

1986

Gay M. Beckstead v. Robert W. Marsing, Gay  
Marsing. Dpma;d Rau Demmos. Francis H.  
Dennis, Jeffery W. McBride, and Barbara H.  
McBride : Brief of Appellant

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. \_\_\_\_\_

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

GAY M. BECKSTEAD, JEANNE  
BERTRAND, and JEANNE FONTAINE,

Plaintiffs/  
Appellants,

vs.

ROBERT W. MARSING, GAY MARSING,  
DONALD RAY DENNIS, FRANCIS H.  
DENNIS, JEFFERY W. McBRIDE,  
and BARBARA H. McBRIDE,

Defendants/  
Respondents.

860093-CA  
Case No. 20411

BRIEF OF APPELLANTS

Appeal from the Judgment of the Second Judicial  
District Court of Weber County, Honorable Ronald  
O. Hyde, Judge

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MAR 28 1985

Clerk, Supreme Court, Utah

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

GAY M. BECKSTEAD, JEANNE	)	
BERTRAND, and JEANNE FONTAINE,	)	
	)	
Plaintiffs/	)	
Appellants,	)	
	)	
vs.	)	Case No. 20411
	)	
ROBERT W. MARSING, GAY MARSING,	)	
DONALD RAY DENNIS, FRANCIS H.	)	
DENNIS, JEFFERY W. McBRIDE,	)	
and BARBARA H. McBRIDE,	)	
	)	
Defendants/	)	
Respondents.	)	

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STATEMENT OF ISSUES

1. WHETHER A VENDEE IN THE PURCHASE OF REAL PROPERTY PLACED IN ESCROW HAS UNTIL DELIVERY OF DEED FROM DEPOSITORY AFTER THE FINAL PAYMENT IS MADE TO REQUIRE REFORMATION OF CONTRACT.

2. WHETHER A SUBSEQUENT PURCHASER OF REAL PROPERTY CHARGED WITH INFORMATION, KNOWLEDGE AND CLAIMS OF A PURPORTED PRIOR PURCHASER OF REAL PROPERTY BY REASON OF RECORDING OF A NOTICE OF CONTRACT INTEREST, AND AFTER PERSONAL KNOWLEDGE OF CLAIM TO REAL PROPERTY, CAN BE PLACED IN TITLE IN A SUIT TO VOID THE CONVEYANCE TO HIM BECAUSE OF THE RUNNING OF THE STATUTE OF LIMITATIONS (THREE YEARS FROM DISCOVERY OF MISTAKE) PRIOR TO AN ACTION BEING BROUGHT TO CORRECT AN ERROR IN THE CONTRACT AND DEED.

3. WHETHER STATUTE OF LIMITATIONS FOR FRAUD AND MISTAKE IS TOLLED WHERE PARTY AGAINST WHOM THE STATUTE RUNS IS IN POSSESSION OR CONSTRUCTIVE POSSESSION OF THE PREMISES.

4. WHETHER THE STATUTE OF LIMITATIONS RUNS AGAINST A PARTY IN AN ACTION WHO FILES AN ACTION AFTER DISCOVERY OF A MISTAKE BUT DOES NOT ALLEGE FRAUD FOR A MISTAKE.

STATUTES

1. Section 57-3-2, Utah Code Annotated, 1953, as amended:

Record imparts notice. Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder, and every financing statement which complies with the provisions of section 70A-9-402 shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice.

2. Section 78-12-26(3), Utah Code Annotated, 1953, as amended:

Within three years: An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

STATEMENT OF CASE

This is an action for breach of contract, for reformation of contract and deed, and for voidance of deed to subsequent purchaser. Defendants filed a Motion for Summary Judgment, moving for dismissal of Plaintiffs' Complaint on the grounds that Plaintiffs had not filed their action within three years of discovering that a mistake in the description in the contract had been made. Plaintiffs claim that Defendants had actual, as well as constructional, notice of Plaintiffs' claim, that Plaintiffs had partial possession, and that Plaintiffs had until final payment was made on the contract before the Statute of Limitations would start to run, and therefore that the three-year Statute of Limitations for mistake does not apply. The Court found that Plaintiffs "learned of the incorrect description in the deed and in the contract...no later than May 1979" and held that 78-12-26(3) applied and that Plaintiffs' action was barred.

