singleton</u> , 723 P.2d 421 (Utah 1986)	17

<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104, 197 (Utah 1991)	2
---	---

Statutes:

Utah Code Ann. § 25-5-1 (1995 Repl.)	2, 10, 19
Utah Code Ann. § 25-5-3 (1995 Repl.)	15, 17
Utah Code Ann. § 25-5-8 (1995 Repl.)	2, 20
Utah Code Ann. § 78-2-2(3)(j) (1996 Supp.)	1
Utah Code Ann. § 78-2a-3(2)(j) (1996 Supp.)	1
Utah Code Ann. § 78-37-6 (1992 Repl.)	3, 11

Rules:

Arizona Revised Statutes § 12-1282	14
Rule 54(b), Utah Rules of Civil Procedure	13
Rule 56(c), Utah Rules of Civil Procedure	3
Rule 69, Utah Rules of Civil Procedure	1, 13
Rule 69(e)(3), Utah Rules of Civil Procedure	12, 13
Rule 69(j)(1), Utah Rules of Civil Procedure	4, 10, 11, 15
Rule 69(j)(3), Utah Rules of Civil Procedure	3

Other:

50 C.J.S. Judicial Sales § 37(b) (1947)	12
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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) (1996 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)(j) (1996 Supp.).

STATEMENT OF ISSUES

A. ISSUES FOR REVIEW.

1. Did the District Court correctly find that Appellant Roger T. Russell ("Russell") was neither a "judgment debtor" or a "successor in interest to the judgment debtor" within the meaning of Rule 69, Utah Rules of Civil Procedure, and therefore lacked the capacity to redeem parcels of real property which Appellee Mark L. Rindlesbach ("Rindlesbach") had purchased at a sheriff's sale?

2. Did Evan W. Hansen ("Evan") bind Drew William Hansen ("Drew") and Diana M. Hansen ("Diana") when he allegedly entered into an oral agreement with Russell for the sale and purchase of real property titled in their name, without any written document evidencing either Evan's authority to act of their behalf, or their subsequent ratification of Evan's acts.

3. Did the District Court correctly find that notwithstanding Russell's acts allegedly performed in reliance on an oral agreement between himself and Evan for the purchase of real property owned by Drew and Diana, the statute of frauds prevented the specific performance of said oral agreement.

B. STANDARD OF REVIEW.

This matter is on appeal from the District Court's grant of summary judgment in favor of Rindlesbach and against Russell. In reviewing a grant of summary judgment, the appellate court views the facts in light most favorable to the non-moving 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 correctness of the trial court's conclusions of law. Winegar v. Froerer Corp., 813 P.2d 104, 197 (Utah 1991). However, an appellate court may affirm the grant of summary judgment on any ground available to the trial court, even if it is not one relief upon below. Higgins v. Salt Lake County, 855 P.2d 231, 135 (Utah 1993).

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)(3). Conduct of Sale.

(3) Conduct of sale. All sales of property under execution must be made at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor such officer's deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale. The sale must be held in a place reasonably accessible to the general public. The property must be

sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and the third person requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions. The officer shall pay to the judgment creditor or the attorney for the judgment creditor so much of the sales proceeds as will satisfy the judgment. any excess in the proceeds over the judgment and reasonable accrued costs must be returned to the judgment debtor, unless otherwise directed by the judgment or the court.

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

On November 18, 1993, Rindlesbach, who had acquired the beneficiary's interest in a trust deed encumbering certain real property owned by Drew and Diana, filed a Complaint seeking judicial foreclosure of the trust deed. On January 6, 1994, Russell, who claimed an interest in the real property pursuant to an oral purchase agreement, filed an Answer to Rindlesbach's Complaint, together with a Counterclaim, Crossclaim and Third-Party Complaint. 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. Following issuance of an Order of Sale, Rindlesbach purchased the foreclosed property at a sheriff's sale conducted on August 2, 1994.

