

2008

Max B. Graff v. Naterra West LLC; Naterra West, LLC; Gateway Farms, LLC; and Fusion Group, LLC; Gateway Farms LLC and Fusion Group, LLC v. Max B. Graff; Anita B. Graff; Curtis A. Graff; Carol A. Graff; Graff Ranches, LC; Don D. Gilbert : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MAX B. GRAFF,

Plaintiff/Appellee,

vs.

NATERRA WEST, LLC

Defendant/Appellant.

NATERRA WEST, LLC; GATEWAY
FARMS, LLC; and FUSION GROUP,
LLC,

Counterclaim Plaintiffs/Appellants,

GATEWAY FARMS, LLC and FUSION
GROUP, LLC,

Intervening Plaintiffs/Appellants,

vs.

MAX B. GRAFF; ANITA B. GRAFF;
CURTIS A. GRAFF; CAROL A. GRAFF;
GRAFF RANCHES, LC; DON D.
GILBERT,

Counterclaim Defendants/Appellees.

Case No. 20080075-CA

BRIEF OF APPELLANT

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard

FILED
UTAH APPELLATE COURTS

JUN 13 2008

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STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon Utah Code Ann. sec. 78A-4-3(2)(j).

STATEMENT OF THE ISSUES

ISSUE 1: Whether the trial court correctly granted summary judgment to Plaintiffs/Appellees Graffs.

Standard of Review: De novo. By definition, “a district court does not resolve issues of fact at summary judgment,” therefore, this Court “consider[s] the record as a whole and review[s] the district court’s grant of summary judgment de novo, reciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party.” *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439, 441 (Utah 2006).

Preservation for Appeal: R. at 1002-24.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

None.

STATEMENT OF THE CASE

Plaintiff/Counterclaim Defendants/Appellees Graffs filed suit on July 28, 2006 seeking to collect liquidated damages under a real estate purchase contract (“REPC”), and they also sought a declaratory judgment that the REPC had terminated by its own terms. (R. at 1-27.) On August 9, 2006, Defendant/Counterclaim Plaintiff/Appellant Naterra West, LLC answered and counterclaimed, asserting five causes of action: (1) detrimental reliance, (2) fraud, (3) breach of good faith and fair dealing, (4) unjust enrichment, and (5) conspiracy. (R. at 28-62.) Subsequently, on September 5, 2006, Gateway Farms, LLC and Fusion Group, LLC moved to intervene as plaintiffs (r. at 82-137), and on October 25, 2006, they filed a Complaint in Intervention against the Graffs (r. at 217-282).

On February 5, 2007, the Graffs moved for summary judgment against Fusion Group, Naterra, and Gateway West, arguing that the statute of frauds universally defeated each and every counterclaim against the Graffs. (R. at 852-981.) Fusion Group, Naterra, and Gateway Farms opposed the motion on March 22, 2007. (R. at 1002-24.) The Graffs filed a reply memorandum on April 12, 2007. (R. at 1062-69.) The Graffs filed a request to submit the motion the same day. (R. at 1070-72.)

On May 14, 2007, the trial court conducted a hearing on the Graffs’ motion. (R. at 1153.) Two months later, on July 10, 2007, the court issued its order¹ holding that the

¹ After the Court issued its July 10, 2007 Order, the Graffs moved on November 2, 2007 for the Order to be made final under Rule 54(b). (R. at 1201-49.) The trial court granted that motion on December 10, 2007. (R. at 1258-60.) Then on January 15, 2008,

statute of frauds defeated each and every affirmative claim by Fusion Group, Naterra, and Gateway Farms, specifically: detrimental reliance, fraud, breach of good faith and fair dealing, unjust enrichment, conspiracy, claim for attorneys' fees, and the claim for specific performance. (R. at 1152-59.) (A copy of the trial court's Order is attached hereto as **Addendum A.**)

Fusion Group, Naterra, and Gateway Farms filed its Notice of Appeal on January 8, 2008. (R. at 1261-63.)

the trial court issued an amended order, certifying it under Rule 54(b) as final and appealable. (A copy of the amended Order is attached hereto as **Addendum B.**)

STATEMENT OF FACTS

On December 10, 2004, Counterclaim Plaintiff/Appellant Gateway Farms, LLC (“Gateway”)² entered into a Real Estate Purchase Contract with the Counterclaim Defendants/Appellees Graffs (“Graffs”) to purchase four parcels of land (approximately twenty-seven acres) in American Fork, Utah (“Property”).³ (R. at 318.) Gateway was supposed to close on the Property by April 1, 2005. (R. at 942.) The Property was to be part of a larger planned residential community that Fusion Group, LLC (“Fusion Group”) wanted to develop. (R. at 318-19.)

While obtaining the requisite appraisals and city approvals for the development, Gateway requested, and the Graffs granted, several extensions to the closing dates. (R. at 318.) During this time, David Robinson⁴ (“David”), Max Graff (“Max”), and Curtis Graff (“Curtis”) were in near-constant communication. (R. at 318.) David kept Max and Curtis informed of the status of the approvals and permits and the progress toward closing on the Property. (R. at 318.)

After entering into the REPC with the Graffs, Gateway spent immense amounts of time, money, and other resources to cultivate the development, of which the Graffs’ land

² Fusion Group, LLC owns a 100% interest in Gateway Farms. (R. at 318.)

³ Prior to Gateway Farms contracting to purchase the Property, it was zoned for light industrial and could not be developed for residential use. (R. at 319.) As a likely result, the Property had been for sale for a number of years without any buyers. (R. at 319.) And as a result of Gateway, Naterra, and Fusion’s efforts in creating a master plan and assembling numerous parcels to meet a 100-acre minimum, thereby allowing the property to be developed for residential use, the Property dramatically increased in value. (R. at 319.)

⁴ David Robinson was responsible for land acquisition for Fusion Group, LLC, Naterra West, LLC, and Gateway Farms, LLC. (R. at 318.)

was to be a part. (R. at 318-19.) And the Graffs were well aware of—and happily accepted—Gateway’s efforts, which, among other things, substantially increased the value of the Graffs’ land. (R. at 318-19.)

Subsequently, the REPC between Gateway and the Graffs terminated without Gateway closing on the Property. (R. at 319.)

Then, on May 25, 2005, Defendant/Counterclaim Plaintiff/Appellant Naterra West, LLC (“Naterra”)⁵ entered into a REPC with the Graffs to purchase the Property. (R. at 319.) Addendum 2 to that REPC provided that Naterra had to close by May 31, 2006, or in the alternative, if financing had not been obtained by that time “for reasons outside of the control of [Naterra],” it could close by June 30, 2006. (R. at 349.) Additionally, Naterra had to provide the Graffs with ten days’ notice prior to closing.⁶ (R. at 349.)

In May 2005, when Naterra contracted to purchase the Property, the required city approvals and appraisals had still not been procured. (R. at 319-20.) Thus, to allow sufficient time to obtain these approvals, David requested (on Naterra’s behalf) a number of extensions from the Graffs within which to close on the Property. (R. at 319-20.) The Graffs liberally granted these extensions. (R. at 319-20.)

⁵ Fusion Group, LLC owns a 5% interest in Naterra West, LLC. (R. at 318.)

⁶ David’s understanding of the 10 days’ notice as contained in Addendum 2 of the REPC between Naterra and the Graffs required that if Naterra wanted to close earlier than May 31, 2006 or before the final closing date of June 30, 2006, the buyers were to give 10 days notice to allow closing arrangements to be made prior to June 30, 2006. (R. at 325.) David understood that the contract called for a June 30, 2006 closing unless notice of an earlier closing was given. (R. at 325.)