STATEMENT OF FACTS

In the summer of 1977, Defendant GAY MARSING and Plaintiff GAY BECKSTEAD were real estate agents for Opheikens

& Co. Realty (R-38, 142). Defendant MARSING, in the summer of 1977, put her home and thirteen (13) acres on the market for sale. She was in the process of going through a divorce and was anxious to sell her property to resolve her divorce settlement requirements (R-39, 142). After a period of time of having no prospects to sell the home and the acreage, she decided to sell the house separate from the acreage (R-39, 143).

Plaintiff BECKSTEAD was interested in purchasing the acreage behind Defendant MARSING's house and was shown the property by MARSING in August of 1977 (R-40, 41, 143). At the time Defendant MARSING showed the property to Plaintiff BECKSTEAD, a Weber County plat of the property (R-136) was referred to in Defendant MARSING's representation of the amount of property being offered to Plaintiff BECKSTEAD (R-41). The acreage shown on the Weber County plat owned by Defendant MARSING indicated Defendant MARSING was the owner of 1.89 acres, 8.66 acres, and 1.55 acres (R-136, 143). The 1.89 acres was the land on which the house was located; the 8.66 acres was the land behind the house; the 1.55 acres was for access and also additional land behind the house (R-143). The land offered to the Plaintiff BECKSTEAD by the Defendant MARSING was approximately ten (10) acres (8.66 plus 1.55) (R-60, 143).



On August 11, 1977, an Earnest Money Receipt and Offer to Purchase was executed by the parties wherein Defendant MARSING agreed to sell to Plaintiff BECKSTEAD 10 acres plus three shares of irrigation water for the sum of \$25,000.00 (\$2,500.00 per acre) (R-43, 55, 143).

The sale was to be closed on September 16, but, at the request of Defendant MARSING, the sale was not closed until October 5, 1977 (R-144).

Shortly after the MARSING-BECKSTEAD contract had been entered into, Defendant MARSING stated that she had shown the home to Defendant DONALD DENNIS; that he was quite interested, but desired to have more ground with the house, at which time Plaintiff BECKSTEAD said to the Defendant MARSING that she (BECKSTEAD) was glad that "we got our ten acres first" (R-144).

Defendants DONALD and FRANCIS DENNIS bought the home and 1.89 acres in the latter part of 1977 (R-60, 145).

Defendant MARSING, by agreement, was to survey the division line between the two properties, and in the spring of 1978 Plaintiff BECKSTEAD went to the property to put up a fence in accordance with the survey stakes, but could not find them and was informed by Defendant DONALD DENNIS that he knew where the line was and where the markers had been that were no longer there (R-144). Having no reason to doubt him, the fence was put up where DONALD DENNIS indicated

the markers had been (R-144). The fence is probably not on any deeded lines (R-67).

In the fall of 1978, the Plaintiff BECKSTEAD offered the property for sale to Plaintiffs BERTRAND and FONTAINE. The Weber County plat was again referred to, showing the 8.66 acres and the 1.55 acres (R-144). A contract for the ten acres was entered into by the parties on February 16, 1979, for a price of \$35,000.00 (\$3,500.00) per acre (R-144).

In February 1979, when Plaintiff BECKSTEAD sold the ten acres to Plaintiffs BERTRAND and FONTAINE, a Notice of Contract Interest was prepared, correctly describing the 8.66 acres and 1.55 acres, and recorded in the Weber County Recorder's Office in February 1979 (R-139, 145, 146).

In March or April of 1979, Defendant DONALD DENNIS contacted Plaintiff BECKSTEAD, indicating that he had received the tax notice showing the legal description of 1.89 acres (R-145), claiming he had bought three acres. Plaintiff BECKSTEAD told Defendant DENNIS at that time that she (BECKSTEAD) had bought ten acres and that he (DENNIS) could not have purchased three acres, because there were only two acres left to sell (R-145). Plaintiff BECKSTEAD then contacted Defendant MARSING concerning this call (April

or May 1979), and was told there appeared to be a problem, but she (Defendant MARSING) had taken care of it (R-145).

About April 1979, Plaintiffs BECKSTEAD and BERTRAND picked up copies of the legal descriptions at the Weber County Recorder's office. The descriptions and the plats showed the 8.66 acres and 1.55 acres in MARSING's name (these were subject to the contract between BECKSTEAD and MARSING), and the 1.89 acres in the name of DENNIS (R-145).