On February 2, 1995, Russell filed a Petition for Determination of Entitlement to Redeem a portion of the foreclosed property and paid to the Court the redemption price of the foreclosed property. Rindlesbach objected to Russell's attempted redemption on the grounds that Russell had no standing to redeem. Twenty days later, on February 22, 1995, Rindlesbach commenced a second action, seeking to quiet title to the foreclosed property and other real property upon which Russell also asserted a claim. 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 all defendants other than Russell, which was granted by an Order dated December 22, 1995. On August 11, 1995, Rindlesbach filed a Motion for Summary Judgment against Russell, which motion was granted by a separate Order dated December 22, 1995. Also on December 22, 1995, the District Court entered its Judgment and Decree Quieting Title in the real property. On January 18, 1996, Russell filed his Notice of Appeal of the Order on Plaintiff's Motion for Summary Judgment Against Defendant Russell and of the Judgment and Decree Quieting Title.

STATEMENT OF MATERIAL FACTS

1. Prior to December 1987, Evan and his spouse, Geneva, held fee title to certain real property located at approximately 1815 East

Creek Road South, Salt Lake City, Utah, consisting of approximately 3.53 acres designated in six separate parcels (the "Creek Road Property"). (Rec. pp. 487, 488).

2. On November 30, 1987 and December 7, 1987, Evan and Geneva conveyed the Creek Road Property to Drew and Diana by Quit Claim Deed. (Rec. pp. 487, 491, 492, 495).

3. On or August 10, 1993, Rindlesbach, as buyer, and Drew and Diana and Evan, collectively as sellers, entered into an Earnest Money Sales Agreement whereby Rindlesbach intended to purchase five of the six parcels constituting the Creek Road Property. This real property, consisting of parcels 2, 3, 4, 5 and 6 is hereinafter referred to as the "Contract Property". (Rec. pp. 415-417, 434-435).

4. The closing of the sale under the Earnest Money Agreement was made conditional upon the sellers thereunder clearing title to the Contract Property. (Rec. pp. 418, 435).

5. On or about October 26, 1993, Rindlesbach purchased, for good and valuable consideration, a Trust Deed and Trust Deed Note from Capital City Bank, which Trust Deed encumbered Parcels 1, 3, 5 and 6 of the Creek Road Property, hereinafter referred to as the "Trust Deed Property." (Rec. pp. 129-132, 136-155).

6. On or about November 18, 1993, Rindlesbach initiated a judicial foreclosure action on the Trust Deed Property by filing a Complaint in Civil No. 930906701 before the Third Judicial District Court of Salt Lake County, Mark Rindlesbach v. Drew William Hansen, et al. (the "Foreclosure Action"). (Rec. pp. 1-36).

7. On June 23, 1994, Judge Michael Murphy entered an Order Granting Plaintiff's Motion for Summary Judgment and a Decree of Foreclosure in the Foreclosure Action authorizing a Sheriff's Sale of the Trust Deed Property. (Rec. pp. 246-249, 250-257).

8. In his Order, Judge Murphy specifically declared that Russell was not a "Judgment Debtor" as that term is used in Rule 69, Utah Rules of Civil Procedure, for the purpose of designating the order in which the parcels were to be sold. (Rec. p. 248).

9. On August 2, 1994, pursuant to an Order of Sale, the Salt Lake County Sheriff sold the Trust Deed Property to Rindlesbach, the highest bidder, for the total sum of \$98,036.11 (\$10,036.11 for Parcel 1; \$58,000.00 for Parcels 3 and 5; and \$30,000.00 for Parcel 6). (Rec. pp. 303-306).

10. On or about November 17, 1994, for good and valuable consideration, Drew and Diana executed two separate Quit Claim Deeds (the "Quit Claim Deeds") whereby Rindlesbach acquired fee title to the Contract Property from Drew and Diana. (Rec. pp. 496, 502-504, 505).

11. On or about December 2, 1994, for good and valuable consideration, Drew and Diana executed that certain Assignment of Redemption Rights assigning to Rindlesbach all of their rights to redeem the Trust Deed Property from the Sheriff's Sale. (Rec. pp. 704-705).

