

1986

Marcy G. Myers v. Darlene Stout (Copple) : Petition for Rehearing

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 860279 IN THE UTAH COURT OF APPEALS

MARCY G. MYERS,

Plaintiff-Appellant,

v.

DARLENE STOUT (COPPLE),

Defendant-Respondent.

No. 860279

(Category 14 b.)

PETITION FOR REHEARING

Appeal from a final judgment of the
Third District Court, Salt Lake County, State of Utah
Honorable Philip R. Fishler, Presiding

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COURT OF APPEALS

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Defendant-Respondent.

No. 860279-CA

(Category 14 b.)

PETITION FOR REHEARING

Appellant herewith petitions the Court of Appeals for rehearing and respectfully shows misapprehended or overlooked points of law and fact in the November 9, 1988 decision of the Court as follows:

POINT 1 - Relative to the Court's conclusion that appellant "failed to marshall the evidence and demonstrate its insufficiency and, therefore, we (the Court) reject her challenge to the trial court's findings of fact. Given these findings, the trial court judgment is correct.", there is no finding of an oral contract partly performed so of course there is no such finding to challenge.

Finding No. 5 (During the summer of 1978 Mrs. Stout discussed the sale of the home with Mr. and Mrs. Smith, and both agreed it would be sold to Mrs. Stout.) states nothing more than an agreement to agree to something.

Even so, at pages 6 through 12 of appellant's opening

brief there is quoted all of the evidence and testimony of any and all communications between respondent and Sandra Smith for the purpose of showing there was no oral contract and of course therefore, the insufficiency of the evidence is self-evident and could not be better demonstrated.

If respondent viewed the evidence differently or if she was relying on evidence or testimony other than that which was quoted in appellant's opening brief then this should have been presented in her answering brief.

And again, at page 15 of appellant's opening brief the evidence and testimony is marshaled and which contains no evidence of part performance of the claimed oral agreement.

By way of argument, as was attempted to be stated in appellant's opening brief the quiet title judgment here appealed does not exhibit any independent title, nor any right or interest which the judgment converted to title. If it appeared from the judgment that respondent's claim was founded in fact upon an oral contract with Sandra Smith which was partly performed and the judgment confirmed the same and extinguished the appellant's adverse claim, the judgment would have connected itself with the title which I believe was the point our Court made in *State, etc. v. Santiago*, 590 P.2d 335 (Utah 1979) to demonstrate the office of a quiet title decree. In the instant case there is no indication in the judgment as to how and when respondent acquired an ownership interest in Sandra Smith's one-half interest in the property.

Additionally, it is not sufficient in order that the

judgment be supported by the facts, that the conclusory finding of oral contract partly performed be made without more. Clear, definite, and mutually understood terms must be found (Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 [1959], and Homgren Brothers, Inc. v. Ballard, 534 P.2d 611 [Utah 1975]) which are based upon clear, unequivocal and definite testimony, or other evidence of the same quality. So it would follow that if the agreement to be confirmed by the judgment and appellant's interest extinguished then there must be evidence introduced and findings made regarding completed performance of the clear, definite and mutually understood terms by the contracting party in the absence of which the judgment is not supported by the facts.

Further, the acts of part performance alleged by respondent are not exclusively referable to the oral contract alleged to exist between Sandra Smith and respondent but were also required by the uniform contract. Downtown Athletic Club v. Horman, 740 P.2d 275 (UtahApp 1987).

As in Holmgren, supra, at page 615, the court held "It only needs to be said that without an oral contract, its terms, and a mutual understanding, being proved by clear, unequivocal and definite evidence, there is no contract to which the claimed acts of part performance could apply, nor is there a contract which the court could enforce."

There is no record evidence of an oral contract

between appellant's predecessor in interest, Sandra Smith, and respondent and therefore the trial court's findings such as they are, although "detailed" in the minds of the panel, can and should be disturbed. *Bennion v. Hansen*, 699 P.2d 757 (Utah 1985), and *Harline v. Campbell*, 728 P.2d 980 (Utah 1986).

Finding No. 6 (Mrs. Smith acquiesced in the sale and agreed to the sale by showing Mrs. Stout through the home and discussing the purchase price of \$97,500.00.) establishes the basis for respondent's claim on Sandra Smith acquiescing in the uniform contract and of her, Sandra Smith's, agreement therewith inferred from her showing respondent through the home prior to the sale, and not on a separate oral agreement.