After entering into the REPC with the Graffs, Naterra—just like Gateway before it—spent a great deal of time, money, and other resources to further the development (of which the Graffs’ land was to be a part). (R. at 318-19.) The Graffs knew that Naterra was working to improve and increase the value of the Property, and they gladly accepted this benefit without any cost to them. (R. at 319.)

After trying to obtain city approvals for some time, ultimately, Naterra went out of contract. (R. at 320.) But Don Gilbert, the Graffs’ attorney, provided extensions within which to close, and with each extension, the Graffs reinstated the terms of the REPC. (R. at 320.)

Throughout this time, David continued to be in close contact with Max, because David trained several of the Graffs’ horses. (R. at 320.) David traveled to the Graffs’ Property between two to six times per week, and David spoke with Max about the REPC and the transaction generally on several of these occasions. (R. at 320.) In fact, David frequently visited with Max and Curtis and provided updates on the progress of the project, including, but not limited to city approvals, ordering appraisals, financing, timing, etc. (R. at 320.)

On several occasions between May 25, 2005 and June 22, 2006, David spoke with Max regarding possible funding options to purchase the Property, including Naterra obtaining a bank loan, or, alternatively, obtaining a loan from other investors or various “hard money” lenders. (R. at 320.) David also explained the additional costs of a “hard money” loan and that Naterra would prefer to pay certain carrying costs to the Graffs rather than to “hard money” lenders. (R. at 320.) Nevertheless, David informed Max

that if Naterra could not obtain financing from the preferred bank loan by the June 30 closing deadline, Naterra would be able to close on the Property through these various investors or “hard money” lenders. (R. at 321.)

David relayed to Max and Curtis that the bank loan required that the several parcels of land in the development, including the Graffs’ Property, close simultaneously. (R. at 321.) This was due to the city’s large park space requirement and those park spaces being dedicated to the city or homeowners’ association. (R. at 321.) David explained that closing on the purchase of several parcels through bank financing would allow the entire project to proceed. (R. at 321.)

On several visits to the Graffs’ property, Max informed David that Max was having difficulty finding suitable land for his new residence after the sale was complete. (R. at 321.) David repeatedly encouraged Max to locate a new residence quickly because once all of the approvals came in, it would not take long to close on the purchase. (R. at 321.)

On or about June 7, 2006, David asked the American Fork City Counsel to add an agenda item to its June 13 or 14, 2006 council meeting. (R. at 321.) This item was an additional vote required by the new planned community ordinance that would allow the appraiser to move forward with the appraisals. (R. at 321.) David informed Max of this agenda item and the need for the city’s approval before the appraiser could finalize the appraisal on the Property. (R. at 321.)

Then, on or about June 14, 2006, after the necessary preliminary city approval, David contacted the appraiser to continue expediting the appraisal of the subject property.

(R. at 322.) David confirmed with the appraiser that Naterra was closing on the Property (and the related properties in the development) at the end of the month. (R. at 322.) David informed Max about the deadline provided by the appraiser. (R. at 322.)

On or about June 22, 2006, eight days before closing, David contacted Max again about the status of the preferred bank loan. (R. at 322.) David informed Max that due to delays in the various appraisals and city approvals, the closing (using the preferred bank loan) would need to be deferred into the first part of July 2006. (R. at 322.) Max told David to contact Don Gilbert, the Graffs' attorney, to work out an extension and closing arrangements. (R. at 322.) David understood that Gilbert was acting as the title agent in the closing and recording the sale and was responsible for preparing various closing documents, including the issuance of the title policy, the settlement statement, and preparation of documents to transfer water rights from the sellers to the buyers at closing, as required by the contracts. (R. at 322.)

Max never indicated that he was no longer going to discuss contract issues with David or Naterra. (R. at 322.) In fact, Max acted exactly as he had in the past when David had requested an extension due to unforeseen problems with closing. (R. at 322.) Max's tone and body language also reflected the same willingness to continue with the sale and grant an extension, as he had done numerous times before. (R. at 322-23.)

Following Max's instructions, David made several attempts to contact Gilbert by telephone, leaving messages at his office and by calling Gilbert's personal cell phone. (R. at 323.) David also sent Gilbert e-mails. (R. at 323.) David knew that Steve Black, a

principal of Naterra, also sent Gilbert an e-mail on June 30 to make arrangements for an extension and for closing. (R. at 323.)

In spite of these numerous attempts to contact Gilbert during the entire month of June, he failed to respond or return any calls to David, Steve Black, or any other principal or employee of Naterra. (R. at 323.)

After the several unsuccessful attempts to contact Gilbert (and his failure to return the messages), David spoke with Max to ask if he had heard from Gilbert about making the closing and extension arrangements. (R. at 323.) Max indicated that he had not heard from Gilbert and again told David that he should continue to attempt to contact Gilbert concerning extension and closing arrangements. (R. at 323.) Max never indicated that he would be unwilling to extend the closing date past June 30, 2006. (R. at 323.) In fact, the contrary; Graff continued to indicate to David that closing would still take place. (R. at 323.)

On June 30, 2006, Naterra was ready, willing, and able to close. (R. at 324.) But neither Gilbert nor the Graffs scheduled a closing for June 30, 2006, primarily because Gilbert, the individual designated by the Graffs to handle the closing, was incommunicado. (R. at 324.) Naterra did not know where and if the closing settlement was to occur. (R. at 324.) Naterra was aware, however, that several closing documents, including the water rights documentation, were not prepared or delivered to Naterra prior to June 30, 2006. (R. at 324.) Neither Gilbert nor Max informed Naterra of any closing instructions or arrangements for closing prior to or on June 30, 2006. (R. at 324.)

On July 5, 2006, a few days after closing should have occurred, Gilbert responded to Steve Black, a principal of Naterra. (R. at 324.) Gilbert informed Black that the contract between Graffs and “Fusion/Naterra” had expired. (R. at 324.) Also on July 5, 2006 there was a meeting between David, Naterra, Gilbert, and the Graffs, during which Max informed David that Max had been “praying” that Naterra would default on the REPC so that Max could sell the Property for more money per acre.⁷ (R. at 324.)

David later learned that in spite of acting as the closing agent, Gilbert never prepared the necessary closing documents and water certificates. (R. at 324.) David also learned that Gilbert was out of the state for a period of approximately three weeks, including during the June 30 closing deadline. (R. at 324.) Gilbert later informed David that Gilbert did not have access to his email during that time. (R. at 324.)

⁷ The contract purchase price between Naterra and the Graffs was approximately \$171,000 per acre. After the June 30 closing deadline passed, the Graffs informed Naterra that the Graffs were not willing to take less than \$250,000 per acre for the Property because the land had increased in value thanks to Fusion and Naterra’s work with the city and others to prepare the land for a planned residential development. (R. at 325.)

SUMMARY OF ARGUMENTS

This case is about whether the Graffs (and/or their attorney, Don Gilbert) provided an extension within which to close on a piece of property in American Fork, Utah.

There is a disputed issue of material fact whether the Graffs (and/or Gilbert) agreed to extend the June 30 closing deadline. Alternatively, there is an issue of material fact whether the Graffs (and/or Gilbert) stonewalled all communications from Developers leading up to the June 30 closing, thereby preventing Developers from closing or receiving another extension. These disputed facts alone justify reversing summary judgment.