12. Russell claims an interest in the Creek Road Property as evidenced by that certain Notice of Interest dated on or about August 16, 1993, and recorded in the official records of Salt Lake County, State of Utah, on or about August 16, 1993, as Entry No. 5579822, in

Book 6731, at Pages 2762, et seq., supplemented by that certain Correction Notice of Interest dated on or about August 17, 1993, and recorded in the official records of Salt Lake County, State of Utah, on or about August 17, 1993, as Entry No. 5581629, in Book 6733, at Pages 1352, et seq. (the "Notice of Interest"). (Rec. pp. 368, 539).

13. The Notice of Interest relates to an alleged oral real estate contract entered into between Evan, as seller, and Russell, as buyer, in the spring of 1991 whereby Russell agreed to purchase and Evan allegedly agreed to sell a portion of the Contract Property (the "Oral Contract"). (Rec. p. 368).

14. Drew and Diana, the fee owners of the Creek Road Property, never authorized Evan, either orally or in writing, to negotiate for or consummate a sale of the Creek Road Property either to Russell or to any other party. (Rec. pp. 488, 496).

15. Although a proposed written agreement was drafted, it was never accepted or signed by the parties. In fact, Russell refused to execute the proposed agreement or take title to the property. (Rec. pp. 368, 488, 496, 513, 541-544).

16. Prior to and after the spring of 1991 Russell made periodic payments either to Evan or for the benefit of the Creek Road Property, but did not make the payments or fulfill other covenants required in the proposed agreement. (Rec. pp. 535, 563-570).

17. Prior to and after 1991, Russell kept some of his horses on the Creek Road Property which were cared for in part by Evan, whose residence remained on the Property. (Rec. pp. 474-478, 536).

18. Prior to and after 1991, Evan and Russell had various business dealings with each other, including loan and sales transactions. (Rec. pp. 460-462).

19. Russell claims an interest in Parcels 3, 5 and 6 of the Trust Deed Property by virtue of his Petition for Determination of Entitlement to Redeem dated February 2, 1995, and the tender of certain funds into Court in the Foreclosure Action for the purpose of redeeming those parcels from the Sheriff's Sale. (Rec. p. 369).

20. Rindlesbach has objected to and continues to oppose Russell's Petition and attempted redemption and, on February 22, 1995, filed a Complaint herein seeking to quiet title to the Contract Property based both on the foreclosure action and his deeds from Drew and Diana. (Rec. pp. 328-334).

21. The claims of each of the Defendants in the quiet title action other than Russell were resolved by the District Court's Order Granting Plaintiff's Motion for Summary Judgment and Default Judgment Against Various Defendants. (Rec. pp. 602-606).

22. On October 4, 1995, Judge Murphy granted Rindlesbach's Motion for Summary Judgment against Russell in the quiet title action, which was finalized in an Order and Judgment and Decree Quieting Title issued by Judge William A. Thane dated December 22, 1995. (Rec. pp. 582-587, 588-595).

23. On January 18, 1996, Russell filed a Notice of Appeal initiating this proceeding. (Rec. pp. 654-657).

SUMMARY OF ARGUMENT

Following the Sheriff's Sale on the Trust Deed Property, Russell attempted an eleventh hour redemption of the foreclosed property. Notwithstanding the prior determination of the District Court that Russell did not qualify as a judgment debtor, he now seeks to obtain redemption rights as a successor in interest to the judgment debtor. This argument is flawed. Russell has failed to demonstrate his right under Rule 69(j)(1) of the Utah Rules of Civil Procedure. The actual successor in interest to the Trust Deed Property of Drew and Diana is Rindlesbach. He purchased not only the fee title interest thereto but all rights of redemption as evidenced by recorded assignment instruments.