In May 1979, Plaintiff BECKSTEAD received a call from DONALD DENNIS, informing her that he had received a Warranty Deed for an additional acre (R-145). Plaintiff BECKSTEAD again reviewed the plats and descriptions at the Weber County Recorder's office and found that there were now 2.91 acres in the name of Defendant DONALD DENNIS (R-145). The deed referred to by DONALD DENNIS had been purportedly signed on December 5, 1977, but not notarized until January 26, 1979, and was not recorded until May 1979 (R-139).

The Earnest Money Receipt and Offer to Purchase between Plaintiff BECKSTEAD and Defendant MARSING called for ten acres (R-137, 138). The contract, escrow, and deed placed in escrow between MARSING and BECKSTEAD was described to cover only nine of the ten acres (R-146). The contract and escrow between BECKSTEAD and MARSING was not paid in full by BECKSTEAD until 1983, after the lawsuit had been filed by Plaintiffs against Defendants (T-146). Defendant

GAY MARSING's Warranty Deed to Plaintiff GAY BECKSTEAD was not delivered to Plaintiff GAY BECKSTEAD until final payment had been made in October 1983 (R-146).

SUMMARY OF ARGUMENTS

It is Plaintiffs' position that they had until the time of the final payment of the contract and receipt of deed from depository before the Statute of Limitations would commence to run on any action they might bring against the Defendants for reformation, mistake, or voidance of documents.

It is Plaintiffs' further position that Defendants cannot complain against Plaintiffs' claimed interest in the acre of property in question because the Defendants were on notice by reason of a recording of Notice of Contract Interest and actual notice given Defendants by Plaintiffs of Plaintiffs' claimed interest prior to any stated or recorded claim of Defendants in the property in question.

While the fence dividing the possession between Plaintiffs and Defendants was not placed on a deed line, Defendants were aware of Plaintiffs' claim to possession of the property in question, and because of Defendants' knowledge of such claim, Plaintiffs should not be barred by the Statute of Limitations that requires that an action for mistake or

fraud be filed within three years of the time of finding out that a mistake has been made.

While an action for fraud, and mistake may be appropriate in the instant case, other actions, such as breach of contract, voidance of documents, reformation of descriptions, or quiet title action should not be precluded by the three-year Statute of Limitations for mistake.

#### ARGUMENT

##### POINT ONE

WHETHER A VENDEE IN THE PURCHASE OF REAL PROPERTY PLACED IN ESCROW HAS UNTIL DELIVERY OF DEED FROM DEPOSITORY AFTER THE FINAL PAYMENT IS MADE TO REQUIRE REFORMATION OF CONTRACT.

1. The vendor in the sale of real property placed in escrow pending final payment has until the final payment is made to perform per the terms of the real estate contract. The Utah Supreme Court follows this reasoning in Hurwitz v. David B. Richards and Company, 436 P.2d 794 (20 U.2d 232), quoting Section 451, Contracts, in 17 Amjur 2d:

"It is a well-established general rule that where a party repudiates a contract before time for performance arrives, the repudiation may be withdrawn unless the other party, before the withdrawal, manifests an election to rescind the contract or materially change his position in reliance on the repudiation. The locus poenitentiae is kept open until the injured party elects to treat the contract as abandoned by the other party and brings action for nonperformance."

In the Hurwitz v. David B. Richards and Company case, the Utah Supreme Court further quotes Diamos v. Hirsch, 91 A. 304, 372 P.2d 76:

"We have recognized that an action may be maintained for breach of contract based upon the anticipatory repudiation by one of the parties in the contract. It is well-established that in order to constitute an anticipatory breach of contract there must be a positive and unequivocal manifestation on the part of the party allegedly repudiating that he will not render the promised performance when the time fixed for it in the contract arrives. And as succinctly pointed out in Section 319 of the Restatement of Law of Contracts, the effect of repudiation is nullified: '(a) where statements constituting such a repudiation are withdrawn by information to the effect given by the repudiator to the injured party before he has brought an action on the breach or has otherwise materially changed his position in reliance on them; \*\*.'"

Again in the Hurwitz v. David B. Richards case the Utah Supreme Court stated that the party having the right to declare an anticipatory breach had three options available:

"1. Treat the entire contract as broken and sue for damages. 2. Treat the contract as still binding and wait until the time arrives for its performance and at such time bring an action on the contract [underlining added]. 3. Rescind the contract and sue for the money paid or for the value of services or property furnished."