Our Court on at least two occasions has considered such evidence and its sufficiency to overcome the bar of the statute of frauds. In *Coombs v. Ouzounian* 465 P.2d 356 (Utah 1970), the Court, relying on the California case of *O'Banion v. Paradise*, 61 Cal.2d 559, 39 Cal.Rptr. 370, 393 P.2d 682 (1964), as authority, noted that in the transaction there before the court, the wife admitted in her deposition that she knew her husband was selling the property to the plaintiff and that she intended him to do so. However, since the wife was not bound by her husband's actions, whatever effect her acquiescence (emphasis mine) might have had was ended when she granted her interest in the property to a third person. Such an act amounted to a tacit repudiation

of any conflicting oral agreement on her part. In Gregerson v. Jensen, 669 P.2d 396 (Utah 1983), where a check endorsed by the husband was relied on to meet the statute of frauds objection, the court noted that "[allthough [the wife] participated in the conversations leading up to the delivery of the check she signed nothing" and in that "she has never signed any writing sufficient to satisfy the statute of frauds obligating her to sell her property to the buyers, there was, as the district court held, no basis for a decree of specific performance against the sellers."

POINT 2 - As stated before in this petition, the basis of the quiet title judgment is not known so appellant dealt with the doctrine of merger on the theory that if the facts supported the imposition of merger in this case they would not therefore support the judgment. From the outset it appeared to appellant as though respondent was attempting to show that Mr. and Mrs. Smith were jointly engaged in business as "Al Smith Construction Company" and that the signature of one was the signature of both wherefore the signature of Alvin R. Smith on the uniform contract for Al Smith Construction Company was also the signature of Sandra Smith. And it is appellant's contention that if this is true with respect to the contract then it is also true with respect to the merged deed.

Finding No. 3 (Al Smith Construction Company was not a corporation at the time of the contract, but 'Contemporary Home Builders' was a corporation with Al Smith and Sandra Smith, his wife, as principals.) comports with the third defense of

defendant's amended answer that

" . . . Sandra Smith was a principal in Al Smith Construction Company and by virtue of the Uniform Real Estate Contract by and between Al Smith Construction Company and Darlene Stout, Sandra Smith conveyed all her right, title and interest in the subject real property to Darlene Stout in July 1978."

to indicate a business relationship between Alvin R. and Sandra Smith (e.g., partners) whereby Alvin's signature for Al Smith Construction Company would bind Sandra. If she is bound on the contract as though she had signed it the same would be true with respect to the merged deed even though the deed describes only a one-half interest. The doctrine is applicable where full performance by the seller is manifested by execution and delivery of a deed which is accepted by the buyer which manifests his acceptance of seller's performance even though the estate conveyed may differ from that promised in the antecedent agreement. *Stubbs v. Hemmert*, 567 P.2d 168 (Utah 1977).

POINT 3 - The Court holds the bar of the statute of limitations inapplicable because the oral contract was set up in defense. This approach is correct if the enforcement of the oral contract which is saved only by the provisions of §25-5-8 which grants a court the power to compel the specific performance of agreements in case of part performance thereof, does not have the nature and character of an independent action and constitutes a pure defense. Otherwise, the bar of the statute applies. 54 C.J.S., § 38 Limitations of Actions, p. 76. The

writer has not been able to find any authority on the specific facts of this case but it would seem the only reasonable interpretation that the enforcement of an oral agreement partly performed has the nature and character of an independent action.

If the facts support the imposition of the bar of the statute of limitations then they do not support the judgment.

POINT 4 - Conclusion No. 1 (Darlene Stout as purchaser and Al Smith dba as Al Smith Construction as seller entered a [sic] Uniform Real Estate Contract for the purchase of the subject real property.) and Conclusion No. 2 (Sandra Smith orally agreed to the sale and acquiesced in the sale to Stout and knew the sale was for the entire parcel of property.) confirm that we are not here dealing with a separate oral agreement partly performed but only with the uniform contract that cannot be connected to Sandra Smith in any way that will satisfy the statute of frauds for the reasons heretofore stated. The conclusions and judgment therefore are not supported by the facts.

CONCLUSION - It remains for the undersigned to apologize to the members of the panel for the disjointed appearance in appellant's opening brief of the arguments presented and for the difficulty the members of the panel had in following these arguments, and to provide an explanation of the bare mention of "departure" at oral argument.

It should first be noted that the concept of departure was raised in the trial court on these facts, to-wit, in mid-trial respondent was permitted to amend her answer to include matters variant to her first answer and sworn answers to interrogatories. Appellant moved the trial court to strike the amended answer (See Appendix hereto). No opportunity was given for discovery and it was appellant's position that respondent should not be permitted, or was estopped, to make the new claims by amendment or otherwise where she had taken a contrary position in the same case. The amended answer was the first mention of an oral contract partly performed but without allegation as to time, circumstances and terms.

Appellant prays judgment that this petition for rehearing be granted and the undersigned certifies this petition is presented in good faith and not for purpose of delay.


DATED December 9, 1988.



ROYAL K. HUNT

PROOF OF MAILING

I certify that on December 9, 1988 four copies of the foregoing PETITION FOR REHEARING were mailed to Carl J. Nemelka 75 North Center, American Fork, Utah 84003, by first-class mail.