In addition, the Graffs were not entitled to summary judgment as a matter of law because partial performance is an exception to the statute of frauds. Developers partially performed pursuant to their agreement with Max Graff to wait and rely on the Graffs' attorney, Don Gilbert, for closing and extension instructions. Those instructions never came, to the detriment of Developers.

Finally, Developers' equitable claims were neither briefed nor argued, so the trial court should not have ruled on them. And equitable claims, like unjust enrichment, are not subject to the rigors of the statute of frauds because equitable remedies are, by their nature, based on fairness, not on rigorous adherence to technicalities.

Therefore, the Court should reverse the trial court's grant of summary judgment for the Graffs and remand this matter to the trial court.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

Under the Utah Rules of Civil Procedure, a court may not grant summary judgment unless the moving party establishes “[1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). When a court addresses a motion for summary judgment, the court’s function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court’s “sole inquiry should be whether material issues of fact exist.” *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

On a motion for summary judgment, the nonmoving party is not required to “prove” its case in order to defeat the motion. Rather, the nonmoving party is only required to submit evidence “sufficient to raise a genuine issue of fact.” *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). In addition, if there is “any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party [and] the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.” *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Finally, the nonmoving party’s evidence is to be believed for purposes of the motion, and if there is a conflict in the evidence as to a material fact, the motion must be denied. *See, e.g., Draper City*, 888 P.2d at 1100-01.

II. WHETHER THE GRAFFS EXTENDED THE CLOSING DEADLINE IS A DISPUTED MATERIAL FACT.

The parties dispute whether they agreed to extend the June 30, 2006 closing deadline. The Graffs argue they did not; Fusion Group, Gateway Farms, and Natterra (collectively “Developers”) argue they did. The Developers presented facts that dispute the Graffs’ facts on this issue. Therefore, summary judgment was inappropriate, and the Court should reverse the trial court’s grant of summary judgment and remand to the trial court.

On June 22, 2006, Max Graff told David Robinson to contact Don Gilbert, the Graffs’ attorney, about extending the June 30, 2006 closing deadline and making closing arrangements. (R. at 322-23.) David did all he could to follow Max’s instructions. (R. at 322-23.) David made numerous attempts to contact Gilbert. Specifically, David called Gilbert’s cell phone many times between June 22 and June 30, but Gilbert never answered. (R. at 1006.) David left several voicemails on Gilbert’s cell phone asking Gilbert to return the call because the closing deadline was fast approaching. (R. at 1006.) David also called Gilbert’s office, but Gilbert was never available, so David left messages with the individual answering the phone. (R. at 1006.) Finally, David also sent Gilbert e-mails, but he never responded. (R. at 1006.)

And David was not the only individual on the Developers’ behalf to try to contact Gilbert. Ryan Henderson also tried to contact Gilbert to review the water application change form and other matters related to transferring the water rights to the Natterra at closing. (R. at 1006.) But Henderson never reached Gilbert. (R. at 1006.)

In addition to David and Henderson, Steve Black, a principal of Developers, also contacted Gilbert by e-mail to make arrangements for closing. (R. at 1006.) Again, Gilbert never responded. (R. at 1006.)

After these unsuccessful attempts to reach Gilbert, David contacted Max again (before June 30) to see if Max had heard from Gilbert about making closing or extension arrangements. (R. at 1006.) Max told David that he had not heard from Gilbert, and Max again told David to continue to try to reach Gilbert to make closing and extension arrangements. (R. at 1006-07.) Max never told David that the Graffs would not extend the closing deadline. (R. at 1007.) In fact, the contrary; Max told David to contact Gilbert to make closing and extension arrangements, implying that Max was amenable to extending the closing date (or, at a minimum, closing on June 30). (R. at 1006-07.) Naterra was ready and willing to close on June 30, but closing depended on Graff arranging the closing, including preparing several closing documents, like those for the water rights. (R. at 1007.)

Unfortunately, David came to learn that Gilbert was out of the state during this entire period while David, Black, and Henderson were trying to reach him. (R. at 324.) Gilbert was incommunicado the entire time; he had no access to e-mail or his cell phone, which David did not learn until the July 5, 2006 meeting. (R. at 324.)

The crux of this issue is whether the Graffs, by referring Developers to Gilbert and by failing to indicate otherwise, agreed to extend the June 30 closing deadline. This is a material fact because it is at the heart of this case: if the Graffs granted the extension, the

REPC was enforceable, and if the Graffs did not grant the extension, the REPC terminated.

Additionally, there is a question of material fact whether the Graffs prevented Developers from closing or obtaining another extension. Max told David to contact Gilbert to make closing or extension arrangements. David (and others) did that in every conceivable way. And when Gilbert did not respond, David again approached Max before June 30 to see if Max had heard from Gilbert. Max implied that an extension or closing on June 30 would be acceptable but to contact Gilbert to make those arrangements. Again, Gilbert failed to respond, in spite of Developers making every effort to adhere to their obligations under the REPC. It seemed strange that the Graffs would continue to urge David to work through Gilbert when Gilbert was incommunicado with all the parties.

Then curiously, Max told David on July 5, 2006 that he had been “praying” that Naterra would go out of contract. (R. at 1007.) Max wanted Naterra to go out of contract because Max felt that the Graffs could sell the Property for more money due to the improvements that Developers made on the property (obtaining city approvals, appraisals, re-zoning, etc.). (R. at 1007.) This is the heart of Developers’ unjust enrichment claim.

Viewing these facts in a light most favorable to Developers, there is a question of material fact (1) whether the Graffs impliedly granted an extension to the June 30 closing date and (2) whether the Graffs and/or Gilbert stonewalled Naterra from closing or

obtaining another extension. Therefore, the Court should reverse the trial court's grant of summary judgment in the Graffs' favor.

II. EVEN IF THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT, THE GRAFFS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PARTIAL PERFORMANCE IS AN EXCEPTION TO THE STATUTE OF FRAUDS.

Even if the Court were to find no disputed issues of material fact, the Graffs do not meet the second prong of the summary judgment standard: the moving party must be entitled to judgment as a matter of law. Here, the Graffs rested their entire argument to defeat Developers' claims on one theory, the statute of frauds. But partial performance is an exception to the statute of frauds, and Developers partially performed after relying on Max Graff's oral indications that the Graffs would extend the closing date (or would agree to close on June 30). Therefore, the Court should reverse the trial court's grant of summary judgment for the Graffs.

The statute of frauds provides, *inter alia*, that certain agreements—including those conveying an interest in land—are void “unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement” Utah Code Ann. § 25-5-4(1) (2006).

But there is also an exception to the statute of frauds known as partial performance. The standard for partial performance in Utah provides that “[1] the oral contract and its terms must be clear and definite; [2] the acts done in performance of the contract must be equally clear and definite; and [3] the acts must be in reliance on the contract.” *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002) (citation and quotations

omitted) (alterations in original) (overruled on other grounds). Moreover, the 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.” *Id.*; *see also Jenkins v. Percival*, 962 P.2d 796, 801 (Utah 1998) (holding that an otherwise invalid agreement because it does not satisfy the statute of frauds may nevertheless be enforced through a court’s equitable prerogative if a party, relying on an oral agreement, partially performs its contractual obligations).