The Creek Road Property has been titled in the joint names of Drew and Diana since November 30, 1987. Nevertheless, Russell negotiated exclusively with Evan for the purchase of the real property. His assertions that Evan was an agent with apparent authority to act on behalf of Drew and Diana fails because of the express language of the statute of frauds. Similarly, Russell's argument that the action and non-action of Drew and Diana constituted ratification of Evan's alleged oral contract with Russell similarly fails because of the Utah courts' extension of the statute of frauds. Utah Code Ann. § 25-5-1 (1995 Repl.).

Finally, Russell's attempt to bypass the responsibilities of the statute of frauds by asserting his partial performance of the oral contract does not meet the exclusive reference test generally recognized in Utah. Russell's claimed part performance of making

periodic payments (in the aggregate substantially less than that required under the alleged oral agreement), his placement of his horses on the property, and assistance in the maintenance of the horse care area do not indicate performance under the oral contract as the only reasonable explanation for those actions. A long history of lending, commercial transactions, and animal husbandry between Russell and Evan provide much more likely explanations for their respective conduct. This is particularly evident in light of Russell's acknowledged refusal to ever execute and consummate the oral agreement or take title to the property.

Russell's failure to show, as a matter of law, his legal entitlement to redeem the Trust Deed Property from the foreclosure sale, and to impose upon the non-contracting fee title owners of the Creek Road Property, an alleged incomplete oral agreement made with a non-owner thereof, were good and sufficient grounds for the District Court to grant Rindlesbach's Motion for Summary Judgment. That Order and the Decree Quieting Title should be affirmed by this Court.

ARGUMENT

I. RUSSELL LACKS THE STATUTORY CAPACITY REQUIRED BY RULE 69 IN ORDER TO REDEEM PROPERTY FROM THE SHERIFF'S SALE.

Utah Code Ann. § 78-37-6 (1992 Repl.) provides that "[s]ales of real estate under judgments of foreclosure or mortgages and liens are subject to redemption as in case of sales under executions generally." The rules governing executions, including Sheriff's Sales, allow only certain "persons or their successors in interest" to redeem real property: "(A) the judgment debtor; [and] (B) a creditor having a

lien by judgment, mortgage, or other lien on the property sold . . . subsequent to that on which the property was sold." Utah R. Civ. P. 69(j)(1). These provisions comprise Utah's entire statutory scheme for the redemption of real property. Russell's current attempt to qualify is now focused exclusively on the classification of a "successor in interest to judgment debtor". (See Appellant's Brief at p. 13).

It is widely recognized "that the right of redemption . . . [is] a substantive right to be exercised in strict accord with statutory terms." Mollerup v. Storage Systems International, 569 P.2d 1122, 1124 (Utah 1977) (overturning lower court's grant of an extension of time to redeem as an abuse of discretion). Such terms include the determination of "classes that come within [the statute's] provisions." 50 C.J.S. Judicial Sales § 37(b) (1947).

The District Court's Order Granting Plaintiff's Motion for Summary Judgment in the foreclosure action entered on June 23, 1994 in the Foreclosure Action, included the following finding:

3. Defendant Russell is not a "Judgment Debtor" as that term is used in Rule 69(e)(3) of the Utah Rules of Civil Procedure and is therefore not entitled to make a designation of the order in which parcels of real property are to be sold at the anticipated Sheriff's Sale.

(Rec. p. 248). This Finding was a result of a hotly contested argument at the hearing and was based on the undisputed evidence that there was no written executed agreement whereby Russell claimed his alleged ownership to the property, neither was there any written document establishing Russell's financial responsibility to Rindlesbach for payment of Trust Deed Note subject of the foreclosure

action. Russell did not appeal that Order; rather, his counsel specifically consented to the form and content of the same. (Rec. p. 249, 733).

Although the term "judgment debtor" is not specifically defined in Rule 69 or any of its subsections, it is axiomatic that, unless otherwise defined, identical terms within subsections of the same rule must have identical meanings. Kilner v. State Farm Mut. Auto. Ins. Co., 847 P.2d 1292, 1299 (Kan. 1993).