This line of reasoning is also propounded in Corporation Nine v. Taylor, 513 P.2d 417 (30 U.2d 47), where the Utah Supreme Court stated:

"Corporation Nine also essays that it is entitled to damages against the Taylors because they had committed a breach of contract by entering into an

agreement with a Mr. Jerry Young to sell part of the land to him. Two points support the trial court in rejecting this claim. First, the law does not require the vendor to have clear and marketable title at all times during the performance of its contract, and is not ordinarily so obliged until the time comes for him to perform [underlining added]. The buyers should not be heard to complain unless it appears that it will be impossible or at least highly unlikely that seller will be able to perform his contract when he is called upon to do so, which we do not see as the situation here. Complimenting this is the fact that the buyer himself should not be heard to complain when it is his own default which is preventing fulfillment of the contract."

This doctrine is also found in Doxey-Layton Company v. Stark, 548 P.2d 902. The Utah Supreme Court, in commenting on the Statute of Limitations where a contract and deed are held in escrow, stated:

"This Statute allows an action to be brought on the ground of fraud or mistake within three years, but provided the cause shall not be deemed to have accrued until the aggrieved party discovers the facts constituting fraud or mistake. Plaintiffs claim the statute began to run as of the date of execution; viz., August 13, 1963, rather than the date of delivery - termination of the escrow.

"A deed in escrow, under the conditional sales contract, is effective as a conveyance after performance of the contract obligations, and upon delivery by the depository. Except for unusual circumstances (those which would create a shocking injustice), which the Court does not find present here, the date of delivery of the deed does not relay back to the date of execution of the deed [underling added], or the commencement of the escrow period. Thus, in this matter, the limitation period to reform the deed did not commence to run until May 15, 1970."

In the instant case, Plaintiff BECKSTEAD did not receive her deed from the escrow depository until 1983. Laches and the Statute of Limitations should not commence to run until receipt of her deed.

The Utah Supreme Court, in the Corporation Nine v. Taylor case cited above, gave the vendor until time to perform to furnish clear and marketable title. This same rule should apply to a vendee seeking to obtain that which is purchased. To rule otherwise would require the vendee to bring his action before performance is required, but not permit the suit because the vendor had until time of performance to deliver. The Utah Supreme Court, in the Corporation Nine v. Taylor case, took this position, unless it would appear to be impossible for seller to be able to perform. In the instant case, the subsequent purchasers (Defendants herein) were on notice by recording of Notice of Contract Interest and by actual notice prior to their recording any claim to the acre in question. With this knowledge by Defendants, they are not bona fide purchasers without notice and they should not be heard to say that it is impossible for title to be delivered to Plaintiffs.



POINT TWO

WHETHER A SUBSEQUENT PURCHASER OF REAL PROPERTY CHARTED WITH INFORMATION, KNOWLEDGE AND CLAIMS OF A PURPORTED PRIOR PURCHASER OF REAL PROPERTY BY REASON OF RECORDING OF A NOTICE OF CONTRACT INTEREST, AND AFTER PERSONAL KNOWLEDGE OF CLAIM TO REAL PROPERTY, CAN BE PLACED IN TITLE BECAUSE OF THE RUNNING OF THE STATUTE OF LIMITATIONS (THREE YEARS FROM MISTAKE) PRIOR TO AN ACTION BEING BROUGHT TO CORRECT AN ERROR IN THE CONTRACT AND DEED.

2. A purchaser of real property is charged with knowledge of information, claims, etc., recorded prior to recording his claim or interest in the real property. Defendant DONALD DENNIS did not receive or record his deed (May 1979) until after Notice of Contract Interest in sale of the same property between Plaintiff BECKSTEAD and Plaintiffs BERTRAND and FONTAINE had been recorded (February 1979), and after being told by Plaintiff BECKSTEAD that he could not have three acres because she (BECKSTEAD) had bought ten acres and there were only two acres left. Defendant DENNIS acquired his deed after personal notice and recording of the BECKSTEAD-BERTRAND interest, and he becomes an interloper to title subject to a quiet title action by Plaintiffs. UCA 57-3-2, 1953, as amended, states that recording imparts notice of every instrument in writing recorded from the time of filing.

The Statute of Limitations does not apply in an action to seek reformation where violation of prior sale was known to subsequent purchaser. The Utah Court, in Bench v. Pace,

538 P.2d 180, held that Statute of Limitations did not apply where a mistake was made in not reciting the reservation of oil and gas rights in a contract, known at the time of execution of the contract, which facts were well known to the contract purchasers of the property. The Court held:

"The Defendant's ownership of the mineral estate was not threatened until these proceedings were initiated, and in view of these circumstances we are of the opinion that the Statute of Limitations and doctrine of laches do not apply."