In this case, it is undisputed that David informed Max that Naterra was ready and willing to close on the purchase of the property through the various “hard money” investors. (R. at 1009.) Robinson also explained that the Developers preferred to close on property through the bank financing. (R. at 1009.) Unfortunately, as result of the various appraisals, inspections, city approvals, etc., Developers could not close with bank financing until early July 2006, only days after the June 30, 2006 deadline. (R. at 1009.) In response to David’s information, Max instructed David to contact the Graffs’ attorney, Don Gilbert, to work out the closing arrangements including any extension. (R. at 1009.) David, on behalf of Developers, agreed to contact Gilbert and work out closing arrangements, including any extension. (R. at 1009.) It is undisputed that Developers, based on this arrangement between David and Max, made several attempts to contact Gilbert. (R. at 1009.) Unfortunately, even after these several attempts, Developers were unable to reach Gilbert regarding closing arrangements or any extension. (R. at 1009.)

The Graffs argue that pursuant to the statute of frauds, any agreement between the parties to extend the closing deadline (or to make closing arrangements) must be in writing. But the Graffs fail to recognize Developers' conduct in reliance of the oral agreement reached by David and Max. The Utah Supreme Court has held that a verbal agreement related to the transfer of real property can be taken out of the statute of frauds, and a party can be estopped from challenging the oral agreement upon showing that (1) there was an agreement, (2) part or full performance, and (3) reliance upon the agreement. *Orton v. Carter*, 970 P.2d 1254, 1259 (Utah 1998).

The Graffs do not dispute that there was an oral agreement reached between David and Max. It is further undisputed that Developers acted in reliance on that agreement by attempting to contact Gilbert, the Graffs' attorney. And Developers relied on the oral agreement to their detriment when neither Gilbert nor the Graffs communicated with Developers about closing or extending the closing date.

Even if the Graffs contend that the agreement reached by David and Max modified only the present contract, Developers' performance under the modification removes the agreement from the statute of frauds. For the purposes of the statute of frauds, just as partial modification of a written contract that is likewise in writing is enforceable, so is an oral modification of the contract that parties clearly relied upon and that one party performed in part. *Fisher v. Fisher*, 907 P.2d 1172, 1176-77 (Utah App 1995); *see also Green v. Stansfeld*, 886 P.2d 117, 122 (Utah Ct. App. 1994) (stating that under equitable doctrine of part performance, court will sometimes apply estoppel to enforce oral or

implied agreement which has been partially or fully performed in reliance on the agreement).

Finally, the doctrine of part performance is designed to prevent the exact sort of fraud that Developers asserted in their Counterclaim and Intervening Complaint. In this case, as detailed above, the Graffs instructed David and Developers to contact Gilbert to work out the details about closing the transaction or extending the closing deadline. Developers, relying on this agreement, attempted to contact Gilbert numerous times and through various means. This resulted in Developers being out of contract with the Graffs, and it is the basis for Developers' lawsuit. In their Counterclaim and Intervening Complaint, Developers contend that Max made false representations or recklessly made representations that Developers should contact Gilbert even though Max knew Gilbert was unavailable. Max was certainly aware of the time, money, and resources expended in developing the Property. (R. at 318-19.) Max Graff also indicated that he was praying that the parties would go out of contract so he could get more money for the property. (R. at 324.)

In defense of the various claims brought by the Developers, including fraud, the Graffs now argue that any agreement reached between Developers and Max is void under the statute of frauds and all claims related to the agreement should be dismissed. But the Utah Supreme Court, recognizing this tactic, has held that "[t]he doctrine of part performance was fashioned by courts of equity not to annul the Statute of Frauds, but only to prevent its being made the means of perpetrating a fraud." *Coleman v. Dillman*, 624 P.2d 713, 715 (Utah 1981); *see also In re Madsen's Estate*, 259 P.2d 595, 601 (Utah

1953) (“Part performance which will avoid statute of frauds may consist of any act which puts party performing in such position that nonperformance by other would constitute fraud.”) (citation omitted).

Based on doctrine of part performance and Developers’ conduct and reliance on the agreement between Developers and Max, the agreement is removed from the statute of frauds. Therefore, the Graffs were not entitled to judgment as a matter of law, and this Court should reverse the trial court’s grant of summary judgment to the Graffs.

III. DEVELOPERS’ EQUITABLE CLAIMS WERE NOT BRIEFED OR ARGUED. AND DEVELOPERS’ EQUITABLE CLAIMS ARE NOT SUBJECT TO THE STATUTE OF FRAUDS. THEREFORE, THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON DEVELOPERS’ EQUITABLE CLAIMS.

In their motion for summary judgment, the Graffs contend that as a matter of law any modification to the REPC between Developers and the Graffs must be in writing. The Graffs focus solely on the issue of the statute of frauds as their basis for dismissing all claims and causes of action raised by Developers. The Graffs’ summary judgment “statement of facts” (only four sentences) relate only to the alleged oral agreement or modification of the original written agreement between the parties. (R. at 856-57.) And in the section of the Graffs’ memorandum in support titled “Purpose of This Motion for Summary Judgment,” they argue that Developers cannot escape enforcement of the statute of frauds, and therefore, Developers do not have a case. (R. at 858.)

Finally, in their “Summary of the Argument” section, the Graffs indicate that although their motion does not attempt to analyze each of Developers’ claims and defenses separately, the motion will address how each fails the statute of frauds. (R. at

858.) Even though the Graffs attempt to dismiss all claims raised by the Developers, nowhere in the briefing is the equitable claim for unjust enrichment even discussed. This kind of catch-all language was not sufficient for the trial court to rule on Developers' equitable claims.

This Court dealt with a similar issue in *Coroles v. Sabey*, 79 P.3d 974 (Utah Ct. App. 2003). In that case, the plaintiffs/appellants brought thirteen causes of action, and the trial court dismissed the entire complaint. *Id.* at 979. The plaintiff/appellant presumed to appeal the trial court's ruling with respect to each of the thirteen individual causes of action. *Id.* But in its opening brief, in a prophylactic attempt to address each and every cause of action of the thirteen, the appellant titled section I of the brief "THE TRIAL COURT ERRED IN DISMISSING THE ENTIRE COMPLAINT." *Id.* In spite of the broad language, the appellant provided no analysis in the brief of five of the thirteen causes of action that were supposedly appealed. *Id.* Thus, on appeal, this Court held that the appellant's global reference alone did not constitute the analysis required to brief the five causes of action that the appellant all but ignored. *Id.* Therefore, the appellant waived his appeal as to those five causes of action. *Id.*

Similarly, the Graffs cannot garner a judgment on Developers' seven discrete causes of action simply by making one global, introductory reference to "each of Developers [sic] claims" failing to satisfy the statute of frauds. (R. at 858.) This was a legally insufficient basis for the trial court to grant summary judgment on Developers' equitable claims.

The absence of arguments related to unjust enrichment is not surprising because the statute of frauds defense cannot apply to the Developers' claims for unjust enrichment. "The [unjust enrichment] doctrine is designed to provide an equitable remedy where one does not exist at law. In other words, if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment." *Am. Towers Owners' Ass'n. v. CCI Mech.*, 930 P.2d 1182, 1193 (Utah 1996); *see also Alpha Partners, Inc. v. Transamerica Inv. Mgmt., L.L.C.*, 153 P.3d 714, 722-23 (Utah Ct. App. 2006).

The Developers' unjust enrichment claim is not related to the REPC or the alleged oral agreement, but rather, is based on facts that the Graffs unjustly retained certain benefits without payment for their value. As discussed in their Counterclaim and Complaint in intervention, Developers indicate that they conferred benefits on the Graffs, including but not limited to getting the Property annexed into the city of American Fork; acquiring all of the parcels necessary for the planned community; working to acquire access to the property, proper open space, surveys, and engineering so that the plat and planning could be approved; establishing relationships with city officials; paying hundreds of thousands of dollars in acquisition costs; and paying interest in carrying costs. (R. at 40; 226; 375-76; 378-79; 382.) The Graffs appreciated or had knowledge of said benefits. (R. at 40; 226; 376-77.) The Graffs also accepted or retained said benefits under such circumstances as to make it inequitable for the Graffs to retain said benefits without payment of its value. (R. at 40; 226.)