In Salt Lake City Corp. v. James Constructors, 761 P2d 42, 45 (Utah App. 1988), the Court declared:

Although any judge is free to change his or her mind on the outcome of a case until a final decision is formally rendered, . . . the "law of the case" doctrine is employed to avoid delay and to prevent injustice. The purpose of this doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and difficulties involved in repetitious contentions and rulings upon the same propositions in the same case.

In this matter, the 1994 Order finding that Russell was not a "judgment debtor" was made following a hearing on the issue and was approved by Russell's counsel and certified as "final" pursuant to Rule 54(b). (Rec. p. 248, 249). See also State v. O'Neil, 848 P2d 694, 697 (Utah App. 1993) and Plumb v. State, 809 P2d 734, 740 (Utah 1990). For the same reasons that the Court previously found that Russell was not a "judgment debtor" for purposes of former Rule 69(e)(3), and in harmony with the "law of the case", Russell should be precluded from redeeming the Trust Deed Property as a "judgment debtor" under subsection (j) of the same Rule.

The judgment debtors were Drew and Diana, the obligors on the note securing the trust deed. (Rec. pp. 143, 251). As judgment

debtors, Drew and Diana retained their right to redeem the Trust Deed Property from the Sheriff's Sale. A judgment debtor does not necessarily require the ownership of property securing the debt. Clawson v. Moesser, 535 P.2d 77, 78 (Utah 1975). It is very significant that the Utah Rule grants the right to redeem to the "judgment debtor" and its successors, not to the owner of the property and its successors. The only transfer of redemption rights (which are interests in real property) from Drew and Diana was accomplished through the written Assignment of Redemption Rights executed by Drew and Diana in favor of Rindlesbach. (Rec. pp. 704-705).

In his Brief, Russell ignores the 1994 Order of Judge Murphy and relies instead upon a case interpreting the Arizona redemption rule. In Forty-Four Hundred East Broadway Co. v. 4400 East Broadway, 660 P.2d 866 (Ariz. Ct. App. 1982), the Arizona Appellate Court construed its statute granting the right of redemption broadly, including subsequent purchasers of secured real property as persons entitled to redeem. That statute is different from Utah's:

Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest:

1. The judgment debtor or his successor in interest in the whole or any part of the property.

Arizona Revised Statutes § 12-1282. The Utah Rule does not identify the "successor in interest in the whole or any part of the property." Had the Utah lawmakers desired subsequent purchasers of the real estate to enjoy redemption rights, they would have adopted clear language similar to Arizona's. Clearly, the purpose of the Utah Rule is to protect a party obligated for secured debt from an inequitable

liquidation of the secured asset for less than fair value, thereby allowing the judgment debtor to minimize the deficiency judgment available in Utah.

Of additional significance to the Arizona Court in Forty-Four Hundred was the distinctions made with a prior Arizona case. In Perry v. Safety Savings & Loan Association of Kansas City, 544 P.2d 267 (Ariz. App. Ct. 1976), the court held that Perry did not become a successor in interest under the Arizona statute because he failed to obtain a "properly acknowledged deed conveying the right of redemption of the judgment debtors as to the mortgaged premises. Forty-Four Hundred, 660 p.2d at 869. Similar to Perry, Russell has failed to obtain a written instrument which could evidence any legal or equitable interest in either the real property or the right to redeem same. Even in Arizona, Russell would necessarily fail in his quest for judicial approval of his asserted redemption rights. Russell may not redeem the Trust Deed Property, because he simply does not belong to either class of redemptioners set forth in Rule 69(j)(1).

II. EVAN'S DEALINGS WITH RUSSELL WERE NOT BINDING UPON DREW AND DIANA IN ANY ATTEMPT TO SELL THE CONTRACT PROPERTY.

Just as a contract to sell an interest in land is unenforceable by or against parties who did not sign a written contract, one cannot serve as an agent for another party whose signature is required on a real estate contract without written authorization from the principal.

There was no ratification as a matter of law because Utah Statute of Frauds requires that any agent executing an agreement conveying an interest in land on behalf of his principal must be authorized in writing.