ROYAL K. HUNT

APPENDIX

On March 27, 1985, defendant Stout served an amended answer which included allegations of agency, ratification, oral contract and part performance, waiver, estoppel, fraud, laches, and that plaintiff is not a bonafide purchaser for value without notice.

ARGUMENT AND AUTHORITY (and motions): Plaintiff moves the court to strike the said amended answer for the reasons and grounds it violates Rule 15(a), U.R.Ci.P., the defenses therein are insufficiently plead (Williams v. State Farm Ins Co., 656 P 2d 966 (Utah 1982) and for the reasons following.

The claims of defense contained in the amended answer are based on facts known to the defendant Stout at the time her original answer was served and filed. The function of Rule 15(a), U.R.Ci.P., which provides generally for the amendment of pleadings, is to enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original complaint or answer. 6 Wright & Miller, Federal Practice and Procedure, Sec. 1473, p. 375. There was an oral application by defendant Stout for leave to amend her pleading to include the defense of estoppel. This procedure is permissible only if plaintiff is put on notice of the nature and purpose of the request and is given the same opportunity to present objections to the proposed amendment as he would have if a formal motion had been made where defendant Stout would, under the requirements of Rule 7(b), U.R.Ci.P., have to set forth with particularity the relief or order

requested and the grounds supporting the application. Glenn Falls Ins. Co. v. Newton Lmbr and Mfg Co., 388 F 2d 66 (10CCA 1967).

The delay in requesting the amendment is inordinate and inexcusable, there is bad faith on the part of defendant Stout, repeated failure to cure the deficiencies over a period of three years by seeking leave to amend, there is undue prejudice to the plaintiff by putting him through the time and expense of continuing litigation on new theories, with the necessity for additional discovery, to allow the amendment would be manifestly unfair and unduly prejudicial to plaintiff which outweighs the right to have the case tried on the merits, and finally, the futility of the amendment is indicated from the files and records herein which include Interrogatories and Requests to Admit and Requests for Production of Documents to Defendant Darlene Stout, First Set, defendant Stout's Answers to Interrogatories, Requests for Admission and Requests for Production, and defendant Stout's Supplemental Answers to Interrogatories, which show conclusively that there is no factual predicate for the defenses set forth in the amended answer.

Interrogatory No. 2 (plaintiff to defendant) is as follows: "Do you claim to have any right, title, or interest, or right to the possession of said real property, other than by force of the Uniform Real Estate Contract a copy of which is appended to your third-party complaint filed herein."

On her first attempt defendant Stout answered "Yes."

Interrogatory No. 3 (plaintiff to defendant) is as follows:
"If you have answered interrogatory 2, above, in the affirmative, state and explain such claim of interest, and include

- a. The nature and extent of the interest or claim;
- b. The type of estate you claim in the said real property;
- c. When the interest or estate was acquired;
- d. A description of any documents you received by which you claim to have acquired such interest and upon which your claim to said real property is based."

Again, on her first attempt defendant Stout answered:

3. Unanswered.

- a. See defendant's counter-claim.
- b. Legal and equitable interest
- c. See defendant's counterclaim.
- d. A Warranty Deed.

On her second attempt at answering interrogatory number 3 defendant Stout again left paragraph 3 unanswered and answered subparagraphs a., b., c., and d. as follows:

- a. Ownership fee.
- b. A legal and equitable interest.
- c. On or about the 21st day of July, 1978.
- d. The Warranty Deed which was attached to defendants first set of Answers to Interrogatories and the Uniform Real Estate Contract which was exhibit "A" of defendants third-party complaint and counterclaim.

Interrogatory No. 5 (plaintiff to defendant) is as follows:

"State in detail the basis, factual and legal, of the allegation (paragraph 14, Second Cause of Action, Third Party Complaint) that on or about July 21, 1978, you became and still are the owner in fee of said real property, and describe all documents by title, substance and content that support such allegation."

On her first attempt defendant Stout answered:

"ANSWER: See Answer to Interrogatory #3.

On her second attempt defendant Stout answered:

"ANSWER-See answer to Interrogatory number 3. In addition, defendant would not have entered into the Uniform Real Estate Contract with Al Smith alone had any representation been made that the only interest defendant was purchasing was an undivided 1/2 interest. Other factual bases are included in defendant's allegations in her third party complaint."

It is only reasonable to assume that a recitation of all facts that support the claims made in the amended answer would have been provided by defendant in her responses to the interrogatories referred to above; in that no facts capable of supporting the claims of defendant in her amended complaint were provided it can only be assumed that none exist and it would be futile to permit the amendment to stand because there is no factual predicate therefore.

As to said defendant's defenses as contained in her said amended answer plaintiff moves the court for judgment on the pleadings pursuant to Rule 12(h)(1), U.R.Ci.P.