Developers must prove all three elements to sustain a claim of unjust enrichment. *Desert Miriah, Inc. v. B&L Auto, Inc.*, 12 P.3d 580, 582-83 (Utah 2000). None of the elements of unjust enrichment are related to the contract or oral agreement and therefore are not subject to the statute of frauds defense.

Moreover, the Graffs contend in their Motion for Summary Judgment that pursuant to the Utah Supreme Court's decision in *F.C. Stangle v. Ernst Home Ctr., Inc.*, 948 P.2d 356 (Utah 1997), all of Developers' claims should be dismissed. Specifically related to tort actions, including fraud, the Graffs cited a portion of the opinion that reads:

We have stated that the operation of the statute [of frauds] is not confined to cases where an action is brought directly on the contract. Whatever the form of the action may be, *if the proof of a promise or contract within the statute is essential to maintain it*, there can be no recovery unless the statute is satisfied.

Id. at 473 (emphasis added).

Based on *Stangle*, the key element in applying the statute of frauds to other tort actions is whether proof of a promise or contract within the statute is essential for maintaining that tort action. Again, the statute of frauds defense applies only to actions related to a contract or agreement. In this case, Developers' unjust enrichment claim is not a tort action as discussed or briefed in the Graffs' summary judgment motion. More importantly, Developers' unjust enrichment claim does not relate to any contract or agreement, but rather, only to benefits unjustly retained by the Graffs.

Because the statute of frauds only pertains to causes of action related to contracts or agreements, it cannot be used to defeat, as a matter of law, equitable causes of action such as unjust enrichment that are wholly unrelated to any contract or agreement.

Moreover, the application of the statute of frauds to an unjust enrichment claim was never briefed in the Graffs' summary judgment motion, and it was not argued at oral argument.

Therefore, the Court should reverse the trial court's grant of summary judgment for the Graffs.

CONCLUSION

There is a disputed issue of material fact whether the Graffs (and/or their attorney) agreed to extend the June 30 closing deadline. Alternatively, there is an issue of material fact whether the Graffs (and/or their attorney) stonewalled all communications with Developers leading up to the June 30 closing. These disputed facts alone justify reversing summary judgment.

In addition, the Graffs were not entitled to summary judgment as a matter of law because partial performance is an exception to the statute of frauds. Developers partially performed pursuant to their agreement with Max Graff to wait and rely on the Graffs' attorney, Don Gilbert, for closing and extension instructions. Those instructions never came, to the detriment of Developers.

Finally, Developers' equitable claims were neither briefed nor argued. Further, equitable claims, like unjust enrichment, are not subject to the rigors of the statute of frauds because equitable remedies are, by their nature, based on fairness.

Therefore, the Court should reverse the trial court's grant of summary judgment for the Graffs and remand this matter to the trial court.

RESPECTFULLY SUBMITTED this 13th day of June 2008.

HILL, JOHNSON & SCHMUTZ, L.C.



Stephen Quesenberry

Charles L. Perschon

Attorneys for Defendants/Counterclaim

Plaintiffs/Intervening

Plaintiffs/Appellants Fusion Group,

LLC, Naterra West, LLC, and Gateway

Farms, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June 2008, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed, first class, postage prepaid, to the following:

MARK L. ANDERSON
Law Office of Mark L. Anderson
C/O Western Standard
977 South Orem Blvd.
Orem, Utah 84058
Attorneys for Plaintiffs/Appellees

DONALD D. GILBERT
1145 South 800 East
Suite 145
Orem, Utah 84097
Attorney for Plaintiffs/Appellees

GRAHAM H. NORRIS, JR.
1329 South 800 East
Suite 243
Orem, Utah 84097
Attorney for Counterclaim Defendant/Appellee Don Gilbert



ADDENDUM A

ADDENDUM A

MARK L ANDERSON, NO 0105
977 South Orem Blvd
Orem, Utah 84058
Telephone (801) 224-9677
Facsimile (801) 224 8909
Attorney for Plaintiffs MAX B GRAFF,
ANITA B GRAFF, CURTIS A GRAFF,
CAROL A GRAFF, GRAFF RANCHES, LC,

FILED
Fourth Judicial District Court
of Utah County, State of Utah

7/10/07 ltg Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

<p>MAX B GRAFF, ANITA B GRAFF, CURTIS A GRAFF, CAROL A GRAFF, GRAFF RANCHES, LC, Plaintiffs,</p> <p>Vs</p> <p>NATERRA WEST, LLC, Defendants,</p>	<p>ORDER</p>
<p>NATERRA WEST,</p> <p>Counterclaimant,</p> <p>GATEWAY FARMS, LLC, and FUSION GROUP, LLC,</p> <p>Intervening Plaintiffs,</p> <p>Vs</p> <p>MAX B GRAFF, ANITA B GRAFF, CURTIS A GRAFF, CAROL A GRAFF, GRAFF RANCHES, LC, DON D GILBERT</p> <p>Counterclaim Defendants</p>	

PLAINTIFFS MAX B. GRAFF, ANITA B. GRAFF, CURTIS A. GRAFF, and CAROL A. GRAFF, AND GRAFF RANCHES LC (“Graffs”) filed a motion for summary judgment by and through their counsel Mark L. Anderson. Said Motion was made pursuant to rule 56 U.R.P.C. and moved the court for summary judgment against Defendant Naterra West, LLC; Plaintiffs in Intervention, Gateway Farms LLC and Fusion Group LLC, (hereinafter “Developers”). Its accompanying memorandum dated February 1, 2007 supported this motion. The Developers filed a Memorandum in Opposition, and Graffs responded with their Reply Memorandum. Graffs filed a Notice to Submit.

On May 14, 2007, this Court held a hearing on the issues presented to it on said Motion.

Now having heard the arguments, and having carefully considered all of the submissions, the Court:

HEREBY FINDS, CONCLUDES AS A MATTER OF LAW, AND ORDERS
as follows:

FINDINGS OF FACT:

1. Even though the parties dispute the existence of an oral agreement to extend the closing date as between Developers and Graffs, when considering the Developer’s factual allegations as true, the alleged oral agreement regarding an extension, as between Max Graff and the Developers, contained terms that were far from clear.
2. The words contained in the alleged oral agreement (judged in the light most favorable to the Developers) do not address whether an extension was granted, or

for how long, but suggest at best, “some form of an extension.”

3. The words contained in the alleged oral agreement are not clear and definite.
4. The words allegedly spoken by Max Graff to Developer David Robinson, at the time of the alleged oral agreement, do not amount to an express waiver of the statute of frauds.
5. Notwithstanding, even assuming an oral agreement existed the Developers’ claims and/or causes of action should be dismissed because:
 - a. Developer’s failure to close on June 30, 2006 was not arguably shown as exclusively based on reliance upon on the alleged oral agreement.
 - b. The court notes that the fact that Developers did not close on June 30, 2006 arguably could have occurred for other reasons, e.g. the lack of funding, a decision not to go forward with the transaction, or other reasons wholly apart from the alleged oral agreement.
 - c. This failure to show the alleged oral agreement as the sole basis for the Developers non-action of not closing bars Developers’ claims as such claims are prohibited by Utah Law.
6. It is the general rule in Utah, to avoid enforcement of the Statute of Frauds, that the part performance, or reliance, upon an oral agreement, may not be mere non-action. Here, the mere non-action of failing to close is insufficient to allow allegations of part performance to prevail. In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action as part performance.
7. The allegations of part-performance in terms of calling the Graffs’ attorney and

sending him e-mail are insufficient part performance because these are not substantial and are “word oriented” not “acts oriented ”

8. In addition, it would be expected, that contact with Graff’s attorney would occur (e.g. he was to prepare the closing documents, etc.) and therefore the e-mail and phone calls were not adequately shown as exclusively based on reliance upon on the alleged oral agreement.