Bradshaw v. McBride, 649 P.2d 74, 78 Utah 1982). See Utah Code Ann. § 25-5-3. It is undisputed that Evan never received a written authorization from either Drew or Diana to negotiate or execute a contract with Russell for the sale of their real property. (Rec. pp. 488, 496). Thus, pursuant to the Utah statute of frauds, not only was there no enforceable contract for the sale of the property to Russell, but there was no effective authorization for Evan to act on behalf of Drew and Diana in connection with real property.

Since 1987, Drew and Diana have held themselves out to the public as owners of the fee title to the Creek Road Property as evidenced by good and valid deeds recorded with the Salt Lake County Recorder. (Rec. pp. 487, 491, 492, 495). Russell's claimed ignorance of that fact must be attributable to himself. Furthermore, it is undisputed that Russell made no effort to confirm the identity of the owner(s) of the Creek Road Property or the apparent authority of Evan to act for said owner(s). Utah law recognized that it is the duty of a buyer to confirm the authority of an agent to act on behalf of a principal.

The general rule is that one who deals with an agent has the responsibility to attain the agent's authority despite the agent's representations.

Bradshaw v. McBride, *supra* at 78.

Having failed to comply with the statute of frauds for the sale of real property and for the designation of Evan as agent to sell real property, Russell now asserts that the conduct of Drew and Diana confirmed or ratified Evan's act of selling the Creek Road Property and somehow overcomes the statute of frauds obstacle. In his action

for specific performance, Russell asks this Court to effectively repeal the statute of frauds.

All of the foregoing principles are well established in Utah. In the factually similar case Bradshaw v. McBride, 649 P.2d 74 (Utah 1982) the plaintiffs and defendants owned contiguous parcels of real property. One of the eight sibling owners of the McBride property entered into an oral agreement with Bradshaw to sell Bradshaw the McBride parcel. Bradshaw in fact paid \$5,000.00 of the \$33,000.00 sales price. He thereafter repaired fences, installed a water line, and grazed his cattle on the McBride parcel. However, the other seven sibling owners refused to sell. The trial court entered a judgment of specific performance for Bradshaw, but the Utah State Supreme Court reversed, holding the contract void under the statute of frauds. The issues discussed in Bradshaw include lack of a contract signed by the parties in interest, lack of proper agency by the person who negotiated the agreement, lack of proper ratification by the owners, and lack of sufficient part performance. These are the same issues before this Court in the instant case.

With regard to agency, the Court said:

. . . The general rule is that one who deals with an agent has the responsibility to ascertain the agent's authority despite the agent's representations. . . . [citing Dohrmann Hotel Supply Co. v. Beau Brummel, Inc., 99 Utah 188, 103 P.2d 650 (1940) *Id.* at 78.

Furthermore, the Court clearly and unequivocally stated the Utah law concerning notification as follows:

Furthermore as to all defendants, there was no ratification as a matter of law because the Utah Statute of Frauds requires that any agent executing an agreement conveying an interest in land on behalf of his principal must be

authorized in writing. Utah Code Ann. 1953 § 25-5-3 . . . Where the law requires the authority to be given in writing, the ratification must also generally be in writing. [citations omitted]. *Id.*

A similar result occurred in Williams v. Singleton, 723 P.2d 421 (Utah 1986). Plaintiffs in that case were joint owners of a home. Defendants offered to buy the home and paid earnest money. There was no question about the plaintiff wife's intent. She claimed that she explicitly authorized her husband to accept on her behalf and fully intended to be bound to the contract. The Court held her intent and verbal authorization ineffective absent a written acceptance or a written authorization given to the husband to act on her behalf. The court declared:

One joint tenant or tenant in common cannot bind his cotenant by a contract which he may make relating to the common property. . . . [citing Coombs v. Ouzounian, 465 P.2d 356 (1970)].