POINT THREE

WHETHER STATUTE OF LIMITATIONS FOR FRAUD AND MISTAKE IS TOLLED WHERE PARTY AGAINST WHOM THE STATUTE RUNS IS IN POSSESSION OR CONSTRUCTIVE POSSESSION OF THE PREMISES.

3. Statute of Limitations for fraud and mistake do not apply where the one against whom the Statute is to be asserted is in possession. The Utah Court in Jensen v. Manila Corporation of the Church of Jesus Christ of Latter-day Saints, 565 P.2d 63, found the claim of laches adequately answered in Tapler v. Fray, 184 Pa. Supr. 239, 132 A.2d 890 (1957). The Utah Court quoted the Tapler Court:

"Plaintiffs were in undisputed possession of the premises, and there was no occasion to bring this action earlier. Laches will not be imputed to one constantly in complete possession of premises, the title to which is in controversy."

The record in this case indicates that possession of the acre in question was partly in Plaintiffs and party in Defendants; the fence placed on the property was not placed on a deed line.

POINT FOUR

WHETHER THE STATUTE OF LIMITATIONS RUNS AGAINST A PARTY IN AN ACTION WHO FILES AN ACTION AFTER DISCOVERY OF A MISTAKE BUT DOES NOT ALLEGE FRAUD FOR A MISTAKE.

4. For the Statute of Limitations for fraud and mistake to apply, there must be an allegation of fraud or mistake. In Haws v. Jensen, 209 P.2d 229, the Utah Supreme Court said:

"The Defendant's final contention is that Plaintiff's cause of action, if any, is barred by 104-2-24(3), UCA (1943), which provides that an action for relief on the ground of fraud or mistake must be commenced within three years. This contention, too, must fail. There is no allegation of fraud or mistake in the Complaint. The Plaintiff did not rely upon either ground for recovery in this action. It is not intended that Amber fraudulently procured the conveyance of the property to her upon the promise to hold it for the use and benefit of Plaintiffs. Clearly, the statute relied upon by Defendant is not here applicable."

In Wahlen v. Scottsdale Plumbing Co., Inc., 55-57 P. 2d 190, the Arizona Court of Appeals (1976), stated in a question of the applicability of Statute of Limitations for fraud and mistake:

"Assuming ARS Section 12-543 is applicable, this statute provides in part that: 'There shall be commenced to prosecute within three years after the cause of action accrues, not afterwards, the following actions: "For relief on the ground of fraud or mistake..."'

"We first note that the statute on its face is applicable to the commencement of 'actions for relief on the ground of fraud' and forbids such 'action' after the passage of three years. However, if the fraudulent character of the deed arises in some other way than in an 'action' there is nothing on the face of the statute that prevents it from being assailed for fraud."

The Arizona Court further commented:

"See also Davidson v. Salt Lake City, 95 U. 347, 81 P.2d 374 (1938). Puccetti quoted favorably from Stewart v. Hansen, 32 Cal. 260 (Cal. 1867) which elaborated on the underlying theory as follows:


'It is true that the clouds in question have their inception in fraud; but fraud is not a universal characteristic of the cause of action and cannot, therefore, be adopted as a test of the true nature of the action when its position in the various categories presented by the Statute of Limitation comes to be considered.... The gravamen of the action is that the conveyances of which complaint is made, are clouds upon the title, and for that reason, and that only, their cancellation is asked. The right of Plaintiff to his relief does not depend altogether upon the question of whether they are tainted with fraud, but upon the fact that they are clouds. Conveyances not tainted with fraud may cloud the true title. Hence, fraud is a false quantity when it would come to assign an action of this character to its proper class under the Statute of Limitation. If fraud exists, it does so merely as a feature of the case and not as a test of the true nature of the cause of action within meaning of the Statute.' 32 Cal. at 263."

Plaintiffs in this action ask that their deed be reformed to correct an error in description and that the deed to subsequent purchasers be voided.

CONCLUSION

Plaintiffs in this action ask that the decision of the lower Court granting Summary Judgment and dismissing Plaintiffs' action for failure to file within three years after discovery of a mistake be reversed and that Plaintiffs be permitted to take their action to trial.

Respectfully submitted,  
this 22nd day of March,  
1985

  
\_\_\_\_\_  
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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct  
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postage prepaid, this 22nd day of March, 1985.

  
Cheryl L. Konstein  
Secretary