CONCLUSIONS OF LAW:

1. The Utah Legislation has enacted U.C.A. 1953 (as amended) §25-5-1, and U.C.A. 1953 (as amended) § 25-5-3 which speak to Utah’s Statute of Frauds, these Statutes are controlling law in this case.

2. It is the general rule in Utah that the part performance, or reliance, upon an oral agreement, may not be mere non-action. The non-action of failing to close is insufficient to allow allegations of part performance to prevail. Therefore, in this regard Developers’ claims or arguments cannot prevail.

3. In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action (as in failing to close) as part performance. Therefore, in this regard Developers’ claims or arguments cannot prevail.

4. Developers’ failure to arguably show the alleged oral agreement as the sole basis for the non-action of not closing prohibits Developers’ claims under Utah Law. Therefore, in this regard Developers’ claims or arguments cannot prevail

5. In order to set aside the Statute of Frauds, the party asserting the Statute of Frauds as a defense must be shown to have clearly and expressly waived the Statute of Frauds as a defense. There is no showing that occurred. Therefore, in this regard Developers claims or arguments cannot prevail.

6. An oral agreement, which pertains to the sale of real property, which contains terms, which are not clear and definite, cannot prevail. Therefore, in this regard Developers' arguments fail.

7. In this matter the alleged oral agreement cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments fail.

8. In this matter the alleged part performance cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments cannot prevail.

9. The Statute of Frauds controls the parties' rights and obligations in this matter. Therefore, in this regard Developers' arguments cannot prevail.

10. For these reasons all of the Developers' claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC, and Fusion Group LLC must fail.

These include:

- A. Detrimental Reliance,
- B. Fraud,
- C. Breach of Good Faith and Fair Dealing,
- D. Unjust Enrichment,
- E. Conspiracy
- F. Claim for Damages, attorney's fee(s), etc.
- G. Claim for Specific Performance

11. For these reasons, described above, any and all of the Developers' filings, as described in the Order below, consisting of *Lis Pendens*, or Notice of Interest, or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings should be hereby declared null and void, without any legal force or effect of any of kind.

ORDER:

1. The Graffs' Motion for Summary Judgment against the Developers regarding the above described matter is granted.

Therefore, all of the Developers' claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC, and Fusion Group LLC must fail.

These include

- A Detrimental Reliance,
- B Fraud,
- C Breach of Good Faith and Fair Dealing,
- D Unjust Enrichment,
- E Conspiracy
- F Request for Damages, attorneys fee(s), etc
- G Request for Specific Performance

2 There are no genuine issues of material fact, so judgment as a matter of law is appropriate

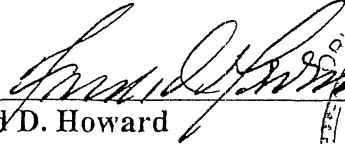
3 All causes of action, or any other claims, as noted above, and as raised in any of the Developer's pleadings are hereby dismissed with prejudice

4 Any and all of the Developers' filings of Notice of Interest (including but not limited to the NOTICE OF INTEREST IN REAL PROPERTY, dated and filed on July 18, 2006, a copy of which is attached hereto as Exhibit "A"), of *Lis Pendens* (including but not limited to the NOTICE OF LIS PENDENS, dated August 9, 2006, a copy of which is attached hereto as Exhibit "B") or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's Office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings are hereby declared null and void, without any legal force or effect of any of kind

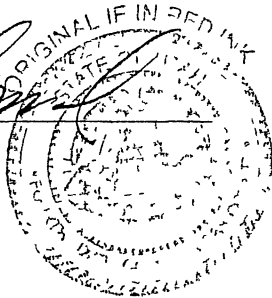
5 The previous Motion to Nullify Liens as filed by Donald Gilbert on behalf of the
Graffs is granted

DATED this 10 day of July, 2007

BY THE COURT:



Fred D. Howard
Fourth District Court Judge



Approved as to form:

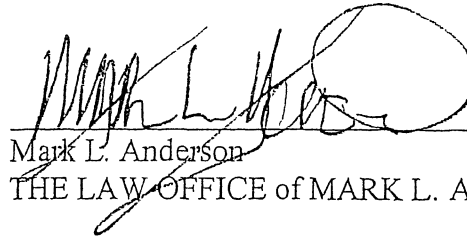
Scott Preston
Attorney for Developers

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May 2007 I caused a similar but not identical copy of the foregoing ORDER to be hand delivered to the office or home of Scott Preston at the following address:

HILL JOHNSON & SCHMUTZ
Stephen Quesenberry
Scott Preston
4844 North 300 West, Suite 300
Provo, UT 84604

SCOTT PRESTON
1268 N 540 W
Orem, UT 84057

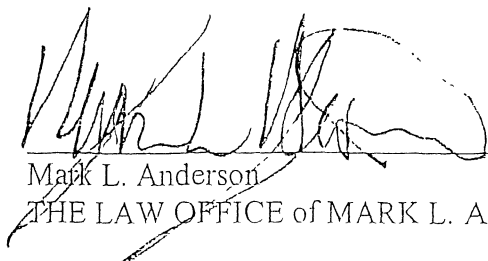


Mark L. Anderson
THE LAW OFFICE of MARK L. ANDRSON

I hereby certify that on the 7th day of June 2007 I caused a true and correct copy of the foregoing ORDER to be hand delivered to the following:

HILL JOHNSON & SCHMUTZ
Stephen Quesenberry
Scott Preston
4844 North 300 West, Suite 300
Provo, UT 84604

THE FOURTH JUDICIAL DISTRICT COURT
125 North 100 West
Provo, UT 84601



Mark L. Anderson
THE LAW OFFICE of MARK L. ANDRSON

Exhibit A

NOTICE OF INTEREST IN REAL PROPERTY

TO WHOM IT MAY CONCERN:

ENT 90643:2006 PG 1 of 2
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
2006 Jul 18 12:23 pm FEE 15.00 BY SW
RECORDED FOR SELECT TITLE INSURANCE AGEN
ELECTRONICALLY RECORDED

Notice is hereby given that the undersigned has an interest in that certain real property situated in Utah County, State of Utah, described as follows:

COMMENCING NORTH 1353.83 FEET & WEST 433.11 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE SOUTH 89 DEG 59'57" WEST 632.01 FEET; THENCE NORTH 0 DEG 21'18" EAST 365.42 FEET; THENCE SOUTH 89 DEG 51'38" EAST 623.96 FEET; THENCE SOUTH 0 DEG 54'40" EAST 363.93 FEET TO BEGINNING.
Aka Tax Serial No. 13-59-57. AREA APPROX 5.257 ACRE.

COMMENCING NORTH 1353.83 FEET & WEST 1065.09 FEET FROM SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 59'58" WEST 1075.96 FEET; THENCE NORTH 0 DEG 21'34" EAST 368 FEET; THENCE SOUTH 89 DEG 51'43" EAST 1075.92 FEET; THENCE SOUTH 0 DEG 21'22" WEST 365.43 FEET TO BEG.
Aka Tax Serial No. 13-59-56. AREA APPROX 9.058 ACRE.

