

1986

Marcy G. Myers v. Darlene Stout (Copple) : Reply Brief

Utah Court of Appeals

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DOCKET NO. 860279-CA

IN THE UTAH COURT OF APPEALS

MARCY G. MYERS,

Plaintiff-Appellant,

V.

DARLENE STOUT (COPPLE),

Defendant-Respondent.

Case No. 860279 - CA

(Category 14 b.)

APPELLANT'S REPLY BRIEF

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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IN THE UTAH COURT OF APPEALS

MARCY G. MYERS,

Plaintiff,

V.

Case No. 860279 - CA

DARLENE STOUT (COPPLE),

Defendant.

APPELLANT'S REPLY BRIEF

The statement of jurisdiction and description of the nature of the proceedings in the lower court are as set forth in plaintiff-appellant's opening brief.

STATEMENT OF ISSUES

Issues as hereafter stated are in answer to new matter set forth in defendant-respondent's brief:

1. Whether rule 52(a) that findings of fact shall not be set aside unless clearly erroneous has application here.
2. Whether "an exception" to the merger rule applies avoid application of the rule.
3. Whether an oral agreement for the sale and purchase of a one-half interest in the real property in question occurred.
4. Whether "estoppel" did, or legally can, establish 1 defendant-respondent title to such one-half interest.

5. Whether defendant-appellant's claim of "oral agreement" is barred by the applicable statute of limitations.

STATEMENT OF THE CASE

The facts as set forth in plaintiff-appellant's opening brief as well as in defendant-respondent's brief are restated here but to which is added that defendant-respondent neither pleaded (R 17-25, 180-184) nor does the record contain evidence that would tend to establish an exception to the "merger" rule.

ARGUMENT

1. The clearly erroneous rule has no application. The determination of the lower court that there was an oral agreement between Sandra Smith and defendant-respondent is a conclusion of law and is reviewed on the basis of "legal correctness." *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 389 (Utah App. 1987); *Diversified Equities, Inc. v. American Savings & Loan Association, et al.*, 62 Utah Adv. Rep. 25 (Utah App. 1987). As pointed out in plaintiff-appellant's opening brief, there is no evidence of an oral agreement.

2. All of the conditions for the application of the merger rule as stated in *Secor v. Knight*, 716 P.2d 790 (Utah 1986) are present here. Exceptions to the application of the rule exist, e.g., fraud, mistake, and the existence of collateral rights, *Secor, supra*, p. 793. But none of these exceptions were

pleaded by defendant-respondent and no evidence was offered with respect to any or either of such defenses.

3. The terms of an oral contract for the sale and purchase of real property must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality. Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 (1959); Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611 (Utah 1975). In this case there is no evidence whatever to satisfy this rule; certain acquiescence (revoked) may have been shown but acquiescence too is a legal conclusion and tested for "legal correctness" on review but even if found is insufficient in law to support the judgment where revoked. Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1956).

4. Defendant-appellant claims plaintiff-respondent is estopped. Our statute of frauds provides:

Every contract for the . . . sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

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.

The doctrine of promissory estoppel has been extended in limited form to cases concerned with the statute of frauds where the

promise as to future conduct constitutes an intended abandonment of an existing right of the promisor. Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332. It has no application however, to create title but only operates to estopp one to assert the statute of frauds where he has, by his language or conduct, led another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice. 73 Am Jur2d Statute of Frauds §567, pp. 205-206. Here, there is no oral agreement to serve as the basis for the claimed estoppel.

5. Under the statute of frauds the courts are limited to compelling specific performance of partly performed agreements Defendant-respondent has pleaded her claimed "oral agreement" with Sandra Smith as a defense (R 180-184) but has requested no affirmative relief by way of specific enforcement of the contract. The subject matter of the defense however, constitutes an independent cause of action as defined by the statute of frauds, was legally subsisting at the time of the commencement of this action by plaintiff-appellant's predecessor in title, and the statute of limitations is applicable thereto. 51 AmJur2d Limitations of Actions §78 p. 657.

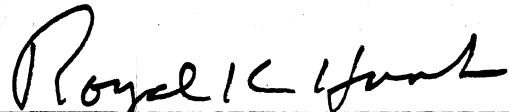
CONCLUSION

As stated in plaintiff-appellant's opening brief.


ROYAL K. HUNT

PROOF OF MAILING

On October 20, 1987, I mailed four copies of the foregoing APPELLANT'S REPLY BRIEF to Carl J. Nemelka, attorney for defendant Darlene Stout (Copples), at 75 North Center, American Fork, Utah 84003, postage for first-class mail fully prepaid thereon.

A handwritten signature in cursive script, reading "Royal K. Hunt", written over a horizontal line.

ROYAL K. HUNT