Thus, even when a party's intent is clear, the lack of written authorization renders an oral contract for the sale of real property unenforceable. In the instant case, there is no evidence that Diana even knew that Russell had negotiated a contract of sale with Evan until the sale of the Property to Rindlesbach. There are no factual assertions of Drew's knowledge until two years after the alleged oral argument was made. Under the Utah standard, Evan cannot be deemed an agent for the fee title owners of the Creek Road Property as a matter of law, and the oral contract is unenforceable.

Even if Drew and Diana had known all the details about what Evan was allegedly doing with respect to the sale of the property, their acquiescence could not serve as a substitute for a properly written

agency or as an estoppel to deny agency. See, Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970). Coombs involved an action for specific performance of an option to purchase the defendants' home. The defendant husband had signed the option contract but his wife and joint owner of the property had not. The plaintiff argued that the defendant wife was equitably estopped to deny her husband's agency to sign on her behalf because she knew he had signed the agreement but did nothing to indicate her lack of consent. Her lack of action arguably implied her assent to his acting as her agent. The Court held the contract void under the statute of frauds. Its holding on the estoppel argument was as follows:

. . . any contract by a husband affecting the wife's interest in land is unenforceable against her in the absence of a written authorization signed by the wife, since there is no husband-wife exception to the statute of frauds. The court observed that the wife admitted in her deposition that she knew her husband was selling the property to plaintiff and that she intended him to do so. However, since the wife was not bound by her husband's action, whatever effect her acquiescence might have been was ended when she granted her interest in the property to a third person. *Id.* at 465. P.2d 358.

In the instant case, Drew and Diana have stated that never authorized Evan to act on their behalf and they do not consider the alleged oral agreement between Evan and Russell valid or enforceable.

III. THE STATUTE OF FRAUDS PREVENTS RUSSELL FROM ASSERTING ANY OWNERSHIP INTEREST IN THE CONTRACT PROPERTY.

The Utah Statute of Frauds provides that:

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 Repl.). An express reading of this statute, by itself, precludes Russell from asserting any ownership interest in any part of the Creek Road Property. Russell admits the absolute absence of any written documents signed by any of the parties conveying or agreeing to convey the Creek Road Property. (See Appellant's Brief at p. 7, ¶ 7; Rec. p. 732).

However, the Utah Code Annotated §25-5-8 (1995 Repl.) provides further 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." Thus, the relevant issue becomes whether certain actions of Russell, as a matter of law, constitute part performance sufficient to recognize the alleged oral contract notwithstanding the statute of frauds. Utah courts have determined what constitutes sufficient part performance generally. In Martin v. Scholl, 678 P.2d 274 (Utah 1983), the Court restated the rule announced in Randall v. Tracy Collins & Trust Co., 305 P.2d 480 (Utah 1956), 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.

The element of reliance is of particular importance, especially when the existence of the oral contract is contested or the oral contract's terms, as in the present case, lack definiteness. Id. at 276. In such cases, the acts of reliance must be "exclusively

referable" to the contract. If the acts "can be explained on another ground, they are insufficient to remove the bar of the statute of frauds and the contract is unenforceable." Id. at 277.

In Martin, the trial court found the plaintiff to have entered into an oral contract with a Mr. Chaffin in 1947, making the following findings:

Pursuant to the contract, Mr. Chaffin agreed to convey to plaintiff 120 acres of land if Martin would continue working as his foreman. Martin remained, receiving a salary and occasional raises. . . . From the time Chaffin and Martin entered into their agreement . . . until Chaffin's death on July 30, 1975, Martin worked exclusively for Chaffin as his foreman in reliance upon their agreement that the subject property would be conveyed to Martin. In reliance on the agreement, Martin labored 10 to 16 hours per day, 7 days a week during the summer months and, occasionally when necessary, worked around the clock. In the winter time, Martin labored 8 to 10 hours per day, 7 days a week. During this period of time Martin's salary ranged from \$75 per month in 1947, to \$375 per month in 1975. From 1960 until 1969, Martin received \$325 per month without a single raise. Additionally . . . Martin and his wife Martha, provided substantial personal services to Chaffin and that Martin's son Denny performed farming operations on Chaffin's farms and ranches for which he was not compensated. It is further found that these services would not have been provided but for the agreement between Chaffin and Martin that the subject property was to be conveyed to Martin.