COMMENCING NORTH 1009.31 FEET & WEST 427.62 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 26'11"W 664.98 FEET; THENCE NORTH 0 DEG 21'28" EAST 338 FEET; THENCE SOUTH 89 DEG 59'57" EAST 657.34 FEET; THENCE S 0 DEG 54'50" EAST 344.57 FEET TO BEGINNING.
Tax Serial No. 13-59-55. AREA APPROX 5.179 ACRE.

COMMENCING NORTH 1015.84 FEET & WEST 1092.2 FEET FROM THE SOUTHEAST CORNER OF SECTION 24, TOWNSHIP 5 SOUTH, RANGE 1 EAST, SALT LAKE BASE & MERIDIAN; THENCE NORTH 89 DEG 26'7" WEST 1050.62 FEET, THENCE NORTH 0 DEG 21'28" EAST 327.63 FEET; THENCE NORTH 89 DEG 59'59" EAST 1050.63 FEET; THENCE SOUTH 0 DEG 21'28" WEST 338 FEET TO BEGINNING.
Tax Serial No. 13-59-54. AREA APPROX 8.027 ACRE.

Said interest arises in connection with purchase agreements with respective owners.

BUYER

Gateway Farms, LLC

By:



Steven G. Black, Manager

Naterra West, LLC

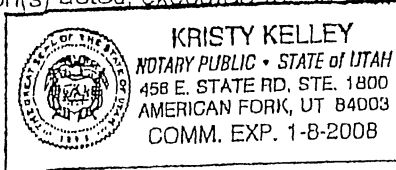
By:



Steven G. Black, Manager

State of Utah, Utah County;

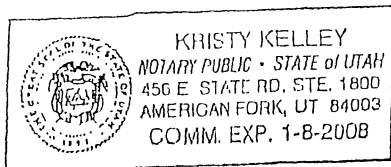
On July 18, 2006, before me, the undersigned Notary Public, personally appeared Steven G. Black, Manager of Gateway Farms, LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.




Notary Public

State of Utah, Utah County;

On July 18, 2006, before me, the undersigned Notary Public, personally appeared Steven G. Black, Manager of Naterra West, LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.




Notary Public

Exhibit B

ENT 102799:2006, PG 1 of 6
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
2006 Aug 09 4:37 pm FEE 26.00 BY SW
RECORDED FOR HILL JOHNSON SCHMUTZ

STEPHEN QUESENBERRY (8073)
SCOTT D. PRESTON (11019)
HILL, JOHNSON & SCHMUTZ, L.C.
Jamestown Square
3319 North University Avenue
Provo, Utah 84604
Telephone (801) 375-6600

Attorneys for Defendant and Counterclaimants

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MAX B. GRAFF; ANITA B. GRAFF;
CURTIS A. GRAFF; CAROL A. GRAFF,
GRAFF RANCHES, LC,

Plaintiffs,

vs.

NATERRA WEST, LLC,

Defendant.

NATERRA WEST, LLC,

Counterclaimant,

vs.

MAX B. GRAFF; ANITA B. GRAFF;
CURTIS A. GRAFF, CAROL A. GRAFF,
GRAFF RANCHES, LC; DON D. GILBERT,

Counterclaim Defendants.

NOTICE OF LIS PENDENS

Case No. 060402272

Division No. 5

DEFENDANT and Counterclaimant Nattera West, LLC, hereby claims an interest in the property that is the subject of this lawsuit, said land being legally described on Exhibit A hereto, for the duration of this lawsuit, and thereafter as ordered by the Court.

A notice of lis pendens will be filed of record on the subject property.

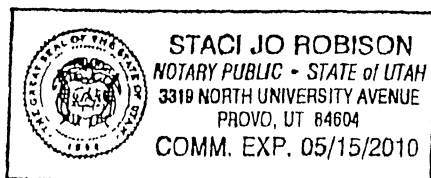
DATED this 9 day of August, 2006.

HILL, JOHNSON & SCHMUTZ, LC

STEPHEN QUESENBERRY
Attorneys for Defendants

STATE OF UTAH)
 :SS
COUNTY OF UTAH)

On the 9 day of August, 2006, personally appeared before me Stephen Quesenberry, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.




NOTARY PUBLIC

ADDENDUM B

ADDENDUM B

MARK L. ANDERSON, NO. 0105
MICHAEL L. NIXON, NO. 7589
977 South Orem Blvd
Orem, Utah 84058
Telephone: (801) 224-9677
Facsimile: (801) 224-8909
Attorney for Plaintiffs MAX B. GRAFF;
ANITA B. GRAFF; CURTIS A. GRAFF;
CAROL A. GRAFF; GRAFF RANCHES, LC;

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

<p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; Plaintiffs;</p> <p>Vs.</p> <p>NATERRA WEST, LLC, Defendants,</p>	<p>AMENDED ORDER</p> <p>Case Number: 060402272</p> <p>Division No 5</p> <p>Judge: Fred D. Howard</p>
<p>NATERRA WEST, Counterclaimant;</p> <p>GATEWAY FARMS, LLC; and FUSION GROUP, LLC, Intervening Plaintiffs,</p> <p>Vs.</p> <p>MAX B. GRAFF; ANITA B. GRAFF; CURTIS A. GRAFF; CAROL A. GRAFF; GRAFF RANCHES, LC; DON D. GILBERT Counterclaim Defendants.</p>	

PLAINTIFFS MAX B. GRAFF, ANITA B. GRAFF, CURTIS A. GRAFF, and CAROL A. GRAFF, AND GRAFF RANCHES LC (“Graffs”) filed a motion for summary judgment by and through their counsel Mark L. Anderson. Said Motion was made pursuant to rule 56 U.R.P.C. and moved the court for summary judgment against Defendant Naterra West, LLC; Plaintiffs in Intervention, Gateway Farms LLC and Fusion Group LLC, (hereinafter “Developers”). Its accompanying memorandum dated February 1, 2007 supported this motion. The Developers filed a Memorandum in Opposition, and Graffs responded with their Reply Memorandum. Graffs filed a Notice to Submit.

On May 14, 2007, this Court held a hearing on the issues presented to it on said Motion.

Now having heard the arguments, and having carefully considered all of the submissions, the Court:

**HEREBY FINDS, CONCLUDES AS A MATTER OF LAW, AND ORDERS
as follows:**

FINDINGS OF FACT:

1. Even though the parties dispute the existence of an oral agreement to extend the closing date as between Developers and Graffs, when considering the Developer’s factual allegations as true, the alleged oral agreement regarding an extension, as between Max Graff and the Developers, contained terms that were far from clear.
2. The words contained in the alleged oral agreement (judged in the light most favorable to the Developers) do not address whether an extension was granted, or

for how long, but suggest at best, “some form of an extension.”