The Utah Supreme Court, however, reversed the lower court's decision and held that these acts of alleged reliance by the proposed purchaser -- labor 10 to 16 hours per day, seven days a week in the summer and 8 to 10 hours per day in the winter -- constituted insufficient part performance to remove the oral contract from the statute of frauds. The Court held that the conduct of the plaintiff could have been reasonably explained on grounds other than the recognition on an oral

agreement and were therefore not "exclusively referable" to the contract. Id. at 279.

Similarly, in Price v. Lloyd, 86 P. 767 (Utah 1906), the Court reversed a lower court's judgment awarding real property to a decedent's niece who had moved onto decedent's property, made improvements thereon and performed personal services for the deceased. In both Price and Martin, the Court overruled the lower courts' findings and found that the plaintiffs failed to show their respective actions could be reasonably explained only by the recognition and enforcement of a disputed oral contract.

The alleged oral contract between Evan and Russell lacks definite terms. (Rec. pp. 478-480). The proposed written document was never executed; neither was it followed. If any oral agreement between Russell and Evan is to be enforced, Russell must show that his sporadic payments were actions of reliance and exclusively referable to the alleged contract. By his admission, his actions do not rise to that level. His own testimony indicates other reasons for his periodic payments to Evan. (Rec. pp. 460-462). Russell was a tenant on the Property. Evan's attorney, Merrill G. Hansen, informed Russell of the problems due to the failure to finalize any sale of the Contract Property and characterized the relationship as landlord-tenant with animal boarding services. (Rec. pp. 105-107). Evan kept and cared for Russell's horses throughout the period when Russell was allegedly purchasing the Property. Russell also gave Evan loans at various times, even preceding the alleged purchase of the Creek Road Property, without any definite terms of repayment.

The fact that Evan's family and Drew's family continued to live in the two homes on the Creek Road Property and that Russell failed to occupy either home or obtain rent payments for the same further evidences that Russell did not believe that he owned the Creek Road Property. Most importantly, Russell even failed to communicate his intentions to purchase the Property to the actual owners, Drew and Diana, until they told Russell of their intent to sell to Rindlesbach. The alternative explanations for Russell's actions provide the more than adequate basis to dismiss Russell's attempt to enforce a disputed oral contract to purchase real property.

In his Brief, Russell places heavy reliance on the recent case, The George Fisher, Jr. Family Inter Vivos Revocable Trust v. Fisher, 277 Utah Adv. Rep. 44 (Ut. App. 1995). In Fisher this Court recognized an oral modification of a written agreement for the sale of real property through partial performance. The subject of the modification was the timing of payments, and there was support for some form of modification from both parties. The issue was limited to the specific terms being modified.

The instant case is a far different one from Fisher. Here, the very purpose and existence of the alleged oral agreement is contested. There is no written agreement between Russell and Drew and Diana which can be subject to interpretation or oral modification based on the conduct of the parties. Unlike Fisher, this case is an example of exactly the kind of contested conveyance of real property that the statute of frauds was enacted to prevent.

CONCLUSION

There are many contested facts in this matter, but none of them were necessary for the determination of the District Court. Because there are no genuine issues as to any **material** fact, and because Rindlesbach was entitled to summary judgment as a matter of law, the District Court properly found (1) that Russell was neither a "judgment debtor" or a "successor to the judgment debtor, and therefore lacked the statutory capacity to redeem the Trust Deed Property from the Sheriff's Sale, (2) that the acts allegedly performed by Russell in reliance on his asserted oral contract with Evan for the purchase of real property failed to meet the test of exclusive reference, and (3) that therefore the statute of frauds prevented the enforcement of Russell's asserted oral contract. Rindlesbach respectfully urges this Court to affirm the District Court's Order on Plaintiff's Motion for Summary Judgment against Russell and its Judgment and Decree Quieting Title.

DATED this 8 day of October, 1996.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing
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