3. The words contained in the alleged oral agreement are not clear and definite.
4. The words allegedly spoken by Max Graff to Developer David Robinson, at the time of the alleged oral agreement, do not amount to an express waiver of the statute of frauds.
5. Notwithstanding, even assuming an oral agreement existed the Developers’ claims and/or causes of action should be dismissed because:
 - a. Developer’s failure to close on June 30, 2006 was not arguably shown as exclusively based on reliance upon on the alleged oral agreement.
 - b. The court notes that the fact that Developers did not close on June 30, 2006 arguably could have occurred for other reasons, e.g. the lack of funding, a decision not to go forward with the transaction, or other reasons wholly apart from the alleged oral agreement.
 - c. This failure to show the alleged oral agreement as the sole basis for the Developers non-action of not closing bars Developers’ claims as such claims are prohibited by Utah Law.
6. It is the general rule in Utah, to avoid enforcement of the Statute of Frauds, that the part performance, or reliance, upon an oral agreement, may not be mere non-action. Here, the mere non-action of failing to close is insufficient to allow allegations of part performance to prevail. In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action as part performance.
7. The allegations of part-performance in terms of calling the Graffs’ attorney and

sending him e-mail are insufficient part performance because these are not substantial and are “word oriented” not “acts oriented.”

8. In addition, it would be expected, that contact with Graff’s attorney would occur (e.g. he was to prepare the closing documents, etc.) and therefore the e-mail and phone calls were not adequately shown as exclusively based on reliance upon on the alleged oral agreement.
9. The present case has multiple claims and multiple parties.

CONCLUSIONS OF LAW:

1. The Utah Legislation has enacted U.C.A. 1953 (as amended) §25-5-1, and U.C.A. 1953 (as amended) § 25-5-3 which speak to Utah’s Statute of Frauds, these Statutes are controlling law in this case.

2. It is the general rule in Utah that the part performance, or reliance, upon an oral agreement, may not be mere non-action. The non-action of failing to close is insufficient to allow allegations of part performance to prevail. Therefore, in this regard Developers’ claims or arguments cannot prevail.

3. In terms of setting aside the Statute of Frauds, non-action is not part performance, and Utah law does not support reliance upon non-action (as in failing to close) as part performance. Therefore, in this regard Developers’ claims or arguments cannot prevail.

4. Developers’ failure to arguably show the alleged oral agreement as the sole basis for the non-action of not closing prohibits Developers’ claims under Utah Law.

Therefore, in this regard Developers' claims or arguments cannot prevail.

5. In order to set aside the Statute of Frauds, the party asserting the Statute of Frauds as a defense must be shown to have clearly and expressly waived the Statute of Frauds as a defense. There is no showing that occurred. Therefore, in this regard Developers claims or arguments cannot prevail.

6. An oral agreement, which pertains to the sale of real property, which contains terms, which are not clear and definite, cannot prevail. Therefore, in this regard Developers' arguments fail.

7. In this matter the alleged oral agreement cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments fail.

8. In this matter the alleged part performance cannot eviscerate the Statute of Frauds. Therefore, in this regard Developers' arguments cannot prevail.

9. The Statute of Frauds controls the parties' rights and obligations in this matter. Therefore, in this regard Developers' arguments cannot prevail.

10. For these reasons all of the Developers' claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC, and Fusion Group LLC must fail.

These include:

- A. *Detrimental Reliance*,
- B. *Fraud*,
- C. *Breach of Good Faith and Fair Dealing*,
- D. *Unjust Enrichment*,
- E. *Conspiracy*,
- F. *Claim for Damages, attorney's fee(s), etc.*
- G. *Claim for Specific Performance.*

11. For these reasons, described above, any and all of the Developers' filings, as described in the Order below, consisting of *Lis Pendens*, or Notice of Interest, or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings should be hereby declared null and void, without any legal force or effect of any of kind.

12. But for the Graffs' remaining claims in the present case, this Order, without being made final pursuant to Rule 54(b) would become immediately appealable.

13. Although there is some overlap in the facts that underlie the Developers' counterclaims and the Graffs' remaining claims, that the difference is significant enough as to both facts and parties that this order shall not have a res judicata effect on the remaining claims in this case.

14. The rights of the parties in this case will not be significantly abridged by making this Order “final” within the meaning of U.R.C.P. 54 (b). Further, by making this order final, there is a high likelihood that the parties will be able to move forward with an appeal of this order more quickly (if they so choose), thereby allowing the appellate process give certain direction as to the disposition of the subject property (if any direction is necessary) in a more timely manner, than if the parties were to wait until the final adjudication of the remaining claims. Therefore the Court finds that there is no just reason for delay in making this Order final.

ORDER:

1. The Graffs’ Motion for Summary Judgment against the Developers regarding the above described matter is granted.

Therefore, all of the Developers’ claims and causes of action, as raised in their pleadings, including 1) the Naterra West LLC counterclaim, 2) Intervening Complaint, of Gateway Farms LLC, and Fusion Group LLC fail.

These include:

- A. Detrimental Reliance,
- B. Fraud,
- C. Breach of Good Faith and Fair Dealing,
- D. Unjust Enrichment,
- E. Conspiracy,
- F. Request for Damages, attorney’s fee(s), etc.
- G. Request for Specific Performance.

2. There are no genuine issues of material fact, so judgment as a matter of law is appropriate.

3. All causes of action, or any other claims, as noted above, and as raised in any of the Developer's pleadings are hereby dismissed with prejudice.

4. Any and all of the Developers' filings of Notice of Interest (including but not limited to the NOTICE OF INTEREST IN REAL PROPERTY, dated and filed on July 18, 2006, a copy of which is attached hereto as Exhibit "A"), of *Lis Pendens* (including but not limited to the NOTICE OF LIS PENDENS, dated August 9, 2006, a copy of which is attached hereto as Exhibit "B") or any other filing on the Graffs' Real Property, (Real Property is the property which has been in dispute, and/or has been described in the parties pleadings) filed in any governmental location, Recorder's Office, or Court, which in any way has, or may have affected, encumbered or clouded the title to the Real Property which has been in dispute in this matter, all such Developers' filings are hereby declared null and void, without any legal force or effect of any of kind and title to said Real Property is hereby quieted in favor of the Graffs as against any and all claims the Developers have, had or may have pertaining to this law suit with all rights, title and interest of the Real Property remaining with the Graffs and no rights of any kind inuring to the benefit of the Developers.

5. The previous Motion to Nullify Liens as filed by Donald Gilbert on behalf of the Graffs is granted

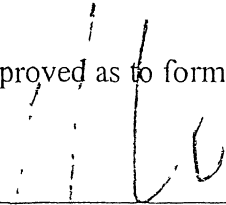
6 For the reasons stated above and those contained in the Graffs' memorandum in support of the motion to amend the July 10, 2007 Order (incorporated by reference herein, This Order is Final within the meaning of Rule 54(b) of the Utah Rule of Civil Procedure and hereby certified for appeal.

DATED this _____ day of January, 2008.

BY THE COURT:

The Honorable, Fred D. Howard
Fourth District Court Judge

Approved as to form:



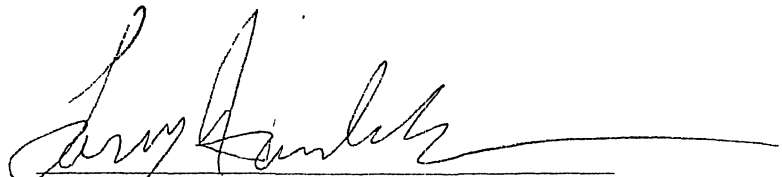
Stephen Quesenberry
Charles Perschon
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2008 I caused a true and correct copy of the foregoing **AMENDED ORDER** to be mailed, first class, postage prepaid or hand delivered to the following:

HILL JOHNSON & SCHMUTZ
Stephen Quesenberry
Charles L. Perschon
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4844 North 300 West
Provo, UT 84604

THE FOURTH JUDICIAL DISTRICT COURT
125 North 100 West
Provo, UT 84601



Larry Hardenbrook, Office Manager
THE LAW OFFICE OF MARK L. ANDRSON